Evidence Outline – Spring 2011 – Professor Lawson

ALWAYS HAVE TO ASK: WHAT IS THE PROPOSITION FOR WHICH THE EVIDENCE IS BEING OFFERED?

REMEMBER: KEEP IN MIND WHAT SPEAKS TO *ADMISSIBILITY* AND WHAT JUST GOES TO *WEIGHT*/*CREDIBILITY*

ALWAYS ASK ABOUT THE FRE 403 INQUIRY

<u>Theories and Frameworks</u>

I. The Theoretical Structure of Legal Proof
    a. To prove anything, you need to consider:
        i. **Admissibility**: which considerations are permitted to count for or against the legal truth of the proposition in question
            1. What can a judge or jury properly consider?
                a. The Federal Rules of Evidence (and state counterparts) largely answer this question
        ii. **Significance**: once one has identified the admissible evidence, one must then establish the level of significance to which that evidence is entitled
            1. While our legal system has explicit (though perhaps highly elastic) rules for establishing admissibility, it imposes almost no formal structure on the decision maker's significance-assigning process
                a. So we rely on reasonableness
                    i. Our rules/norms/principles will inform our judgment about how much the evidence set should count for
        iii. **Weight or Magnitude**: when the admissible evidence has been identified and evaluated, one needs a standard of proof that expresses the total weight or magnitude of the evidence required for a justified assertion of that proposition
            1. The law does speak to this consideration by formalizing standards of proof required
                a. Ex: preponderance of the evidence in civil cases, which is usually defined as "more probable than not" or as "50% +"
                b. Ex: beyond a reasonable doubt in criminal cases
            2. The consequences of specifying a standard of proof turns particular evidence sets and norm of significance into different conclusions (i.e. could have the same evidence, but depending on the standard of proof, the outcome could be different)
    b. Why do we formalize admissibility but no significance?
        i. The alternative of formal rules of admissibility is a free proof system
            1. Free proof systems let everything in, but with the option of giving certain pieces of evidence no significance (versus just saying it is inadmissible to begin with)
        ii. Generally, we have rules of admissibility because we utilize juries, while other parts of the world do not
            1. So as an operational matter, the rules tend to be enforced less strictly if it is a bench trial versus a jury trial
                a. Although technically the rules should apply the same to both situations

II. The Operational Structure of Legal Proof
    a. The task of a juror at trial is an evaluation of the evidentiary support for a proposition or a series of propositions – and these propositions come from the formalities of the law that establish the elements of causes of action, each of which must be established or a cause of action fails

i. One meaning of the phrase "to establish each proposition" is to refer to a process in which the fact finder goes through the set of elements – element by element – and decides if each is satisfactorily satisfied
    1. If so, verdict for the plaintiff
    2. The law takes this formal element by element approach → it is about arguing particular elements and making sure each element is satisfied
        a. Every cause of action and every substantive legal norm can be broken down into elements, and this is how we instruct judges and juries to structure their opinions
ii. A second meaning reverses the first approach in that the fact finder determines that the story that exemplifies the formal requirements of the law is satisfactorily establish, and thus so is each of its various parts (i.e., elements)
    1. This is Allen's approach → the parties should tell their story and the trier of fact will then look over the entire evidence set and determine if P's story is right … if so, then that means that P satisfied all of the elements required
iii. Consequences of the law's approach vs. Allen's approach
    1. Under an elements approach, D does not have to speak at all
        a. P can put on their case and D can rest without speaking (and D can still win doing this because P's evidence might not satisfy all of the element)
    2. Under an alternative story approach – that requires the trier of fact to weigh the relative plausibility of the set of events set out by P and D – if D says nothing, D will lose because there will be no alternative set of events by which to compare P's story of what happened
        a. Therefore, this approach places more of a burden on D
iv. Allen supports an alternative story approach because if you view legal claims as a series of discrete elements that must be proved, and if we attach to the notion of proof anything remotely resembling a probability judgment, it turns out there are strange and perhaps unintended consequences
    1. The more elements there are in an action, the less likely that P will be able to satisfy the standard of proof
        a. Therefore, the more elements you have to prove, the less likely you will win
            i. And the law does not consciously structure its approach with this paradox/consequence in mind
    2. Under the elements approach, if the probability of any one of the elements falls below .5, then P loses (even if all of the other elements are .99); however, if all of the elements are .51, then P could still win
        a. Allen suggests that this is one reason the gestalt approach is better – to minimize errors across the legal system
v. Complicating this discussion is a considerable body of evidence suggesting that what everyone in the legal system actually does in the course of litigation is compare stories
    1. People tend to fall into story-telling mode because the trier of fact wants a cohesive story
        a. In the end, you are not trying to prove what you think is true, but rather you are trying to convince some decision maker to rule in your favor

III. The Cognitive Structure of Legal Proof
    a. If the ultimate goal is not to obtain the objective truth, but rather to win your case (however that happens), it becomes crucial to know how it is that the decision maker understands and processes the information you give them – above and beyond the formalized rules
        i. Simon suggests that no one has any idea how judges and jurors decide cases
        ii. Hastie suggests three approaches to a theory of juror decision making:

1. Simple catalogues of general behavioral facts
    a. Basically, there is no theory – things just happen the way that they do
2. Algebraic process models
    a. People make decisions using algebra – and this is grounded in probability theory
        i. So you start with a particular probability assessment and as each new piece of evidence enters the evidence set, you can use these probability measures to show how the new evidence changes the existing probability assessment
            1. Note: Lawson doesn't buy this explanation
3. Cognitive information-processing models
    a. Looking at all of the evidence that is introduced – even if the evidence is introduced as proof of each element by element that makes up the claim – decision makers actually take all of that stuff, integrate it, put it into a big pot, and make their gestalt judgment about what the most plausible account of what happened it
        i. Similar to Allen's alternative story approach

<u>The Domain of Evidence Law</u>

Fact vs. Law

I. Allen & Pardo: any attempt to draw a hard and fast line between propositions of law and fact is doomed
    a. On the one hand, it is the legal system's fundamental and critical distinction
        i. Significant consequences attach to whether an issue is labeled "factual" or "legal"
            1. Ex: whether a judge or jury will decide the issue; if, and under what standard, there will be appellate review; whether the issue is subject to evidence and discovery rules; whether procedural devices such as burdens of proof apply; and whether the decision has precedential value
    b. On the other hand, the distinction continues to confuse courts and commentators – there is no rule or principle that will unerringly distinguish a factual finding from a legal conclusion
        i. Any distinction the law chooses to make is ultimately going to be convention
            1. If an issue is conventionally regarded as legal, is usually decided by the judge, and involves highly general matters like appropriate standards of conduct, it will likely be thought of as a "legal" question
                a. And the reverse is true

II. Lawson's *Stipulating the Law*
    a. It is hornbook law that courts ordinarily look with favor on stipulations (short circuiting the formal process of proof) designed to simplify, shorten, or settle litigation and save costs to the parties, and such stipulations should be encouraged by the courts rather than discouraged
        i. However, courts will occasionally disregard stipulations that are manifestly contrary to evidence in the record
            1. Ex: where the parties attempt to stipulate facts to establish jurisdiction that does not exist
                a. So parties cannot stipulate to something to get a case to the Supreme Court when there is not actually a case or controversy appropriate for SCOTUS jurisdiction
        ii. If it is not plain on the face of the record that a stipulation is false, courts will not actively search for reasons to reject that stipulation
            1. By and large, courts leave it to the parties to determine which facts are worth arguing about, even if a predictable consequence of that practice is to have cases sometimes decided on the basis of factual assumptions that are objectively (though not obviously or knowingly) false
    b. With propositions of fact, the baseline norm is that party stipulations are conclusive

c. With propositions of law, the baseline norm is that party stipulations are ineffectual
    i. Courts will not accept stipulations as controlling as to questions of law or legal methodology (how courts will determine applicable law)
        1. Courts are not limited to the particular legal theories advanced by the parties, but rather retain the independent power to identify and apply the proper construction of governing law
            a. And this is very different than what happens with adjudicative facts, because there the judge is supposed to be limited only to the record (plus whatever background, stock information the decision maker brings to bear)

Fact vs. Fact

I. The term "judicial notice" actually encompasses a range of situations in which judges take official cognizance of propositions of fact and of law
    a. FRE 201 deals with judicial notice in the strict sense of a formal judicial determination that a particular adjudicative fact is not subject to reasonable dispute
        i. FRE 201: Judicial Notice of *Adjudicative* Facts
            1. (a) Scope of rule: this rule governs only judicial notice of adjudicative facts
            2. (b) Kind of facts: a judicially noticed fact must be one not subject to reasonable dispute in that it is either
                a. (1) generally known within the territorial jurisdiction of the trial court **– or –**
                b. (2) capable of accurate and read determination by resort to sources whose accuracy cannot reasonably be questioned
            3. (c) When discretionary: a court may take judicial notice, whether requested or not (subject to FRE 201(e) if the a party objects)
            4. (d) When mandatory: a court shall take judicial notice if requested by a party and supplied with the necessary information
                a. Note: it would be appealable error if the judge failed to take judicial notice and the requirements were satisfied
            5. (e) Opportunity to be heard: a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken
            6. (f) Time of taking notice: judicial notice may be taken at any stage of the proceeding
            7. (g) Instructing jury:
                a. In a *civil* action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed
                b. In a *criminal* case, the court shall instruct the jury that it <u>may</u>, but is not required to, accept as conclusive any fact judicially noticed
        ii. More on FRE 201
            1. Types of facts about which parties seek judicial notice pursuant to FRE 201 and are sometimes successful: business or government customs; calendar dates and time limits; product characteristics in IP litigation; current events; general principles of economics; fees and salaries; geography; historical information; judicial records; medical information; official records; scientific facts and principles; and weather
            2. Note that FRE 201(b) only provides two bases for taking formal judicial notice, and the judge's personal knowledge is not one of them
                a. Ex: *Storm Plastics v. U.S.* – judge could not take judicial notice of the quality of a fishing lure
            3. Sources one might use to satisfy FRE 201(b)
                a. Almanacs

b. Encyclopedias
c. Calendars
d. Historical works
e. Charts tabulating information deduced from the application of the laws of physics
f. National Weather Service statistics
    i. Ex: Problem 11.1 to establish the amount of rainfall in an area

4. Sources one cannot generally use to satisfy FRE 201(b)
    a. Personal knowledge/experience
        i. Ex: Judge cannot take judicial notice of the effects of general anesthetic because he had been under it recently
        ii. But, framed more generally, could probably establish that there is a connection between general anesthesia and how people *in general* react
    b. Pamphlet accompanying a drug created by the drug manufacturer (i.e. not from the FDA or a medical dictionary)
    c. 1967 dissertation & research paper
    d. Newspaper articles are generally not sufficient
        i. Ex: Problem 11.3

iii. Advisory Committee Notes

1. **Adjudicative facts** are simply the facts of the particular case
    a. When a court or an agency finds facts concerning the immediate parties – who did what, where, when, how, and with what motive or intent – the court or agency is performing an adjudicative function, and the facts are therefore adjudicative ones
    b. Adjudicative facts are those to which the law is applied in the process of adjudication
        i. They are the facts that normally go to the jury in a jury case
        ii. They relate to the parties, their activities, their properties, their business
    c. The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses
        i. So when can we short circuit this normal process of proof?
            1. FRE 201(b) suggests two ways to short circuit the process
2. **Legislative facts** are those which have relevance to legal reasoning and the lawmaking process
    a. Parties will introduce legislative facts in the hope that they persuade the judge, but the judge is not limited to the legislative facts presented by the parties (*see* stipulations, *supra*)
3. Consequences of calling something adjudicative vs. legislative
    a. With an adjudicative fact found by a jury, the appeal standard is strict – the jury will only be overturned if no reasonable person could have concluded what they did
    b. With an adjudicative fact found by a judge, the reviewing court can only overturn the lower court judge if he was clearly erroneous, in civil cases (so <u>not</u> de novo review)
    c. With a legislative fact, the appellate court will review de novo, as though they were propositions of law (even though the lower court made them as findings of fact)
    d. Additionally, if something is deemed a legislative fact:
        i. The judge is not limited to the record before it

ii. It is not subject to the formal rules of admissibility

iv. Problem 11.2: judicial notice was upheld re: Guam is seriously vulnerable to typhoons, and that the month of Nov. is the peak of typhoon season
    1. If this is being tried in Guam, then it is likely that these facts are generally known to the relevant trial community (FRE 201(b)(1))
    2. And even if not, likely there is a reasonably unimpeachable source that could establish weather patterns (FRE 201(b)(2))

v. Problem 11.4: is judicial notice proper on the basis of a newspaper article describing the widespread layoffs at Acme?
    1. Newspaper article is not a source whose accuracy cannot be reasonably questioned
        a. But, perhaps judicial notice could be taken if the firings were generally known throughout the trial community (close case)

vi. Problem 11.5: consider the time period when considering judicial notice
    1. In the 1960s, health hazards from smoking was probably not common knowledge
    2. In 2011, it would likely be deemed common knowledge

vii. Problem 11.6: district court took judicial notice of certain factual findings, and these factual findings had been made in an order entered by another district court in an earlier suit
    1. Judicial notice of the fact that factual findings were made would be appropriate
    2. Judicial notice of the subject of the facts, however, is inappropriate

Alternative to Evidence

I. The term "judicial notice" is also often used more loosely to refer to other forms of judicial fact-finding not addressed by the FRE (formal process of proof) at all [i.e. what we're calling: alternatives to evidence]

II. <u>Judicial (and Jury) Notice</u>
    a. Judicial notice (formal and informal?) is largely concerned with facts that seem so obvious it is silly to make the parties use the formal, conventional methods of proof
        i. The judicially noticed facts could be readily established through formal methods, but this just involves more time and money
    b. Judges and jurors will also make factual judgments based on general assumptions, background knowledge, guesses, hunches, prejudices … and we just have to recognize that this happens
        i. Jurors are not supposed to conduct their own investigations outside the courtroom
        ii. Jurors are not supposed to offer any specialized knowledge they may have incidentally about the issues in the case
            1. However, no one has a clue how to determine the where the line is between a juror properly using their background knowledge and a juror improperly acting like an expert witness

III. <u>Judicial Summary of and Comment on the Evidence</u>
    a. In most jurisdictions (not all), the trial judge has the power (but not the obligation) at the conclusion of the case to take the prerogative of summing up for the benefit of the jury the general trust of the evidence that was procedure = judicial summary
        i. And if the judge finds it appropriate to opine thereon, he may – provided that he instructs the jury his opinion is not binding = judicial comment
    b. Note: judicial summary and comment is not regulated by the rules of evidence

IV. <u>Stipulations</u> are another way of proving certain factual propositions without going through the formal process of proof
    a. If the parties stipulate to certain facts, they will be deemed facts – taken as conclusive evidence
        i. And this saves the parties from actually introducing evidence regarding that fact
    b. Mechanisms:
        i. During the pre-trial process with motions in limine, e.g.
        ii. During the trial
    c. Can parties stipulate to something that is false?

i. Parties may consciously, knowingly, deliberately stipulate to claims that they all know are false
    1. And normally a stipulation of fact is binding
    2. However, a court can deny parties' stipulations if the false stipulation is the only reason there is a case or controversy in the first place
        a. You cannot stipulate to facts that create a case where there is not one/jurisdiction

d. Can parties stipulate to something that is so obviously false but does not affect the jurisdiction of the court?
    i. SCOTUS: parties cannot stipulate to something that is obviously false that creates a different kind of case
    ii. Generally, though, if the parties stipulate to facts, courts will not investigate or double check whether the agreed upon facts are true
        1. 99.9% of the time whatever the parties agree to is off the table and accepted by courts

e. Can parties stipulate to the law?
    i. Parties stipulate to the law often
        1. Ex: it is commonplace for parties to agree what jurisdiction's law will govern if the parties to a contract are in different jurisdictions; and routinely courts accept contractual terms specifying the forum for deciding legal questions
        2. Ex: plea bargains are an example of parties stipulating to the law

f. Can parties agree to the operational meaning of the First Amendment, leaving the courts to determine whether a certain application of this operational meaning has been satisfied, e.g.?
    i. Courts will generally not accept stipulations of law (even if both parties agree) … except in the few limited areas mentioned (choice of law forum and plea bargains)
        1. Ex: courts will determine on their own whether something is commercial speech within the First Amendment; what level of scrutiny applies under the Fourteenth Amendment; whether or not they use or forgo legislative history

Total Case Consists Of:

I. Formal evidence admitted through the FRE
II. Judicial notice
    a. Formal
    b. Informal
        i. Background facts/assumptions, e.g.
III. Judicial summary and comment
IV. Stipulations
V. Standards of Proof (*infra*)
    a. Lawson considers part of your total case because proving your case is a function of what you put in and how much of that you have to put in

<u>How Much Evidence?</u>

I. The standard of proof is a crucial mechanism for determining what you have to prove/how much you have to prove
    a. Who has to prove anything? Can you win your case by doing nothing?
        i. There are two aspects to the burden of proof:
            1. **Burden of persuasion** (standard of proof)
                a. Procedural rules that the jury must apply in evaluating the evidence
            2. **Burden of production** (who must go forward and who can do nothing)
                a. The law will always allocate to one party the obligation to produce evidence

i. The judge applies the burden of production rule to determine if a party has produced enough evidence to avoid a directed verdict (or some other adverse ruling that terminates the right of the party to proceed)

II. Burdens of Proof in Civil Cases
  a. Burden of Production
    i. Each issue to be litigated, whether it is an element or an affirmative defense, has a burden of product associated with it that requires one party or the other to produce evidence relevant to the particular issue
      1. If the party with a burden of production fails to produce sufficient evidence on a particular issue, the judge will not permit the issue to go to the jury
        a. Thus the burden of production informs the parties how issues will be decided if no evidence is produced
    ii. The burden of production is a function of the burden of persuasion
      1. The purpose of the production requirement is to require the party who has it to present enough evidence to create a jury question
        a. To decide if there could be reasonable disagreement about which party should prevail, the judge must consider the burden of persuasion
    iii. Typically the pleading or moving party bears both the burden of pleading and the burden of production
  b. Burden of Persuasion
    i. A burden of persuasion is a rule of decision that informs the decision maker how to decide a case in light of the uncertainties that inevitably will accompany the presentation of evidence
      1. In civil cases, 99.99% of the time, the standard will be "preponderance of the evidence" (and .01% of the time it will be "clear and convincing evidence")
        a. So in most cases plaintiffs must prove each element of their necessary factual claims to a preponderance of the evidence
          i. And defendants must establish affirmative defenses by the same standard
        b. Preponderance of the evidence = more likely than not
          i. This is obviously hard to define, so there is an assumption that the decision maker can make the kinds of evaluations necessary to determine whether it more likely than not that a fact is true
            1. Possibilities for how decision makers act:
              a. No account for how they deal with this standard
              b. People are making quasi-mathematical statistical judgments to determine whether something is more or less likely
              c. People are comparing the claim of P to the claim of D (rather than comparing the claim of P with reality/50%+1 kind of calculation)
              d. Standards tell the decision maker how to decide comparatively
                i. Reasonable doubt: strict
                ii. Preponderance of the evidence: less strict
            2. Study (pg. 707): when jurors are told to determine whether P's case is supported by a preponderance of the evidence, they understand that burden to be a

probability between .7 and .8 … much higher than what the law intends (.5+)

ii. *Schechter v. Klanfer* (N.Y.S.2d 1971)
    1. Issue: whether the jury should have been instructed to hold P, who had by amnesia lost his memory of the events causing his injury, to a lesser degree of proof than a P who could have testified to the events
    2. Court decides that the jury may consider whether P should be held to a lesser degree of proof (noting that they do this in other circumstances: in a wrongful death case when the victim is not there to testify, e.g.)
        a. In line with the Committee on Pattern Jury Instructions of the Assoc. of Supreme Court Justices, which recommends that the amnesiac P be held to a lesser degree of proof if the jury is satisfied from medical and other evidence that P is suffering from loss of memory and that the injuries P incurred were a substantial factor in causing P's loss of memory
            i. The limitation that the accident must have been a substantial factor in causing the loss of memory is predicated on the notion that it is unfair to allow D (who has knowledge of the facts) to benefit by standing mute when P's inability results from D's acts
        b. If the baseline standard for a civil action of negligence is preponderance of the evidence, then to operationally reduce the burden of persuasion means that P could win even if it is less likely than not
            i. This does <u>not</u>, however, shift the burden of proof of eliminate the need for P to introduce evidence of a prima facie case
    3. Significance: the law can enhance a party's case – not by the introduction of more evidence – but by bringing the standard of proof down (by reducing the amount of evidence the party needs to provide)
        a. And this is how a standard of proof could be part of the total case – a substitute for evidence

III. Burdens of Proof in Criminal Cases
    a. The process of proof in criminal cases is similar but not identical to the process of proof in civil cases
        i. In both, the law determines what facts need to be proven in order to establish that a crime has occurred
        ii. In both, generally, the "plaintiff" (so the state in criminal cases) must plead and prove the necessary elements of the crime
            1. And in many jurisdictions there are affirmative defenses that defendants must plead and with respect to which defendants bear the burden of production or persuasion
        iii. The primary differences between civil and criminal arenas are that the normal burden of persuasion in criminal cases is proof beyond a reasonable doubt
            1. And that as a result of *Winship*, the state always carries that burden with respect to the necessary elements of the offense
    b. Burden of Persuasion
        i. *Winship* (U.S. 1970): due process requires the proof beyond a reasonable doubt standard in adult criminal prosecutions and requires the same standard in delinquency adjudications based on conduct that would be criminal if committed by an adult
            1. The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged

a. *Winship* constitutionalized beyond a reasonable doubt as the burden of persuasion in criminal cases and extended this standard to juvenile cases

ii. *Mullaney* (U.S. 1975): Maine's homicide statute placed the burden of persuasion on D to prove that a killing was in the heat of passion or sudden provocation in order to reduce the crime from murder to manslaughter
   1. By drawing a distinction between those who kill in the heat of passion from those who kill in the absence of this factor, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*
      a. D cannot be made to prove that he acted in the heat of passion
         i. It is up to the state to prove beyond a reasonable doubt that he did not act in the heat of passion
            1. And this seems to be saying that it is unconstitutional for a state to make D put on affirmative defenses …

iii. *Patterson* (U.S. 1977): N.Y. statute that recognizes an extreme emotional distress defense to reduce murder to manslaughter, placing the burden of persuasion with respect to this affirmative defense on D, was upheld
   1. Court noted that subsequent to *Mullaney*, in *Rivera v. Delaware* (1976), it reaffirmed that placing the burden of proof with respect to insanity on the defendant did not violate due process
   2. The difference between Maine's statute and N.Y.'s is how the statute is drafted
      a. N.Y. defines the elements of murder twofold – intending to kill and killing, which the state proved beyond a reasonable doubt – and everything else was cast as an affirmative defense in a separate section of the statute
      b. Maine defined murder to include "without any provocation"
         i. So *Patterson* is holding that a state cannot build affirmative defenses into the statute because they will be required to prove every element of the crime beyond a reasonable doubt
   3. *Patterson* is clarifying that *Mullaney* did not really mean what it seemed like it said
      a. It is OK to have affirmative defenses that D has to prove beyond a preponderance of the evidence
         i. This creates a dual set up:
            1. elements of the crime must be proved by the state beyond a reasonable doubt (*Winship*)
            2. affirmative defenses or mitigating circumstances are OK to be set up so that they have to be proven by D by a preponderance of the evidence (*Patterson*)
               a. [i.e., the government does not have to show beyond a reasonable doubt that there circumstances did not exist]
         ii. Once you have this dual set up for criminal law generally, isn't there an incentive for legislative drafters to draft laws that minimize the things that count as elements of the crime and maximize the things that count as affirmative defenses or mitigating circumstances …

iv. *Martin v. Ohio* (U.S. 1987): Ohio's statute basically put the burden on D to prove that D acted in self-defense … so essentially the element of the crime the state needed to prove beyond a reasonable doubt was that D killed someone
   1. And this was upheld as OK

v. Summary: this result of this line of cases is a constitutional rule about how states have to draft their criminal statutes
1. The prosecution must prove beyond a reasonable doubt each fact listed in the statutory definition of the crime
a. Whatever the state defines as the elements of an offense, it will have to prove beyond a reasonable doubt
2. It is permissible, however, to place the burden of persuasion on D with respect to affirmative defenses such as extreme emotional distress or self-defense, as long as the state categorizes them as affirmative defenses rather than elements of the crime
3. Note that there are some unspecified limits beyond which the states may not go in creating affirmative defenses that limit the *Winship* proof beyond a reasonable doubt mandate

c. Burden of Production
i. As in civil cases, the primary significance of a production burden is that the failure to meet it will preclude the party who has that burden from presenting the matter to the jury
1. The court will resolve the issue against the party with the production burden

IV. Presumptions
a. "Presumption" is a term that courts and commentators use to describe rules that regulate the process of proof by creating a special legal relationship between one fact, A, a proven fact that gives rise to the presumption, and another fact, B, the presumed fact
i. There almost always will be some inferential relationship between a presumed fact and the fact that gives rise to the presumption
ii. Presumption is a label that courts, legislatures, and commentators attach to a variety of devices that manipulate the process of proof
1. Ex: presumptions can move around burdens of proof

b. Irrebuttable or Conclusive Presumptions
i. Once there is proof of fact A, the fact giving rise to the presumption, fact B, the presumed fact, is conclusively established
1. The party against whom the presumption operates is not allowed to present evidence of non-B
ii. Editors think that a conclusive presumption is nothing more than a somewhat awkwardly worded substantive rule of law → If the law states that P must prove fact B to prevail and if, on proof of fact A, fact B is conclusively presumed to exist, the rule of law really is that P will prevail by proving either fact A or fact B
1. Because a conclusive presumption is nothing more than a substantive rule of law, the question whether the facts giving rise to a conclusive presumption exist is one for the jury to decide
2. Irrebuttable presumptions have largely died in modern case law because of this understanding that calling something an irrebuttable presumption is just another way of describing the substantive law

c. Mandatory Rebuttable Presumptions
i. Mandatory rebuttable presumptions create special burden of proof rules for designated situations
1. Mandatory *Production* Burden Presumptions
a. Some presumptions create a mandatory relationship between fact A, the proved fact, and fact B, the presumed fact, that affects only the burden of producing evidence
i. Once a party establishes fact A, there must be finding of fact B unless the party against whom the presumption operates produces evidence of non-B

1. However, how conclusive the evidence must be to defeat the presumption is unclear

b. Editors describe a mandatory production burden presumption as an equivalent to a specialized directed verdict rule

2. Mandatory *Persuasion* Burden Presumptions
   a. Some mandatory rebuttable presumptions shift the burden of persuasion to the party against whom they operate
      i. Editors deem a mandatory persuasion burden presumption the functional equivalent of an affirmative defense
      ii. Lawson notes that a presumption in this circumstances may serve as a form of evidence to the extent that moving the standard of proof around is an alternative to evidence
   3. Typically the jury decides whether the facts giving rise to a mandatory rebuttable presumption exist

d. Permissive or Weak Presumptions

i. Sometimes the law creates a special relationship between two facts – fact A, the proven fact, and fact B – but makes that relationship permissive rather than mandatory
   1. Res ipsa loquitur is the most common permissive presumption
   2. Editors note that permissive presumptions are the equivalent of standardized comments on the evidence

e. **Federal Rules Approach to Presumptions**:

i. **FRE 301: Presumptions in General Civil Actions and Proceedings**: In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast
   1. Essentially the Rule provides that the effect of a presumption is to place a burden of production on the party against whom the presumption operates

ii. **FRE 302: Applicability of State Law in Civil Actions and Proceedings**: In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law

iii. Because of the uncertain scope of the "except as otherwise provided" clause and because FRE 301 fails to address devices other than presumptions that allocate burdens of proof, FRE 301 is virtually useless
   1. If these provisions play any significant role in the disposition of cases, no one has actually been able to deduce what that would be

f. Presumptions in Criminal Cases: The Impact of *Winship*

i. Presumptions that make defined elements of crimes irrebuttable are unconstitutional

ii. Presumptions that shift the burden of persuasion to D with respect to elements of offenses are also unconstitutional
   1. Except perhaps in cases in which the general relationship between the proven facts and the presumed fact exists beyond a reasonable doubt

g. Note: Presumptions are not evidence in themselves, just move around burdens (?)

