Evidence Outline

RELEVANCE

- Relevance and Its Limits
  - Rule 401: Test for Relevant Evidence
    - Evidence is relevant if:
      - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
      - (b) the fact is of consequence in determining the action
    - *Very low standard
  - Rule 402: General Admissibility of Relevant Evidence
    - Relevant evidence is admissible unless any of the following provides otherwise:
      - The United States Constitution;
      - A federal statute;
      - These rules; or
      - Other rules prescribed by the Supreme Court
    - Irrelevant evidence is not admissible
- Conditional Relevance
  - Rule 104: Preliminary Questions
    - (a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
    - (b) **Relevance That Depends on a Fact**. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced.
      - *Low level of proof
      - *Only has relevance if other things are true
        - i.e., If Abby was on the treadmill from 6-8pm, at a bar from 8-11pm, and then at the jail from 11pm-3am, she was probably not reading for Evidence class
          - Standing alone, these pieces of evidence do not show anything, but in conjunction with the other pieces of evidence, it will advance the proposition she was not reading for Evidence class
      - Could any reasonable jury ever find that the defendant stole credit cards? (*Beechum*)
    - (c) **Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:
      - (1) the hearing involves the admissibility of a confession;
      - (2) a defendant in a criminal case is a witness and so requests; or
      - (3) justice so requires
    - (d) **Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
    - (e) **Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.
- Balancing Probative Value Against Prejudicial Impact
  - Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

        - The court may exclude relevant evidence if its **probative value is <u>substantially outweighed</u>** by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.
        - *Balancing test
            - Probative value (things that have a tendency to make a fact at issue more or less likely) vs. prejudicial impact
            - Can only throw out evidence if the prejudicial impact **substantially outweighs** the probative value
            - There is a strong tendency to admit evidence
    - Old Chief allows a prosecutor to tell a story – the narrative of the prosecution – so a case cannot be reduced to trial by stipulation
        - i.e., The Court must not accept a defendant's stipulation that the police department found a firearm in his home and, if the jury finds he possessed it, he is guilty of being a felon in possession of a weapon, which would forbid the prosecution from introducing evidence of the type of weapon found.
            - Under Old Chief, the gun itself is part of the prosecutor's narrative of the case.

CHARACTER EVIDENCE

- General Prohibition on Character Evidence
    - Rule 404: Character Evidence; Crimes or Other Acts
        - (a) Character Evidence.
            - (1) **Prohibited Uses.** 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.
            - (2) **Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:
                - (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
                - (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
                    - (i) offer evidence to rebut it; and
                    - (ii) offer evidence of the defendant's same trait; and
                - (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.
            - (3) **Exceptions for a Witness.** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.
        - (b) Crimes, Wrongs or Other Acts.
            - (1) **Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
                - *Massachusetts allows the specific details of prior acts of violence but that is not the majority state or federal rule
            - (2) **Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving **motive,** opportunity, **intent**, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
                - (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
                - (B) do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice
            - ***Modus Operandi** – The Identity Exception
                - If the defendant committed a crime with such a unique trademark, that when we know he/she did it on the previous occasion, and we see that act occur with the same trademark on a second occasion, we can say that this at least some evidence (enough to get to the jury) that the defendant did it again
                - i.e., We know the defendant robbed a bank wearing a chicken costume on the first day and then on day two we know someone robbed a bank wearing the same outfit
                    - The jury gets to hear the evidence that the defendant did that very unique crime on day one to show that there is at least some evidence that the defendant also committed that crime on day two

- Rule 405: Methods of Proving Character
  - (a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
    - *The defense is allowed to offer evidence of good character that is inconsistent with the charge; but that is limited to either reputation or opinion testimony (*Michelson*)
    - *On cross-examination, the prosecution can inquire into the character witness's knowledge about specific acts the defendant may have committed that would bear on the defendant's character as well as the evaluation of other people who have had occasion to assess either the defendant's character or the defendant's reputation (*Michelson*)
  - (b) **By Specific Instances of Conduct.** When a person's character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

- Prior Sexual Misconduct
  - Rule 413: Similar Crimes in Sexual-Assault Cases
    - (a) **Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.
    - (b) **Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
    - (c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
    - (d) **Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law involving:
      - (1) any conduct prohibited by 18 U.S.C. chapter 109A;
      - (2) contact, without consent, between any part of the defendant's body – or an object – and another person's genitals or anus;
      - (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
      - (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
      - (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).
    - *Pennsylvania does not have this rule (use 404b)
    - *This rule applies to federal cases but is still subject to Rul3 403 balancing
  - Rule 414: Similar Crimes in Child-Molestation Cases
    - (a) **Permitted Uses.** In a criminal case in which any defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.
    - (b) **Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
    - (c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
    - (d) **Definition of "Child" and "Child Molestation."** In this rule and 415:
      - (1) "child" means a person below the age of 14; and
      - (2) "child molestation" means a crime under federal law or under state law involving:
        - (A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
        - (B) any conduct prohibited by 18 U.S.C. chapter 110;
        - (C) contact between any part of the defendant's body – or an object – and a child's genitals or anus;
        - (D) contact between the defendant's genitals or anus and any part of a child's body;
        - (E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

        - (F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)-(E)
    - Rule 415: Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation
        - (a) **Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rule 413 and 414.
        - (b) **Disclosure to the Opponent.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
        - (c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
- Habit vs. Character
    - Rule 406: Habit; Routine Practice
        - Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.
- Inanimate Objects
    - See Simon Case
    - Character of "things" is different than character or people
        - The same complex rules that regulate the character of people and its admissibility is not at issue with the character of inanimate objects
    - Allowed to look at the character of a particular inanimate object in the past to determine whether it is something we believe will happen with that same inanimate object in the future
    - Recreations must be accurate

POLICY REASONS FOR EXCLUDING EVIDENCE

- Rule 407: Subsequent Remedial Measures
    - When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
        - Negligence;
        - Culpable conduct;
        - A defect in a product or its design; or
        - A need for a warning or instruction
    - But the court may admit this evidence for another purpose, such as **impeachment** or – if disputed – proving ownership, control, or the feasibility of precautionary measures
- Rule 408: Compromise Offers and Negotiations
    - (a) **Prohibited Uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
        - (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and
        - (2) conduct or a statement made during compromise negotiations about the claim – except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority
    - (b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.
    - *If there is not actually a legal dispute at issue, then the offer of settlement is not an offer of settlement at all
        - It is not offering to resolve a legal issue
        - There cannot be a settlement offer if there is nothing to settle because there is no lawsuit
        - Must be a legal issue/litigation or it must be on the horizon
    - *If negotiations are made to an officer of a government agency, it could be admitted in a criminal trial
- Rule 409: Offers to Pay Medical and Similar Expenses
    - Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury
    - *Courts want to encourage benevolence/charity

- Rule 410: Pleas, Plea Discussions, and Related Statements
    - **Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
        - (1) a guilty plea that was later withdrawn;
        - (2) a nolo contendere plea;
        - (3) a statement made during a proceeding on either of those please under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
        - (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea
    - (b) **Exceptions.** The court may admit a statement described in Rule 410(a)(3)-(4):
        - (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
        - (2) in a criminal proceeding for perjury or false statement; if the defendant made the statement under oath, on the record, and with counsel present
    - *Negotiations in Criminal Cases
        - Even if it doesn't result in a plea, the discussion of the plea with the prosecution that never comes to fruition is inadmissible
        - Includes proceedings with government agencies
            - i.e., You are charged with tax fraud and engage in plea negotiations; the negotiations cannot be used against you in the IRS civil proceedings
- Rule 411: Liability Insurance
    - Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

HEARSAY

- Hearsay vs. Non-Hearsay
    - Rule 801: Definitions That Apply to This Article; Exclusions from Hearsay
        - (a) **Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person **intended it as an assertion**
            - *i.e., Nonverbal: "Where's the guy who shot you?" And you point to somebody, that is considered a statement
        - (b) **Declarant.** "Declarant" means the person who made the statement
        - (c) **Hearsay.** "Hearsay" means a statement that:
            - (1) the declarant does not make while testifying at the **current** trial or hearing; and
                - *Testimony from trial one is considered hearsay at trial two
                - *Even if it was taken by a court reporter under oath, if it was not at this proceeding, it will fit the definition of hearsay (and if being offered for truth of matter asserted)
            - (2) a party offers in evidence to **prove** **the truth of the matter asserted** in the statement
        - (d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
            - (1) **A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
                - (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing or other proceeding in a deposition;
                    - *See Rule 803(5) if statement was not made under oath
                - (B) is consistent with the declarant's testimony and is offered:
                    - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
                    - (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
                - (C) identifies a person as someone the declarant perceived earlier
                    - i.e., A police lineup
            - (2) **An Opposing Party's Statement.** The statement is offered against an opposing party and:
                - (A) was made by the party in an individual or representative capacity;
                - (B) is one the party manifested that it adopted or believed to be true;
                - (C) was made by a person whom the party authorized to make a statement on the subject;

- (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
- (E) was made by the party's coconspirator **during and in furtherance of** the conspiracy
  - i.e., Five people decide to rob a bank, one goes in with a note that says, "Your money or your life."
    - That statement is admissible against all of the robbers
  - i.e., One robber goes home and tell his wife "We robbed a bank today."
    - This is not admissible because, although it was made by a coconspirator, it was not during or in furtherance of the robbery
- The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation under (E)