<u>Welcome to the Jungle</u>

I. What we learn initially from the *Johnson* trial transcript:
   a. The law requires cases to be structured around proving specific, substantive elements
      i. Although the jury, at the end of the trial, must find each of these elements satisfied, the law does not tell the jury the applicable law (i.e., the elements) until after the trial is over in the jury instructions

1. Therefore lawyers basically have no choice but to present their case as a story – to create a sense of what happened and hope that the jury can identify the elements

b. Opening instructions to the jury from the judge are largely boilerplate and worthless
   i. However, they do advise the jurors not to undertake any independent investigation (no interviewing witnesses, no going to the scene, no consulting references) because the evidence is supposed to be limited to what the parties present
      1. We know, though, that jurors come in with a certain stock background knowledge that is impossible to divorce
   ii. Judges do not advise the jurors on the substantive elements of the offense at this stage
      1. And lawyers are not allowed to do so in their opening statements either

c. FRE 611 has to do with the form of eliciting testimony from witnesses, and it says relatively little
   i. FRE 611: Mode and Order of Interrogation and Presentation
      1. (a) Control by court: The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment
      2. (b) Scope of cross-examination: Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination
      3. (c) Leading questions: Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinary leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions

<u>Relevance …</u>

I. Relevancy is the foundational principle for all modern systems of evidence law
   a. **FRE 401: Definition of "Relevant Evidence"**: "Relevant evidence" means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
   b. **FRE 402: Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**: All relevant evidence is admissible, expect as otherwise provided by the Constitution, by Act of Congress, by these rules, or by other rules prescribed by SCOTUS pursuant to statutory authority. Evidence which is not relevant is not admissible

II. FRE 401 requires that to be relevant, an evidentiary fact must connect by a process of inferential reasoning to a fact of consequence in the case, and the essential elements of the substantive law that governs the case determines what the facts are of consequence
   a. Evidentiary Fact: a fact offered into evidence
   b. Fact of Consequence: a fact that can be connected through inferential reasoning to one of the essential legal elements
   c. Essential Elements: determined by the substantive law of the case

III. Under FRE 401 and 402, judges will exclude all evidence that is not relevant
   a. In deciding whether an item of evidence is relevant under FRE 401, the judge must consider two issues:
      i. Materiality: Is the item offered to prove a fact that is "of consequence" to the case?
         1. In general, a proposition of fact is "of consequence" (i.e., material) if it matters to the legal resolution of the dispute – if it can be connected through inferential reasoning to one of the essential legal elements of the substantive law that governs the case

ii. Relevancy: Does the evidence actually tend to prove (or disprove) that fact by making it more (or less) probable?
    1. Probability is determined largely from knowledge and experience
    2. Judges will admit evidence as making a fact of consequence more or less probable when they think there are *reasonable* generalizations based on common knowledge and experience that will support each inference in the chain of reasoning [important to know what background assumptions judges are prepared to make or to allow the jury to make]
        a. Judges do not require objective proof of most generalizations that sound reasonable, due to the lack of empirical knowledge about most of human behavior
            i. Nevertheless, there are two obvious limits implicit in the "reasonable juror" test:
                1. The necessary generalizations cannot be known to the judge to be false
                2. They cannot be speculation
                    a. Ex: based on stereotypes
    3. FRE 401 defines relevant evidence as having "*any tendency* …"
        a. This is a minimal test
            i. By so strongly favoring admissibility, FRE 401 reduces idiosyncratic exclusions of evidence
                1. Implicit in the Federal Rules is the concept that the relevance of evidence is determined by whether the evidence *could influence a reasonable juror or reasonable jury*, rather than whether the evidence does or would influence the trial judge

b. In most cases, judges admit some testimony that may not seem to have any obvious connection to any fact of consequence in the case
    i. Reasonable background information about the witness who is testifying is always admissible … it allows the jury to make better informed judgments about the credibility of a witness and the reliability of that witness' observations
        1. Basically, there is a well-understood, unstated exception to Rule 401 that relevant evidence means "evidence having any tendency to make the existence of any fact more or less probable" … *or that enhances the believability, understandability, clarity, or coherence of the narrative being spun by one of the parties*

c. Summary So Far:
    i. There is a general presumption that if evidence is relevant it is admissible
    ii. There is a conclusive presumption that irrelevant evidence is not admissible
    iii. Relevant evidence has to connect up somehow to the essential elements of the case
        1. If various background assumptions are used to do this, they have to at least be plausible
    iv. The constraint of admissibility created by FRE 401 and 402 is not that great
        1. If the evidence makes something even marginally more or less probable, FRE 401 is likely satisfied

IV. *Knapp v. State* (Ind. 1907): illustrates the low threshold of probative connection required by the concept of relevance
    a. "The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend in a slight degree to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth"
        i. A thin, strained, remote connection is likely good enough to satisfy any FRE 401 relevancy standard, which is the first threshold for admissibility but certainly not the last

V. Problem 3.1 (*Johnson* case)
    a. Relevance of the food port door being opened or not?
        i. If the food port door was closed, then that marginally helps Johnson's case that the guards were the aggressors and he was acting in self-defense (because if the food port door was not opened, then they were not in fact there to collect the food trays)
            1. This likely satisfies the low threshold for relevancy
    b. Relevance of gang member affiliation?
        i. Here, only possible relevance would be to Butler's credibility when he testified that Johnson's testimony was right
            1. Since Butler's testimony is relevant, anything that goes to his credibility is relevant
                a. Relationship between Butler's gang membership and the credibility of his testimony → background assumption that gang members are more likely to lie for each other than non-gang members – if they are in the same gang
    c. Relevance of transition from SHU to Facility B?
        i. Prosecutor wants to suggest that Johnson was not just a criminal, but one from the SHU, so that makes it marginally better for their case that Johnson was the aggressor
        ii. Johnson would alleges (a) if he was in transition, then that means he was on his best behavior, and/or (b) because he came from SHU, the guards assumed he was more violent so they attacked him first
        iii. Note: Competing inferences and the degree of relevance will matter for a FRE 403 objection

VI. Problem 3.2 (School Bus Driver)
    a. Essential Element: Negligence
    b. Trying to Establish: Careful driving on date of accident, to defeat negligence claim
    c. Testimony at Issue: I love the kids → I take care of things I love → I take care of the kids → I did so on the day in question → I was driving carefully and was not negligent
        i. This is not the world's greatest argument, but it is enough to satisfy FRE 401 relevancy

VII. Problem 3.3 (Insider Trading)
    a. Essential Element: Trading on insider information without disclosure
    b. Trying to Establish: Information upon which CEO traded was not publicly known and he traded without disclosing
    c. Email from Auditor to CFO re: tell CEO: CFOs, when advised by auditors, would normally tell their boss this big news, as opposed to waiting around for four days to tell him the news
        i. Meets the FRE 401 and 402 minimal relevance standard

<u>… and Its (Relevance's) Limits</u>

I. FRE 403 afford the trial court authority to exclude evidence that is admittedly relevant under FRE 401 and 402, but that the judge believes might distract the jury from its role of rational decision making
    a. **FRE 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**: Although relevant, evidence may be excluded if its *probative value is substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence
        i. The trial judge is vested with the ultimate discretion and there is minimal appellate review re: FRE 403 determinations

II. Probative Value → to decide the merits of a FRE 403 objection, the judge must first analyze the persuasive effect that the item of evidence will be likely to have on the jury's thinking about the fact of consequence it is offered to prove
    a. Strength of the Underlying Inferences

i. Most courts agree that the primary measure of probative value is the strength of the inferences that connect the evidentiary fact to the fact of consequence and then to an essential element in the case
1. This strength depends on the rough probabilities of the generalizations underlying those inferences
a. So if the inferential chain is weak enough (and marginally relevant), a judge might determine that it is not worth the court and parties' time, etc. to present it

b. Certainty of the Starting Point
i. If witnesses admit themselves that they are themselves uncertain about what facts they actually perceived, or if a document contains ambiguous language, judges may discount the value that they attribute to the evidence for purposes of FRE 403

c. Need
i. Judges should balance the probative value of and need for the evidence against the harm likely to result from its admission
ii. The availability of other means of proof may also be weighed in the decision to exclude evidence on grounds of unfair prejudice

III. 403 Dangers → the judge must estimate the danger that the item of evidence poses to the jury's rational decision-making process and to the judicial system's interest in efficient decision making

a. Unfair Prejudice
i. Unfair prejudice refers to the danger that evidence might suggest an improper basis upon which the jury could decide the cast
1. Evidence is <u>not</u> unfairly prejudicial simply because it is detrimental to a party's case
ii. There are two principal risks of unfair prejudice within the scope of FRE 403:
1. Evidence about a party can trigger a response that has nothing to do with its logical connection to a fact of consequence
2. Evidence might be used by the jury in a manner that violates a rule of evidence law

b. Confusion of the Issues
i. Evidence confuses the issues when it focuses the jury's attention too closely on a factual issue that is not central to the outcome of the case
1. Such issues are termed "collateral," which usually means that their connection to the essential elements is trivial and may be based on complicated or attenuated theories of relevance
a. It is not that these collateral issues are irrelevant, but that they are too distracting and tend to confuse the issues

c. Misleading the Jury
i. The danger of misleading usually involves a risk that an item of evidence will cause the jury to draw a mistaken inference
1. Facts taken out of context or presented in a falsely suggestive manner can also trigger this danger
ii. Specific types of evidence can be viewed as misleading if the judge fears that the jury will give the evidence more weight than it deserves

d. Undue Delay, Waste of Time, and Needless Cumulative Evidence
i. Each of these dangers illustrates a different aspect of the same underlying problem: The introduction of evidence always absorbs court time, incurs expense by the opposing parties and by the state-run judicial system, and expends the attention of the jury
1. While evidence should not be excluded solely to avoid delay, the court should consider the probative value and balance it against the harm of delay
2. Courts have held that evidence may waste the jury's time if offered to prove stipulated, collateral, or background facts

3. The danger of needless cumulative evidence includes the expenditure of trial time on repetitive testimony, plus the risk of losing the attention of the jury
    a. Keep in mind that there may be reasons why repetition is needed – such as the centrality of the fact of consequence being proved, the degree to which that fact is in dispute, and the probative value of the corroboration itself

IV. Substantially Outweigh → the final step is for the trial judge to weigh the probative value of the offered item of evidence against the danger that the item poses under FRE 403
    a. There does not appear to be any common understanding of "substantially outweigh" – trial judge has enormous discretion
        i. The rule's requirement that probative value be outweighed substantially appears to require that some risks of negative impact be tolerated
            1. The burden in FRE 403 favors wrongful decisions to admit evidence over wrongful decisions to exclude it
    b. Limiting Instruction – the balancing of probative value versus a FRE 403 danger is also affected by FRE 105
        i. **FRE 105: Limited Admissibility**: When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly
            1. If the judge believes that the jury will probably follow such an instruction, the judge may find that the 403 dangers are lowered and will admit the item
                a. It is not clear, however, that the jury can or will follow such an instruction
                    i. The effectiveness of limiting instructions may be hindered by the jury's lack of understanding of the policy behind a rule of exclusion and the jury's lack of comprehension of the instruction itself
                    ii. As a general rule, courts behave as though instructions do effectively exclude improper evidence from the jury's consideration

V. Appellate Review of Judicial Discretion Under FRE 403
    a. On appeal, these judgments are reviewed under the abuse of discretion standard, which is a very deferential standard
        i. It means that courts will tolerate trial court decisions that the appellate judges might not have made themselves
            1. Reversal is only justified when the trial court "abuses" its discretion
                a. Most appellate decisions affirm district courts' FRE 403 decisions, whether they admit or exclude the disputed evidence
    b. *United States v. Hitt* (9th Cir. 1992): the district judge has wide latitude in making FRE 403 decisions, but this latitude is not unlimited
        i. Where the evidence is of very slight (if any) probative value, it is an abuse of discretion to admit it if there is even a modest likelihood of unfair prejudice or a small risk of misleading the jury
            1. D's rifle was at issue here; P wanted to introduce a picture of the rifle, but problem was the rifle in the picture was surrounded by a dozen other guns
                a. The evidence here was not only highly prejudicial and at most marginally probative – it was also misleading
    c. *Old Chief v. United States* (U.S. 1997) (5-4): the problem here is not posed by the evidence itself (i.e., D's prior conviction), but rather it is because there is an alternative means of proving the same fact that seems to prove less of a risk under FRE 403 – D is willing to stipulate to the prior conviction so Government cannot introduce all of the facts and details surrounding said prior conviction

i. SCOTUS goes through a fairly elaborate song and dance why it feels parties should be free to shape presentation of proof as they wish … before they tell the government they have to accept D's stipulation
    1. "D's FRE 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilty and all the circumstances surrounding the offense"
    2. "Government invokes the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice – or, more exactly – that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it … and this is unquestionably true as a general matter"
    3. "For purposes of FRE 403 weighing of the probative value against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other
        a. The risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available
            i. What we have said shows why this will be the general rule when proof of convict status is at issue, just as the prosecutor's choice will generally survive a FRE 403 analysis when D seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried"
        b. Key: stipulation affects the probative value
ii. Note: In general, prosecutors should not be forced to except stipulations because they need to be able to tell their narrative how they see best
    1. So this case does <u>not</u> stand for the proposition that prosecutors are required to accept stipulations in all cases
iii. Note: The actual effect of the *Old Chief* decision on actual practice is decidedly mixed
    1. FRE 403 decisions need to be made on the specific facts of the case, rather than on broad generalizations of law

VI. Hypo: Four people arrested for a bank robbery; one of the four IDs D as the 5th person; the other three do not; this one cut a deal with the government; evidence tying 5th person to the crime: arrested ten weeks after, he had a .38 gun and someone during the robbery had a .38 gun; is his possession of the .38 at the time of his arrested admissible?
    a. FRE 401 & 402: Probably, but minimally so
        i. If we know a participant had a .38 and this guy was arrested with a .38, then that makes his a part of a smaller group of people who have .38s . . . but do we know that this guy had the .38 ten weeks ago?
    b. FRE 403: no right answer
        i. Relevance is minimal
        ii. Jury is highly likely to draw inferences from this evidence that are not really warranted by an objective assessment of the evidence

<u>Foundations</u>

Preconditions for Relevance

I. Laying the foundation for proof = no evidence is admissible until it is shown to be what its proponent claims that it is
    a. The foundational requirements differ for each type of evidence

i. The effect of these foundational requirements is to give the judge additional control – beyond FRE 401, 402, and 403 – over what evidence the advocates may present to the jury
    1. Satisfaction of the foundational requirements does not guarantee admission though

II. Laying the Foundation for Witnesses

a. **FRE 601: General Rule of Competency**: Every person is competent to be a witness except as otherwise provided in these rules. However, in *civil* actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law
    i. The first sentence of FRE 601 abolishes all categorical grounds of incompetence, subject only to the limit that where state law furnishes the rule of decision in federal court, a state-created category of incompetency will be applied
        1. In general, apart from the judge and the jury, people who witnessed relevant events cannot be prevented from testifying solely because of their status or their interest in the case
            a. The Federal Rules permit the jury to decide whether such status or interest affects a witness's credibility (whereas the categorical incompetencies of statuses and the common law would have withheld that witness from the jury)
                i. Appellate courts seldom overturn a trial court's finding that a witness is competent to testifying, emphasizing that most disabling factors should be treated as matters affecting credibility for the jury to resolve, not as matters of competence
    ii. Particular challenges to the competency of individual witnesses may be resolved as a matter of the trial's court's discretion under:
        1. FRE 601
        2. FRE 602
        3. FRE 603
        4. FRE 403
            a. Consensus of opinion is that, notwithstanding the sweeping language of FRE 601, if a trial judge makes the finding that a particular witness with have such little probative value that it is automatically outweighed by 403 dangers, he could exclude a witness under FRE 403

b. **FRE 602: Lack of Personal Knowledge**: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of FRE 703, relating to opinion testimony by expert witnesses
    i. FRE 602 mandates that before a witness may testify about a matter, the witness must be shown to have personal knowledge of that matter by evidence "sufficient to support a finding"
        1. The requirement that witnesses must "know" the matters about which they testify as a result of their own sensory perception is essential to our system of proof: witnesses perceive real world events and describe these events to the jury, and the jury perceives the witnesses and evaluates whether or not to rely on them
            a. So there must be *sufficient evidence*, not to prove that they actually saw what they saw, but so that a reasonable person could believe that they actually saw what they saw

i. To satisfy the sufficiency standard, usually all the proponent needs to do is to ask whether the witness did in fact see or hear the matters that are about to be described to the jury
1. FRE 602 provides that the witness's own testimony – "I saw that" – will suffice

ii. Hypo: Traffic accident and the only issue is what color the light was
1. Stevie Wonder would not qualify as a witness under FRE 602 if the only relevant issue is the color of the light
a. He could testify as to sounds – or the beeping crosswalk – if relevant
2. Someone red/green colorblind could satisfy FRE 602 if evidence was introduced to the effect of the traffic light had three stacked colors, and witness could tell the bottom (or top) light was the one on
a. Need to prove he was in a position to observe the signal

iii. Problem 4.1 (*Johnson* case)
1. Office Houston could have personal knowledge about a one-inch gash on his shin, so he would be able to testify about his injury
2. Office Van Berg's could not have personal knowledge about a bone chip – he does not have extensive medical training to have personal knowledge about that
a. He is in a position to have personal knowledge that his thumb hurts

iv. Problem 4.2 (Bus Driver)
1. Laying foundation for an elderly neighbor who will testify that the boy was in the gravel shoulder when he was hit (not the middle of the street
a. First: where were you at the time of the accident?
i. Have to establish that she was close enough to the accident site to have witnessed it
b. Second: what were you doing at the time of the accident?
i. Have to establish that she had an opportunity to see the accident
c. Third: did you see the accident?
2. Co-worker will testify that after the accident the driver said "I shouldn't have been in such a hurry"
a. First: where were you?
b. Second: how soon after the accident was this conversation?
c. Third: what exactly did you hear?

v. Problem 4.3: P identified an OCF product as an asbestos material with which he knew he had worked; but he also testified that his memory was adversely affected by the morphine he was taking; OCF objects on the basis that P did not have knowledge of the OCF product because of his memory loss/confusion
1. Trial judge let P's testimony in because he did not start taking the morphine until after he stopped working, so at the time he was working he was not on morphine and was in a position to have personal knowledge of the stuff he was working with
a. Note: How reliable the evidence is goes to the weight the jury gives it – <u>not</u> to its admissibility though

c. **FRE 603: Oath or Affirmation**: Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so
i. Notion that witnesses must acknowledge that there is some fundamental responsibility in a court of law to tell the truth
1. If someone is genuinely incapable of making this assurance (as determined by the trial judge), they cannot be a witness
a. This is a very specific person-by-person analysis though

i. This might be where we can sometimes disqualify small children and incompetents … even though FRE 601 abolishes categorical exclusions

ii. Oath can be entirely un-religious

1. There is not a formalized mechanism specified in the Federal Rules for this

d. **FRE 604: Interpreters**: An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation

e. **FRE 605: Competency of Judge as Witness**: The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point

f. FRE 606: Competency of Juror as Witness

i. (a) At the trial: A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury

ii. (b) Inquiry into validity of verdict or indictment: Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotion as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror *may* testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying

III. The Authentication and Identification of Exhibits

a. FRE 901: Requirement of Authentication or Identification

i. (a) General provision: The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence *sufficient to support a finding* that the matter in question is what its proponent claims

ii. (b) Illustrations: By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

1. Testimony of witness with knowledge: Testimony that a matter is what it is claim to be
2. Nonexpert opinion on handwriting: Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation
3. Comparison by trier or expert witness: Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated
4. Distinctive characteristics and the like: Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances
5. Voice identification: Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker
6. Telephone conversations: Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone

7. Public records or reports: Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept
8. Ancient documents or data compilation: Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered
9. Process or system: Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result
10. Methods provided by statute or rule: Any method of authentication or identification provided by Act of Congress or by other rules prescribed by SCOTUS pursuant to statutory authority

b. FRE 901(a) requires the proponent of an exhibit to do two things:
    i. to state what the proponent *claims* the exhibit to be; and
        1. The proponent of any item of evidence must have in mind a theory as to why that item is relevant to prove facts that are of consequence in a case
            a. Relevance thus requires the proponent of an exhibit to articulate a connection between the exhibit and the parties or the litigated events in the case
                i. This connection is typically what the proponent claims the exhibit to be for purposes of FRE 901, and what courts require the proponent to prove in order to identify or authenticate it
                    1. The FRE 901 foundation, therefore, follows from the articulation of why tangible objects, photos, recordings, or written documents are relevant
    ii. to produce evidence "sufficient to support a finding" that it is what the proponent claims
        1. <u>Evidence "sufficient to support a finding" means evidence upon which the judge thinks a jury *could* reasonably find a fact to be more likely true than not</u>
            a. The judge will not submit an exhibit to the jury that the jury could not *reasonably* believe to be authentic
            b. And FRE 901(b) illustrates how to produce evidence sufficient to support a finding (to satisfy FRE 901(a))

c. **Real Evidence**: refers to tangible items that played some role in the litigated event and from which the jury may draw inferences
    i. The item's connection to the specific events in dispute make it relevant, and that connection is "what the proponent claims" for purposes of satisfying FRE 901
        1. Thus the foundation for real evidence typically consists of a witness who can identify the item's physical involvement in the case
            a. One typical method of identification is that the witness may recognize the piece of evidence – typically because it has a readily identifiable characteristic
                i. The witness's personal knowledge satisfies FRE 901(b)(1)
            b. Chain of custody is the second typical method of identification, most often used when an exhibit is generic and has no readily identifiable characteristics
                i. A complete chain of custody under FRE 901(b)(4) would require the testimony of all people who handled the exhibit plus testimony to show that the exhibit was stored in a secure place when it was not being handled

c. The chain of custody can also establish that the item has not been tampered with and that it is in the same condition as it was when it was discovered
    i. This showing may be required if the condition of the item is as important as its identity and if it is an item that might be adulterated or tampered with
d. Cases decided under FRE 901(a) make it clear that the complete chain of custody need not always be proved to satisfy the sufficiency standard
    i. Even where gaps exist in the chain of custody of substances that require testing, courts have held that a jury could reasonably find that the exhibit in question was adequately identified and still in an unchanged position

ii. Once an item of real evidence has been authenticated, it is still potentially subject to the judge's discretion to exclude pursuant to FRE 403
    1. However, it is customary for judges to treat real evidence as being highly probative and thus of considerable assistance to the jury
        a. Thus, the admission of even gruesome objects has been upheld if they played a part in the litigated events

d. **Demonstrative Exhibits**: reproduce or depict persons, objects (such as items of real evidence that are not brought into court), or scenes that are connected to the litigated events in the case
    i. These exhibits are offered to illustrate or explain the testimony of witnesses, including experts, and to present complex and voluminous documents
        1. So although these things are not really evidence, they are relevant because they assist the jury in understanding testimonial, documentary, and real evidence
            a. And they are authenticated by testimony from the witness whose testimony their illustrate
    ii. The proponent must be prepared to show that the exhibit is a fair or accurate or true depiction of what the proponent claims that it portrays
    iii. Some demonstrative exhibits are generally admitted as a matter of course, such as photographs of the scene of a crime or accident
        1. But sometimes their admission raises 403 dangers such as unfair prejudice and risk of misleading the jury
            a. The judge will decide the FRE 403 objection in typical fashion, by estimating the exhibit's probative value and weighing that against the pertinent danger

e. **Demonstrations and Experiments in Court**: sometimes a witness's testimony about an out-of-court event can be illustrated through a demonstration or experiment in court
    i. Such in-court demonstrations are tested for relevancy under FRE 401
    ii. They are also tested under FRE 403 because of their potential for misleading or confusing the jury
    iii. The proponent of the demonstration must lay a proper foundation establishing the similarity of circumstances and conditions between the out-of-court event and the in-court presentation
        1. The conditions need not be identical, but they must be sufficiently similar to provide a fair comparison

f. Recorded and Computer-Generated Reenactments, Animations, and Simulations of Events
    i. Reenactments and animations are used to illustrate what witnesses have already testified to, and they are subject to the same requirement of being fair and accurate representations
        1. Reenactments involve the use of human models

2. Animations typically consist of computer-generated drawings that depict people or objects in motion

ii. Computer-generated simulations are more complex in that they are produced by inputting information into a computer program that determines how an event "must have happened" and then provides a visual image of that conclusion

1. The most complete foundation for simulated accident reconstruction will involve the sufficiency of the input data, the reliability of the underlying technical or scientific principles, the accuracy of the computer's operating system, and the accuracy of the mathematical formulae programmed into the computer

iii. All of these are subject to objection under FRE 403

1. The principle risks are that the presentation inevitably simplifies the real-world events and that much data pertinent to accident reconstruction are supplied by outside sources who are unknown

g. **Recordings**: audio, video, and photographic recordings of events that occurred outside the courtroom are a cross between demonstrative evidence and eyewitness testimony

i. If properly authenticated, recordings may be admissible as substantive proof that the out-of-court events occurred

1. When a camera or other device records what a witness is also seeing, that "percipient witness" can authenticate the recording

a. The witness would identify the events in the recording, state the basis for the witness's ability to identify the events, and affirm that the recording is a fair or accurate or true record of the events perceived

i. Similar to that for demonstrative evidence under FRE 901(b)(1)

2. When a recording functions as a "silent witness," (ex: x-ray) a percipient witness does not exist and cannot testify to the simplified foundation

a. Instead, the recordings made by equipment that operates automatically may satisfy the requirements of the Federal Rules so long as a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system

i. Courts may require a chain of custody

ii. Recordings are subject to FRE 403

h. **Written Documents**: typically, a written document is relevant because its contents are connected to the litigated events of a case by the identify of its author or by knowledge of its organizational source

i. The law of evidence, however, does not treat the signature or recital of authorship on the face of a document, without more, as sufficient proof of authenticity

1. Proof of the genuineness of a signature is sufficient to identify the author of a writing

a. Observation of the act of signing a document will satisfy FRE 901(b)(1)

b. Identification of a signature based on familiarity with handwriting will satisfy FRE 901(b)(2)

c. Under FRE 901(b)(3) either the jury or an expert may compare the signature on the exhibit itself with a specimen that has been authenticated pursuant to FRE 901

2. FRE 901(b)(4) is an extremely broad and flexible standard that permits proof of authorship or source through many types of evidence

a. The author may be identified by a document's contents and/or by the circumstances in which it was found

b. Records of a business or other institution can be authenticated as to source under FRE 901(b)(4) through proof of matching letterhead,

comparison with matching forms, testimony about routine practices of the institution in generating such records, and through testimony of a custodian about how the business's filing or data retrieval system operates and that the document was retrieved from a certain file or in a certain way

i. If computerized data retrieval process or system is used, further testimony may be required to satisfy the requirement of FRE 901(b)(9) that the computerized process must produce an accurate result
ii. FRE 901(b)(7) provides for the authentication of certain types of public records or reports
1. Proof that they are from the public office where items of this nature are kept can be provided by testimony from the custodian or by a certificate of authenticity from the public office

3. If a writing is more than 20 years old and is in a place where it would likely be if it were authentic, the document will be admitted as "genuine" pursuant to FRE 901(b)(8) as an ancient document
4. There are no subsections of FRE 901(b) that deal with new electronic technologies, but FRE 901 provides flexibility in applying its standard of sufficiency
a. Courts have developed analogies to traditional writings in admitting e-mails, chat group discussions, and web postings
i. Emails can be authenticated by their authorship
1. The electronic signature that they bear may not be sufficient, however, because of the risk of manipulation of e-mail headers
2. Additional data such as the address that an e-mail bears, the use of the "reply" function to generate the address of the original sender, the content of the information included in the e-mail, and other circumstances can suffice
ii. Courts are skeptical about attributing documents obtained from a website to the organization or individual who maintains the site

i. **FRE 902: Written Documents That Are Self-Authenticating**: Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following … (*See* FRE 902 for list)
i. FRE 902 defines those documents that, on the basis of their appearance or self-evident content alone, are so likely to be authentic that the proponent need produce no extrinsic evidence to prove it (i.e., without the testimony of a foundation witness)
1. The opponent may still dispute the authenticity of these "self-authenticating" documents though

j. Problem 4.4: Pros wants to introduce a sawed off shot gun found under the bed where D was sleeping; Pros needs to authenticate the evidence under FRE 901(a) (i.e., that this is the same gun found at the time of the arrest)
i. If the gun is very rare, unique, distinctive – enough so that a reasonable person could conclude it was indeed the same gun – then FRE 901(a) will be satisfied
1. Do not have to prove conclusively that it was the same gun
a. Reasonable person could conclude standard
2. In order to convict, the jury *will* need to decide it is the same gun, but this goes to weight

ii. Pros could also establish a proper chain of custody from the time of the arrest to the time of trial so that a reasonable jury could conclude it was the same gun

k. Problem 4.5: Pros wants to introduce navigational charts taken from the pot smuggling boat that are for Jamaica to Miami
    i. Coast Guard testifies at trial that he recognizes the charts as the same ones he seized because of the Bob Marley drawings on them
        1. Assuming that it is not standard practice to draw Bob Marley on navigational charts, Coast Guard's testimony is likely enough to authenticate the charts
        2. Chain of custody would also be proper – to show that the maps are in the same condition they were when they were seized
    ii. To establish that the bag of weed at trial was the one seized from the boat, pros will need to establish a chain of custody to prove she did not just bring a generic bag of a leafy green substance to trial
        1. Chain of custody could show that they ID'd the bag, that it was put directly into a safe, and was not removed until trial – or if removed was always properly accounted for
            a. Standard re: how tight chain of custody needs to be → *a reasonable finder of facts could reasonably believe it is what it is claimed to be*
                (a.k.a. a lot of trial judge discretion)

l. Problem 4.15 (Insider Trading): possibilities for laying a proper foundation under FRE 901 . . .
    i. A copy of Auditor's written memo to CFO dated 3/14/04
        1. Need proof of authorship
            a. Could ask Auditor on the witness stand whether he wrote the memo
            b. Could also authenticate by proving signature – compare signatures
        2. Need proof of delivery
            a. Introduce records from the delivery service
    ii. A copy of Auditor's email to CFO dated 3/14/04
        1. Could ask Auditor on the witness stand whether he wrote the memo
        2. Could bring in IT and trace the email to Auditor's computer
    iii. CEO's sale of 100,000 shares on 3/16/04
        1. Could subpoena broker's records that will reflect the sale
            a. Authenticate this by testimony from the broker's office that these are the proper records and they executed the sale on CEO's instructions

"Best Evidence"

I. The best evidence rule(s) imposes additional foundational requirements on the proponent of writings, recordings, and photographs
    a. When a writing, recording, or photograph is offered to prove its content, the chances are good that the original will be more trustworthy than a copy
        i. Therefore, <u>the best evidence rule creates a requirement for the production of originals</u>
            1. The requirement may be excused, and other "secondary" evidence of the contents may be admitted if the absence of the original is explained or justified

II. This is <u>not</u> a requirement that parties present only the *best* evidence
    a. Therefore, Lawson prefers "Original Documents Principle"

III. **FRE 1001: Definitions**: For purposes of this article the following definitions are applicable:
    a. (1) "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation
    b. (2) "Photographs" include still photographs, X-ray films, video tapes, and motion pictures
    c. (3) An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original"

d. (4) A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original

IV. FRE 1002:
   a. **FRE 1002: Requirement of Original**: To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress
   b. FRE 1002 applies broadly, insofar as "writings" and "recordings" are defined very broadly under FRE 1001(1) to include any form of data compilation
      i. However, the scope of FRE 1002 does <u>not</u> extend beyond writings, recordings, and photographs
         1. Therefore, the best evidence rule does <u>not</u> apply to objects (models, sculptures, e.g.)
         2. Ex: a t-shirt with "Katy Perry Rules!" written on it → in one sense this is an object, but in another sense it is a writing; we would have to know what was relevant about the t-shirt – it's size/condition or the text? Ultimately, the Federal Rules don't answer this question and it would be up to the trial judge
   c. What constitutes an "original" that will satisfy FRE 1002 is also defined broadly by FRE 1001(3)
   d. The key issue in applying FRE 1002 is the determination of when the "content" of these kinds of items is being proved … because <u>the best evidence rule requires an original only when the proponent is offering a writing, recording, or photograph as relevant *to prove its own content*</u>
      i. The content of a writing, recording, or photograph may be a fact of independent legal significance in the case under the applicable substantive law
         1. When there are disputes over terms of written agreements, and either the substantive law requires the agreement to be proved by the writing or the party chooses to rely on the writing to prove the terms, the best evidence rule applies
      ii. If a proponent chooses to use a writing, recording, or photograph to prove that an event occurred/what happened, it would be used to prove its contents and the original would be required
      iii. In some cases, a writing may be referred to, but it is a fact about the writing, not the precise terms of its contents, that the proponent is trying to prove
         1. In these cases, the best evidence rule does <u>not</u> apply
            a. And there is no doctrinal solution re: whether the substantive contents of the document are at issue versus just proving the document's existence
               i. Will come down to trial judge's discretion
         2. Ex: whether or not an entity was incorporated: we do not care what the precise details of the articles of incorporate are – all we care about is the fact that the articles existed, to prove incorporation
         3. Ex: whether or not someone is marred: we do not care about the details – all we care about is whether or not a marriage license exists

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

VI. FRE 1004
   a. **FRE 1004: Admissibility of Other Evidence of Contents**: The original is <u>not</u> required, and other evidence of the contents of a writing, recording, or photograph is admissible ***if*** –
      i. (1) All originals are lost or have been destroyed, *unless* the proponent lost or destroyed them in bad faith; or
      ii. (2) No original can be obtained by any available judicial process or procedure; or

iii. (3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
iv. (4) Collateral matters: The writing, recording, or photograph is not closely related to a controlling issue

b. FRE 1004 provides the standard catalog of common law exceptions that justify or explain why a proponent should not be required to produce an original
    i. Loss or destruction of the original, pursuant to FRE 1004(1), may be proved by testimony from a person with knowledge, or by circumstantial evidence that the proponent has made a reasonable, diligent, and unsuccessful search for the original
        1. The party need not explain with absolute certainty what happened to the original, but has the burden to prove that its loss or destruction has been held insufficient to establish bad faith
            a. Negligent destruction of documents has been held insufficient to establish bad faith
                i. Negligent Destruction ≠ Bad Faith

c. FRE 1004 permits the proponent to use any "other evidence" of the content of the original
    i. A common form of secondary evidence is the oral testimony of a witness who once perceived the original and claims to remember it

VII. FRE 1005
- a. **FRE 1005: Public Records**: The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, *may be proved by copy*, certified as correct in accordance with FRE 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given

VIII. FRE 1006
- a. **FRE 1006: Summaries**: The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court *may be presented in the form of a chart, summary, or calculation*. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court
    i. Note that the voluminous materials must themselves be shown to be admissible
        1. But it is not required that the underlying voluminous materials are actually admitted

IX. FRE 1007
- a. **FRE 1007: Testimony or Written Admission of Party**: Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original

X. FRE 1008
- a. **FRE 1008: Functions of Court and Jury**: When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depend upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for <u>the court to determine</u> in accordance with the provisions of FRE 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the <u>trier of fact to determine</u> as in the case of other issues of fact
    i. The FRE has decided to allocate these three specific instances in which the jury determines an issue
        1. This does not necessarily make these relevance questions (since FRE 104(b) is traditionally concerned with questions of conditional relevance)

2. In accordance with FRE 104(b) = *sufficient to support a finding* standard

ii. So, questions about whether the evidence was destroyed and whether that was done in bad faith = questions for the judge under FRE 1008/FRE 104(a)

b. FRE 1008 provides that most preliminary questions of fact under the best evidence rules are for the judge pursuant to FRE 104(a), and the judge will admit or exclude the offered evidence accordingly

c. If the opponent raises an issue as to the existence of or the true content of the original, then that issue must go to the jury under FRE 104(b), and the judge must admit the evidence to permit the jury to decide the issue

XI. Ex: *Seiler v. Lucasfilm, Ltd.* (9th Cir. 1986): Seiler's drawings were "writings" within the meaning of FRE 1001(1); they consist not of "letters, words, or numbers" but of "their equivalent"; therefore, Seiler must either produce the original or show that it is unavailable through no fault of his own [FRE 1004(1)]; this he could not do

a. One justification for the best evidence rule is the prevention of fraud

b. This is probably illustrative of the outer boundaries as to what we can consider a "writing, recording, or photograph" (i.e., to include drawings/sketches)

XII. Problem 4.20

a. The Government could prove CEO's stock sale on 3/16/04 by calling CEO's stock broker as a witness and asking her whether she sold CEO's 100,000 shares at CEO's direction

i. This would <u>not</u> violate FRE 1002 because the Government is not introducing any writings, recordings, or photographs – the only things the Original Documents Principle applies to

XIII. Problem 4.21: Dentist indicted for tax fraud; IRS wants to introduce an interview from D's divorce proceeding, in which he said about concealing assets; interview was tape recorded, attorney took notes, attorney's secretary (who was not present) transcribed the conversation from the tape recording; the tape, notes, transcript, attorney and secretary are all available

a. The law does not specify which of these ways the IRS must use or the order it must try

i. Although the tape recording might be most accurate, there is no obligation that a party must use it on the "Best Evidence" Rule

1. Only requirement as far as the Best Evidence Rule is concerned, is that if a party uses a writing, recording, or photograph as a means of proving content, then presumptive they need the original (unless there is a good reason not to)

b. If the tape recording is used, the Best Evidence Rule is implicated

i. FRE 1003 – a duplicate is admissible (if the attorney made a back-up tape, e.g.), provided there is not a genuine question as to the authenticity of the original

ii. FRE 901 – to authenticate the recording, IRS could have the lawyer testify that it is accurate

c. IRS could <u>not</u> have someone from the lawyer's office testifying about what the lawyer's notes said

i. This would be a violation of the Best Evidence Rule because the person testifying would be trying to prove the content of a writing by using something other than the original

ii. *Unless*, there is a FRE 1004 exception

d. IRS could <u>not</u> introduce the transcript of the tape

i. This would be a violation of the Best Evidence Rule because the transcript is trying to prove the content of the recording, through some means other than the original (i.e., the tape)

ii. *Unless*, there is a FRE 1004 exception

1. Ex: lawyer erased the tape in the ordinary course of business, lost her notes, and does not remember the contents of the conversation – assuming no bad faith, this would be reason under FRE 1004 for non-production of the original

a. Now any appropriate secondary evidence can be used, assuming proper authentication

XIV. Problem 4.22: Police officer finds empty Bud Light bottles in the car after a head on collision – must P produce the original labels and bottles?
- a. The Best Evidence Rule does not apply to objects (i.e., bottles)
- b. As for the labels, whether the Best Evidence Rule applies depends on whether the brand is relevant
    - i. If so, P would be need to prove the content of the document (i.e., label)
        1. Then this would be a "twilight zone" case where the evidence seems to be both (subject and not subject to the Best Evidence Rule)
            a. Result = trial judge discretion as to categorization

XV. Problem 4.23: Coast Guard wants to testify that when searching the pot smuggling boat he found a GPS with directions from Jamaica to Miami on the screen; Coast Guard did not seize the GPS, but will testify to what he saw on the screen
- a. This is potentially an Original Documents problem because the Government is trying to prove the contents of a writing (i.e., the GPS screen) by something other than the original (i.e., the actual GPS screen) -- by the Coast Guard's memory
    - i. Coast Guard's memory will not suffice to prove the contents of a writing unless a FRE 1004 exception is applicable
        1. And there the facts do no present any good reasons for not seizing the GPS in the first place

FRE 104

I. FRE 104: Preliminary Questions
- a. (a) Questions of admissibility generally: Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges
- b. (b) Relevancy conditioned on fact: When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence *sufficient to support a finding* of the fulfillment of the condition
    - i. [i.e., where the objection is to relevance and there are factual determinations that go into the Q: whether something is relevant]
- c. (c) Hearing of jury: Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests
- d. (d) Testimony by accused: The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case
- e. (e) Weight and credibility: This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility

II. Judicial Factfinding Under FRE 104
- a. FRE 104 establishes the power of the judge to decide preliminary questions concerning the admissibility of evidence and the process by which these questions are to be decided
    - i. The trial judge's decision to admit or exclude evidence always requires the judge to answer preliminary questions necessary to the application of the rules of evidence – could be questions of law, of fact, or ones that require discretion
        1. FRE 104(a) provides that, in general, all of these preliminary questions are to be decided by the court
            a. There is one exception to FRE 104's delegation of decision making to the judge, and that is FRE 104(b)
                i. FRE 104(b), rather than FRE 104(a), would apply to fact finding on preliminary facts that are critical to the relevance of offered items of evidence
                    1. The determination of conditional relevancy is left to the jury

ii. FRE 104(b), like FRE 602 and FRE 901, applies the "sufficiency" standard, meaning that the judge decides only whether "evidence sufficient to support a finding" on the preliminary fact question has been introduced

ii. FRE 104(a) states the general principle that preliminary questions of fact shall be determined by the court, but it does not contain an explicit standard of proof

1. SCOTUS has held that judges are to decide preliminary questions of fact under FRE 104(a) by a **preponderance of the evidence** in both civil and criminal cases
    a. "The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the FRE have been afforded the consideration"
2. Thus, FRE 104(a) imposes a persuasion burden on preliminary fact questions
    a. The persuasion burden under FRE 104(a) means that the judge must be persuaded that it is more likely than not that the preliminary fact is true
        i. And the judge is not bound by the rules of evidence, except for privileges
            1. This means that the judge may take otherwise inadmissible evidence, such as hearsay, into account

b. When the judge is persuaded about a FRE 104(a) preliminary fact and admits an offered item, the opponent may still challenge the admitted item's weight and credibility, and may introduce evidence that reduces its probative value, as provided by FRE 104(e)

III. FRE 104(b), Conditional Admissibility, and the Problem of Conditional Relevancy

a. Most offered items of evidence require additional contextual facts to link them to the dispute, and all items of evidence require the use of generalized propositions of fact that support the inferences necessary to reach a fact of consequence
    i. FRE 104(b) speaks to this issue of related facts being necessary to relevancy
        1. First, FRE 104(b) explicitly approves the "conditional admissibility" of offered items when additional facts or generalizations are necessary to establish their relevance
            a. Conditional admissibility = a process by which an item of evidence can be admitted provisionally, subject to the proponent's subsequent production of additional evidence (which will ultimately make the evidence admissible)
                i. If the additional evidence is not subsequently produced, the judge could strike the testimony or evidence from the record and instruct the jury not to consider it
                ii. The opponent to the offered item may be convinced that P has no evidence of the "condition of fact" and is concerned that the jury will not later disregard the item that has been admitted "conditionally" despite the judge's instructions to do so
                    1. In such a case, the opponent could state this concern to the trial judge, and if the judge believes the risk is substantial, he may not conditionally admit the offered items and can require the proponent to produce the additional evidence first
                        a. Normally, however, the judge will let each party present the evidence in the order in which each sees fit
            b. NOTE → conditional admissibility and conditional relevancy are distinct

i. CR speaks to whether something is admissible at all
ii. CA speaks to the fact that something can be admitted provisionally upon additional evidence coming in later that makes it ultimately admissible

2. Second, the rule appears to establish the "sufficiency" standard of proof for the determination of those additional facts or generalizations (and this appears to be a higher standard than the "any tendency" standard in FRE 401)
    a. This language has led to the identification of a special evidence doctrine that suggests there is a special class of identifiable cases of "conditional relevancy" where the relevancy of an offered item of evidence depends on the existence of some other fact
        i. For this class of cases, the other fact then has to be proved under the sufficiency standard
    b. In actual practice, there are very few reported cases in which preliminary questions of fact are identified and formally decided under FRE 104(b)
        i. Most of them raise questions of notice, identification of someone/something, and basis for lay or expert testimony
            1. **Notice** Ex: if the purpose of evidence is to establish notice on someone's part, the condition for relevancy of the underlying evidence is going to be that the person did in fact receive, heard, had access to the notice
            2. **Identity** Ex: if the purpose of evidence is to establish characteristics, knowledge, etc. of some person or thing and you have evidence of that characteristic, this evidence is only relevant if it is indeed characteristic of the thing in question
                a. Another Ex: admitting a conviction record into evidence is only relevant if the record is for the John Smith that it is being admitted against – that they are the same people is a conditional fact under FRE 104(b)
            3. **Expert Testimony** Ex: if the purpose of the evidence is the foundation or basis for expert testimony, relevancy is only met if it is sufficiently connected up to things in the case
                a. Expert testimony is only relevant if the expert knows what they are talking about and if they applied the methodology properly

ii. With FRE 104(b) the judge does screen the relevancy objection, but only to make sure that there is indeed sufficient evidence so that a reasonable jury could find that the conditions of relevancy are satisfied
    1. This is a lesser role for the judge than under FRE 104(a)

b. Keys:
    i. If a "condition of fact" necessary to establish the relevance of an offered item of evidence is in serious dispute, FRE 104(b) provides that the court may admit the offered item "conditioned upon" later proof of the necessary fact
    ii. The FRE 104(b) standard is higher than the FRE 401 "any tendency" standard
        1. In some cases, courts require the proponent to satisfy the higher standard of "evidence sufficient to support a finding" in proving a condition of fact deemed necessary to the relevance of an offered item of evidence

iii. Both parties may present evidence on FRE 104(b) condition of fact questions, and the judge must determine whether there is evidence sufficient to support a finding that the preliminary fact is true
    1. In making this decision, the judge may consider only evidence that would be admissible to the jury
iv. After the judge determines the sufficiency of the evidence on the preliminary question under FRE 104(b), as under FRE 602 and 901, the judge either admits or excludes the offered item
    1. The judge does not inform the jury about his determination of sufficiency
v. The opponent may present evidence to disprove the preliminary fact to the jury
    1. The jury will decide the preliminary fact as part of its ultimate decision making
        a. The judge may instruct the jury that it must decide the preliminary fact question before it can consider the offered item of evidence to which it pertains

IV. Hypo (pg. 220): One page of a five-page document concerning the dangers of asbestos fireproofing material was offered by P to prove that D, the manufacturer, knew or should have known of the dangers of asbestos and was liable to P for failure to warn; D had sold asbestos to P in Sept. 1968 – so document was relevant prior D's knowledge of the dangers only if it was received by D prior to Sept. 1968
    a. Assume that P presents evidence that the document was found in the bottom of a file drawer belonging to an official of D, in a stack of unrelated and undated papers
        i. Under the minimal FRE 401 "any tendency" standard, this document could still be deemed relevant, even without an indication as to when it was received by D
            1. Knowing that the document was in D's files makes it more likely that D knew of the document by Sept. 1968 than if the document were not in the files
            2. Note: *If* this document was post-dated Sept. 1968, it would fail even the FRE 401 minimal relevancy standard
        ii. If the trial courts treats the date of receipt under FRE 104(b) as a "condition of fact" upon which the relevancy of the document depends, the "evidence sufficient to support a finding" standard will apply
            1. Evidence "sufficient to support a finding" under FRE 104(b), 602, and 901 means the same thing – evidence from which a jury *could* reasonably find the preliminary fact to be more probable than not
                a. This is a production burden – if the judge finds that the proponent has produced evidence from which a jury *could* find the preliminary fact, the judge must apply the evidence rule in the proponent's favor
            2. Perhaps this higher standard would not be satisfied by the mere presence of the proffered document in D's files
                a. It would not be unreasonable for a court to find that a reasonable jury *could not* be persuaded that it was more probable than not that the document was received by D prior to Sept. 1968
            3. If the FRE 104(b) "sufficiency" standard were applied, the document would likely be excluded as irrelevant unless P presented more evidence on the question of D's receipt (that the other four pages of the document were dated 1966, e.g.)

V. Problem 4.29 (Insider Trading): P wants to introduce a CEO-initialed copy of Auditor's memo to CFO
    a. If this is a pure FRE 401 relevancy question, the initialed document is relevant and admissible
    b. This is a FRE 104(b) conditional relevance question because we are trying to prove notice/knowledge of CEO by a certain date – only relevant if he read and initialed the memo before 3/16/04
        i. Testimony from CEO's secretary that she always puts things in his inbox the day they arrive and he always signs and puts them in his outbox (but when?) is likely not going to be enough to satisfy FRE 104(b)

1. *If* we have testimony that 98% of the time the CEO reads and initials stuff the same day it comes in, then FRE 104(b) is likely satisfied
    a. Whether the jury believes this is one of the 2% of times when CEO did not follow procedure goes to weight

VI. Problem 4.30: Wrongful death suit brought on the grounds that the police shot victim while he was surrendering; police allege that he was coming at them with a gun; expert testifies that police's account cannot be correct because victim's hands were raised in a surrender position and if he was holding the gun in his right hand, when he was shot in the right forearm he would have dropped the gun
    a. FRE 104(b)/Conditional Relevance Q: Expert's testimony is only relevant if the victim was holding the gun in this right hand
        i. Evidence to satisfy the sufficiency standard:
            1. Surely there is someone who can testify that victim was right handed
            2. Use of statistical evidence to show statistical likelihood is <u>not</u> sufficient to generate liability
                a. So the mere fact that 90% of people are right handed is not the kind of evidence the law buys as valid

VII. Dicta:
    a. Inquiry that a court must undertake under FRE 104(b) is less rigorous than that under FRE 104(a)
        i. Because under FRE 104(a) the judge must find by a preponderance of the evidence (per SCOTUS), and under FRE 104(b) the judge must only find that there is evidence sufficient to support a finding that the conditional fact is true
        ii. Note: Judge can consider inadmissible evidence under FRE 104(a), but cannot consider inadmissible evidence under FRE 104(b) because jurors cannot consider inadmissible evidence
    b. FRE 104(b) is a higher standard than FRE 401
        i. Notion that there can be plenty of evidence that is relevant under FRE 401 but that will not make it under the screening mechanism set out under FRE 104(b)

<u>Categorical "Irrelevance" – The Character, Propensity, and Specific Acts Rules</u>

What You Can't Get In

I. Introduction
    a. FRE 403 allows the trial judge to exclude relevant evidence on a discretionary, case-by-case basis
    b. In contrast, FRE 404-415 ("the relevance rules") establish certain categorical exclusions of otherwise relevant evidence
        i. Keep in mind that the exclusionary provisions may not be a complete bar to the admissibility of a particular piece of evidence
            1. Rather, they prohibit the proponent from offering the evidence *only in a particular context or for a particular purpose*
    c. Definitions:
        i. **Propensity** = a tendency of a person or thing to behave in a certain way
        ii. **Character** (FRE 404) = a type of propensity, probably the most common and familiar
            1. Character in evidence law is a trait of a person to act a certain way, and evidence of a person's character is relevant – but generally inadmissible – to show that he committed a particular act consistent with his character trait on a specific occasion that is the subject of the litigation
        iii. **Past Specific Acts** (a.k.a. "other crimes, wrongs, or acts" [FRE 404(b)]) = instances of a person's past conduct that are not the subject of *this case*
        iv. **Habit** (FRE 406) = a propensity that the law of evidence distinguishes from character
            1. Evidence of habit is generally admissible
            2. Generally speaking, propensities towards conduct that is more consistent, routine, and repetitive tend to be categorized as "habit," while conduct that is less so tends to be called "character"

II. General Prohibition on Use of Character and "Past Specific Acts" Evidence to Prove Conduct on a Particular Occasion

a. FRE 404: Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

i. (a) **Character evidence generally**: Evidence of a person's character or a trait of character is not admissible *for the purpose of proving action in conformity therewith* on a particular occasion, *except*:

1. Character of accused – In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under FRE 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
2. Character of alleged victim – In a criminal case, and subject to the limitations imposed by FRE 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
3. Character of witness – Evidence of the character of a witness, as provided in FRE 607, 608, and 609

ii. (b) **Other crimes, wrongs, or acts**: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes*, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial

b. FRE 405: Methods of Proving Character

i. (a) Reputation or opinion: In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct

ii. (b) Specific instances of conduct: In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct

c. Keys:

i. Evidence of a person's character is relevant to show the person's action in conformity with character on a particular occasion

ii. The FRE prohibit the use of character evidence to show action in conformity with character except in the situations set forth in FRE 404(a)

iii. The FRE do not define "character" or "character trait"

1. Typically, character traits are qualities or aspects of a person that tend to be reflected in occasional, rather than routine, conduct and tend to have moral overtones and, therefore, inherent prejudice

iv. Past specific acts, or instances of conduct other than the ones that form the subject matter of the litigation, are often relevant to prove character in order to show conduct in conformity on a specific occasion

1. However, they are excluded from evidence for this purpose by FRE 404(b)

III. The Admissibility of Specific Acts that are Deemed Relevant Without a Character Inference

a. The basic prohibition of FRE 404(a) prohibits a certain kind of propensity inference – specifically, a "character" inference, one that asks the fact finder to infer that a person acted a certain way on the occasion in question because it was his "character" to act that way

i. The basic provision of FRE 404(b) emphasizes this prohibition with respect to evidence of past specific acts
    1. ***But* nothing in these rules prohibits the use of past specific acts that are relevant for some purpose other than to prove character to prove, in turn, conduct on a particular occasion**

b. Specific acts may be admissible pursuant to the second sentence of FRE 404(b) to prove a fact of consequence that is not called "character" or a "character trait"
    i. **In order to admit evidence pursuant to the second sentence of FRE 404(b), the proponent must satisfy three requirements**:
        1. The proponent must articulate some non-character purpose for which the specific acts evidence is relevant
            a. Ex: motive, opportunity, knowledge . . .
        2. The proponent must introduce evidence that the person who allegedly committed the act in fact did commit the act
        3. The proponent must be prepared to respond to a likely FRE 403 objection to the evidence
        4. If the proponent of the evidence is the prosecutor, there is a fourth requirement: that the prosecution respond to a criminal defendant's demand for notice

c. The eight examples listed in the second sentence of FRE 404(b) can be grouped into three broad and overlapping categories
    i. Evidence that is essential to the narrative of the proponent's case
        1. Sometimes the events giving rise to civil or criminal liability are an inextricable, essential part of a larger story involving other actions by a party
            a. These other actions are in turn relevant to an essential element, tending to prove who did the act or what the act was
                i. Dicta: *Old Chief*'s general proposition: lawyers get to tell their stories
                    1. Notion that the FRE do not want to force lawyers to leave huge gaps in their stories
        2. Motive – opportunity – plan – preparation: terms that capture the idea of these various narrative elements
    ii. Evidence showing relevant states of mind
        1. States of mind are at issue in many litigated cases
            a. In such cases, past specific acts ***can be admissible*** for the non-character purpose of proving knowledge, intent, or absence of mistake or accident
        2. How do you prove intent in a criminal case?
            a. Normally the criminal D will not testify, so what would be the evidence of intent in a particular criminal case?
            b. We will have to ask the trier of fact to infer intent from conduct, and in order to do this, you have to be able to present enough of these other actions to allow the trier of fact to make plausible and reasonable inferences about states of mind
    iii. Evidence showing identity
        1. In cases where the defense theory is that the wrongful conduct was perpetrated by some other known or unknown person, past specific acts can be relevant as circumstantial evidence that the defendant is indeed the perpetrator
            a. Identity is probably listed separately as a way of including the "modus operandi" theory: where other conduct is so distinctive and nearly identical in its attributes or methods to the litigated conduct as to

suggest by itself that the same perpetrator did the past and present acts, it can be admitted as showing identity

d. Under the FRE, the question of whether a person was culpably involved in the specific acts is an *FRE 104(b)* preliminary fact question

i. The proponent can satisfy the standard by offering evidence *sufficient to support a finding* by a preponderance of the evidence that the person was culpably involved in the act

1. Ex: *Huddleston v. United States* (U.S. 1988) (pg. 239): questions about whether or not evidence of these past acts can serve any purpose other than the prohibited inferences of FRE 404(a) and (b) are conditional relevance questions – the evidence is only relevant *if* there is reason to think that it actually happened; therefore, per FRE 104(b), the trial judge is only supposed to determine if there is "evidence sufficient to support a finding" that these prior acts happened

e. Past specific acts evidence offered under the second sentence of FRE 404(b) nearly always raise a potential FRE 403 objection

i. This is because in virtually every instance in which past specific acts are offered for one of the FRE 404(b) (second sentence) purposes, there will still be the risk that the jury will consider the past conduct for the impermissible purpose of proving character to prove conduct in conformity with character on a specific occasion

1. A classic FRE 403 objection is presented, based on the argument that the prejudice flowing from the impermissible purpose substantially outweighs the probative value of the permissible purpose

a. Factors re: FRE 403 balancing:

i. How probative the non-character purpose is of some contested issue in the case

ii. How probative the specific act is to prove the non-character purpose

1. Consider, e.g.: close temporal proximity and substantial similarity

iii. How probative the evidence is to establish that the act occurred (e.g., whether there is a dispute about the nature of the act or D's involvement in it)

iv. How much of a risk of unfair prejudice would result from introduction of the evidence (e.g., how heinous is the specific act)

v. How effective a limiting instruction is likely to be in reducing the risk of unfair prejudice

ii. In practice, FRE 403 is seldom a barrier to the admissibility of specific acts evidence

f. Specific Application of the Second Sentence of FRE 404(b) that may well be in some tension with the prohibitory language of the First Sentence of FRE 404(b)

i. The problem of "*res gesta*"

1. While evidence of past acts to show "motive" or "opportunity" might supply elements that fill out the story of the case, they are also independently relevant: For example, a person with a motive is more likely to have done the act in question than someone with no motive

a. However, parties sometimes argue for admission of evidence that is not technically relevant on the ground that it purportedly involves the "same transaction" as the conduct at issue in the case, or helps to "complete the story" of the case = *res gestae*

b. *Res gestae* rationale = P should be able to tell a cohesive story, a story that makes sense

i. → a way around the propensity inference . . . because you are not introducing the evidence to show the prohibited purpose – action in conformity with character – but rather to complete the narrative
    1. Lawson has FRE 403 concerns and would require strong relevance

ii. The problem of specific acts evidence to prove intent
    1. FRE 404(b) identifies "intent" as one of the permissible noncharacter uses of past specific acts evidence
        a. Some courts have formulated the admissibility of past specific acts evidence to prove intent this way: "Where a defendant claims that his conduct has an innocent explanation, prior act evidence is generally admissible to prove that the defendant acted with the state of mind necessary to commit the offense charged"
    2. Perhaps one could view "intent" as something other than "conduct," so that the use of past specific acts to prove intent on a particular occasion is different from the prohibited use of past specific acts to prove conduct on a particular occasion
    3. Or perhaps the law of evidence could be seen as making an "intent exception" to the prohibition of specific acts to prove character to prove conduct on a specific occasion as a pragmatic concession to the need for circumstantial evidence to prove states of mind
    4. Whatever the justification, many courts seem willing to gloss over the difficulty that use of past specific acts to prove intent violates the prohibition in the first sentence
    5. Trick, from defense standpoint → distinguish cases where intent is actually at issue and where it is not
        a. If the only issue in the case is identity, then the law seems to suggest that the prosecution does not get to introduce evidence of motive or intent, e.g.