- Not Offered for the Truth of the Matter Asserted (Rule 801(c)(2))
  - Silanskas Case
    - The statement that her husband went and joined the monastery can be entered by anyone who heard her say this because it is not being offered for the truth
    - In fact, it is being entered for the exact opposite reason, to show that it is inconsistent with what really happened
  - When the statement is not provided for the truth of the matter asserted:
    - Everyone ran out of the building because Professor Oliver yelled "There's a fire!"
    - Oliver's statement can be brought in to show why everyone ran out of the building, but not to prove that a fire actually existed
    - It's irrelevant why he yelled "There's a fire!" or if there really was a fire
  - **Implied Assertion**
    - Pizza Example
      - When Oliver picks up the phone and orders a pepperoni pizza, there is an implicit assertion that he is calling a pizza place and he wants to place the following order
      - He is implicitly stating that the place he is calling sells pizza, or at least he is thinking it in his head
      - Just because he called the shop does not mean he intended to assert to anyone else that he was in fact calling a pizza place
      - The fact that it could be inferred that he was calling a pizza place, but he did not care whether you inferred it or not, allows the ordering of the pizza to be used to infer that it was in fact a pizza place that he called
    - Zenni Case
      - "Put two dollars on Paul Revere in the third" is implicitly saying that the place being called is in fact a gambling establishment
      - Although this statement was implicit, it was not intended as an assertion, and therefore, does not meet the definition of hearsay
        - Not a verbal act because it is not at issuea
        - The gambling parlor is not suing the caller for the two-dollar bet
        - Not attempting to prove a contract
        - Not attempting to prove how the caller changed the world or how the world was changed as a result of his activity
    - Jackson Case
      - "Don't do it, Kenny" and "Is this Kenny?"
      - Was not used to announce that the person was in fact Kenny
      - Speaker is indifferent as to whether people understood from his statement that he was speaking to Kenny
    - Implied assertion **is not hearsay** unless the declarant **intended the content to be an assertion**
  - **Verbal Acts**
    - There is no truth in a verbal act
      - It is simply a command to do something
      - Words that have immediate **consequences** are verbal acts
    - By merely speaking certain things, you have changed the nature of the world by commanding it to be so

        - By saying, “Deliver a pepperoni pizza to my house” you have changed the nature of the world by merely speaking
        - There is no truth content to this statement; this is not a falsifiable claim; it is neither true nor false
    - Weaver Case
        - “Will you take money to look the other way?”
            - Defendant is soliciting a bribe (changing the nature of the world/words of consequence), which is a verbal act
        - Statement can be offered to show the consequences/effort to bring about those consequences, not for the truth of the matter asserted
    - Pang Case
        - The written check is a verbal act because it changes the nature of the world
            - The bank will take the money out of the account and give it to someone else
        - The check is not being offered for the truth of the matter asserted, but rather for your effort to move money from one place to another
    - Schindler Case
        - Slanderous statement that was overheard is not hearsay because it is not being offered for the truth of the matter asserted
            - “He’s a bad doctor.” Is not being brought into show that he is a bad doctor, but to show that this statement was a slanderous statement
        - BUT if Carl says, “Jim said that Bob is a bad doctor,” there is a truth value to that statement
            - Did Jim actually say that or not?
            - Will be offered for the truth of the matter asserted and is considered hearsay
- **Knowledge**
    - Safeway Case
        - “Look out for the ketchup.” Could be considered a verbal act (“Look out/Be careful”)
        - The person who slipped on the ketchup had advance notice that the ketchup was on the floor and should have taken steps/adequate precaution to not slip in it
        - Not offered to show whether there was ketchup on the floor or not, but to show that the plaintiff had knowledge about the ketchup
- **Effect on the Hearer**
    - Doctor Example
        - i.e., A defendant in a vehicular homicide case wants to testify that he was informed by his doctor that he had only one year to live. After he heard the news, he went on a bender and got very drunk, went driving, and crashed into another car which killed the driver.
        - The defendant can testify as to what his doctor told him because it explains why he went on the bender.
    - Herrera Case
        - “I will kick your ass” unless illegal aliens are brought across the border
        - Would not be hearsay because it is not offered to show that she would actually beat her up
            - Offered to show that Herrera was concerned that this would actually occur if she failed to carry out the task
    - Suggs Case
        - Two sisters claim that their brother’s girlfriend had “something to do with” his death
            - Called police to report that someone was in the brother’s house (his girlfriend)
        - “There’s someone in the house” is hearsay because it is being offered for the truth of the matter asserted
            - But in this case, it is not being used to show that she was actually in the house, but to show why the police showed up at the house
        - Offered to show why someone did something
            - Used to show how the police responded to the situation
            - In response to the call, the police showed up
- Prior Inconsistent Statements (Rule 801(d)(1)(A))

- Truman Case
  - Refusal to testify is inconsistent with testimony that was previously given
- Sua Case
  - Witnesses previously signed statements that were inconsistent with what they were saying during trial
    - The statements were not made under penalty of perjury and under oath; the statements were just given to the police officers
  - **Substantive Evidence**
    - The inconsistent statements must be signed under oath, under penalty of perjury, and during a trial, deposition or other proceeding
  - **Impeachment Evidence**
    - Jury cannot convict a person of a crime if the only evidence they have of the crime comes in as impeachment evidence
    - Prior inconsistent statements in this case would be used as impeachment evidence