iii. The intent/specific acts problem where intent is not disputed
    1. Early leading cases on this issue held that the past specific act evidence should be excluded where the defendant offered to stipulate
        a. The need for the evidence is one of the factors to consider in making the FRE 403 determination
            i. Therefore, the more the evidence is needed, the more likely courts will find a permissible purpose for admissibility (and vice versa)
    2. Impact of *Old Chief*
        a. In theory if the only permissible reason under FRE 404(b) is intent, e.g., and the defense is prepared to stipulate that intent is not an issue in the case, does that make the FRE 404(b) problem go away (i.e., no legit reason for the prosecution to introduce the evidence now)?
            i. Generally, we cannot compel the prosecution to accept a stipulation by the defense
                1. Basically, defense cannot stipulate their way out of the prosecution's evidence if the prosecution is determined to get it in
        b. General way that the *Old Chief* decision has played itself out has been for courts to focus on the part of the opinion that says the prosecution gets to present its case however it wants

i. But Lawson and the Editors think this is a misreading of the opinion, despite the fact that real world judges disagree with them

iv. Doctrine of Chances
1. Another application of FRE 404(b) (second sentence) that carries the potential for misuse is the so-called anticoincidence theory of relevance/doctrine of chances
    a. Used to refute a defense of "mistake or accident," the doctrine of chances is based on the generalization that if the specific acts are sufficiently numerous and similar to the crime charged, coincidence or randomness is unlikely to explain their occurrence
        i. Instead, it is more likely that there is some unifying causal explanation – a single person's intentional, repetitive action, e.g. – for the occurrence of such numerous and similar events
2. Conceptually, how do we distinguish the doctrine of chances (reasoning from past behavior that the current event could not have been an accident or mistake) from past behavior that there is a propensity to act that certain way (i.e., the prohibited propensity inference)?
    a. Virtually every evidence scholar thinks that there is a perfectly good distinction, and it does not completely wipe out FRE 404(b):
        i. Doctrine of Chances only kicks in when D has put into issue "accident or mistake" (i.e., "I agree this happened, but I didn't intend for it to") – now the prosecution is free to use the doctrine of chances to rebut D's claim
        ii. To apply, there must be enough events that are suspiciously enough connected so it is plausible enough to make the anti-coincidence claim
3. Allocation:
    a. Jury has to decide under FRE 104(b) whether the prior events occurred and whether they were done by the actual defendant – identity Q
    b. Case law also leaves the question about whether there are enough of these events to make the judgment that it is not coincidence to the jury
4. Admissibility is probably going to end up turning on FRE 403 balancing??

v. Modus operandi and the character inference
1. A modus operandi is a pattern of behavior sufficiently distinctive or idiosyncratic to support the inference that the same person who committed the prior act must also have committed the one in question in the current case
    a. It is thus relevant where the defendant denies committing the act in the case before the court
        i. Because a high degree of distinctiveness and similarity is required to establish modus operandi, the doctrine will necessarily apply only in limited circumstances
2. Courts have traditionally accepted past specific acts evidence under a modus operandi theory under FRE 404(b), yet as suggested above in the case of intent, it is difficult to see how modus operandi evidence is relevant to prove identity without making a character inference
    a. The proponent asks the fact finder to infer that D has a propensity to act in a certain distinctive way, as shown by past instances, and therefore acted in that way on the occasion in question
        i. The only justification to treat modus operandi evidence differently from other character evidence is that, because of the high standard of uniqueness and similarity of the

behavior, it is more probative than generic character evidence
1. In this respect, modus operandi may be simply a special case of the doctrine of chances

g. Assuming that you can find some reason other than the prohibited inference-type reason, the two constraints on admissibility are:
   i. **FRE 104(b)** – you must actually have evidence sufficient to support a finding that the other acts happened (and that D committed them)
   ii. **FRE 403** – even if you can squeeze the evidence in under FRE 404, need to consider its probative value and prejudicial impact

IV. Habit and Routine Practice
   a. Both the FRE and the common law permit the use of evidence of a person's habit to show action in conformity with that habit on a particular occasion
      i. Similarly, they both permit evidence of business custom or the routine practice of an organization to show action in conformity with that custom or practice
         1. **FRE 406: Habit; Routine Practice**: Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice
   b. FRE 406 serves two important purposes:
      i. FRE 406 places no special restrictions on admitting habit evidence
      ii. FRE 406 provides a useful clarification that habit evidence is not subject to the strictures of FRE 404-405 even though habit evidence closely resembles character evidence in its form and logic
         1. Like character evidence, the relevance of habit evidence depends on a propensity inference – the inference that a person is more likely to have acted in a certain way on a particular occasion if it was his propensity (character or habit) to act in such a way
   c. Editor's Note: Although reputation evidence is one of the traditional methods of proving a character trait, a proponent should not be able to use reputation evidence to prove habit or routine practice
      i. Reputation evidence offered for this purpose would be hearsay, and while there is a hearsay exception for reputation evidence offered to prove *character* (FRE 803(21)), there is no exception for reputation evidence offered to prove habit or routine practice
   d. Habit vs. Character → this classification is frequently dispositive of its admissibility
      i. Habit refers to a propensity that is much more specific and routine than a character trait
         1. Distinguishing Factors:
            a. Regularity
            b. Specificity
            c. Moral Neutrality
   e. The admissibility of habit or routine practice evidence is likely to turn on the resolution of two closely related but distinct questions:
      i. Q: Is the activity in question a habit/routine practice – or – character trait?
      ii. Q: Is the evidence in the particular case sufficient to establish the existence of the habit or routine practice?
   f. Problem 5.18 (Bus Driver)
      i. Letter from school board that driver has always been a safe driver is not admissible evidence of habit
         1. Good driving is not the sort of thing that can be a habit
            a. Needs to be something that can be automatic – something like putting your seatbelt on

i. But, would <u>not</u> be able to use habit evidence of wearing your seatbelt as evidence that you are a cautious person – *only* to show that you always wear your seatbelt

g. Problem 5.19: D charged with shoplifting – claimed he bought the item and did not get a sales receipt; P wants to introduce testimony of the store manager that it is their standard practice to give sales receipts for every purchase
    i. This is almost certainly the kind of routine, every day practice of an organization that would qualify under FRE 406
        1. *Cf.* An organization would not be able to claim habit for things like "we usually clean up broken pickle jars" – this is not a routine practice
    ii. Admitting the evidence is not proof positive that they actually gave the receipt in this instance, but it is admissible top prove it is their standard practice

h. Problem 5.20: D is being used for negligence for speeding through a yellow light and hitting P's car on D's way to work; P offers testimony from D's supervisor that D was frequently late to work and always seemed to be in a rush; D objects as impermissible character evidence
    i. This is pretty clear character evidence, and would not satisfy FRE 406
        1. If D was late every single day for twenty years, then *maybe* that would qualify as habit, but it still looks like propensity evidence

i. Problem 5.21 (Insider Trading): CEO's secretary testifies to her mail collection process and to the of the CEO reading the mail and initialing; what is crucial here is *when* the CEO read the memo, not whether he read it ever
    i. Secretary's testimony would be admissible if it is deemed habit, routine practice and not impermissible character evidence
        1. Doing something every day for a long period of time is the regularity FRE 406 has in mind
        2. Pros can likely introduce secretary's testimony about what *she* does with the mail
    ii. Questionable whether the secretary could testify to the CEO's habit/routine because there is a concern that she might lack sufficient firsthand knowledge – a foundation concern
        1. We would want additional evidence that she is in a position to know that he indeed does read, initial and return stuff to her how she says
        2. It could be that there is some stuff he reads without giving back – does she cross-check what is going in and coming out?

V. <u>Similar Happenings</u>
- a. Similar happenings = prior conduct by *persons* **or** occurrences involving *inanimate objects* that are offered for some purpose other than to prove character, habit, or routine practice
- b. Evidence of similar happenings falls into three categories:
    i. **Organizational Propensity**: past similar conduct of, or occurrences within, an organization, offered to show that the organization has a "propensity" toward certain acts or occurrences to prove the organization's conduct on a specific occasion
        1. Organizational propensity is some factor attributable to the organization, rather than to chance (typically a formal or informal policy), that would tend to cause the acts or occurrences
    ii. **Organizational Liability**: past similar conduct of, or occurrences within, an organization, offered to establish an element of liability, such as "notice" or "pattern or practice" liability, or to establish a standard of care
    iii. **Characteristics of Objects**: past similar behavior or operation of, or occurrences involving, an inanimate object
- *c. There is no specific FRE dealing with similar happenings*
    i. But courts do, in fact, usually treat evidence of similar happenings or nonhappenings as a distinct category of evidence

1. Modern cases have liberalized admission of similar happenings evidence and tend to treat it as a classic instance of FRE

ii. Bottom line: similar happenings evidence is governed only by FRE 401-403

d. Except when similar happenings evidence is offered to show notice, courts tend to require a showing of similarity as a condition of admissibility
   i. So, when the probative value of the evidence depends on the degree of similarity among the happenings, courts are likely to require a high degree of similarity
e. One of the most important uses of similar happenings is to show an institutional policy or practice
f. Similar happenings evidence is also understood to include evidence of nonhappenings offered to prove lack of notice or that an event did not occur or did not occur in the manner or for the reason alleged
   i. In this type of case, a court is likely to require evidence that the conditions were similar during the time of the nonhappenings
   ii. Additionally, the court is likely to require a significant number of nonhappenings

VI. Problem 5.1 (Insider Trading): P wants to introduce evidence that four years ago CEO sold 25,000 shares one week before a major and abrupt fall in company's share price, and that one year ago CEO purchased 30,000 shares 30 days before the company announced a profitable acquisition
   a. Is this evidence relevant under FRE 401?
      i. Inference is yes – if CEO did it before, then that evidence makes it more likely CEO would do it again
      ii. To be relevant though, we need evidence that on these two occasions, the CEO was trading on material, non-public information
         1. This is a 104(b)/Conditional Relevance question
            a. P will need to introduce evidence to show that these two prior trades were materially similar to the current one to suggest that in all situations CEO had access to material, non-public information
         2. Assuming that FRE 104(b) can be satisfied, FRE 401 threshold would be cleared
   b. Does this evidence pass FRE 404(b)?
      i. No, this is exactly the inference FRE 404(b) prohibits
      ii. These facts do not suggest that any FRE 404 exceptions – permissible reasons to introduce character evidence or past specific acts – will apply
         1. *Cf.* CEO's defense is not that he is an idiot and not capable of insider trading, so cannot use the knowledge exception, e.g.

VII. Hypo: D charged and convicted of intentionally aiding and abetting in the delivery of a controlled substance (heroin) and she appeals the conviction based on certain evidentiary rulings; evidence at issue – gun, distinctive TV set, numerous other weapons, two bags of pot, and scale – was seized pursuant to a valid warrant; trial judge admitted the evidence under the various FRE 404(b) exceptions; appellate court reversed on the grounds that it was possible to couch the relevancy arguments in acceptable FRE 404(b) terms, but it is almost impossible to avoid the inference that the primary relevance of this evidence was to prove the D was a "bad person"
   a. If the point of this evidence is to prove that D violated the gun possession and marijuana possession laws so she is more likely to be engaged in heroin trafficking, that is exactly the argument the FRE 404 prohibits
   b. Pros' Theory:
      i. Guns – in the experience of the state's agents, people who engage in heroin trafficking often have guns (i.e., an empirical connection between guns, scales, and heroin trafficking)
         1. This is valid as motive, preparation, plan, ability, e.g.
      ii. TV set was stolen – agents testifies that stolen goods tend to be associated with heroin transactions
      iii. Pot – possession of pot is particularly probative on the question of intent

VIII. Problem 5.5: Is specific acts evidence admissible?

a. J's home burglarized, no evidence of forced entry; pros offers evidence against D that a week before the burglary, D stole J's purse containing her keys
    i. FRE 104(b) – pros would need evidence sufficient to support a finding by a reasonable jury that D stole J's purse
    ii. Permissible FRE 404(b) Purposes:
        1. Opportunity – of all the people who could have entered the house without breaking in, D is part of that group (assuming jury finds that the previous acts happened under FRE 104(b))
            a. What if this is a seemingly safe neighborhood and no one locks their doors – so you do not need keys to have an opportunity?
                i. Might be a 104(b) conditional relevancy question, but we would need more facts
        2. Plan/Preparation – why would D steal the purse? Presumably to break into the house later
    iii. FRE 403 inquiry likely
b. D is charged with growing weed; D claims that her friends are responsible and she thought the plants were weeds; pros offers a neighbor's eyewitness testimony that he saw D harvest weed on her property a year ago
    i. Impermissible FRE 404(b) Argument: Once a pot harvester, always a pot harvester
    ii. Permissible FRE 404(b) Purpose: Knowledge – evidence that D knew what weed looked like
    iii. Possible 104(b) Problem: We would need evidence sufficient to support a finding by a reasonable jury that a year ago when the neighbor saw her harvesting pot she knew then that it was pot (i.e., what if she thought it was just weeds a year ago too?)
        1. So additional evidence re: did the neighbor see her weed-whacking the pot – or – did he see her collect it and smoke it?
c. D is charged with killing X, who was about to testify as an eyewitness in a major drug conspiracy trial; pros offers evidence of D's participation in the conspiracy
    i. Impermissible FRE 404(b) Argument: D is a "bad guy" because he is involved in a drug conspiracy
    ii. Permissible FRE 404(b) Purpose: Motive – evidence to show why D would choose to kill this particular person
        1. How much evidence does pros need to show D was a part of the conspiracy?
            a. "Evidence sufficient to support a finding by a reasonable jury"
    iii. FRE 403 Inquiry: Certainly prejudicial evidence, but the probative value may be quite substantial if it is the pros' only evidence of motive – notion that pros has to be able to tell their story about why this guy would kill the victim

IX. Problem 5.9: D charged with armed robbery and burglary; Fred testifies that a man with a knife, in jeans and a T-shirt and ski mask, broke into his home through the window, had a slight limp and was 6ft tall; Pam testifies that a week before Fred's robbery a man with similar features robbed her and her dog bit him in the leg (i.e., explaining the limp); both robberies occurred at 11AM in the same neighborhood; D objects to Pam's testimony as impermissible character evidence, on FRE 403 grounds, and on the fact that he was acquitted of burglary in the Pam incident
    a. Permissible FRE 404(b) Purpose: Identity – evidence to prove the identity of the person in the principle case (i.e., Fred's case)
        i. Pretty good permissible FRE 404(b) case – if pros cannot use this evidence to prove identity, then what else can they use?
        ii. Possible FRE 104(b) conditional relevance question: why type of dog was this – one capable of causing a limp?
    b. Acquittal does <u>not</u> prohibit admitting this evidence
        i. Acquittal only tells us that the jury did not find D guilty beyond a reasonable doubt (i.e., acquittal standard for criminal cases)

ii. Standard for admissibility is only "evidence sufficient to support a finding by a reasonable that the past events happened"

c. FRE 403 Inquiry
   i. Probative Value = Identity
   ii. Prejudicial Impact = Relatively High
      1. Might want to know how common it is that jeans and T-shirts get worn, how many people are 6ft tall, how many peoples' legs got bit by a dog that day?
         a. Notion that the more common these facts are, the less probative they will be of identity

X. Problem 5.10: D charged with illegal possession of a firearm, which was discovered in a car parked outside of his house; D frequently used the car, but it belonged to his aunt; pros wants to introduce evidence that D was previously arrested for robbery, that the police were at his house to execute a search warrant to search for the proceeds of the robbery, that they discovered the key to the car during the search, and D's aunt consented to the search of the car
   a. D is on trial here for illegal possession of a gun, not robbery; so technically speaking, this evidence is not relevant under FRE 401 for the charged crime; all the robbery does is explain why the police are there in the first place
   b. Permissible FRE 404(b) Purpose: Telling the Narrative – prosecution does not want the jury to think that police are the bad guys just snooping around cars for no good reason
      i. Court accepted the argument
      ii. Lawson would not have
   c. FRE 403 Inquiry: Prejudicial impact is quite substantial and the probative value – narrative relevance – is fairly thin
      i. Whatever the trial judge decides would likely be upheld on appeal

XI. Problem 5.13: D is charged with arson for allegedly intentionally setting fire to his diner; D alleges that it was an accident; pros wants to admit evidence that two other businesses owned by D have burned down (and D claimed those were accidents at the time too) and that D pleaded guilty to arson in connection with one of those previous situations
   a. FRE 401 "any tendency" standard is surely satisfied
   b. Impermissible FRE 404(b) Purpose: D is the type of person who is inclined to burn down his businesses
   c. Permissible FRE 404(b) Purpose: Absence of Mistake or Accident (Doctrine of Chances) – to rebut D's claim of accident
   d. FRE 403 Inquiry:
      i. Probative Value = Could be relatively high if diners like D's do not burn down that frequently
      ii. Prejudicial Impact = Pretty High

XII. Problem 5.16: D is on trial for possession of cocaine with intent to sell; pros wants to offer testimony by a police officer that three weeks prior to the charged crime, D sold cocaine to B; D objects as improper character evidence; P alleges that it is admissible on the FRE 404(b) ground of intent
   a. Impermissible FRE 404(b) Purpose: For the jury to infer that D is in fact a cocaine dealer
      i. If D sold in the past, likely D was selling this time
   b. Permissible FRE 404(b) Purpose: Intent – if pros can show possession of a kilo of cocaine, then the pros has a pretty good case that D is intending to sell (who uses a kilo of cocaine on their own?)
   c. *Old Chief* Inquiry: D tried to avoid the testimony by claiming that intent was not at issue, but in general, courts cannot force prosecutors to accept stipulations – parties must have the freedom to present their case how they see fit
   d. FRE 403 Inquiry: (from D's standpoint)
      i. Probative Value = There was not a conviction, nor an arrest (as far as the facts say), just an officer saying he saw a sale
         1. Note: FRE 104(b) – an officer/witness's testimony <u>is</u> sufficient evidence so that a jury could find the past act happened, if it wanted

e. What if D gets on the stand and testifies that she did not know that the stuff in the trunk of her car was cocaine, so pros asks D about her conviction for selling heroin eleven years ago? D invokes the rule against character evidence, but P claims it goes to knowledge, intent, and plan
    i. Lawson thinks pros should have just focused on knowledge – notion that because she is familiar with heroine, she knows what cocaine is when it is in the trunk of her car
        1. Ongoing plan is going to be difficult to show because this is an eleven year time period
        2. Intent only works if she knew the stuff was cocaine
    ii. Some pause because the previous conviction was for heroin and not cocaine (what she is currently charged with) . . . but it is plausible that someone who knows what heroine is knows what cocaine is too
    iii. FRE 403 Inquiry: Need to balance the probative value – knowledge – against the relatively substantial prejudicial impact

XIII. Problem 5.17: D is on trial for the murder of her 8-month old foster child; four times previously, this child had suffered instances of gasping for breath and turning blue for lack of oxygen; fifth time, child died; each time, D had sole access to the child; pathologist testifies for pros that child's death was not an accident; expert attributed 25% doubt to the possibility of some disease currently unknown to medical science causing the death; over time, D has had access to nine children who suffered a minimum of twenty of these lack of oxygen episodes
    a. Permissible FRE 404(b) Purpose: Absence of Mistake or Accident (Doctrine of Chances)
        i. Could these all have been random accidents? It is possible . . . but the FRE are not going to exclude the evidence based on this slight possibility – the possibility of accident speaks to weight

What You Can Get In

I. Three Circumstances Where you are Going to Use Character Evidence:
    a. D wants to raise it
    b. Impeachment
    c. FRE 413 – 415, and 412 (i.e., Sex Offense Cases)

II. <u>Exceptions to the Prohibition on Use of Character to Prove Conduct of a Particular Occasion</u>
    a. FRE 404(a)(1)-(3)
        i. A criminal defendant is free to introduce evidence of the defendant's own character [FRE 404(a)(1)] – *or* – the victim's character [FRE 404(a)(2)]
            1. D is opening the door to the character issue
        ii. When a defendant elects to open the character evidence door, the prosecution in its rebuttal case may introduce character evidence to rebut the defendant's evidence [FRE 404(a)(1) & (2)]
            1. Note: When Ds open the door to a *victim's* bad character, they also open the door to their *own* bad character
            2. Whenever the prosecution is rebutting the defendant's character evidence, the prosecution's evidence **must be about the same character trait** addressed by the defendant's evidence
        iii. FRE 404(a)(2) also provides that the prosecution may introduce evidence of a homicide victim's character for peacefulness, *if* the defendant has suggested that the victim was the first aggressor
        iv. FRE 404(a)(3) is a cross-reference to the rules that permit the impeachment and rehabilitation of witnesses with evidence of their character for truthfulness [FRE 607-609]
            1. The relevance of any witness's testimony depends upon the assumption that the witness is testifying truthfully
                a. Thus parties are permitted to introduce evidence that either undermines or supports a witness's truthfulness
    b. FRE 404(b) and 405(a): How Character is Proven

i. When character evidence is admissible under one of the FRE 404(a) exceptions, in what form can the evidence be offered?
    1. A witness might offer specific instances of conduct of the person whose character trait is in question
    2. A witness could offer to testify that in the witness's opinion the person in question has the particular character trait
    3. A witness could offer to testify that the person has a reputation in the community for having the kind of character trait that is relevant to the litigation
        a. An individual's reputation is what people say about the individual, and when reputation evidence is offered to prove character, it is the truth of the reputation that is important
            i. Thus reputation evidence = hearsay
                1. *But* FRE 803(21) provides an exception to the hearsay rule for evidence of reputation offered to show an individual's <u>character</u>
ii. FRE 404(b)'s prohibition on the use of specific acts to prove a person's character for the purpose of showing action in conformity with that character trait expressly applies to the FRE 404(a) exceptions
    1. Therefore, <u>even where character evidence is admissible under FRE 404(a)(1) or (2), it may not be proven by past specific acts</u>
iii. FRE 405(a) provides that reputation evidence and opinion evidence are permissible means of proving character *whenever* a party offers admissible character evidence to show action in conformity with that character

c. Problem 5.34 (*Johnson* case): Assume that one of the charges against Johnson was assaulting Officer Walker
    i. Is Officer Houston's testimony that on several previous occasions Johnson had assault other prisoners and guards admissible?
        1. No – not unless Johnson raised the character issue first and prosecution was offering this testimony in rebuttal
            a. This is also specific acts, versus reputation/opinion testimony
        2. Note: Pros could admit the evidence under FRE 404 to explain why they had ten guards show up – because that is not a propensity inference, just explaining why there were so many guards there
            a. But still have FRE 403 to consider
    ii. Is Inmate Green's testimony that Officer Walker has a reputation for violence admissible?
        1. Form is correct – testifying about *reputation* <u>not</u> acts
            a. But, evidence will not be admissible unless there is a non-propensity reason
                i. Impermissible: Walker has this particular character reputation, therefore he acted in accordance on this occasion
                ii. Permissible: To show Johnson's reasonable fear of Walker
    iii. Is Officer Walker's testimony in rebuttal that Johnson has a reputation for violence admissible?
        1. *If* D were to raise character issues to show that Johnson was not violent, then this testimony would be admissible in rebuttal
        2. *But*, prosecution cannot introduce this evidence on their own

d. Problem 5.35: D charged with perjury; prosecutor wants to introduce:
    i. W1's testimony that he knows of at least five occasions on which D has lied
        1. Not admissible because pros cannot introduce character evidence
            a. Even if they could, it would <u>not</u> be through specific instances of past acts of lying, *but rather* by reputation or opinion testimony
    ii. W2's testimony that D has a reputation in the community for dishonesty

1. Form is OK (i.e., reputation testimony, no specific past acts), but this is propensity testimony so it is <u>not</u> coming in

iii. D wants to introduce: W3's testimony that D has a reputation in the community for honesty

1. Admissible – D can open the door to character evidence
    a. But now pros is free to introduce evidence of the same character trait

III. <u>Evidence of Sexual Assault and Child Molestation</u>

a. FRE 413-415 are exceptions to the general prohibition on introducing evidence of past acts against D in order to argue that past bad acts show a propensity to do the bad acts in the present

i. FRE 413: Evidence of Similar Crimes in Sexual Assault Cases

1. (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault <u>is admissible</u>, and may be considered for its bearing on any matter to which it is relevant
2. (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause
3. (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule
4. (d) For purposes of this rule and FRE 415, "offense of sexual assault" means a crime under Federal law or the law of a State that involved –
    a. (1) any conduct proscribed by ch. 109A of t. 18 U.S.C.
    b. (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person
    c. (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body
    d. (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person
    e. (5) an attempt or conspiracy to engage in conduct described above

ii. FRE 414: Evidence of Similar Crimes in Child Molestation Cases

1. (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation <u>is admissible</u>, and may be considered for its bearing on any matter to which it is relevant
2. (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause
3. (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule
4. (d) For purposes of this rule and FRE 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State that involved –
    a. (1) any conduct proscribed by ch. 109A of t. 18 U.S.C.. that was committed in relation to a child
    b. (2) any conduct proscribed by ch. 110 of t. 18 U.S.C.
    c. (3) contact between any part of the defendant's body or an object and the genitals or anus of a child

d. (4) contact between the genitals or anus of the defendant and any part of the body of a child
e. (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child
f. (6) an attempt or conspiracy to engage in conduct described above

iii. FRE 415: Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

1. (a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in FRE 413 and 414
2. (b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause
3. (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule

b. Purpose → To liberalize the admissibility of character evidence in sexual assault and child molestation cases, by removing the two primary objections that would otherwise be available under FRE 404
   i. First, the prosecution is permitted to open the door to use of character evidence in such cases, a right otherwise reserved to criminal defendants under FRE 404(a)
   ii. Second, the prosecution may offer past specific acts of sexual assault or child molestation as evidence that the defendant committed the current offense, notwithstanding the FRE 404(b) ban on past specific acts to prove character to show action in conformity on a particular occasion
c. Every appellate case dealing with this issue has concluded that sexual misconduct evidence is subject to FRE 403 balancing
   i. There is no requirement that re: past act there was an arrest or conviction
   ii. Proponent only needs to show sufficient evidence of the past acts under FRE 104(b) to allow a reasonable trier of fact to conclude that the acts did occur
d. Nothing in FRE 413 indicates whether the term "consent" in section (d) means legal or actual consent
   i. Majority view is that it means *legal* consent
e. Problem 5.46: D charged with intentionally having sexual contact with a minor – D lured a three year old with candy; D testified denying the incident; on rebuttal, P offers the testimony of a twelve year old who says a week before the incident with the three year old, D lured her with $20
   i. With FRE 413-415: Twelve year old's testimony definitely comes in under FRE 414
   ii. Without FRE 413-415: Testimony could come in under FRE 404(b) as evidence of intent or plan
      1. Notion that most of the time FRE 413-415 are not even necessary for admission, but they certainly help clarify the FRE's stance
f. Problem 5.47: D is charged with sexual assault and battery after following B out of a bar; D alleges that B mis-ID'd him; P offers testimony from two woman how said they were sexually assaulted by D after he followed them out of a bar five and seven years ago
   i. With FRE 413-415: Testimony is clearly coming in
      1. Note: P does not need a conviction or assault to offer testimony of prior sexual acts
         a. All P needs is sufficient evidence of the past acts to satisfy FRE 104(b), and testimony of a witness is sufficient to bring the issue to the jury

ii. Without FRE 413-415: Testimony is probably still coming in under FRE 404(b) as evidence of identity

g. Problem 5.48: D is charged with rape and his defense is that C consented to have sexual relations with him after a fun evening; P wants to admit testimony from a woman that had dated D three years ago and that he raped her, but she never reported the incident
   i. With FRE 413-415: Testimony would be admissible
      1. Witness's testimony is enough under FRE 104(b) to get the issue to the jury, despite the lack of a police report or arrest
         a. Jury can take that fact into account when weighing the evidence
   ii. Without FRE 413-415: P needs a permissible FRE 404(b) purpose
      1. Lawson doesn't know what a permissible FRE 404(b) purpose would be

h. Problem 5.50: D, a 21 year old college student, is charged with rape of B, a classmate; P alleges that the rape occurred during their first and only date; D says B consented; P wants to admit:
   i. Testimony of a 16 year old student that she recently had consensual sex with D
      1. FRE 414 will not admit the evidence because "child" is defined as someone under the age of fourteen, regardless of consent
      2. FRE 413 will likely apply though because when the Rule says "consent," it probably means "legal consent" and a 16 year old cannot give legal consent
      3. Without FRE 413 or without "consent" meaning "legal consent," it will be tough to come up with a theory of relevance that will admit this testimony
      4. FRE 403 Inquiry: Even with FRE 413 in place, it will be hard for P to get past FRE 403
   ii. Testimony of another student that on her first date with D he was extremely aggressive and ripped some of her clothing off before she could stop him
      1. If this behavior counts under FRE 413(d), then the testimony is admissible
      2. Without FRE 413-415: More difficult to get in
         a. Might be able to get in under FRE 404(b) to show intent, but the case would be stronger if this behavior was deemed attempted sexual assault (versus D just being aggressive and inappropriate)

IV. <u>Evidence of an Alleged Victim's Past Sexual Behavior or Disposition in Sex Offense Cases</u>

a. Until recently, many courts were quite liberal in permitting rape and other sex crime Ds to introduce evidence of the alleged victim's sexual history when D claimed that the victim had consented
   i. The most common form of prior sexual history evidence was reputation testimony, but a number of jurisdictions also permitted specific acts evidence
      1. "Rape Shield Legislation": Starting in the 1970s, states began to enact to curb the admissibility of some of this evidence

b. FRE 412: Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition
   i. (a) Evidence generally *inadmissible*: The following evidence is <u>not</u> admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
      1. Evidence offered to prove that any alleged victim engaged in other sexual behavior
      2. Evidence offered to prove any alleged victim's sexual predisposition
   ii. (b) *Exceptions*:
      1. In a criminal case, the following evidence <u>is admissible</u>, if otherwise admissible under these rules:
         a. (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence

b. (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution
c. (C) evidence the exclusion of which would violate the constitutional rights of the defendant
i. (to present an effective defense, e.g.)