- Prior Consistent Statements (Rule 801(d)(1)(B))
  - 2014 Amendment (pg. 183)
    - A consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper influence or motive arose
      - i.e., Driver A claims that the car that caused the accident was red, and the driver of the blue car attempts to bribe Driver A to say that the car that caused the accident was red, and during trial Driver A once again says the car was red
        - Driver A was saying the car was red prior to the bribe
    - Prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well
    - Prior consistent statement must satisfy Rule 403 balancing test
- Opposing Party's Statement (Rule 801(d)(2))
  - Made by the Party in an Individual or Representative Capacity (Rule 801(d)(2)(A))
    - Shafer Case
      - The affidavit itself is written by the brothers and they are parties to the suit
      - Within the affidavit contains the statement of their father, who is also a party
      - Both the affidavit and its contents must satisfy an exception to hearsay
        - Rule 801 (d)(2)(A) and Rule 805
  - Adoptive Admission (Rule 801(d)(2)(B))
    - Silanskas Case
      - The Defendant is expected to speak up if the allegations being presented are not true
      - "David deserved to die."
        - The Court expected Silanskas to speak up and say he wasn't a part of the killing if in fact he was innocent
    - Babbitt Case
      - If someone says something that incriminates another person (i.e., Bob and I robbed a bank tonight), and Bob says nothing, his silence can be offered as an adoptive admission
      - We must believe that the silent person would have responded/objected to these incriminating statements
  - Authorized Admission (Rule 801(d)(2)(C))
    - Kingsley Case
      - Jackson, Kingsley's supervisors, was expressly authorized by the company to say things regarding Kingsley's employment and the statements could be attributed to the company as a party admission
      - Party admission – anything a party said to ANYONE can be reported by ANYONE who heard it
        - A party admission allows for the statement of a party only if offered by an OPPOSING party
  - Statement by Party's Agent or Employee on Matter Within the Scope of Employment Admission (Rule 801(d)(2)(D))
    - Powers Case

        - Statements made by an independent contractor do not reflect back to the company that hired them and would not be admissible under this rule
    - Co-Conspirator Statement Admission (Rule 801(d)(2)(E))
        - Cruz Case
            - Must be established that each person accused was actually a part of the same crime in order to prove they were a part of a conspiracy and were coconspirators
            - Only then can statements by coconspirators be used
        - Bourjaily Case
            - Inadmissible hearsay statements that would otherwise be inadmissible can be considered in addition with other evidence to determine that there was in fact a conspiracy that involves all the people against whom you are bringing the claim
            - Once this is determined, the statements may be admitted
        - Magluta Case
            - Statements made that conceal the conspiracy can also be considered to be in furtherance of the conspiracy, so long as they are made during the conspiracy
                - Cannot be brought in if the statements are made after the ends of the conspiracy have been satisfied or if the conspirators have abandoned completion of the conspiracy
            - In this case, the conspiracy of the bribe ended after the finding of acquittal for Magluta
        - Andrew Case
            - Mrs. Andrew's lover told his daughter to call Mr. Andrew and inform him his wife was sick in a hospital far away after he had cut the break line
            - By telling his daughter to call Mr. Andrew, his statements were in furtherance of the crime
            - If you can show that relating a historical fact in some way advances the conspiracy (lays the groundwork of something else) it can be admitted
                - "That crazy lady is trying to get me to kill her husband."
                    - Lays the groundwork to see how his daughter will react for when he calls her and asks her to tell Mr. Andrew's that his wife is in the hospital

HEARSAY EXCEPTIONS

- Hearsay Exceptions Regardless of Declarant's Availability
    - Rule 803: Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant Is Available as a Witness
        - The following are **not excluded** by the rule against hearsay, regardless of whether the declarant is available as a witness:
            - (1) **Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it
                - *Phillips Case
                    - "My husband is having an affair and I am going to divorce him."
                        - This was not something she was observing as it was happening
                        - Must be what you are immediately perceiving; not conclusions you are drawing at the present time
                    - Three requirements:
                        - (1) the statement must happen at the time of the event;
                        - (2) the statement must describe the event; and
                        - (3) the event must be something within the declarant's personal knowledge
                - *Murillo Case
                    - "I'm with Diana and Rico."
                        - Contemporaneous description of what the victim was experiencing or seeing (satisfies this rule)
            - (2) **Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused
                - *Sutphin Case
                    - Daughter told her father her boyfriend said he would kill her if she ever left him again

                - She was still under the stress of the excitement of the event when she returned to her father's car after speaking with her boyfriend
            - Five-factor test:
                - (1) the length of time between the event and the relating of the statement;
                - (2) the age of the speaker/declarant;
                - (3) the physical and mental state of the declarant;
                - (4) the characteristic of the event; and
                - (5) the subject matter of the statement
    - *This rule is not focused on accuracy, but an assurance against fabrication
- (3) **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will
    - *"I've just been shot"
        - Would be admitted as a then-existing physical condition
    - *Phillips Case
        - Four ways this rule can be used:
            - (1) To prove state of mind;
                - For this to be true, it must be relevant to something in the case
            - (2) To show a then-existing physical or emotional condition;
            - (3) The use of a person's then-existing state of mind to show intent/that they are intending to do something
                - "I plan to go to the store."
            - (4) To show insight into a will
    - ***Hillmon Case**
        - "I've met a man named Hillmon and I plan to go to Crooked Creek."
            - This state of mind is relevant because it shows he actually was in Crooked Creek and that is where the body was found
        - **If we assume the intent to do something is some evidence that the person actually did it, it is relevant**
            - Can offer statements that show state of mind regarding future intent to show the person acted later consistently with that state of mind
    - *Shepard Case
        - "Dr. Shepard has poisoned me."
        - This goes to her state of mind
            - Being offered to show that she was not suicidal, and therefore did not poison herself
        - Must be examined under Rule 403 balancing test
    - *Houlihan Case
        - Can always show that a person's statement of intent to meet another person is their state of mind and therefore some evidence that the meeting occurred
        - Some jurisdictions require corroborating evidence that a meeting actually occurred between the two people
- (4) **Statement Made for Medical Diagnosis or Treatment.** A statement that:
    - (A) is made for – and is reasonably pertinent to – medical diagnosis or treatment; and
    - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause
        - *Dever Case
            - If an adult victim claims he was shot by John, it is relevant that he was shot (for his medical treatment), but not who shot him
            - For children, **it is relevant** to learn the identity of the perpetrator
- (5) **Recorded Recollection.** A record that:

    - (A) is on a matter **the witness** once knew about but now cannot recall well enough to testify fully and accurately;
    - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
    - (C) accurately reflects the witness's knowledge
    - If admitted, the record **may be read** into evidence but may be received as an exhibit only if offered by an adverse party
        - *Prior statement does not have to be made under oath
        - *A writing shown to the witness does not have to be something the witness wrote (it could be a copy from the NY Times on the day the event occurred or another witness's statement)
- (6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
    - (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
    - (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
    - (C) making the record was a regular practice of that activity;
    - (D) all these conditions are shown by the testimony of the custodian or another qualified witness, **or by a certification** that complies with Rule 902(11) or (12) or with a statute permitting certification; and
    - (E) the opponent does not show that the source of information or method or circumstances of preparation indicate a lack of trustworthiness
- (7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:
    - (A) the evidence is admitted to prove that the matter did not occur or exist;
    - (B) a record was regularly kept for a matter of that kind; and
    - (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness
- (8) **Public Records.** A record or statement of a public office if:
    - (A) it sets out:
        - (i) the office's activities;
        - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or
        - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
            - *i.e., a coroner's report finding how a person died
    - (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness
    - *Merely recording a statement is a transcription, which falls outside of this exception
        - If the transcription notes that "he was nervous when he was speaking," that part would be included
- (9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.
    - *Have custodian of the records provide the certificate that this is something the government office regularly keeps
- (10) **Absence of a Public Record.** Testimony – or a certification under Rule 902 – that a diligent search failed to disclose a public record or statement if:
    - (A) the testimony or certification is admitted to prove that
        - (i) the record or statement does not exist; or
        - (ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and
    - (B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice – unless the court sets a different time for the notice or the objection
- (11) **Records of Religious Organizations Concerning Personal or Family History**. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization

    - *Does not matter if the religion is not considered “mainstream” or is not widely accepted
- (12) **Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:
    - (A) made by a person who is authorized by a religious organization or by law to perform the act certified;
    - (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
    - (C) purporting to have been issued at the time of the act or within a reasonable time after it
- (13) **Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker
- (14) **Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:
    - (A) the record is admitted to prove the content of the original record document, along with its signing and its delivery by each person who purports to have signed it;
    - (B) the record is kept in a public office; and
    - (C) a statute authorizes recording documents of that kind in that office
    - *Notes within the document are admissible
        - i.e., John and Mary are married and transfer property to Tracy
- (15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document’s purpose – unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document
    - *Burton Case
        - Handwritten will that was not signed or dated stated that the decedent’s wife wanted her property to go to her parents and not her husband because she was afraid of him
        - The fact that she was afraid of him was not relevant to the transfer of the property, so it would not be admitted
- (16) **Statements in Ancient Documents.** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established
    - *Admissibility of statements within newspaper reports depends on the court (*Hicks*)
- (17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.
    - *i.e., A report of stock market trades at the end of the day; records provided by car manufacturers/dealers; etc.
    - *The jury can take this information back to the deliberation room
- (18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:
    - (A) the statement is called to the attention of an **expert witness** on cross-examination or relied on by the expert on direct examination; and
    - (B) the publication is established as a reliable authority by the expert’s admission or testimony, by another expert’s testimony, **or** by judicial notice
    - If admitted, the statement **may be read into evidence** but not received as an exhibit
- (19) **Reputation Concerning Personal or Family History.** A reputation among a person’s family by blood, adoption, or marriage – or among a person’s associates or in the community – concerning the person’s birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history
- (20) **Reputation Concerning Boundaries or General History.** A reputation in a community – arising before the controversy – concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation

- (21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.
- (22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:
    - (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
    - (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
    - (C) the evidence is admitted to prove any fact essential to the judgment; and
    - (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant
    - The pendency of an appeal may be shown but does not affect admissibility
- (23) **Judgments Involving Personal, Family, or General history, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:
    - (A) was essential to the judgment; and
    - (B) could be proved by evidence of reputation

- Hearsay Exceptions That Require Declarant's Unavailability
    - Rule 804: Exceptions to the Rule Against Hearsay – When the Declarant is Unavailable as a Witness
        - (a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
            - (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
                - *i.e., Attorney-client privilege; Fifth Amendment privilege
            - (2) refuses to testify about the subject matter despite a court order to do so;
            - (3) testifies to not remembering the subject matter;
            - (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
                - *Age can be considered a "mental illness;" Testifying in-court at 4 years old may be considered mental illness (*Riley*)
            - (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
                - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
                - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2)-(4)
            - But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying
        - (b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
            - (1) **Former Testimony.** Testimony that:
                - (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
                - (B) is now offered against a party who had – or in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross, or redirect examination
                - *Prior testimony, even at a preliminary hearing, is admissible if the witness is unavailable
                    - BUT, if the prosecution does not provide the defense attorney with discovery that would have allowed an effective cross-examination at the preliminary hearing, that testimony is not admissible
            - (2) **Statement Under the Belief of Imminent Death.** In a prosecution for **homicide** or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, **made about its cause or circumstances**
                - *"Dying Declaration"
                - *The declarant does not actually have to die
            - (3) **Statement Against Interest.** A statement that:
                - (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to

invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
        - (B) **is supported by corroborating circumstances** that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability
        - *Only the defense will be using this rule
    - (4) **Statement of Personal or Family History.** A statement about:
        - (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
        - (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate
        - *"My great-grandmother used to say we were related to Thomas Jefferson"
        - *Declarant does not need personal knowledge for this information to be admissible
    - (5) Transferred to Rule 807
    - (6) **Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.** A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so **intending that result**
        - *"Forfeiture by Wrongdoing"
        - *The action must be taken with the knowledge that this person would be testifying
        - *Must be done with intention to prevent a witness from testifying
            - If a witness is killed, it must be done with the intention to stop them from testifying, not just the intention to kill them for some other reason
        - *Does not matter if there is a mixed motive for doing so as long as one reason is to stop a witness from testifying (*Jackson*)

- Hearsay Within Hearsay
    - Rule 805
        - Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule
            - *i.e. A hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances

- Confrontation Clause
    - Added requirement for the prosecution to show if it seeks to admit something that is an exception to hearsay against a defendant in a **criminal case**
        - In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him
        - Found in Sixth Amendment of the Federal Constitution
    - **Crawford Case**
        - The Confrontation Clause requires cross-examination whenever a statement that was made by a witness, who is now **not subject** to cross-examination, was made in anticipation of litigation
            - i.e., A statement that was prepared for the police or a prosecutor; a written or oral statement that was recorded
            - The statement **cannot be used unless the witness is there** to be cross-examined on it
        - In order to bring in a statement against a defendant in a criminal case:
            - **(1)** must show that there was a hearsay exception (federal or state rules)
            - **(2)** under Crawford, must show that the statement being brought in against the criminal defendant is not a statement that was made reasonably in anticipation of litigation
                - **Statement cannot be testimonial**
                    - Testimonial = made in anticipation of litigation
    - Giles Case

        - If a witness was previously threatened about testifying and then does not come to trial out of fear of death, the prior threats are admitted under the hearsay exception and the Confrontation Clause
    - Bryant Case
        - Because the shooting had occurred only 25 minutes prior, and neither the police nor the victim knew where the shooter ran, the statement made identifying the shooter could be intended to help catch the shooter at that moment rather than to convict him later
            - Was the statement made to arrest him or convict him?
            - Was there an ongoing danger?
        - Dying declaration satisfies the Confrontation Clause
- Davis Case
    - When you are calling to seek help or report a crime, which the Court describes as ongoing but has immediately passed, it is not for the purpose of offering testimony in a subsequent case, but used to resolve the current situation
    - Where the parties are separated and speak to the police separately, it is analogous to Crawford and the statements would be offered in anticipation of a criminal trial
    - Mens Rea matters: **why did you make this statement?**

IMPEACHMENT AND REHABILITATION

- Bias and Perception
    - Rule 607: Who May Impeach a Witness
        - Any party, including the party that called the witness, may attack the witness's credibility
    - Rule 608: A Witness's Character for Truthfulness or Untruthfulness
        - (a) **Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
            - *Cross-examination must rise to the level that the witness's truthfulness has been attacked (*Michael*)
                - Must target the witness's generic truth-telling ability
                    - i.e., You're a liar or have bad character for telling the truth
                        - This is when someone can come in and testify that you are in fact a good person
                    - Mere inconsistent statements are not necessarily an attack on your truth-telling ability
                        - Cannot merely be that you got it wrong, must rise to level of showing that you are not a truth-teller generally
                    - If there are a number of inconsistent statements, it could rise to the level of not having a good character for the truth (determined on case-by-case basis)
        - (b) **Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, **extrinsic evidence is not admissible to prove** specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
            - (1) the witness; or
            - (2) another witness whose character the witness being cross-examined has testified about
            - By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness
    - State Rule 616 (Not in Federal Rules of Evidence)
        - In addition to other methods, a witness may be impeached by any of the following methods:
            - (A) **Bias.** Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.
                - *Bias must exist at the time of the incident in question
                - *Can bring in extrinsic evidence of bias
                - *Extrinsic evidence must have material bearing on the case
            - (B) **Sensory or mental defect.** A defect of capacity, ability, or opportunity to observe, remember, or relate may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.
                - *Extrinsic evidence must have material bearing on the case
            - (C) **Specific contradiction.** Facts contradicting a witness's testimony may be shown for the purpose of impeaching the witness's testimony. If offered for the sole purpose of

impeaching a witness's testimony, extrinsic evidence of contradiction is inadmissible unless the evidence is one of the following:
    - (1) Permitted by Evid. R. 608(A), 609, 613, 616(A)-(B) or 706; or
    - (2) Permitted by the common law of impeachment and not in conflict with the Rules of Evidence