2. In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim <u>is admissible</u> if it is otherwise admissible under these rules ***and*** its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation <u>is admissible</u> ***only if*** it has been placed in controversy by the alleged victim

iii. (c) Procedure to determine admissibility
1. A party intending to offer evidence under subdivision (b) must –
a. (A) file a written motion at least fourteen days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
b. (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative

2. Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise

c. FRE 412 is designed to take off the table a whole series of lines of questions about the victim's past acts or character, subject to narrow exceptions
i. Key Exception = FRE 412(b)(1)(C) → which protects any constitutional rights D may have that would be violated by evidence exclusion
1. The language is a reference to: (i) the DP doctrine that a criminal defendant has the constitutional right to present a defense, and (ii) the Sixth Amendment confrontation clause right to confront and cross-examine witnesses
a. Ex: case law (pg. 313-316): one principle stressed throughout the cases is the general right of the states to regulate their own procedures; nonetheless, those procedures must sometimes give way to D's constitutional rights even when the procedures have laudatory goals
i. Thus D's right to present a reasonable defense took precedence over the state's hearsay policy in *Chambers*, the state's confidentiality rule for juvenile record in *Davis*, and the state's interest in keeping prejudicial information from the jury in *Olden*
ii. In some cases D's right to present a defense may override an evidentiary rape shield rule, despites its laudatory purpose and general reasonableness

ii. Note: If D's evidence falls within one of the first two narrow exceptions, it is <u>not</u> automatically admissible
1. The evidence must be "otherwise admissible under these rules"
a. Therefore, the court could still exclude the evidence on FRE 403 grounds, e.g.

d. Some people adamantly maintain that evidence of a sexual assault victim's prior sexual history is irrelevant to the issue of consent
i. FRE 412(b)(1)(B), however, explicitly permits proof of sexual behavior between D and the alleged victim to prove the victim's consent

ii. The familiar concept of relevance rests on the premise that individuals have propensities to behave in particular ways and that we can arrive at reasonable conclusions about historical facts by taking these propensities into account
    1. Given this pervasive reliance on the premise that we know we can infer something about an individual's conduct on some occasions if we know how the individual behaved on other occasions, and given the very low FRE 401 threshold requirement for "relevance," courts have <u>not</u> been willing to reject all evidence of an alleged victim's prior sexual behavior as irrelevant to the issue of consent

e. FRE 412 excludes most evidence of an alleged victim's prior sexual behavior and sexual predisposition, even when it is relevant under the above-described propensity theory
    i. The exclusionary provisions in FRE 412(a) come into play only with respect to evidence of "other sexual behavior" and "sexual predisposition"
        1. *Sexual behavior* connotes all activities that involve actual physical conduct or that imply sexual intercourse or conduct; and activities of the mind, such as fantasies or dreams
            a. Ex: use of contraceptives, birth of an illegitimate child, or venereal disease
        2. *Sexual predisposition* includes evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder
            a. Ex: evidence relating to the alleged victim's mode of dress, speech, or lifestyle

f. In hostile work environment and other ***civil* cases** <u>the balancing test in FRE 412(b)(2) governs</u> admissibility of evidence of an alleged victim's sexual behavior and predisposition
    i. This test *differs* from the FRE 403 balancing test in two respects:
        1. It is a reverse FRE 403 test
            a. FRE 403 favors admissibility
            b. FRE 412(b)(2) favors exclusion
                i. By requiring that the probative value must substantially outweigh countervailing factors
        2. One should probably interpret "unfair prejudice" in FRE 403 as referring only to prejudice against a party to the litigation
            a. By contrast, FRE 412(b)(2) specifically refers to prejudice against a party <u>*and*</u> harm to the alleged victim

g. Problem 5.51: To prove that C consented to sex, D wants to admit:
    i. Testimony from D that he and C had consensual sex on several prior occasions
        1. Admissible under FRE 412(b)(1)(B)
        2. D also has to satisfy FRE 401 and FRE 403 too
        3. Any FRE 404 problems – that is, that C has a propensity to consent so she likely consented on this occasion?
    ii. Testimony from three men that they had met C at bars and had consensual sex with her
        1. Inadmissible under FRE 412
        2. Lawson thinks this would be admissible under FRE 404(a)(2) (if FRE 412 did not exist)
            a. Even then, would need to address FRE 403 dangers
    iii. Testimony that C has a reputation in the community for promiscuity
        1. Pre-FRE 412: Likely admissible under FRE 404(a)(2)
        2. FRE 412: Inadmissible
            a. *Unless*, it is constitutionally required so D is able to present an effective defense (not likely though)
    iv. Testimony from S, a friend of D, that at the first bar on the night in question, C told S that she was attracted to D and she would like to have sex with him

1. Pre-FRE 412: Probably admissible
2. FRE 412: If this testimony counts as evidence of sexual behavior or sexual predisposition, then it is inadmissible
    a. Lawson not sure where this falls

h. Problem 5.53: D, a successful banker with no history of sexual misconduct, is accused of sexually assaulting the neighbor's teenage daughter; D claims she is falsely accusing him because he threatened to reveal to her parents that she and D's son were having a sexual affair
    i. Looks like evidence FRE 412(a) prohibits
    ii. But, likely admissible under FRE 412(b)(C)
        1. Constitutional due process concerns
            a. If this evidence is excluded, D cannot make an effective defense

<u>Limited Relevance</u>

Inadmissible to Prove Negligence, Culpable Conduct, or Liability

I. The FRE preclude evidence of subsequent remedial measures (FRE 407), compromises and offers of compromise (FRE 408), payment of medical and other similar expenses (FRE 409), and liability insurance (FRE 411) . . . to prove fault or liability [despite the fact that the evidence would likely meet the FRE 401 relevance threshold]
    a. *These rules do not exclude evidence altogether*, but they prohibit the proponent from offering the evidence only to prove liability or fault
        i. MUST ASK: *what* is the proponent of the evidence trying to prove; *what* is the proponent's theory of relevance?
            1. If it is <u>not</u> to prove fault or liability, then these rules do <u>not</u> exclude

II. FRE 407
    a. **FRE 407: Subsequent Remedial Measures**: When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent remedial measures is <u>not</u> admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction . . . This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment
        i. A subsequent remedial measure is any action that a person takes after an event to reduce the likelihood of an event's reoccurrence
        ii. Courts rarely focus on the question whether a remedial measure "if taken previously, would [in fact] have made the injury or harm less likely to occur"
        iii. For evidence of a remedial measure to be inadmissible under FRE 407, it must occur ***after*** an injury or harm caused by an event
            1. This rule applies only to changes made after the occurrence that produced the damages giving rise to the action
            2. *If* D took the remedial action subsequent to the injuries of several other people but prior to P's injury, FRE 407 would <u>not</u> preclude admissibility of the design change, e.g.
    b. Rationale → The law does not want to penalize people for fixing things
    c. FRE 407 makes it clear that subsequent remedial measure evidence may be admissible for other purposes
        i. Subsequent remedial measure evidence may be admissible for ***any*** purpose other than to show negligence or culpable conduct – subject to FRE 403 and other exclusionary rules
            1. Ex: the fact that D repaired a staircase suggests that D was the owner of the building, or at least that D (rather than someone else) had control over the staircase and was responsible for maintaining it

2. Ex: if D testifies that the staircase was in good condition at the time of the accident, the fact that D repaired or authorized the repair of the staircase is relevant to impeach D's credibility
3. Ex: taking subsequent remedial measures rebuts D's claim that it was not feasible to maintain the staircase in a safer condition

ii. When a party offers subsequent remedial measure evidence for a legitimate, contested purpose, the question of admissibility in theory should turn on the application of FRE 403
1. If subsequent remedial measure evidence is relevant to prove some contested issue other than negligence, culpable conduct, defect, or need for a warning, the result almost invariably is that the evidence is admissible
a. The party against whom the evidence is admitted is entitled to a limiting instruction though

d. Problem 6.1 (Bus Driver): P wants to admit evidence that the School District adopted a policy six months ago requiring all of its bus drivers to take a special driver ed. course
i. Evidence inadmissible under FRE 407
1. P cannot use this evidence to create an inference of negligence
ii. Hard to see any permissible purposes under FRE 407 that are satisfied

e. Problem 6.3: E is suing a ladder company for personal injuries he received when the ladder fell to the ground; E claims the plastic tip on the ladder was too weak and broke, and that caused the ladder to fall; D claims the plastic tip broke from the impact of the fall or some later time; D's expert witness testifies that the tip was adequate for its purpose; shortly after the accident, ladder company substitutes a strengthened plastic tip on its ladders
i. Framed this way, FRE 407 would prohibit the subsequent remedial measure evidence
ii. Permissible FRE 407 Purpose: Impeachment
1. Trial Judge: Using this evidence to discredit the expert though is really just a run around FRE 407
iii. What if the expert was a ladder company employee who had authorized the change in the plastic tip?
1. Here the real impeachment issue comes up, and the evidence would likely be admissible for impeachment purposes
2. Even if expert-employee has an excuse, that goes to weight not admissibility

III. FRE 408

a. FRE 408: Compromise and Offers to Compromise

i. (a) **Prohibited uses**: Evidence of the following is <u>not</u> admissible on behalf of any party, *when offered to prove* liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
1. furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and
2. conduct or statements made in compromise negotiations regarding the claim, *except* when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority

ii. (b) **Permitted uses**: This rule does not require exclusion if the evidence if offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution

b. Rationale → To encourage settlements, FRE 408 excludes evidence of compromises and of offers to compromise on the questions of liability for or the amount of claims
i. At the same time, the rule makes clear that such evidence may be admissible for other purposes

1. Ex: to show the bias of a witness who testifies for P, D may want to establish that the settlement of that witness's claim against P includes a provision for P to pay the witness a portion of any judgment obtained against D
2. Ex: proof of negotiations and offers to compromise may indicate that a party was acting in good faith to resolve a claim and thus rebut a charge of undue delay

c. The final sentence of FRE 408 does not contain "if controverted" language; nevertheless, in order to have sufficient probative value to overcome an FRE 403 objection, the purpose for which the evidence is offered should be a contested issue in the case
   i. If it is a contested issue, the evidence is likely to be admissible despite the risk that the jury may use the evidence for the impermissible purpose of showing the validity or amount of a claim
   ii. Problem 6.5 (pg. 338): a note shortly after the accident, but before there was any controverted liability, likely does <u>not</u> fall within this exception, and would therefore be admissible

d. FRE 408 excludes not only compromises and offers of compromise but also – at least in civil actions – conduct or statements made during compromise negotiations
   i. However, a party cannot insulate from discovery documents and information that would otherwise be discoverable merely by making reference to or relying on such evidence in the compromise negotiations
   ii. Offers of compromise and statements of fault are inadmissible pursuant to FRE 408(a)(2) *only if* made during compromise negotiations over a disputed claim
      1. If there is no disputed claim or if the statement of fault occurs outside the context of compromise negotiations, the statement of fault will be admissible

e. If a person admits some wrongdoing in the course of negotiations to settle a civil claim, may the prosecution use the statement against the wrongdoer in a subsequent criminal prosecution?
   i. There is a split among the circuits (pg. 333)
   ii. FRE 408 takes a middle course:
      1. It prohibits the use of actual compromises and offers and acceptances in criminal prosecutions, but it creates a limited exception to the general prohibition against the use of conduct or statements made during compromise negotiations
         a. This exception – *the right to use in criminal prosecutions conduct and statements made during civil compromise negotiations* – **exists when**: "the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority"
            i. There will still be FRE 403 concerns though

f. The "on behalf of any party" language is intended to codify the notion that FRE 408 <u>does</u> apply to a party's effort to introduce its own offer of compromise
   i. If this was not the case, the offeror's revealing its own offer could reveal the fact that the adversary entered into settlement negotiations, which would undermine the policy of FRE 408

g. Just as was suggested that evidence of a third person's subsequent remedial measure does not implicate the policies underlying FRE 407, evidence of a third person's offer of compromise does not implicate the policies underlying FRE 408

IV. FRE 409

a. **FRE 409: Payment of Medical and Similar Expenses**: Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is <u>not</u> admissible *to prove liability for the injury*

b. FRE 409 differs from FRE 408 in one significant respect → statements made in conjunction with the payments – including statements of fault – are <u>not</u> excluded

c. Although FRE 409 (unlike FRE 407, 408, and 411) does not include an illustrative list of possible permissible uses for evidence of medical and similar payments, the common law counterpart to FRE 409 permitted evidence for other purposes
    i. There is no indication in the legislative history that the drafters of FRE 409 intended to depart from the common law in this respect, and there is precedent under the FRE for admitting payments to prove something other than liability
        1. Can use evidence of payment of medical and similar expenses for purposes *other than* proving liability for the injury
d. Problem 6.5 (Bus Driver): Evidence that P's mother received a note from D shortly after the accident with $200 – "I hope this helps with some of the expenses"
    i. Likely inadmissible under FRE 409 as an offer to pay medical bills, because of the specific language in the note

V. FRE 411
a. **FRE 411: Liability Insurance**: Evidence that a person was or was not insured against liability is <u>not</u> admissible upon the issue whether the person acted negligently or otherwise wrongfully . . . This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness
b. Like FRE 407-409, FRE 411 excludes evidence of liability insurance only to prove negligence or wrongful conduct
    i. When there is a permissible purpose, the admissibility of the evidence should depend on the application of FRE 403
        1. FRE 403 should require at a minimum that the issue for which the evidence is offered is a contested issue in the case
c. Problem 6.5 (Bus Driver): In cross-examining the school district's accident reconstruction expert, P wishes to show that the witness has a professional relationship with the school district's liability insurance carrier
    i. Inadmissible to show that the school district has liability insurance
    ii. Perhaps admissible to impeach this witness
        1. FRE 403 concerns? Maybe the prejudicial impact of introducing the fact of insurance coverage significantly outweighs whatever minimal impeachment value there is
        2. School district needs to get another expert because of these possible impeachment concerns

VI. Problem 6.8: P sued D for damages for assault and battery after D attacked P at their daughter's hockey game; P wants to admit:
a. D's statement in a mediation session that he was sorry and in the wrong
    i. Inadmissible under FRE 408(a)(2) – this is a formal mediation session and there is a current dispute at issue, so statements made in the course of settlement negotiations cannot be used to prove liability
b. D's willingness to cover P's medical expenses
    i. Inadmissible under FRE 408 and FRE 409
c. An entry from D's diary admitting fault
    i. Likely admissible
        1. Once P has the document in hand, it is going to qualify as an admission and therefore not hearsay
    ii. FRE 403 Inquiry: Probative value is significant, so it is likely still coming in
d. Evidence that D's homeowners' insurance company denied coverage for the alleged incident on the ground that the policy did not cover intentional wrongful acts
    i. Likely admissible
        1. The evidence is <u>not</u> being used to prove the fact of liability insurance
        2. The evidence is being used to establish the wrongfulness of D's conduct . . . D would be entitled to a limiting instruction

Withdrawn Guilty Pleas, Pleas of No Contest, and Offers to Plead Guilty

I. FRE 410

a. **FRE 410: Inadmissibility of Pleas, Plea Discussions, and Related Statements**:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

1. a plea of guilty which was later withdrawn
2. a plea of nolo contendere
3. any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure [governing plea bargaining and the judicial acceptance or rejection of guilty pleas] or comparable state procedure regarding either of the foregoing pleas
4. any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and the in presence of counsel

5. [These exceptions will rarely be of consequence]

b. Two limitations on the scope of FRE 410(4):
   i. The statements must be made in the course of plea discussion
      1. Ex: if D is merely seeking leniency in the charging decision without suggesting any possibility of pleading guilty, a court may conclude that the conversation is not a plea discussion
   ii. D's statement must be made to an attorney for the prosecuting authority
      1. Ex: statements to police officers, who have no formal authority to plea bargain, do not fall within the FRE 410(4) exclusion
         a. However, statements made to police officers as part of the plea negotiation may be covered by the rule if the police as acting as agents of the prosecutor
   iii. Note: There is substantial precedent for approaching the question of whether FRE 410 is applicable from the perspective of the defendant
      1. Statements will not be admissible if D (or D's attorney speaking as an agent) had a subjective belief that plea negotiations with a prosecuting attorney were taking place and if that belief was objectively reasonable

c. *United States v. Mezzanatto* (U.S. 1995): SCOTUS held that D may waive the FRE 410(4) exclusionary mandate, at least with regard to the impeachment use of statements made in the process of plea negotiations

The Doctrine of Curative Admissibility

I. The Doctrine of Curative Admissibility – sometimes referred to as "fighting fire with fire" – permits a party to introduce normally inadmissible evidence in response to the opposing party's introduction of or attempt to introduce inadmissible evidence
   a. Notion is that maintaining a balance of errors may contribute to accurate fact finding
   b. Moreover, this remedy is considerably more efficient than the alternatives of declaring a mistrial or reversing a judgment on appeal

II. Most, but not all, jurisdictions recognize some version of the Curative Admissibility Doctrine
   a. And, although there is no FRE dealing with the subject, federal courts have invoked the doctrine

III. The Doctrine of Curative Admissible is likely to apply only in situations in which a timely objection to the opponent's inadmissible evidence is unlikely to correct the unfairness of presenting or suggesting that evidence to the jury

Relevance for Impeachment

Introduction

I. The strength and accuracy of any witness's testimony is dependent upon certain testimonial abilities:
    a. Capacity to observe and process events
        i. A witness must be able to observe the events to ensure personal knowledge about what they are testifying (FRE 602)
    b. Capacity to recollect/remember what they observed
    c. Capacity to relate/communicate/convey what it that they observed and recollected
    d. Capacity to do so honestly and accurately
        i. Speaks to a witness's credibility, veracity, believability
            1. FRE 603 requires witnesses to affirm they will testify truthfully
        ii. Concerns about: honesty, bias (even if unconsciously), interest in the matter

II. Impeachment is the process of trying to raise doubts about a witness's testimony – an attempt to show that a witness may have inadvertently narrated the events incorrectly, been insincere, misperceived the events, or forgotten some or all of what happened
    a. **There are a variety of ways to discredit/impeach a witness**:
        i. Evidence that a witness has a character trait for untruthfulness suggests that the witness may be untruthful on the witness stand
        ii. Showing that the witness has a bias or interest in the case suggests a motive for being untruthful
        iii. Attacks on other testimonial qualities such as the witness's narrative or perceptive abilities may also undermine a witness's credibility
            1. Such attacks may focus on general abilities (color blindness, e.g.) or on the specific exercise of those abilities on the occasion relevant to the case (witness not wearing glasses at the time event was observed, e.g.)
        iv. Proof of a witness's inconsistent statements suggests that the fact finder should be skeptical about the accuracy of the witness's testimony
        v. Testimony from other sources that contradicts the witness may reduce the witness's believability

III. To admit evidence for the purpose of impeaching the credibility of a witness is to admit evidence that, but for its impeachment value, would not be admissible – either because it would be irrelevant, or because some exclusionary rule would prohibit its substantive use
    a. When evidence is admissible *only* to impeach the credibility of a witness (i.e. is not substantive evidence), limited admissibility has three consequences:
        i. The proponent of the impeachment evidence in resisting a directed verdict or summary judgment motion cannot rely on that evidence to satisfy a burden of production
        ii. The proponent in closing argument cannot rely on the impeachment evidence as substantive proof of disputed facts
        iii. Whenever the evidence is relevant but inadmissible for some nonimpeachment purpose, the party against whom the evidence is offered can make a FRE 403 objection and, if the evidence is admitted, is entitled to a limiting instruction

IV. One can impeach a witness by:
    a. Examination (usually cross-examination) of the witness – *or* –
    b. Introduction of extrinsic evidence (any evidence other than that developed through direct or cross-examination of the witness)

V. Bolstering Credibility
    a. FRE 608(a) prohibits introducing reputation or opinion evidence of a witness's good character for truthfulness *unless* the witness's character for truthfulness has been attacked
        i. The FRE contain no *general* prohibition against bolstering a witness's credibility prior to any impeachment
            1. When a party attempts to introduce preimpeachment bolstering evidence not specifically excluded by FRE 608(a), admissibility *should* turn of the application of FRE 403

2. BUT, federal courts articulate the general common law prohibition against ALL bolstering prior to impeachment
    a. Circumstances in which this general rule does not apply:
        i. General strategy of narrating events
            1. The law allows you to set up why this person is here as your witness – how this person came about to be a witness
            2. Ex: he was staring right at the light, had the best view …
                a. This could technically be seen as bolstering a witness, but the law generally allows since it is part of the ordinary set up of your narrative
        ii. If you need to explain why your key witness is not going to come off well (?)
            1. Ex: to ask the witness why they are sweating so much (i.e., because they get nervous in front of people)
        iii. If your witness has 47 convictions, you can be confident that if you do not address them, the other side will, so FRE 608 is not seen as preventing something bad that is inevitably coming out

VI. Note: <u>If the evidence that is useful for raising impeachment issues is also independently admissible for a substantive purpose under the FRE, then you do not need to worry about whether it can be used for impeachment evidence too</u>
    a. Problem 7.4 (pg. 362)

Impeachment and Rehabilitation with Character Evidence

I. The rules governing the use of character evidence for *impeachment* purposes [FRE 404(a)(3), 608, and 609] are different from the rules governing character evidence for *substantive* purposes [FRE 404(a)(1) and (2), 404(b), and 405]
    a. Impeachment evidence is an explicit carve out from the general FRE 404 prohibition on using past acts to prove character and therefore finding conformity with that character for the present case → FRE 404(c)
        i. This carve out makes admissible evidence to show that a person has been untruthful in the past so it is possible to infer that they are being untruthful in the present

II. FRE 608
    a. FRE 608: Evidence of Character and Conduct of Witness
        i. (a) **Opinion and reputation evidence of character**: The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these <u>limitations</u>: (1) the evidence may refer *only* to character for truthfulness or untruthfulness, and (2) evidence of *truthful* character is admissible *only* after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise
        ii. (b) **Specific instances of conduct**: Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in FRE 609, may <u>not</u> be proved by extrinsic evidence. They <u>may</u>, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified

- The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness

b. FRE 608(a)
    i. The usual method of impeaching or rehabilitating witnesses pursuant to FRE 608(a) is with extrinsic evidence – that is, opinion or reputation testimony offered by one witness about another witness's character for truthfulness
        1. FRE 608(a)(1) limits the use of reputation or opinion evidence to character for truthfulness or untruthfulness
            a. The inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally
            b. Bias & Interest – is *different* from – Truthfulness
                i. You can be biased or interested, but still honest/truthful
                    1. Ex: if someone attacks you for being biased because you are the cousin of P, e.g., that is not necessarily something that can be characterized as an attack on your truthfulness
                ii. Attacks on bias or interest are not governed by the FRE 608 rules
                    1. Can introduce extrinsic evidence & past specific acts
                    2. Subject only to FRE 401 and FRE 403
    ii. FRE 608(a)(2) does not allow such reputation or opinion testimony unless and until the witness's character has been "attacked"
        1. Courts traditionally have regarded impeachment by showing prior convictions (FRE 609) or bad acts that did not result in convictions (FRE 608(b)), as an attack on a witness's character
        2. Courts have regarded proof of a witness's bias or interest as not being an attack on the witness's character

c. FRE 608(b)(1)
    i. FRE 608(b) prohibits the use of extrinsic evidence of a witness's specific acts to prove character *for truthfulness* to show dishonesty or honesty on the witness stand
        1. FRE 608(b) does permit inquiry into a witness's own acts during the examination of that witness *if* the witness is on the stand and *if* probative of (un)truthfulness
            a. The examiner is bound by the answer of the witness – the impeaching party cannot introduce extrinsic evidence to contradict the witness
    ii. Scope of Permissible Questions Under FRE 608(b) re: "(Un)truthfulness"
        1. At the extremes, courts tend to find that perjury or other instances of making false statements **does** suggest untruthfulness; and that acts of violence **do not** suggest untruthfulness
        2. Sometimes an impeaching party will have evidence that a witness was arrested or charged with some offense relating to untruthfulness or that an administrative or judicial body has found that a witness behaved in a manner indicating untruthfulness
            a. In these situations, FRE 608(b) permits the impeaching party to ask about the underlying conduct (i.e., whether the witness falsified documents, engaged in deceitful conduct, or lied in an earlier proceeding)
                i. <u>But</u> a witness's arrest or a factual finding about the witness is not a specific instance of the *witness's* conduct
    iii. Despite the FRE 403 grounds for objecting to FRE 608(b) questions, courts typically are quite liberal in permitting inquiry about specific acts to prove character for impeachment purposes

iv. Because of the suggestiveness that is likely to inhere in a question about a specific act relating to truthfulness, courts have held that the examiner must have a good-faith basis for believing that the act occurred
    1. The good faith belief requirement is not very rigorous

d. FRE 608(b)(2)
    i. Addresses: the cross-examination of reputation or opinion witnesses to test their knowledge of the reputation or the basis for the opinion about which they testify
        1. Once a character witness has given reputation or opinion testimony pursuant to FRE 608(a), the opposing party – in addition to impeaching the character witness with questions about the character witness's own acts of untruthfulness [FRE 608(b)(1)] – may impeach the character witness in the same manner in which a party may impeach character witnesses who give reputation or opinion testimony pursuant to FRE 404(a)(1) and (2)
            a. That is, the impeaching party may ask the character witness if the character witness is aware of relevant specific acts committed by the person whose character was the subject of the witness's testimony
                i. *But*, the specific acts must relate to the character trait about which the FRE 608(a) character witness testified: truthfulness

e. Keys:
    i. FRE 608(b)(1) permits the impeachment and rehabilitation of witnesses with questions about the witnesses' own specific acts that show character for untruthfulness
        1. The examiner is bound by the witness's answer to such questions and may not introduce extrinsic evidence to challenge the answer
    ii. FRE 608(b)(1) specific acts questions must relate to character for truthfulness, and they are subject to exclusion on FRE 403 grounds
    iii. When an FRE 608(a) character witness offers opinion or reputation testimony about another witness's character for truthfulness, FRE 608(b)(2) permits the opposing party to ask the character witness about specific acts probative of truthfulness that the other witness may have committed
        1. The purpose of the questions is to test the basis for the character witness's reputation or opinion testimony

III. FRE 609

a. FRE 609: Impeachment by Evidence of Conviction of Crime
    i. (a) General rule: For the purpose of attacking the character for truthfulness of a witness,
        1. [*Crimes of non-criminal D witnesses*:] evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to FRE 403, ***if*** the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and [*Criminal defendants*:] evidence that an accused has been convicted of such a crime shall be admitted *if* the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
        2. evidence that *any* witness has been convicted of a crime shall be admitted regardless of the punishment, ***if*** it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness
    ii. (b) Time limit: Evidence of a conviction under this rule is not admissible ***if*** a period of more than ten years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, *unless* the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect
    iii. [end of section (b) – (e) is omitted, per the textbook]

b. FRE 609(a) permits impeachment with two types of convictions: (1) convictions for serious crimes, and (2) convictions for crimes of dishonesty and false statement
    i. An essential feature of FRE 609 is that it contains no prohibition against the use of extrinsic evidence (unlike FRE 608(b))
        1. Therefore, if a witness denies a conviction, it is permissible to establish the conviction with extrinsic evidence
            a. For example, with a record of the conviction

c. FRE 609(a)(1) has two balancing tests
    i. For all witnesses *except* criminal defendants = FRE 403
    ii. For criminal defendants = reverse-FRE 403
        1. TEST: the probative value must outweigh the prejudice to D
            a. Probative value → the evidentiary fact that the conviction is offered to prove is the truthfulness of the witness at the time of the witness's testimony
                i. The probative value assessment should include consideration of:
                    1. the age of the conviction
                    2. how probative murder (e.g.) is to show bad moral character or general disposition for law-breaking, which in turn shows a disposition for untruthfulness
                    3. the witness's intervening behavior
            b. Unfair prejudice → concerns:
                i. To what extent will the jury consider the witness to be a "bad guy" and, therefore, be disposed against the witness?
                ii. To what extent is there a risk that the jury may use the conviction not only in its proper propensity sense to prove that the witness may be untruthful on the stand but also in an improper propriety sense?
        2. This test favors exclusion and in effect puts the burden on the prosecution to justify admissibility
    iii. Note: Lawson's Labels:
        1. FRE 609(a)(1) non-criminal defendants' test = normal FRE 403
            a. favoring admissibility
        2. FRE 609(a)(1) criminal defendants' test = neutral FRE 403 test
            a. not favoring admissibility or exclusion
        3. FRE 609(b) = the reverse-FRE 403 test
            a. favors exclusion [pg. 92 of class notes]

d. FRE 609(a)(2) makes certain convictions automatically admissible *without regard to balancing* and *without regard to the seriousness of the crime*
    i. As long as the conviction "required proof or admission of an act of dishonesty or false statement by the witness" and falls within the time limitation set forth in FRE 609(b), a court has no discretion to exclude it
        1. . . . even if the witness were a criminal defendant charged with the identical crime, the evidence would be admissible
        2. This is one place in the FRE where FRE 403 does not overarch
    ii. "Dishonesty or False Statement" = crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretenses, or any other offense which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity to testify truthfully
        1. Most federal courts have interpreted the phrase relatively narrowly and case law tends to limit the phrase closely to the above named crimes
        2. *Cf.* assault, robbery ≠ crimes of dishonesty or false statement

e. All prior convictions falling within the scope of FRE 609(a) – including dishonesty and false statement convictions – are subject to the reverse-FRE 403 balancing test in FRE 609(b) *if* they fall outside the 10-year time period