- Inconsistent Statement
    - Rule 613: Witness's Prior Statement
        - (a) **Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
        - (b) **Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if **the witness is given an opportunity to explain or deny** the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2)
    - Extrinsic Evidence
        - If a witness is allowed to leave town before the prior inconsistent statement is being offered, the extrinsic evidence of the statement (i.e., a transcript/physical documents) must be able to be explained by the witness
            - Therefore, if the witness is gone, the statement cannot be brought in (*Wammock*)
        - If a prior inconsistent statement is made under oath or under the party admission doctrine, then you do not need to give the witness a chance to explain it, it can simply be brought in (substantive evidence)
    - Can bring inconsistent statements in for:
        - Impeachment; or
            - If prior inconsistent statements are needed to build the elements of a case, they cannot be used to prove guilt if they are only coming in as impeachment
                - There must be affirmative substantive evidence to prove the case
                - But inconsistent statements are **alway**s admissible to tear down the statement they are now making on the stand
            - Anything that goes to show why a witness might give a different version of the story other than the one that is true is admissible for impeachment
        - Substantive evidence
- Impeachment by Evidence of a Criminal Conviction
    - Rule 609: Impeachment by Evidence of a Criminal Conviction
        - (a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
            - (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
                - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
                    - *Must be admitted unless the probative value is **substantially outweighed** by the prejudicial effect
                - (B) must be admitted in a criminal case in which the witness is a defendant**, if the probative value of the evidence outweighs its prejudicial effect** to that defendant; and
            - (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement
                - *No balancing test if it is a dishonest act or false statement
        - (b) **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
            - (1) its probative value, supported by specific facts and circumstances, **substantially outweighs** its prejudicial effect; and
            - (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use
        - (c) **Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if:

- (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or
- (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence

▪ (d) **Juvenile Adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if:
- (1) it is offered in a **criminal case**;
- (2) the adjudication was a witness other than the defendant;
- (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
- (4) admitting the evidence is **necessary** to fairly determine guilt or innocence

▪ (e) **Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

- Writing Used to Refresh Recollection
  - Rule 612: Writing Used to Refresh a Witness's Memory
    - (a) **Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
      - (1) while testifying; or
      - (2) before testifying, if the court decides that justice requires the party to have those options
    - (b) **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. §3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.
    - (c) **Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or – if justice so requires – declare a mistrial

OPINION EVIDENCE

- Lay Opinions
  - Rule 701: Opinion Testimony by Lay Witnesses
    - If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
      - (a) rationally based on the witness's perception;
      - (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
      - (c) not based on specific, technical, or other specialized knowledge within the scope of Rule 702
    - *"That car flew by me…maybe going 70-80 miles per hour"
      - Lay witness can talk about comparative speeds in certain circumstances
    - *That boat is large, the weather is warm, that woman is short, etc.
    - *Must be a description based on what the witness actually saw and must be helpful to the jury
- Expert Opinions
  - Rule 702: Testimony by Expert Witnesses
    - A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
      - (a) the 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;
      - (b) the testimony is based on sufficient facts or data;
      - (c) the testimony is the product of reliable principles and methods; and
      - (d) the expert has reliably applied the principles and methods to the facts of the case

AUTHENTICATING EVIDENCE

- Authentication and Identification
  - Rule 901: Authenticating or Identifying Evidence
    - (a) **In General.** 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.
    - (b) **Examples.** The following are examples only – not a complete list – of evidence that satisfies the requirement:
      - (1) **Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.
        - *i.e., Officer is this the gun you recovered from the scene?
      - (2) **Nonexpert Opinion About Handwriting.** A nonexpert's opinion that handwriting is genuine, based on familiarity with it that was not acquired for the current litigation.
      - (3) **Comparison by an Expert Witness or the Trier of Fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.
      - (4) **Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
      - (5) **Opinion Evidence About a Voice.** An opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording – based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
      - (6) **Evidence About a Telephone Conversation.** For a telephone conversation, evidence that a call was made to the number assigned at the time to:
        - (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
        - (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone
      - (7) **Evidence About Public Records.** Evidence that:
        - (A) a document was recorded or filed in a public office as authorized by law; or
        - (B) a purported public record or statement is from the office where items of this kind are kept
      - (8) **Evidence About Ancient Documents or Data Compilations.** For a document or data compilation, evidence that:
        - (A) is in a condition that creates no suspicion about its authenticity;
        - (B) was in a place where, if authentic, it would likely be; and
        - (C) is at least 20 years old when offered
      - (9) **Evidence About a Process or System.** Evidence describing a process or system and showing that it produces an accurate result.
      - (10) **Methods Provided by a Statute or Rule.** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.
- Self-Authenticating Evidence
  - Rule 902: Evidence That Is Self-Authenticating
    - The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
      - (1) **Domestic Public Documents That Are Sealed and Signed.** A document that bears:
        - (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
        - (B) a signature purporting to be an execution or attestation
      - (2) **Domestic Public Documents That Are Not Sealed but Are Signed and Certified.** A document that bears no seal if:
        - (A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
        - (B) another public officer who has a seal and official duties within that same entity certifies under seal – or its equivalent – that the signer has the official capacity and that the signature is genuine