IV. Problem 7.1: D is charged with armed robbery of a liquor store proprietor; proprietor positively IDs D as the robber; D calls S to testify that proprietor has a reputation in the community for lying
   a. Admissible under FRE 608(a) in both substance (character for truthfulness or untruthfulness) and form (reputation or opinion testimony, not past specific acts) . . . provided that a proper foundation is laid

V. Problem 7.2: D is charged with armed robbery of a liquor store proprietor; proprietor positively IDs D as the robber; D calls S to testify that proprietor has a reputation in the community for not remembering faces and for mis-IDing people
   a. Inadmissible under FRE 608(a)(1) because this evidence does not pertain to (un)truthfulness
      i. And would be hearsay (with no applicable exception)
   b. What if S testified about her own experience with the proprietor and she is of the opinion that he has difficulty remembering faces and often mis-IDs people?
      i. This is outside the scope of FRE 608
      ii. Maybe admissible under FRE 701 – Opinion Testimony by Lay Witnesses
      iii. No hearsay problem here

VI. Problem 7.3: H was arrested for sale of cocaine and accepted the government's offer to cooperate in obtaining evidence against his supplier; H ID'd E as the supplier and E was charged; at E's trial, Agent F testified that H had delivered what was in fact cocaine to him, and H testified that he had obtained the cocaine from E; during cross of H, defense counsel elicited information about H's cooperation with the police; during cross of Agent F, defense counsel elicited that H had three independent sources for cocaine; on re-direct of Agent F, pros asks:
   a. Do you believe H received the cocaine in this case from a source other than E?
      i. Inadmissible under FRE 608 for lack of a direct attack on witness's character
         1. This is not appropriate rehabilitation testimony
      ii. If Agent F was some kind of expert in cocaine distribution and there was something unique about cocaine distribution patterns, then maybe we could wedge this into expert testimony realm (but that's a stretch)
   b. In your opinion, is H's testimony in this case truthful?
      i. Inadmissible – cannot even ask this question if witness's character for truthfulness had been called into question
         1. As a matter of form, the witness cannot respond to this question by anything other than – this is my opinion about his character for truthfulness
            a. Cannot testify about his truthfulness on this particular occasion or on a particular piece of testimony
            b. You can ask a witness whether or not they agree with what another witness has said, *but* cannot ask whether the witness thinks the other witnesses are lying or telling the truth
   c. In your opinion is H a truthful person?
      i. Inadmissible – although this is the right form for attacking or rehabilitating a witness, there is nothing yet to rehabilitate because there has not been an attack yet
      ii. If this was admissible – because there had been an attack of his character for truthfulness – the pros would still have to lay a proper foundation to establish that Agent F would have personal knowledge as to whether H was truthful

VII. Problem 7.4: D is charged with perjury and testifies in his own behalf; P's cross fails to shake D's story or cast doubt on his credibility; D offers testimony of W that D has a good reputation in the community for truthfulness
   a. Inadmissible under FRE 608(a)(2) because there has been no attack on the witness's truthfulness
      i. Probably not OK to bolster D's credibility yet
   b. TRICK → Admissible under FRE 404(a)(1) though – criminal Ds can always put their own character into question

VIII. Problem 7.5: D is charged with the sale of heroin; two alleged purchasers and the arresting officer will be prosecution witnesses; evidence that one alleged purchaser in recent years has threatened and intimidated individuals who can offer incriminating evidence against him and that the other alleged purchaser lied under oath in a civil action thirteen years ago (but no conviction, so not worried about FRE 609); D alleges that the arresting officer stole $1,400 from him at the time of the arrest; pros objects to this D asking about these incidents during cross

a. FRE 608(b) prohibition on extrinsic evidence is not the problem here
b. FRE 608(b) allows parties to inquire into on cross-examination the questions concerning the witness's character for truthfulness or untruthfulness (subject to trial judge discretion and FRE 403)
    i. Lawyer must have a good faith belief to warrant asking the questions in the first place
        1. So will want to know what the lawyer's evidence for making the statements are
            a. A lawyer's good faith belief can be formed on the basis of what their client tells them, e.g. (think the stolen $1,400)
    ii. Once a good faith belief for asking is established, the questions must go to the witness's character for (un)truthfulness
        1. Lying under oath – yes
        2. Typically robbery does not speak to someone's character for truthfulness, but we could skew this occasion as one that does by alleging the cop took the money by stealth, using his position as an officer
        3. Witness intimidation – maybe
            a. People who intimidate witnesses are bad people, but it might not always go to their character for (un)truthfulness
            b. There is case law letting this in, but we'd probably want more facts

IX. Problem 7.6: D is charged with murder; he plans to testify in his own behalf and to call W to testify that D has a good reputation for peacefulness; P has a good faith belief for believing that three years ago D was involved in a bribery scheme; that he beat his wife; and that W filed a false income tax return

a. P can ask D about the bribery; P cannot ask about the assault
    i. If D denies the bribery when asked, P cannot introduce extrinsic evidence and must accept D's answer (although can prosecute for perjury later)
b. P can ask W if he heard that D assaulted his wife; P cannot ask W if he heard about D's bribery scheme
    i. W is on the stand to testify about D's reputation for peacefulness, so P can only ask about specific acts that speak to that particular characteristic
c. P can ask W if he intentionally filed a false income tax return last year
    i. W is on the stand, it speaks to his own credibility as a witness, and he can be impeached with things that speak to his veracity

X. Problem 7.7: D is being prosecuted for murdering H, owner of H's Hash House; at trial, F testifies that the day before the murder D said he was going to get H

a. On cross of F, D asks F whether he has even been arrested for possession of weed
    i. Inadmissible – Even assuming the D has a good faith belief for asking, this does not speak to (un)truthfulness
b. A offers to testify that several years ago he was an altar boy at the church F was a chorister and he saw F steal church property
    i. Inadmissible – FRE 608(b) prohibits extrinsic evidence about specific instances of past conduct (assuming this even goes to truthfulness)
c. J, a neighbor of F's parents, offers to testify that she has known F his whole life and in her opinion he in untruthful
    i. Assuming the foundation is adequate (i.e., that living next to F's parents gives you personal knowledge of F's truthfulness), FRE 608(a) permits extrinsic evidence in the form of reputation or opinion testimony about truthfulness
d. In rebuttal, P calls M, who offers to testify that he lives in the same neighborhood as F and that he knows F's reputation in the neighborhood for truth and veracity is good

i. Once J testifies for D that F is a liar, P is allowed to rehabilitate F with evidence of the same kind – reputation or opinion testimony about truthfulness
1. Facts provide a decent foundation for this person to act as a reputation rehabilitation witness

e. On cross of M, D asks if M has heard that F was convicted of perjury two years ago
i. Assuming D has a good faith belief for asking the question, then this is admissible
1. You can ask character witness about specific acts regarding the character trait they are testifying about (and perjury goes to truthfulness)

XI. Problem 7.10: D is being tried for sexually molesting his seven year old step-daughter, who is a prosecution witness

a. After P presents its case, D calls witnesses to testify that the stepdaughter is manipulative and often lies
i. Witnesses can testify as to their opinion or reputation in the community (assuming foundation is correct and FRE 403 objections are not sustained), but they cannot testify to specific past instances

b. During the cross of one of these witnesses, P asks whether the witness is aware of the fact that the step-daughter recently admitted breaking an expensive lamp even though she could have blamed it on her brother
i. Admissible under FRE 608(b)(2) because the witness has offered reputation/opinion testimony and specific instances of conduct may be asked on cross, as long as it goes to the character for truthfulness
ii. Note: Court has discretion to control the form of cross, and this question may be deemed not worth asking

c. During cross of D, P asks about whether D molested his former wife's daughter
i. Pros has a good faith belief for asking – based on a criminal complaint filed
ii. Inadmissible under FRE 608 because it does not speak to the witness's character for truthfulness or untruthfulness
iii. TRICK → Admissible under FRE 414, as substantive evidence (not just impeachment evidence)

d. During cross of D, P asks about whether D misrepresented his college class standing in campaign speeches made three years ago
i. Probably admissible under FRE 608, as it does go to untruthfulness
1. But judge might decide under FRE 403 that its probative value is so minimal it not worth the time

e. In rebuttal, P calls a clinical psychologist who examined the step-daughter and testifies that she never had trouble with the step-daughter saying things that were untrue
i. If a proper foundation is laid, witness <u>can</u> testify about her informed opinion
ii. Psychologist <u>cannot</u> testify to the fact that she has watched her testimony on this trial and it seems credible

XII. Problem 7.14 (*Johnson* case): Trial took place in 1992 and the following convictions were used to impeach the credibility of defense witnesses

a. Robbery and battery (years unknown) by D's cellmate
i. Admissible – crimes are punishable by imprisonment in excess of one year
ii. Not the accused, so subject only to normal FRE 403 balancing
1. Prejudicial impact is minimal since the guy is already in Pelican Bay
iii. We are not worried about the conviction dates being unknown, because the FRE 609(b) time limit starts from the date of conviction or release, *whichever is later*
1. This guy is still in jail

b. First degree murder, assault with a deadly weapon, and first degree burglary (years unknown) by another inmate
i. Admissible – crimes are punishable by imprisonment in excess of one year
ii. Not the accused, so subject only to normal FRE 403 balancing

c. Rape (paroled in 1984) and first degree burglary (1985) by D

i. Maybe admissible – subject to a neutral FRE 403 balancing test
1. Probative Value – Rape and first degree burglary are not high on the truthfulness scale

Impeachment and Rehabilitation with a Witness's Prior Statements

I. A witness's prior statement (i.e., one made at another time and place prior to the witness's current testimony) falls within the core definition of inadmissible hearsay if the statement is offered to prove its truth
a. Prior inconsistent statements, however, are also relevant and traditionally have been admissible for the nonhearsay purpose of impeaching the witness's credibility
i. Proof of an inconsistency, regardless of which statement is true, suggests that the witness may have lied in making one of the statements or that the witness for some other reason (faulty memory or lack of interest, e.g.) has on one occasion not reported accurately what happened
1. Such proof allows the impeaching party to argue to the jury that the witness is not reliable

II. FRE 613
a. FRE 613: Prior Statements of Witnesses
i. (a) **Examining witness concerning prior statement**: In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel
ii. (b) **Extrinsic evidence of prior inconsistent statement of witness**: Extrinsic evidence of a prior inconsistent statement by a witness is <u>not</u> admissible *unless* the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in FRE 801(d)(2)
b. <u>FRE 613 establishes the procedure by which an examiner may introduce evidence of a witness's prior inconsistent statement for the purpose of impeaching the witness's credibility</u> (i.e., a nonhearsay purpose)
i. Typically the examiner will confront the witness with a prior inconsistent statement during cross-examination
1. FRE 613(a) makes clear that the examiner need not disclose the contents of a prior inconsistent statement to the witness before asking whether the witness made the statement
c. FRE 613 & FRE 403
i. Inconsistent statements about the issues in the lawsuit are likely to be more probative for impeachment purposes than inconsistent statements about unrelated matters
1. Thus the most prejudicial inconsistent statements are also the most probative for their impeachment value
a. But because the FRE 403 balancing test favors admissibility, a FRE 403 unfair prejudice argument is not likely to succeed
ii. There is at least one type of situation in which a FRE 403 unfair prejudice argument should have a reasonable chance of succeeding:
1. If a witness who testifies to a lack of memory about an event has made a prior statement about the event, some courts view the claimed current loss of memory and the prior statement as inconsistent
a. When it is reasonable to regard the loss of memory as feigned and, therefore, tantamount to a denial of the earlier statement, the characterization of the statements as inconsistent is reasonable
b. If the loss of current memory seems plausible, then there is no inconsistency … thus the prior statement has relatively low probative value for its legitimate impeachment use, but there is no reduction in

the likelihood that the jury will consider the prior statement for its truth

iii. If an inconsistent statement is about a collateral matter, its probative value may be so low that on at least some occasions the FRE 403 efficiency concerns should require its exclusion

III. Prior Consistent Statements

a. FRE 801(d)(1)(B) exempts from the definition of hearsay a witness's statement that is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive"

i. SCOTUS has interpreted FRE 801(d)(1)(B) narrowly: only prior consistent statements made *prior* to the time that a motive to fabricate or an improper influence arose fall within the scope of the rule

b. When a witness has been impeached with prior inconsistent statements, the uniform view is that contemporaneous prior consistent statements not satisfying the criteria of FRE 801(d)(1)(B) may be admissible to clarify or explain the alleged inconsistency

Other Impeachment Techniques

I. For impeachment techniques that the FRE do not specifically address, courts rely on FRE 401-403 to determine the admissibility of evidence . . .

II. <u>Bias</u>

a. Proof of bias can be particularly effective in discrediting a witness because it is highly probative of insincerity

b. All common law courts permitted proof of a witness's bias both by examination of the witness and by the introduction of extrinsic evidence

i. In *United States v. Abel* (1984), SCOTUS upheld the proof of bias with extrinsic evidence under the FRE

ii. However, the right to introduce extrinsic evidence of bias is not automatic under the FRE

1. Some federal courts hold that when the evidence of bias is a witness's prior statement, extrinsic evidence of the statement is not admissible unless the witness first has had an opportunity to explain or deny the statement

2. There is always the possibility of a successful FRE 403 objection

a. Typically evidence of bias is highly probative, but if the witness fully admits the bias or if the evidence in fact suggests little about the witness's possible bias, a court should likely sustain a FRE 403 objection to extrinsic evidence

b. Evidence of bias may also raise the FRE issue of unfair prejudice

III. <u>Mental or Sensory Incapacity</u>

a. Any sensory or mental deficiency that inhibits a witness's ability to perceive events accurately at the time they occur or to remember and to narrate accurately what happened at the time of trial is relevant to cast doubt on the witness's credibility

i. Ex: witness suffers from faulty memory, some form of mental illness that contributes to a witness's inability to distinguish fact from fantasy, intoxication at the time of the event to which the testimony relates or while on the witness stand, or color-blindness if accuracy with respect to color is important

ii. Subject to the court's discretion to control the mode of cross-examination and to FRE 403, it is permissible to inquire about these matters during the examination of the witness whose sensory or mental condition is at issue

iii. Parties may also introduce extrinsic evidence of a witness's mental or sensory incapacity

1. Courts have permitted extrinsic evidence of such matters as strange, seemingly irrational acts of a witness; expert testimony from a psychiatrist about a witness's mental capacity; and courtroom experiments to demonstrate a witness's poor memory or eyesight

b. In considering an individual's mental incapacity it is important not to confuse mental incapacity as a subject matter for impeachment – with – mental incapacity as a complete bar to testimony

IV. Contradiction

a. Contradiction is a method of impeaching a witness's credibility by introducing evidence that contradicts something the witness has said
    i. Ex: if a witness said she was wearing a yellow dress when she saw the accident, it would contradict her testimony to establish that she was wearing a blue dress on that occasion; and if one can establish that a witness is incorrect about one thing, it is arguably appropriate to infer that the witness may be wrong about other things
        1. However, proof of contradictions about matters unrelated to the issues being litigation are often of only marginal probative value to impeach the witness's credibility

b. FRE 401-403 govern the admissibility of evidence of contradiction, and courts applying FRE 402 may permit cross-examination but exclude extrinsic evidence if the contradiction appears to have little probative value to impeach the witness

c. Rather than invoking FRE 401-403, some federal courts rely on the common law prohibition against the use of extrinsic evidence to impeach on a collateral matter to exclude extrinsic evidence that contradicts a witness on a collateral matter
    i. Extrinsic evidence is collateral pursuant to this common law doctrine if the fact that the evidence establishes cannot be proven with extrinsic evidence for any purpose other than to show the contradiction
    ii. In most cases, proper application of FRE 403 would probably lead to the same result as a the common law prohibition against extrinsic evidence to contradict on a collateral matter

Hearsay

The Basic Definition

I. General Rule of Exclusion and Definitions

a. **FRE 801: Definitions**: The following definitions apply:
    i. (a) A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, *if* it is intended by the person as an assertion
    ii. (b) A "declarant" is a person who makes a statement
    iii. (c) "Hearsay" is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted
    iv. (d) A statement is not hearsay *if* –
        1. **Prior statement by witness**: The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or
        2. **Admission by party-opponent**: The statement is offered against a party and is
            a. (A) the party's own statement, in either an individual or a representative capacity
            b. (B) a statement of which the party has manifested an adoption or belief in its truth
            c. (C) a statement by a person authorized by the party to make a statement concerning the subject

d. (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship
e. (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy

- The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under (C), the agency or employment relationship and scope thereof under (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under (E)

b. **FRE 802: Hearsay Rule**: Hearsay is <u>not</u> admissible except as provided by these rules or by other rules prescribed by SCOTUS pursuant to statutory authority or by Act of Congress

II. FRE 802 is the primary rule of exclusion
   a. It is, however, subject to 29 exceptions and 8 exemptions pursuant to which many kinds of hearsay statements are admitted
   b. The classification of evidence as hearsay or not hearsay is not necessarily determinative of admissibility
      i. Evidence of an out-of-court statement that is not hearsay may be inadmissible for some other reason (privilege, e.g.)
      ii. Evidence that is hearsay may be admissible under one of the exemptions or exceptions

III. Hearsay Policy:
   a. A witness's oath, demeanor, and cross-examination are thought to reduce testimonial dangers and to make in-court testimony more reliable
      i. Cross-examination also increases the likelihood that testimonial dangers – sincerity, narration-ambiguity, perception, or memory problems – will be exposed and evaluated by the jury; and it generates information that helps the jury decide whether to rely on a witness's statement
   b. Whenever the relevance of an out-of-court statement requires inferences about all four testimonial qualities of the declarant, the hearsay policy is implicated

IV. **General Hearsay Requirements**:
   a. Something is a statement
      i. [if something is not a statement, then it is not hearsay]
   b. Made (1) not by the witness who is testifying (2) as part of that witness's testimony
   c. Offered to prove the truth of the matters asserted therein
      i. [if something is offered to prove something *other than* the truth of the matter asserted, it is not hearsay]

V. Implications of the General Rule of Exclusion [FRE 801 and 802]
   a. The truth-of-the-matter-asserted test of FRE 801(c) requires the identification of the "matter" that an out-of-court statement is offered to prove
      i. If an inference that the matters contained in the declarant's assertions are true is required for relevance, then the assertions are "offered to prove" those matters, even if those matters are just a necessary step in the chain of reasoning that continues to some further conclusion
   b. Testimony by witnesses about their own out-of-court statements may still be hearsay
      i. When witnesses testify in court about statements that they themselves made outside of court, those out-of-court statements may still be defined as hearsay by FRE 801(c) because they are "other than one made by the declarant while testifying at the trial or hearing"
         1. Under FRE 801(c), prior statements of witnesses are defined as hearsay unless specifically exempted
   c. A hearsay objection is appropriate after determining that a witness does not have firsthand knowledge of the events testified to, but is relying on what others have said

d. In a multiple hearsay situation, the evidence will be inadmissible unless there is a hearsay exception or exemption for each layer of hearsay
    i. **FRE 805**: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules"

VI. Nonhearsay Statements with No Hearsay Dangers [FRE 801(c)]
a. Not all out-of-court statements are hearsay
    i. A critical aspect of the definition of hearsay is that, under the proponent's relevance theory, the statements are offered to prove the truth of the matters they assert
        1. Many out-of-court statements are not offered for this relevance theory
    ii. Ex: A statement may be offered for the relevant nonhearsay use of showing its *effect on the listener*
        1. Out-of-court statements offered to prove their effect on the listener are relevant in many different kinds of cases
            a. Liability under the substantive law of torts and crimes often turns on the reasonableness of a listener's response to warnings, notices, instructions, and threats
            b. The effect of a statement can also be to create a specific state of mind, such as knowledge, duress, good faith, provocation, or reasonable apprehension of bodily harm – which may be an essential element in a civil or criminal case
            c. Statements made to a listener can provide motive for conduct, and thus are relevant to explain the listener's subsequent behavior
    iii. Ex: Another relevant nonhearsay use for an out-of-court statement is when the statement is itself a *legally operative fact*
        1. Many different kinds of statements are legally operative facts because principles of substantive law give them immediate legal significance
b. The critical step when identifying nonhearsay uses is to show that the evidence is relevant without reliance on the declarant's testimonial qualities
c. When a statement is relevant for both nonhearsay and hearsay uses the question of admissibility is one of discretionary balancing for the trial judge under FRE 403
    i. The risk of unfair prejudice is that the jury, even after being given a limiting instruction, will use the evidence for its improper hearsay purpose
        1. Is the probative value for the admissible purpose substantially outweighed by the danger of unfair prejudice?
            a. Remember: Probative value is affected by whether there are alternative means of proof

VII. Nonverbal Conduct [FRE 801(a)(2)]
a. FRE 801(a)(2) creates a doctrinal test for determining whether any particular item of nonverbal conduct evidence is or is not hearsay →
    i. Test: nonverbal conduct intended as an assertion is hearsay – and – nonverbal conduct not intended as an assertion is not hearsay
    ii. Preliminary Q of fact: Was the actor's nonverbal conduct *intended* as an assertion?
        1. This question will be decided on the basis of the nature of the conduct and the circumstances surrounding it (as presented by both parties)
            a. And FRE 104(a) states that preliminary questions of fact are for the judge (unless they are necessary to the relevance of the offered evidence)
                i. The burden to persuade the judge on the question of intent is on the opponent who is objecting to the admission of the actor's conduct as hearsay
b. Two primary justifications for distinguishing between assertive and nonassertive conduct:
    i. Absence of hearsay danger

1. Notion that nonassertive conduct does not likely present dangers re: the actor's testimonial qualities (sincerity, perception, memory, and accuracy (truthfulness, bias, interest))

ii. Necessity

1. The concern about nonassertive conduct is that it is so pervasive and so often relied on as a matter of course in our everyday lives that we would be giving up too much relevant evidence by classifying such conduct as hearsay

VIII. Utterances Relevant for the Truth of the Declarant's Unstated Beliefs (pgs. 440-449)

a. Implied assertions are treated by the FRE like assertive/nonassertive issue

i. Intent Standard → what was the declarant's intent?

b. Keys:

i. The Advisory Committee Note to FRE 801 construes FRE 801(a) and (c) as excluding oral and written utterances that are offered to prove a declarant's unstated beliefs from the definition of hearsay.

1. Such utterances are not offered to prove the truth of the literal matters they assert

ii. The relevancy of these utterances still depends on the declarants' testimonial qualities

1. However, when the declarant is not intending to communicate the unstated belief, the sincerity danger may be minimal, and the utterance is analogous to non-assertive conduct

iii. In the majority of jurisdictions, if a court finds that the declarant specifically intends to communicate an unstated belief, it will usually exclude the utterance as hearsay

iv. Intent to communicate may be difficult to prove either because of factual uncertainty or because of ambiguity in the meaning of intent

IX. General Approach to the Admission of Hearsay Under the Exemptions & Exceptions

a. FRE 801(d) *exempts* eight types of out-of-court statements from the definition of hearsay, and FRE 803, 804, and 807 create 29 explicit *exceptions* to FRE 802's rule of exclusion

i. Exemptions vs. Exceptions is solely a drafting convention though

1. Drafters created the status of exemption to admit hearsay statements whose principal rationale for admission is the possibility for cross-examining the declarant
2. Most hearsay exceptions admitted under FRE 803, 804, and 807 are justified by the presence of circumstances that tend to minimize one or more of the hearsay dangers
    a. These statements may be more "trustworthy" than other hearsay, and therefore there is less reason for concern about the absence of cross-examination

b. FRE 801(d), FRE 803, and FRE 804 all apply a **categorical approach** to the admission of hearsay

i. These rules establish specific categories of out-of-court statements that can be admitted for their truth

ii. Note: FRE 807 applies a **noncategorical "trustworthiness" approach**

c. Process of Admission

i. A proponent typically offers to prove a declarant's out-of-court statement through the testimony of a witness who overheard it or through an exhibit that contains it (tape or document, e.g.)

ii. Opponent objects on grounds of hearsay

iii. Judge must decide whether the statement is hearsay under FRE 801(a)-(c)

iv. If it is hearsay, the judge must decide whether it fits within the categorical terms of a specific exception or exemption

1. The burden is on the proponent of the statement to produce foundation evidence – typically evidence of who the declarant is, what the content of the statement is, or the out-of-court circumstances in which the hearsay statement

was made – that satisfies the categorical terms of the specific exception or exemption aimed for

d. An out-of-court statement may sometimes be admissible pursuant to more than one hearsay exception or exemption
    i. It is sufficient to overcome a hearsay objection to show that the evidence falls within one exception or exemption though
    ii. Similarly, the fact that the evidence does not quite fit within a particular exemption or exception does not prevent its admission under a different one
e. Once something has satisfied a hearsay exception or exemption, it will still need to be tested under the Confrontation Clause in criminal cases (*infra*)

X. Problem 8.4:
a. Police officer testifies that after interviewing all the available witnesses, including the pedestrian and the driver, she filed an accident report starting that the driver of the SUV failed to stop at the red light. The original report is offered into evidence (i.e., no Original Documents problems)
    i. Report = hearsay
        1. It is a statement made by the person who is now the witness, *but* <u>not</u> made while they were a witness
        2. The report is introduced/only relevant to prove the truth of the matters asserted therein
    ii. Officer can testify as to what she said in the report, and then she would be testifying as a witness
b. The report also states that the pedestrian told the officer that, after the accident, the driver said to the pedestrian: "It's all my fault"
    i. Multiple levels of hearsay
        1. Need an exception for all levels

XI. Problem 8.6: S is suing Deli for injuries sustained when she fell on spilled ketchup; S claims that the ketchup had been on the floor long enough for Deli employees to have known about it; S calls B, who offers to testify: "About half an hour before S had her accident, I was walking past the takeout counter when I overhear someone exclaim loudly 'There's ketchup on the floor!'"
a. Not hearsay
    i. We have a statement – clearly communicative intent
    ii. Whoever made the statement is an out-of-court declarant
    iii. But the statement is not offered to prove the truth of the matter asserted (i.e., to prove there was indeed ketchup on the floor – no one is disputing this point)
        1. The statement is being offered to show that the Deli employees had reason to know there was ketchup on the floor and they did nothing about it
            a. Relevant for S's negligence claim
                i. We don't even care if the declarant was totally wrong or looking at a completely different aisle – the mere fact that someone said there was ketchup on the floor would help S prove that there was ketchup on the floor
b. "Loudly" fact = statement is only relevant if a Deli employee could have heard it
    i. This speaks to relevance though, not hearsay

XII. Problem 8.8: In a racketeering prosecution, a witness for the prosecution appears visibly nervous, etc., but finally does ID one of the Ds as the person who paid him to deposit cash in a phony bank account. At the close of the witness's testimony, P asks whether Ds have threatened him. Witness responds that two of the Ds called him at his house a week before the trial and made threats on his life if he testified
a. Not hearsay
    i. We have a statement
    ii. The statement was made by someone other than the testifying witness testifying at the time (i.e., it was made by Ds)
    iii. But the statement is not offered to prove the truth of the matter asserted

1. If this was a witness tampering prosecution, then the point of introducing the statement would be to prove that a witness was in fact tampered with
2. But this is a racketeering case and the reason for introducing the statement was to explain why the witness looked like a crappy witness (because he was scared)
    a. We do not actually care about the truth of the matter asserted and we do not even care if it was someone other than D who made the statement pretending to be D – as long as the witness heard the statement and it had an effect on him

XIII. Problem 8.13 (Insider Trading): To prove that CEO was responsible for the sale of his 100,000 shares, P offers the letter signed by CEO to his broker directing the broker to make the sale

- a. Not hearsay
    - i. We have a statement with communicative intent
    - ii. The letter is not a statement of a witness on the witness stand
    - iii. But the letter is not offered to prove the truth of the matter asserted
        1. It is the operation of the act (to sell), rather than any truth value we can extract from the statement that is relevant
        2. So it is not hearsay because it is not offered to prove the truth of the matter, but just to prove the matter itself
            a. It is relevant that the statement was made, and that is all we care about
- b. To prove that CEO gave this order on 3/16/04, P points to the handwritten date of 3/16/04 on the letter
    - i. Hearsay
        1. We have a statement – a communicative assertion
        2. Made by someone other than the declarant on the witness stand
        3. Only possible relevance is to assert the truth
            a. The only relevance of this is "I read this letter on 3/16/04 and I am making note of that"

XIV. Problem 8.16: D is being prosecuted for bank robbery; eyewitnesses claim that the robber wore a loud Hawaiian shirt; P offers testimony of Officer E

- a. Officer E asked D's wife to give her the shirt that her husband wore the previous day and she handed her a Hawaiian shirt
    - i. Hearsay
        1. Wife's conduct is tantamount to a verbal statement with communicative intent, and this is only relevant to prove the truth of the nonverbal conduct (i.e., that her husband did indeed wear that shirt yesterday)
- b. Officer E watched D's wife walk into the bedroom and she saw her conceal a leather bag under the bed (which later was found to be full of money)
    - i. Not hearsay
        1. Wife's conduct was not meant to communicate anything – it was not an assertion
        2. Officer E can testify as to wife's conduct (unless excludable on some other grounds)

XV. Problem 8.17: Ship captain inspected ship and then sailed away with his family; P wants to introduce this evidence to prove that the ship was safe

- a. Ship captain's nonverbal conduct is <u>not</u> hearsay because there was no assertive intention by the ship captain to communicate anything to anyone
- b. Evidence is relevant to prove that the boat was navigable (so that the reason the boat is gone is because of bad weather – covered by insurance – and not poor maintenance – not covered) only if ship captain has knowledge of what makes a boat navigable/seaworthy
    - i. Need to lay the foundation before relevancy is established

XVI. Problem 8.18 (Deli/Ketchup): Q as to whether the Deli destroyed the video tapes in question

a. This was clearly not intended as an assertion by the Deli (i.e., we are about to get sued so we are destroying the evidence), so this nonverbal conduct would not fall under the definition of hearsay
b. If the video tapes were not destroyed, but available, would they be hearsay?
    i. Animals and machines (tapes, e.g.) cannot be hearsay declarants – video machine was not a witness
    ii. Law covers machine testimony through the foundation requirements (FRE 900s)
        1. If P could lay the proper foundation, the tapes would be admissible and the images would not be deemed hearsay
            a. *But*, if the tape showed someone saying something, then that does raise a hearsay problem because the person speaking is the declarant now, and not the tape

XVII. Problem 8.22: To prove that Darcy had been using drugs, testimony of one of Darcy's friends is offered: "Last Dec. 31st, I visited Darcy at the State Drug Rehabilitation Center, where he is a patient"
a. Hearsay
    i. This evidence is relevant because of *where* he visited Darcy – why is Darcy at a drug rehab → because he uses drugs
        1. If you are trying to establish the truth of the proposition that Darcy uses drugs and as evidence of that he is in rehab, then Darcy's friend is not in a position to have firsthand knowledge – he is reporting about what other people said and did (i.e., in deciding Darcy needed to be there)
            a. This would be an attempt to smuggle in hearsay (*if* there is not an exception)
b. When would this statement <u>not</u> be hearsay? If the relevance was to prove that Darcy was a patient somewhere (i.e., he was not out robbing a bank) – now the witness has firsthand knowledge to testify about where Darcy was at a particular time

The Basic Exceptions

I. FRE 801(d) exempts certain types of out-of-court statements from the definition of hearsay
a. These statements are admissible to prove the truth of the matters they assert, assuming they are otherwise unobjectionable
    i. FRE 801(d)(1) exempts certain kinds of statements previously made out of court by a testifying witness
        1. There are two basic requirements:
            a. Out-of-court declarant is testifying at trial; and
                i. This can be satisfied through the witness's own acknowledgement that he made the out-of-court statement – or – through the testimony of another witness who can say that the witness was the out-of-court speaker
            b. The declarant is subject to cross-examination concerning the statement
                i. Can you be on the witness stand and *not* subject to cross-examination?
                    1. Ex: if the declarant-witness asserts a valid claim of privilege
                        a. Statement will not be admissible under FRE 801(d)(1) … but there might be another exception that gets it in
                ii. Ordinarily, the witness is regarded as subject to cross-examination if he is on the stand and responds willing to questions
                    1. The witness need not necessarily remember the underlying event or making the prior statement

a. There does not appear to be very many circumstances when a witness is on the stand, not asserting a privilege, and is so unresponsive to questions on cross that they are deemed not subject to cross-examination

2. Personal knowledge is required for statements admitted under FRE 801(d)(1)

ii. FRE 801(d)(2) exempts out-of-court statements made by a party or by persons affiliated with a party, so long as the statements are offered against that party

1. The foundational requirements of subsections (A)-(E) focus primarily on the relationship between the party and the declarant
2. The single common requirement for all the subsections is that the proponent must offer the declarant's statement *against* the opposing party
    a. It is the proponent's choice whether or not to use an opposing party's own statements, or statements of affiliates, to prove the case *against* that party at trial
3. There is no requirement that a party admission be based on firsthand knowledge
    a. This is in contrast to all other hearsay exceptions and FRE 801(d)(1) statements
4. Admission by party-opponent can be a rank conclusion or opinion
    a. Normally, testimony of witnesses is about facts, but here evidence law allows lay opinions
5. No requirement that the declarant is on the witness stand or subject to cross-examination, like FRE 801(d)(1) requires
6. Rationales:
    a. People should be responsible for their statements
    b. Reliability arguments
    c. Necessity
7. Foundational Questions Decided by Who? (more *infra*)
    a. Overwhelming weight of authority is to treat these as FRE 104(a) questions, decided by the judge by a preponderance of the evidence
    b. *Cf.* Lawson thinks the argument for them being FRE 104(b) questions is stronger though – as a matter of textual interpretation
        i. They look like classic conditional relevant questions – unless the requirements are satisfied, the statement won't be deemed relevant under FRE 401
        ii. If it is a FRE 104(b) question, the trial judge will have to conclude that here are sufficient facts so a reasonable jury could believe the evidence, and if he does, he will then send it to the jury

II. FRE 801(d)(1)(A): Prior Inconsistent Statements

a. Foundational Requirements:

i. The contents of the statement are inconsistent with testimony given at trial;

1. The judge should make an FRE 104(a) determination of inconsistency – under the higher standard of preponderance of the evidence – as a condition of admitting the statement for its truth
    a. The relevancy of the prior statement is to prove the truth of its own content
        i. Relevancy is not dependent on whether the statement is actually inconsistent with the witness's trial testimony

ii. The statement was made under oath subject to the penalty of perjury; and

1. FRE 104(a) determination also

iii. The statement was made at a trial, hearing, other proceeding, or in a deposition
1. FRE 104(a) determination also
2. "Other proceeding" = typically, statements made in the course of interviews and lineups are held <u>not</u> to be within the meaning of "other proceedings"
a. The formality of trials, hearings, and depositions is thought to be conducive to reliability and truthfulness
i. The informality of most other interrogations is not
b. In general, freestanding affidavits do <u>not</u> count under FRE 801(d)(1)(A) as "other proceeding"

b. REMEMBER: Prior Inconsistent Statements *Not* Within FRE 801(d)(1)(A) → Impeachment Purposes
i. An allegedly inconsistent statement that does not fit within FRE 801(d)(1)(A) may still be admitted just to show that the witness has said inconsistent things and should not be relied on
ii. *But* if the foundational requirements of FRE 801(d)(1)(A) are satisfied, the statement can be admitted as substantive evidence for the truth of the matter contained therein

III. <u>FRE 801(d)(1)(B): Prior Consistent Statements</u>
a. Foundational Requirements:
i. The contents of the statement are consistent with testimony given at trial; and
1. (*but* <u>no</u> additional requirement that the statement was made under oath, subject to perjury, etc.)
ii. The statement is offered to rebut a charge of recent fabrication or improper influence or motive
1. FRE 801(d)(1)(B) applies only if the credibility of the testifying witness has been attacked in the particular way spelled out in the rule
a. Proof of such attack will be apparent to the judge from the opponent's cross-examination of the witness or from the admission of other impeaching evidence
b. Prior consistent statements should not be admitted for their truth until such an attack has occurred
c. Ex: of motive to fabricate = where confederates of D negotiate a plea bargain and then testify against D; D will seek to impeach such witnesses with the suggestion that they have received favorable treatment from the government in exchange for testimony inculpating D
2. "Rebut" → only pre-motive statements could "rebut" an improper motive because their consistency would show that the in-court testimony was not tainted by that motive
a. Advisory Committee Notes limit the scope of subsection (B) to statements made *before* the motive to fabricate arose

b. REMEMBER: Prior Consistent Statements *Not* Within FRE 801(d)(1)(B) → Bolstering the Witness
i. Consistent statements that do not fall within FRE 801(d)(1)(B) may still be relevant to bolster credibility on other grounds
1. They are, however, not admissible for their truth

IV. <u>FRE 801(d)(1)(C): Prior Statements of Identification</u>
a. Statements identifying a person are admitted under FRE 801(d)(1)(C) without any necessary predicate testimony from the declarant-witness that is consistent or inconsistent with the out-of-court identification
b. Foundational Requirements:
i. The statement is one of identification of a person; and
1. FRE 801(d)(1)(C) *only* covers identification of persons – <u>not</u> of vehicles, animals, etc.
ii. The statement was made after the declarant perceived that person

1. Classic scenario: statements of identification made at traditional lineups and show ups
    a. The declarant would be re-perceiving the person whom the declarant had seen previously committing a crime or participating in some other disputed event
2. Subsection (C) has been interpreted very broadly – not limited to re-perceptions at lineups
    a. Ex: statements that identify a person seen after the disputed event in a chance encounter; that identify the photograph of the person; and that identify a police artist sketch of the person
    b. Also, has been held to permit the admission of hearsay statements that identify people (in surveillance photos, e.g.) who are known to the declarant, but when the declarant did not perceive the underlying disputed event

c. Split in Authorities re: foundational requirement – "perceived"
    i. Ex: *United States v. Lopez* (3d Cir. 2001): a statement to police, made on the day after a series of home invasions in a neighborhood, that the witness had seen three of the defendants in the area of the crime during the time the homes were invaded <u>was admissible</u> under FRE 802(d)(1)(C)
        1. This statement was made without re-perception of the defendants, and was simply a person coming forward after a crime is committed and saying he saw particular persons at a certain place and time
            a. 3d Cir. held that there is nothing in the text of the rule requiring re-perception, so this initial identification can be admitted as non-hearsay (provided the witness is on the stand and subject to cross examination)
        2. Lawson supports this view – no language in the Rule requiring re-perception
    ii. Ex: *United States v. Kaquatosh* (E.D. Wis. 2003): rejected the "*Lopez* rule," criticized as contrary to the meaning of "identification" as used in FRE 801(d)(1)(C), which requires designation of a particular person (or photo) as being the same person previously perceived
        1. Editors support this view – need re-perception
d. Split in Authorities re: whether a physical description of a person given by the declarant to the police, also without re-perception of the person, fits within FRE 801(d)(1)(C)
    i. Ex: *United States v. Brink* (3d Cir. 1994): **admitting** bank teller's statement to police, on the day following a bank robbery, that the robber had dark-colored eyes
    ii. Ex: *Puryear v. State* (Fla. 2002): **excluding** robbery victim's statement to police that assailant was a black male, missing every other tooth, and had body odor

V. <u>FRE 801(d)(2)(A): A Party's Own Statements</u>
a. Foundational Requirements:
    i. The statement is made by a party; and
    ii. The statement is offered against that party
b. This is perhaps the simplest foundation of all the hearsay exceptions and exemptions
    i. *Any* out-of-court statement made in *any* context by *any* party (whether P or D) to *any* action (whether civil or criminal) may be admissible – unless otherwise objectionable – if offered *against* that party
        1. Note: If a party's nonverbal conduct is hearsay under FRE 801(a) because it is intended as an assertion, it is a statement for purposes of this or any other hearsay exception or exemption
            a. Ex: a nod of assent in response to an incriminating question, e.g.
c. Individual and Representative Capacity
    i. A person can speak, and can be a party, either as an individual or as a representative – a trustee, executor, or guardian – of some other entity or individual

1. The rule provides for the admission of statements against the individual person even if those statements were made when the individual was speaking as a representative outside of court
    a. And statements made outside of court by a person, whether as an individual or as a representative, will be admissible against that person if he appears as a party solely in a representative capacity
    b. *Cf.* when an entity such as a corporation is a party, the statements of its representatives can be admitted against the entity under FRE 801(d)(2)(C) or (D), but not pursuant to FRE 801(d)(2)(A)

d. Admission of Party Admissions in Multiparty Cases
    i. Ex: *Bruton v. United States* (U.S. 1968): one party's admission is <u>not</u> admissible against anyone other than the party who made the statement
        1. Solutions: severing the trials; redact specific references to the co-defendant (unless it is obviously still incriminating to the co-defendant); substitution of names with neutral pronouns ("other guys," "persons") if there are several co-defendants
        2. Lawson: 100% will not be a *Bruton* problem on the exam

VI. <u>FRE 801(d)(2)(B): Adoptive Admissions</u>

a. Foundational Requirements:
    i. A statement has been made;
    ii. The party has done something to manifest adoption of it or to show belief in its truth; and
        1. A party may manifest adoption of a statement in any number of ways, including through words, conduct, or silence
        2. If ambiguous, the meaning of a party's behavior is ultimately for the jury to assess, but it has been held that the proponent must present evidence that the party, heard, understood, and acquiesced in the statement
            a. Courts appear to conflict as to whether these are preliminary questions decided pursuant to FRE 104(a) or 104(b)
                1. If you think it is a FRE 104(a) question: trial judge will have to decide the preliminary question of whether the party manifested an adoption to the statement by a preponderance of the evidence
                2. If you think it is a FRE 104(b) question: trial judge will have to conclude that there is evidence sufficient to support a finding, in order to send it to the jury
    iii. The statement is offered against the party

b. Under FRE 801(d)(2)(B) there is no limitation on who may make the statement that is subsequently offered against a party
    i. It is thus not an exemption based on a relationship between the declarant and the party
    ii. Rather, it is based on the party's own conduct

c. Justification → If a party has adopted or manifested belief in the truth of an uncross-examined statement made by another, an inference can be drawn that the party knows that the contents of the statement are accurate, or thinks that the person speaking is reliable and knowledgeable
    i. The party can still dispute these inferences and the statement's accuracy at trial though

d. A problem with using nonresponsiveness or silence as the basis for an inference of a subsection (B) admission is the ambiguity of the party's conduct
    i. These ambiguities are resolved by preliminary fact finding on the question of whether the party's conduct "manifests" adoption or belief
        1. The burden is on the proponent to convince the judge [under FRE 104(a)] that in the circumstances a failure to respond is so unnatural that it supports the inference that the party acquiesced in the statement

a. The judge considers the nature of the statement, the audience, and the surrounding circumstances

2. What if the party testifies at his trial that he did not even hear the other person's statement (to which his silence is alleged to have acquiesced)?
    a. While there is substantial case law that this preliminary question should be decided under FRE 104(b), under the analysis on pg. 217, the judge should use FRE 104(a) to decide whether there is a preponderance of the evidence that the party actually heard the statement
        i. This preliminary fact is solely a matter of hearsay policy, not of relevancy, because evidence of the other person's statement is relevant and harmful to the party whether or not the party heard it

VII. <u>FRE 801(d)(2)(C) and (D)</u>

a. FRE 801(d)(2)(C): Authorized Admissions, Foundational Requirements:
    i. The statement concerns a subject;
    ii. The statement was made by someone whom the party authorized to make a statement concerning that subject; and
        1. Many of these cases involve statements made by attorneys on behalf of their clients – the nature of the relationship and the specific task undertaken by the attorney (or other agent) who represents a party imply authority to speak on the party's behalf
            a. Whether or not such authority exists is a preliminary question for the judge to decide under FRE 104(a)
        2. Other plausible examples:
            a. Minutes taken by the secretary at a school board, if offered against the board
            b. Employer-independent contractor situations
            c. Parent-child situations
    iii. The statement is offered against that party

b. FRE 801(d)(D): Admissions by Agents, Servants, and Employees, Foundational Requirements:
    i. The declarant is an agent or servant (employee) of the party;
        1. The contents of the statement itself may be used to prove the fact of agency and the scope thereof, but the statement alone is not sufficient – need corroborating evidence
    ii. The statement was made during this relationship;
        1. This does not necessarily mean that the statement must be made "on the job" or during the performance of duties
        2. The exemption includes statements made away from the workplace to third parties uninvolved in the speaker's work
    iii. The statement concerns a matter within the scope of the agency or employment; and
        1. Note: Subsection (D) does <u>not</u> require that the declarant have specific authority to speak, nor does it require that the statement be made within the scope of the agent's duties
            a. Rather, subsection (D) focuses on the subject matter: the statement must concern a matter within the scope of employment, that is, must match the subject matter of the employee's job description; and it must be made during the agency relationship's existence
        2. Statements are excluded as <u>not</u> concerning a matter within the scope of the agency when the declarant is like a bystander eyewitness who describes an event perceived at work that has no relation to the job or the concerns of the speaker

3. The contents of the hearsay statement alone are not sufficient to prove the scope of authority – need corroborating evidence

iv. The statement is offered against the party

VIII. FRE 801(d)(2)(E): Co-conspirators' Admissions

a. Foundational Requirements:
   i. The declarant and the party against whom the statement is offered were both members of the same conspiracy;
   ii. The statement was made during the course of the conspiracy; and
   iii. The statement was made in furtherance of the conspiracy
b. LAWSON SAYS IGNORE THIS – WAY TOO DETAILED

IX. Problem 8.32: E (girls) and R (boy) were riding in a car that crossed the median strip on a two-lane highway and collided with a pickup truck driven by W; E was killed in the crash and her executor is suing R for wrongful death, alleging that he was negligently driving the car; R claims E was driving and the accident was her fault

a. Several hours after the accident, W told a trooper that a man was driving the car; two days later W told a friend that a woman was driving the car; called by P (executor) to testify at trial, W testifies that he has a picture in his mind that the woman was behind the wheel
   i. Can P use W's prior statements to prove that R was driving?
      1. FRE 801(d)(1)(A) is not satisfied because these statements were not made under oath, subject to the penalty of perjury at a trial, hearing, or other proceeding, or deposition
         a. Therefore, these inconsistent statements cannot be admitted for the truth of the matter asserted therein
      2. FRE 801(d)(1)(C) → split in authority
         a. Editors/Wisconsin case would not let in W's statements because there was no re-perception
         b. Lawson/*Lopez* case would let the statements in
   ii. To impeach W's credibility?
      1. Yes – can use for impeachment purposes
   iii. If there is no other evidence that R was driving, will the judge grant a directed verdict against P?
      1. Yes, unless the prior inconsistent statements are substantively admissible – for the truth of the matters contained therein
b. What if W's deposition had been taken by P and W said a man was driving?
   i. OK as impeachment evidence
   ii. FRE 801(d)(1)(A): inconsistent with declarant's testimony (satisfied) – given under oath (satisfied) – in a deposition (satisfied)
      1. Can be admitted as substantive evidence
   iii. FRE 801(d)(1)(C): same problem we had in (a) *supra*
c. What if there was no deposition but W had previously submitted a sworn affidavit that said a man was driving in support of P's M for SJ
   i. FRE 801(d)(1)(A): sworn affidavits ≠ "other proceeding", so this hearsay exemption is not satisfied
   ii. Only coming in if FRE 801(d)(1)(C) lets it in or there is another exception
d. Assume the statements in (a) are admitted to impeach W; P also asks W: "Isn't it true that R paid you for the extensive damage done to your truck in the collision, just a week before this trial?"; W: "Yes"
   i. FRE 104(a) trial judge determination needs to be made as to whether writing someone a check is assertive conduct
      1. If it is not assertive, then all we have is conduct so it would not be hearsay and would be admissible evidence
   ii. Would be admissible for evidence of bias, even if there is no substantive use

iii. Dicta: This is not an offer to pay medical bills (FRE 409) and this is not an offer to compromise because W is not suing (FRE 408)

e. Assume the evidence in (d) is admitted; R then offers testimony of W's coworker that, on the day before the trial started, W said that he thinks a woman was driving
   i. FRE 801(d)(1)(B) is <u>not</u> satisfied because the statement was after the alleged payoff – after the motive to fabricate developed

f. Assume that two *men* – E & R – were in the car; P (executor) offers testimony that W said to a trooper, just after the accident, that man there was driving and pointed at R
   i. FRE 801(d)(1)(C): depends on which authority you rely on (Lawson/*Lopez* or Editors/Wisconsin)
   ii. OK for impeachment purposes

g. Same facts as (f): What if several says after the accident W said to a friend that the man with black hair and the blue jacket was driving (i.e., R)
   i. Only if FRE 801(d)(1)(C) is satisfied

X. Problem 8.38 (Bus Driver): Kid's mom testifies that kid's teacher told her, several weeks after the accident, that Driver's Supervisor had told the teacher that, in his opinion, Driver was not keeping a proper lookout before the accident
   a. FRE 805: Each level of hearsay must fall within an exception
   b. Statement by the Supervisor: Admissible under FRE 801(d)(2)(D) – at least against the School District, of which the Supervisor was employed by (probably not against Driver)
      i. Does not matter whether the Supervisor was expressing an opinion or legal conclusion because personal knowledge is not required for admissibility
         1. May go to the weight, credibility, or FRE 403 though
   c. Statement by the Teacher: Maybe Admissible under FRE 801(d)(2)(D)
      i. Teacher was an agency/employee → Relationship was currently existing → Within the scope of the Teacher's agency/employment? Nice FRE 104 question

Availability Exceptions

I. FRE 803 excepts 23 different types of hearsay statements from the general rule of exclusion
   a. There is <u>no</u> requirement in this rule that the declarant be unavailable to testify as a witness
      i. The premise of all FRE 803 exceptions is that these types of statements are reliable enough to be used in the jury's fact-finding even without cross-examination of the declarant by the opponent
         1. Advisory Committee: "These kinds of statements possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available"
   b. FRE 803 exceptions are categorical – they each define a specific type of out-of-court statement that may be admitted for the truth of the matter it asserts
      i. Because the declarant's statement is offered for its truth, the declarant is a source of knowledge for the jury, analogous to a witness testifying at trial
         1. Therefore, the fundamental requirement that witnesses must speak from personal knowledge applies as well to hearsay declarants under FRE 803 (and FRE 804)
   c. The opponent to an item of hearsay can attack the credibility of hearsay declarants in most of the ways that witnesses can be attacked
      i. **FRE 806: Attacking and Supporting Credibility of Declarant**: When a hearsay statement, or a statement defined in FRE 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination

d. In general, the judge's preliminary fact finding necessary to apply the categorical terms of FRE 803 exceptions is governed by FRE 104(a)
    i. The judge may use the statement itself to determine whether and when the event or condition occurred, pursuant to FRE 104(a), and in some cases may require no independent evidence

II. **FRE 803: Hearsay Exceptions; Availability of Declarant Immaterial**: The following are not excluded by the hearsay rule, *even though the declarant is available as a witness*:
    a. (1) **Present sense impression**. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter
    b. (2) **Excited utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition
    c. (3) **Then existing mental, emotional, or physical condition**. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will
    d. (4) **Statements for purposes of medical diagnosis or treatment**. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment
    e. (5) **Recorded recollection**. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party
    f. (6) **Records of regularly conducted activity**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with FRE 902(11), FRE 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit
    g. (7) **Absence of entry in records kept in accordance with the provisions of paragraph (6)**. Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness
    h. (8) **Public records and reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness
    i. (9) **Records of vital statistics**. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law

j. (10) **Absence of public record or entry**. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with FRE 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry

k. (11) **Records of religious organizations**. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization

l. (12) **Marriage, baptismal, and similar certificates**. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter

m. (13) **Family records**. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like

n. (14) **Records of documents affecting an interest in property**. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office

o. (15) **Statements in documents affecting an interest in property**. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document

p. (16) **Statements in ancient documents**. Statements in a document in existence twenty years or more the authenticity of which is established

q. (17) **Market reports, commercial publications**. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

r. (18) **Learned treatises**. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits

s. (19) **Reputation concerning personal or family history**. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history

t. (20) **Reputation concerning boundaries or general history**. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located

u. (21) **Reputation as to character**. Reputation of a person's character among associates or in the community

v. (22) **Judgment of previous conviction**. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for

purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility

w. (23) **Judgment as to personal, family or general history, or boundaries**. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation

III. FRE 803(1) and FRE 803(2)

a. <u>FRE 803(1): Present Sense Impressions</u>

i. Foundational Requirements:

1. The occurrence of an event or condition;
2. The contents of the statement describe or explain the event or condition; and
3. The declarant made the statement while perceiving the event or condition, or immediately thereafter

ii. Primary Justification = the contemporaneity of the statement and the event it is offered to prove tends to ensure the declarant's sincerity – no time or opportunity to fabricate

b. <u>FRE 803(2): Excited Utterances</u>

i. Foundational Requirements:

1. The occurrence of a startling event or condition;
2. Contents of the statement relate to a startling event or condition;
3. The statement was made by the declarant while under stress of excitement; and
    a. Factors re: declarant under the stress of excitement:
        i. Age of the declarant
        ii. Nature of the event
        iii. Lapse of time between the event and the statement
        iv. Whether the statement was made in response to questions
        v. Declarant's physical and mental condition
4. The stress of excitement was caused by the startling event or condition

ii. Primary Justification = a statement made under the stress of a startling event or condition is likely to be spontaneous, and a person under stress is not likely to develop the intent to fabricate – therefore likely to be sincere

c. FRE 803(1) and (2) are categorical

i. **If a statement clearly fits within the broad categorical generalizations of the specific exception, it must be admitted** (unless there is some other objection to its admissibility unrelated to hearsay)

1. Except for three specific exceptions [FRE 803(6), 803(8), and 804(b)(3)], there is <u>no</u> explicit judicial discretion to exclude a particular statement that fits within a categorical exception because the judge doubts the sincerity, perception, memory, or narration of the hearsay declarant

ii. If a judge thinks that a hearsay statement seems to be particularly trustworthy but it is neither contemporaneous with an event nor made under the stress of excitement, the judge has no explicit discretion under FRE 803(1) or (2) to admit it

1. The categorical requirements of each exception determine admissibility

iii. Judges do have some leeway though when the interpret and apply the categorical terms of the exceptions to particular statements

1. Ex: how long a time lag is permitted by the term "immediately thereafter"?
2. Ex: just what is "stress of excitement" and how long does it last?