- (3) **Foreign Public Documents.** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester – or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:
    - (A) order that it be treated as presumptively authentic without final certification; or
    - (B) allow it to be evidenced by an attested summary with or without final certification
- (4) **Certified Copies of Public Records**. A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:
    - (A) the custodian or another person authorized to make the certification; or
    - (B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court
- (5) **Official Publications**. A book, pamphlet, or other publication purporting to be issued by a public authority.
    - *Includes learned treatises
- (6) **Newspapers and Periodicals**. Printed material purporting to be a newspaper or periodical.
- (7) **Trade Inscriptions and the Like**. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
- (8) **Acknowledged Documents**. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
- (9) **Commercial Paper and Related Documents**. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
- (10) **Presumptions Under a Federal Statute**. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.
- (11) **Certified Domestic Records of a Regularly Conducted Activity**. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.
- (12) **Certified Foreign Records of a Regularly Conducted Activity**. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).
- (13) **Certified Records Generated by an Electronic Process or System**. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).
- (14) **Certified Data Copied from an Electronic Device, Storage Medium, or File**. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11)

BEST EVIDENCE AND SUMMARIES

- Rule 1001: Definitions That Apply to This Article

- In this article:
  - (a) A “writing” consists of letters, words, numbers, or their equivalent set down in any form
  - (b) A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner
  - (c) A “photograph” means a photographic image or its equivalent stored in any form
  - (d) An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout – or other output readable by sight – if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it
  - (e) A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original
- Rule 1002: Requirement of the Original
  - An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise
- Rule 1003: Admissibility of Duplicates
  - A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate
    - *A written transcription would question authenticity
- Rule 1004: Admissibility of Other Evidence of Content
  - An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:
    - (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
    - (b) an original cannot be obtained by any available judicial process;
    - (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
    - (d) the writing, recording, or photograph is not closely related to a controlling issue
- Rule 1005: Copies of Records to Prove Content
  - The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.
- Rule 1006: Summaries to Prove Content
  - The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.
- Rule 1007: Testimony or Statements of a Party to Prove Content
  - The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.
    - *May testify when the evidence should be in private records and it’s not, or when it should be in the computer records and it’s not

DEAD MAN’S STATUTE

- Dead Man's Statute states that in a civil action, a party with an interest in the litigation may not testify against a dead party about communications with the dead party
  - If you have a civil dispute with someone who is now deceased, and you are wanting to testify to something that the decedent said, because the person is no longer available, you are not able to tell your side of the story
  - It must be supported by documentary elements or through other witnesses who do not have the same bias that you have
  - The deceased must be an adverse party to the litigation
    - *Hendrickson Case
      - Daughter cannot testify that her mother gave her a ring, and that she actually owned it, because the deceased dad is not there to refute the claim
      - She can offer documents or objective witnesses

PRIVILEGES

- Rule 501: Privilege in General

- The Common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise:
  - The United States Constitution;
  - A federal statute; or
  - Rules prescribed by the Supreme Court
- But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision

- Rule 502: Attorney-Client Privilege and Work Product; Limitations of Waiver
  - The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection
    - (a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver**. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
      - (1) the waiver is intentional;
      - (2) the disclosed and undisclosed communications or information concern the same subject matter; and
      - (3) they ought in fairness to be considered together
    - (b) **Inadvertent Disclosure**. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
      - (1) the disclosure is inadvertent;
      - (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
      - (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)
    - (c) **Disclosure Made in a State Proceeding**. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:
      - (1) would not be a waiver under this rule if it had been made in a federal proceeding; or
      - (2) is not a waiver under the law of the state where the disclosure occurred
    - (d) **Controlling Effect of a Court Order**. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.
    - (e) **Controlling Effect of a Party Agreement**. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
    - (f) **Controlling Effect of this Rule**. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
    - (g) **Definitions**. In this rule:
      - (1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
      - (2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.
  - *Common Interest Waiver Exception (*Bennett*)
    - If you are sharing a legal communication about a case in which you and several others are all mutual defendants, and you all have the same concern about the same issue, then sharing the issue with them does not waive the privilege
    - It is assumed this is part of the joint defense
    - If a third party receives a privileged communication between other parties, no one has the ability to assert privilege; once it has been released to a third party, it constitutes a waiver
  - *Marital Privilege (*Trammel*)
    - Spouses are not required to testify against one another, but if one wants to, they are allowed
    - BUT, if both parties hold the privilege, the defendant can prevent the other person from testifying
    - Mrs. Trammel wanted to testify against her husband in court because she received a plea deal
  - *Keyes Case
    - If you sue your lawyer, the nature of the lawsuit has made an issue out of the things that are contained within the privileged communications, and the privilege is waived

- Outline for Privileges
    - Does a privilege potentially exist for communications between the people involved?
        - Is it one recognized by statute, as with Pennsylvania's doctor-patient privilege?
        - Is there common a law privilege that potentially covers these parties, i.e., spouses?
        - Is there a policy-based justification for a privilege to emerge from elsewhere, i.e., the effort to create a self-policing privilege?
    - Was the communication only between parties who enjoy the privilege of confidential communications, or has the information been shared with third parties? If so, what is the consequence for the privilege?
    - Do privileged communications remain privileged in a lawsuit between the parties to the communication involving the subject of the communication?
    - Is one of the parties to a privileged communication capable of testifying against the other party in a criminal case, or a civil case against a party not a part of the privileged communication?
        - Another way of asking this is, who is the holder of the privilege?