… considerable room for judicial interpretation

d. Distinction between the two is temporal

i. Present sense impression are in the present – while happening or immediately after

1. This needs to be close to 0 seconds/minutes after the event occurred
    a. Lawson doesn't think 5 minutes afterwards will count as a present sense impression

ii. Excited utterances do not have such a strict temporal requirement – as long as you are under the stress of excitement when the statement is made
1. Case law supports something being an excited utterance two days after the event occurred
a. Notion that stress from the event could manifest itself several days later
i. FRE 104(a) question for the judge to decide

e. Personal Knowledge Requirement → the proponent of a present sense impression or excited utterance must show that the declarant had personally perceived the event or condition about which the statement is made

f. Problem 8.43 (Bus Driver): A teacher at kid's school testifies that A, who was on the bus with kid, was playing during recess several days after the accident when A suddenly started to cry and exclaim – "That's the bus driver who hit kid on the side of the road" just as Driver was walking by
i. "That's the bus driver …"
1. Surely a present sense impression if she is saying it as the Driver walks by
a. But this doesn't really help P because everyone agrees Driver hit the kid – the debate is about who is at fault
ii. "… on the side of the road"
1. Not a present sense impression because it is two days after the accident
2. If the statement is going in, it will have to be as an excited utterance
a. Whether something could be an excited utterance two days after the accident = FRE 104(a) question for the trial judge to decide

IV. <u>FRE 803(3): State-of-Mind Declarations</u>

a. Foundational Requirements:
i. The contents of the statement express the declarant's state of mind that is *currently existing* at the time of the statement
ii. State of mind may include emotion, sensation, physical condition, intent, plan, motive, design, mental feeling, pain, and bodily health; and
iii. A state of mind of memory or belief may <u>not</u> be used to prove the fact remembered or believed unless it relates to the declarant's will (which we are not dealing with)
1. Limitation: statements of memory or belief *may* be used to prove a declarant's then-existing relevant state of mind, but *may not* be admitted to prove the fact remembered or believed (unless that fact relates to the declarant's will)
a. Ex: Emily said out of court, "I am angry at John because he stole all of my money last year" – FRE 803(3) <u>could</u> be used to prove E is mad at J; FRE 803(3) <u>could not</u> be used if the statement is offered to prove that John did steal the money (the fact remembered or believed)
2. Sometimes state of mind will be tied up with other, inadmissible stuff and it can be hard to disentangle the two
a. Ex: "*I feel hurt and betrayed* [OK per FRE 803(3)] . . . *by that lying, cheating SOB* [not a statement about state of mind, but rather about past memories or beliefs that lead toward a state of mind, so <u>not</u> admissible]"

b. Primary Justification = there are no perception or memory dangers
i. Necessity may also justify admission – it may be unwise to bar from admissibility one of the primary sources for evidence about mental states

c. For a declarant's statement of state of mind to be relevant, the currently existing state of mind need not be an ultimate issue in the case
i. Evidence of a person's existing state of mind may be just one step in the inferential process to establish some fact of consequence

d. What if we don't care about the then existing mental state, but we care about the mental state before or after the statement?

i. Suppose for relevance purposes, we are most concerned about the state of mind two days before the statement, but we don't have a statement from this time – can we use the person's statement two days later as part of an inferential chain suggesting that if they felt this way at T+2, then maybe they felt the same way at time T (which is the time we really care about)
    1. Projecting a statement backwards or forwards can satisfy the FRE 803(3) requirement, but need to make sure it also satisfies FRE 401
        a. In order to make it relevant you have to be able to leverage the then existing mental state to a different point in time
            i. Which can be done when it makes sense to do so – that is, *when it is plausible to think, given the nature of the statute and the time lapse, there is consistency in state of mind over the time span*
    2. Ex (pg. 505): D wants to establish that some third person had a motive for killing the victim, in order to suggest that the third person was in fact the killer; third person's statement: "I hate the victim," made a week before the killing, is admissible under FRE 803(3) to prove that one week before the killing the third person hated the victim
        a. From hatred at that time we infer a future state of mind – there was probably still hatred a week later, when the killing occurred
            i. Hatred a week later is relevant to show a motive to harm the victim, and from motive we infer the possibility that the third person killed the victim
    3. Ex (pg. 506): M's statement on Monday – "I plan to leave on my vacation to Hawaii on Tuesday" – may be relevant to prove that she in fact left on Tuesday, and that she went to Hawaii
        a. We must infer the truth of the matter she assets – that on Monday, M planted to leave on Tuesday for her vacation in Hawaii
            i. Then from this state of mind, we can infer that she probably had the same intent on Tuesday and, then, that she carried it out and did go to Hawaii
        b. FRE 803(3) can be used to admit M's statement of intent to show that she had that same intent at some future time, and that she acted on it

e. *Mutual Life Insurance Co. v. Hillmon* (U.S. 1892, pre-FRE): suggests that you can use a declarant's state of mind declaration to prove the conduct of the declarant as well as a third person
    i. According to the Advisory Committee Notes, this doctrine is <u>not</u> overruled by the FRE, but the legislative history is ambiguous
        1. House Advisory Committee Report: FRE 803(3) hearsay exception is <u>limited to</u> use of the declarant's state of mind to prove *only* the declarant's own future conduct
        2. Open question how broadly the FRE incorporated *Hillmon*
            a. Ex: D says – "I am planning to met with X" – and X later turns up dead; D's statement is certainly admissible under FRE 803(3) as state of mind
                i. Under the narrowest interpretation of *Hillmon*, it would be permissible for the jury to infer that having a plan to meet with X means that D likely followed through on the plan and did so
                ii. Open question are to whether the FRE permit the jury to infer *that X* met with D (i.e., infer X's conduct consistent with D's state of mind)
                    1. Some courts outright allow

2. Some courts require the inference only if supported by other evidence
3. Some courts do not allow the inference as to third parties

f. Problem 8.48: A bystander testifies that two miles before the accident a hitchhiker said: "I believe that blue car just sped right by me going 100MPH"
   i. Not admissible under FRE 803(3) because this is not a statement about the hitchhiker's state of mind, despite the language "I believe …"
      1. It is a memory or belief to prove the fact of the remembered or believed, what FRE 803(3) excludes
   ii. Maybe we try to qualify it as a present sense impression (if it is stated as it is happening) or an excited utterance . . . depending on the facts

g. Problem 8.54: S is charged with the kidnapping and murder of R, who has disappeared; pros claims S is engaged in extensive cocaine trafficking; that S hired R to do house cleaning for him; that R stole cocaine from his house; and that S retaliated by snatching R off the street, forcing him into this car, and murdering him; S explains R's prints in his car by claiming they took a friendly drive together
   i. W1: "On the Saturday he disappeared, R looked very nervous. He said to me, 'I'm afraid of seeing S'"
      1. Clearing within the FRE 803(3) state of mind exception
         a. Relevance: If R is afraid of S, he is not voluntarily getting into the car with him for a friendly drive
            i. No hidden hearsay problem here – just a straightforward use of declarant's mental state
   ii. W2: "A week before he disappeared, R said 'I don't ever want to see S again'"
      1. At the time R made this statement he was describing his then existing mental state
         a. We can infer from the fact that a week ago he felt this, that he had the same thoughts a week later
   iii. W3: "A few days before he disappeared, R said to me 'I'm afraid of S … because he got really violent with me when he found out about the cocaine I took'"
      1. First half = Admissible under the state of mind hearsay exception
      2. Second half = Inadmissible because it is a memory or belief about past events
      3. Options:
         a. Let it all in
         b. Keep it all out
            i. Notion that so much of the statement is wrapped up with the inadmissible part and the dangers of jury misuse are great
         c. Let some in, keep some out
            i. Likely the situation here because the statement is easily broken apart
   iv. W4: "A few days before he disappeared, R said to me, 'I think S is going to kill me'"
      1. Appears to be within the FRE 803(3) state of mind exception
         a. Does not appear to be a hidden way of getting in a memory or belief of past events

V. FRE 803(4) Statements for Medical Diagnosis or Treatment
   a. Foundational requirements:
      i. The statement must describe medical history, past or present symptoms, pain, sensations, or the inception or the general cause or external sources of symptoms;
      ii. A statement about the cause or source must be reasonably pertinent to diagnosis or treatment; and
      iii. The statement must be made for the purpose of medical diagnosis or treatment
   b. There is some overlap between this exception and FRE 803(3)

i. Ex: a patient's description of currently existing sensation ("I feel dizzy") could fall within both
    1. But FRE 803(4) also admits statements to prove current symptoms that exist outside the mind of the declarant ("The thermometer says I have a temperature of 102") and to prove past symptoms as well ("I had a runny nose yesterday")
        a. **The well-established test is that the declarant's motive in making the statement must be consistent with the purpose of promoting treatment**

c. FRE 803(4) does <u>not</u> specify that the declarant be the patient, relating the declarant's own medical history
    i. Family, friends, nurses, and other medical personnel may convey information for purposes of medical treatment that will be admitted under FRE 803(4)
    ii. If the patient is speaking to an intermediary – a child to a parent, e.g., so that the parent can relate the symptoms to a doctor – the terms of the exception could still apply so long as the purpose of seeking medical help exists
    iii. This feature of FRE 803(4) may make the scope broader than FRE 803(3) and the admissions doctrine
        1. i.e., because the declarant does <u>not</u> need to be a party to have the statement be admissible under FRE 803(4)
d. FRE 803(4) has been interpreted to apply only to statements by persons seeking care, not giving care
    i. Thus statements made by doctors to patients, or by consulting physicians to treating physicians, are not within the FRE 803(4) exception
e. Primary Justification = declarant's selfish motive to be truthful in making the statement
f. Statements About the Cause or External Source Must Be "Pertinent"
    i. It is common for persons seeking medical treatment to describe how their injury occurred, and FRE 803(4) explicitly includes such hearsay statements to prove the truth of the matters they assert ***if*** they are "reasonably pertinent to diagnosis or treatment"
        1. But sometimes patient's statements make more specific attributions of causation (naming specific people, e.g.) …
    ii. In general, pertinence is determined from testimony of the medical professional as to the type of information reasonably relied on by a physician in treatment or diagnosis
    iii. The issue of pertinence frequently arises in cases of child abuse and molestation when the victim names the abuser to the health care professional
        1. Most courts agree that the identity of the abuser is pertinent in domestic abuse cases
g. Most courts have held that admission of statements made to physicians only for the purpose of providing expert testimony is now permitted by FRE 803(4)
    … abandoning the common law limitation
    i. Court will leave it up to the jury to figure out how to discount the fact, if at all, that the statements were made for the purpose of medical diagnosis in anticipation of litigation
h. Statements Made to Psychologists – emotion or mental concerns
    i. The statements that would be pertinent for diagnosis and treatment in this context could potentially include anything and everything
        1. So to the extent that FRE 803(4) has application to this emerging world, it has the potential to be very broad
i. Problem 8.56
    i. "I have a severe headache" = Admissible under FRE 803(3), FRE 803(4), and if you are a party, under the admissions doctrine
    ii. "Yesterday, I had a severe headache" = Admissible under FRE 803(4), provided that it is pertinent to diagnosis or treatment; Inadmissible under FRE 803(3) because it is a memory or belief about past events

iii. "I was hit in the head with a baseball bat" = same as ii. *supra*
iv. "John Jones hit me in the head with a baseball bat" = FRE 104(a) question as to whether it is pertinent as to who hit you in the head
1. Notion that if it is a child versus a huge man, that might matter for treatment

VI. FRE 803(5): Past Recollection Recorded

a. Foundational Requirements:
i. The declarant is testifying as a witness;
1. FRE 803(5) is unique in the FRE 803 exceptions in that it *requires the presence of the declarant in court*, as a witness
a. It is categorically required that the witness not have sufficient memory of the underlying events that are the subject of the out-of-court statement, and that statement must be in written or recorded form
i. So in one sense the witness is both available (on the witness stand) and unavailable (no adequate current memory of the events recorded)
ii. The statement is in the form of a memorandum or record;
iii. The statement concerns a matter about which the witness cannot remember sufficiently to testify fully and accurately;
1. Think: Is it more advantageous to have this memo instead of orally testifying?
iv. The witness once had personal knowledge of the matter;
1. FRE 104(a) question (as most of these foundational requirements are)
v. The statement was made *or* adopted when the matter was fresh in the witness's memory; and
1. Typically if the witness remembers making the written recollection, the witness will be able to testify about the circumstances in which it was created
a. If the witness cannot remember making the written record, then the record's own contents, or the testimony of someone who saw the record being made, or other circumstantial evidence, would be used to satisfy the requirement of personal knowledge and fresh memory
2. The record can be made *or* adopted – so if the witness did not actually write or record, but read over an adopted the written statements made by another, the requirement can be satisfied
vi. The statement correctly reflects the witness's knowledge
1. Some evidence that the statement is correct – both sincerely and accurately recorded – is required
a. Proponent could simply ask the witness to testify truthfully that the record is a correct reflection of what the witness knew when the record was made
b. Sometimes the record itself contains information relevant to its accuracy
i. Ex: check list could contain a statement by the witness that he doubled checked the items; erasures and corrections in the list may indicate care about accuracy; etc.
b. FRE 803(5) places no limit on the subject matter or contents of a statement admitted as a past recollection recorded
c. FRE 803(5) limits the use of a past recollection recorded statement
i. It may be read to the jury, but may not be received as an exhibit
d. Primary Justification = necessity
e. Past Recollection Recorded and Multiple Declarants
i. The proponent of a cooperative report, e.g., can satisfy all of the FRE 803(5) requirements only if both out-of-court declarants – the original observer of the information and the later recorder of the information – testify about the observing and recording process

1. Both declarants in the hearsay chain must be presented as witnesses

ii. Additionally, to admit a cooperative report, e.g., the proponent could combine any number of other hearsay exceptions or exemptions to ensure that each level of hearsay is accounted for

1. **FRE 805: Hearsay Within Hearsay**: Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule

f. Past Recollection Recorded – vs. – Refreshing Recollection

i. When a witness initially cannot recall something, it may be possible to refresh the witness's memory by presenting that witness with a document or something else that the examiner or witness thinks may job the witness's memory

1. There are no substantive limits under the FRE on the type of item that may be used to refresh recollection
2. If the witness's memory is refreshed, then the witness will proceed to testify on the basis of their current, revived recollection
    a. The document is not used as evidence, however

ii. If the object is a writing that refreshes the witness's memory, the opposing party is entitled to inspect the document and to introduce into evidence those portions which relate to the testimony of the witness

1. **FRE 612: Writing Used to Refresh Memory**: Except as otherwise provided in criminal proceedings by 18 U.S.C. §3500, if a witness uses a writing to refresh memory for the purpose of testifying, either: (1) while testifying, or (2) before testifying (if the court in its discretion determines it is necessary in the interests of justice), an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness …
    a. This rule is a rule of admissibility *and* discovery
        i. So, any documents that a person looks at in preparing for a deposition may be discoverable by the opposing party – including documents that would otherwise be protected by the work-product doctrine or some privilege

VII. <u>FRE 803(6): Business Records</u>

a. Foundational Requirements:

i. The statement is in written or recorded form;
ii. The record concerns acts, events, conditions, opinions, or diagnoses;
iii. The record was made at or near the time of the matter recorded;
iv. The source of the information had personal knowledge of the matter;
v. The record was kept in the course of regular business activity; and
vi. It was the regular practice of the business activity to make the record

1. i.e., making such a record, or records like it, happens systematically or repeatedly
2. To be "in the course of a regular business activity", the declarant must have a *business duty* to make the out-of-court statement

b. Additional Features:

i. Authentication → Proponent must produce a custodian or other qualified witness to testify about the foundational requirements or present a written declaration certifying such foundation facts pursuant to FRE 902(11) or (12)

1. Courts require that the witness be able to explain the record-keeping procedures of the business organization
    a. Personal knowledge of the specific records at issue is <u>not</u> required
2. The foundational witness need not be an employee of the business, so long as there is a showing of familiarity with the record-keeping system

3. Written declaration plausibly could be satisfied by: "The records were made and kept in the course of business by an employee who had person knowledge of the facts recorded" (pg. 527)

ii. Judge may exclude a business record that otherwise fits the exception if the source of information or the method or circumstances of preparation show lack of trustworthiness

1. The approach of FRE 803(6) is to permit the judge to deal with untrustworthiness on a case-by-case basis
    a. For example, if the record does not seem reliable and in preparation for litigation or for a self-serving purpose
2. From the structure of the "unless" clause and the policy of the Advisory Committee to relax admission standards for business records, courts have determined that the opponent to the business record has the burden of persuading the judge that a record lacks trustworthiness

c. FRE 803(6) defines "business" very broadly
    i. When record-keeping activity assumes a public role, or provides a function within a formally organized institution, the terms of the exception probably apply
        1. Ex: BU Law School would qualify – does not have to be a profit venture
d. FRE 803(6) does <u>not</u> require testimony as to the accuracy of the contents of the record (like FRE 803(5) required)
    i. Trustworthiness is inferred from the "*regular* business activity" and "*regular* practice"
e. Primary Justifications = necessity and reliability
f. Records Containing Multiple Levels of Hearsay
    i. If several people contribute to the creation of a business record, then there are multiple levels of hearsay in the document
        1. Under FRE 805, each level must fit within a hearsay exception or exemption
            a. If only FRE 803(6) is used to admit the entire document, then all declarants must be shown to satisfy all of its foundational requirements
                i. Ex: J inspected the damaged goods and wrote notes about them; her assistant L entered the contents of her notes onto a company Damage Form; and the manager, E, actually wrote the Damage Report based on the Damage Form
                    1. Each of these declarants perceived something as part of their regulation business duty: the damaged goods, the notes, and the Damage Form
                    2. If the information is transmitted along this business chain with near contemporaneity, then its final incarnation as the Damage Report may fall within FRE 803(6)
                        a. The actual maker of the record, E, does not have to have personal knowledge of the damaged goods – rather, it is sufficient that the record was "made at or near the time *by, or from information transmitted by, a person with knowledge*"
                        b. The custodian or other foundation witness would be required to testify or submit a declaration about the process by which the information was transmitted and the record was created
            b. Can also combine any number of other hearsay exceptions and exemptions to satisfy FRE 805

g. Problem 8.64: P is suing C, chemical manufacturing company, for injuries from C-C cleaning product; P was taken to the ER; P's medical records contain the following notation made by ER doctor: "Burn appears to be second degree. Burn caused by C-C cleaning product, according to patient"
    i. Statements by the doctor to the patient are not under FRE 803(4), but will instead come in under FRE 803(6), which specifically contemplates diagnoses
        1. "Burn appears to be second degree" – exactly the record FRE 803(6) has in mind: routinely made by doctors who have firsthand knowledge about what they are reporting
        2. "Burn caused by C-C cleaner, according to patient" – probably not the doctor's job to report the manufacturer responsible for the burn
            a. Might be possible to make the argument that the manufacturer and the specific chemical makeup is relevant to the doctor, but seems unlikely that the doctor had a business duty to relate the manufacturer
            b. Might be possible to get in under FRE 803(4) as a statement from the patient to the doctor, if pertinent for the purposes of medical diagnosis or treatment

VIII. <u>FRE 803(8): Public Records and Reports</u>

a. Foundational Requirements:
    i. The statement is in the form of a record or report from a public office or agency; and
    ii. The contents of the record involve:
        1. The activities of that office or agency;
            a. Subsection A is generally interpreted to admit records pertaining to a public agency's own internal housekeeping functions, such as its own personal records and budgetary information
                i. It also includes records of official activities of the agency that are necessary to the performance of its public duties independent of any specific investigation or litigation, such as a county's registry of applicants for a firefighter position, or the record of a car's title history
        2. Matters observed and reported pursuant to a duty imposed by law, *but* <u>not</u> matters observed by police or law enforcement in criminal cases; or
            a. Subsection B admits records that report what public employees have observed pursuant to their public duties
                i. There is minimal foundation required
                    1. No requirement of near contemporaneity and regularity (like FRE 803(6) requires)
                ii. Many public records and reports are the product of multiple levels of hearsay, when one public employee observes and reports observations to a colleague or subordinate who is also a public employee, and who then records them
                    1. As long as each link in the chain bears a public duty, FRE 803(8)(B) encompasses the entire report
        3. Factual findings resulting from an investigation authorized by law, *but* <u>not</u> against the defendant in a criminal case
            a. A wide range of government investigative reports have been admitted in civil cases pursuant to subsection (C)
                i. Ex: findings of official misconduct; accident reports of police or incident reports by specialized agencies; safety and diagnostic studies relating to public health issues; and reports and studies on housing and employment discrimination
            b. The scope of "factual finding" is not unlimited, however

i. Ex: preliminary or interim evaluation opinions of agency staff; interim reports; and preliminary memoranda do not satisfy this requirement

c. It is well established that the findings and conclusions that result from judicial proceedings do not fall within FRE 803(8)(C)
    i. *However*, agency hearings within the executive branch (including ALJs) do qualify as investigations

d. FRE 803(8)(C) permits use of factual findings *only* in civil cases and *only* against the government in criminal cases
    i. The prohibition against use against criminal defendants is grounded on concern that multiple, potentially inadmissible hearsay sources in such reports could run afoul of the Sixth Amendment confrontation clause

b. Additional Features:
    i. A person with knowledge of the contents of the proffered public record is not required to lay this foundation and some public records, if identified and authenticated, can satisfy the foundational requirements with their contents alone
    ii. The judge may exclude public records if the sources of information or other circumstances indicate lack of trustworthiness
        1. Despite awkward wording of the rule, this exclusionary clause can be applied to all three subsections under FRE 803(8)
        2. The burden is on the opponent to persuade the judge as to the record's lack of trustworthiness
        3. The proponent must also be prepared to respond by citing factors of trustworthiness
            a. Ex: timeliness of the report; the skill, expertise, and motivation of the investigator; and the procedures followed in preparation of the record

c. Primary Justification→ necessity: the inconvenience of calling public officials to testify and the likelihood that public officials may not recall the information – and – reliability: public official's duty and public access to records

d. FRE 803(8)(C) & the Problem of Multiple Hearsay Sources Within Investigative Reports
    i. Subsection (C) clearly contemplates that the investigator may use hearsay sources, evaluate them, and then reject them or rely on them in making factual findings
        1. Thus, unlike business records under FRE 803(6) and public records under FRE 803(8)(B), where all sources must be operating under a business or public duty in order to conform to the requirement of the exception, **sources relied on under FRE 803(8)(C) need not be operating under any sort of public duty in relaying information to the investigator**
            a. Some of these hearsay sources may fall within their own exception or exemption to the rule of exclusion (excited utterance, statements of parties, business records, e.g.), and this would satisfy FRE 805
            b. If the underlying hearsay sources are not admissible, one safeguard is the public agency's ability to evaluate such sources before it decides to rely on them
                i. If the original source has personal knowledge and no reason to misrepresent the information to the public official, under the circumstances, then the report may be admitted
            c. Another safeguard is the court's ability to exclude the public report under the lack of trustworthiness clause in FRE 803(8)
                i. Courts have used this clause to exclude records of findings that are based on hearsay sources that are unidentified or that the court finds to be unreliable

e. Problem 8.68: D claims that cops violated his right to counsel by questioning him; at suppression hearing, P offers the report of FBI Agent P, who observed D's arrest and questioning; report was prepared several weeks after D's M was filed; it includes Agent P's own recollection of events, including that he and the other cops never heard D ask for an attorney
    i. Report
        1. In a criminal case = Inadmissible under FRE 803(8)(B)
        2. In a civil case = Admissible under FRE 803(8)(B), provided this satisfied the requirements of duty to observe *and* duty to report
    ii. Written finding made by a police dept. review board, after a full hearing, that a year ago the same three officers denied an arrestee assistance of counsel
        1. Presumably this is within the bounds of FRE 803(8)(C)

IX. Other Exceptions for Records Under FRE 803

a. The following exceptions for the most part are based on the notion that the records are likely to be reliable because of the nature of the entity preparing them, the routine nature of their preparation, and their subject matter
    i. FRE 803(9): Records of Vital Statistics
    ii. FRE 803(11): Records of Religious Organization
    iii. FRE 803(12): Marriage, Baptismal, and Similar Certificates
    iv. FRE 803(13): Family Records
    v. FRE 803(14): Records of Documents Affecting an Interest in Property
    vi. FRE 803(15): Statements in Documents Affecting an Interest in Property
    vii. FRE 803(16): Statements in Ancient Documents
        1. Foundational Requirements:
            a. Document has existed for 20 years or more
            b. Document's authenticity has been established
        2. If we have a business record, e.g., that is more than 20 years old, it could come in under FRE 803(16) without having to meet the business records requirements in FRE 803(6)
    viii. FRE 803(17): Market Reports, Commercial Publications
b. FRE 803(7) and FRE 803(10) set forth hearsay exceptions for the absence of entries in business and public records, offered for the purpose of proving the nonoccurrence or nonexistence of a matter that probably would have been included in the particular record
    i. According to the Advisory Committee, the exceptions exist in order to set the question at rest in favor of admissibility

X. FRE 803(22): Judgment of Previous Conviction

a. A judgment on the merits in a criminal or civil action is relevant to prove the actual occurrence of the facts essential to support the judgment
    i. The judgment is hearsay evidence of those facts
        1. A defendant's guilty plea is itself a hearsay statement, and a judge's or a jury's conclusions about the evidence presenting are offered to prove the truth of those conclusions
            a. FRE 803(22) provides for the use of criminal felony convictions
b. Foundational Requirements:
    i. The judgment must follow a criminal trial or guilty plea;
    ii. The judgment must be for a crime punishable by death or more than one year's imprisonment;
    iii. The judgment must be offered to prove the truth of a fact essential to the judgment; and
    iv. A judgment offered against a criminal defendant must be a judgment entered against that defendant, unless it is offered only for impeachment
c. The most frequent use of judgments is to impeach testifying witnesses pursuant to FRE 609

i. Courts invariably admit misdemeanor convictions from *crimen falsi* to impeach witnesses pursuant to FRE 609(a)(2), even though misdemeanors are not included within FRE 803(22)

XI. FRE 803(18): Learned Treatises

XII. FRE 803(19), (20), & (21) = Reputation Exceptions

a. FRE 803(19): Reputation Concerning Personal or Family History
   i. We'll just let this in, even though technically it is hearsay
b. FRE 803(20): Reputation Concerning Boundaries or General History
c. FRE 803(21): Reputation as to Character
   1. This type of evidence is normally admitted through reputation testimony by witnesses, which is hearsay, so we need a hearsay exception for admissibility

Unavailability Exceptions

I. FRE 804 provides five categorical hearsay exceptions that may be used **only** when the hearsay declarant is unavailable

a. These hearsay statements are admissible only as a last resort – *only if the declarant is unavailable to testify in person*
   i. Unavailability = prereq

b. FRE 804: Hearsay Exceptions; Declarant Unavailable
   i. (a) **Definition of unavailability**: "Unavailability as a witness" includes situations in which the declarant –
      1. is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
      2. persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
      3. testifies to a lack of memory of the subject matter of the declarant's statement; or
      4. is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
      5. is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means

      - A declarant is <u>not</u> unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying

   ii. (b) **Hearsay exceptions**: The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
      1. *Former testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination
      2. *Statement under belief of impending death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
      3. *Statement against interest*. A statement that:
         a. (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. (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.

4. *Statement of personal or family history*. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared
5. [Other exceptions.][Transferred to FRE 807]
6. *Forfeiture by wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness

II. FRE 804(a): Definition of Unavailability

a. These primarily questions are to be decided by the judge pursuant to FRE 104(a)
   i. For FRE 804(a)(1), the witness must claim the privilege on the stand
   ii. For FRE 804(a)(2), the witness must be present in court and the court must order the witness to testify
      1. Chain: witness asserts privilege → court denies privilege & orders witness to testify → witness still refuses to testify → court deems witness unavailable
   iii. For FRE 804(a)(3), the witness must testify as to failed memory (i.e. witness *must* be on the witness stand)
   iv. For FRE 804(a)(4), evidence that a mental or physical infirmity (confined to home because of a heart condition, unable to walk because of a back condition, incapacitated by a stroke, e.g.) will continue for some length of time is usually necessary
   v. For FRE 804(a)(5), representations of counsel have been held sufficient to establish the absence or unavailability of a witness, so long as good faith efforts have been made to secure the witness, including requests for voluntary attendance and subpoenas
      1. "Reasonable means" requires a good faith effort, but does not require the doing of a futile act
         a. *Cf*: a declarant in another jurisdiction may not be enough of an excuse if you can easily get them back
         b. *Cf*: a simple affidavit from the lawyer saying: declarant is unavailable, we can't reach him, likely is not going to be enough evidence to establish the fact of unavailability

b. If a witness is unable to, or refuses to, testify *because of the conduct of the proponent* of the hearsay statement, FRE 804(a) directs that the witness <u>not</u> be found to be unavailable
   i. Proof of threats made against a witness are not enough
      1. There must be an actual finding of presumptive unavailability
      2. There must also be a finding of "purpose" underlying the proponent's conduct

c. Problem 8.73
   i. Criminal D asserts Fifth Amendment privilege at trial and defense offers D's own prior testimony
      1. Cases suggest that when a criminal D is creating the unavailability himself by invoking the privilege he is <u>not</u> deemed unavailable
         a. An extension of the wrongdoing rationale
   ii. Witness invokes Fifth Amendment in court
      1. TRICK → We need to know whether the claim of privilege was upheld or not

a. Merely asserting the privilege does not make you unavailable

iii. Party offering the hearsay evidence submits his attorney's affidavit stating that the declarant is in another state beyond the subpoena power of the court
1. Maybe unavailability is satisfied – depends on what efforts the party made
a. A simple affidavit without more is probably not enough
i. What if the declarant could easily be brought back?

iv. Declarant's affidavit that the declarant does not recall the events in question
1. FRE 804(a)(3) *only* deals with situations where the person is actually on the witness stand
a. So this affidavit will not establish unavailability

v. Hearsay declarant is on the stand and claims to have no current memory of the events and the judge believes him
1. Clearly within FRE 804(a)(3)

vi. Hearsay declarant is on the stand and claims to have no current memory of the events and the judge does not believe him
1. From the limited standpoint of the party that is trying to establish unavailability under FRE 804(a)(3), whether the judge believes them or not does not determine the question
a. What determines the question is whether they are in fact available and capable of testifying on the matter

III. <u>FRE 804(b)(1): Former Testimony</u>

a. Foundational Requirements:
i. The statement must be in the form of testimony given at a hearing or in a deposition;
ii. In a **criminal** case, the party against whom the statement is being offered must have had an opportunity and similar motive to develop the testimony at the prior hearing or deposition by direct, cross, or redirect examination; and
iii. In a **civil** case, either the party against whom the statement is being offered, or a predecessor in interest to that party, must have had an opportunity and similar motive to develop the testimony at the prior hearing or deposition by direct, cross, or redirect examination

b. Opportunity to Develop
i. Former testimony of a witness who has become unavailable <u>can</u> be offered against a **criminal** defendant in the current case *so long as* that defendant is the one who had the earlier opportunity and similar motive to "develop" that former testimony
1. It does not matter whether the *former* proceeding in which the testimony was given was criminal or civil

ii. Where the former testimony of a now-unavailable witness is offered in a current **civil** case, the party against whom the former testimony is being offered need not be the same one who had the earlier opportunity and motive to develop former testimony
1. It is permissible if a third-party "predecessor in interest" developed the former testimony
a. Some have interpreted the term "predecessor in interest" narrowly, to include only relationships in which individuals stand in privity to each other in some traditional property/contract law sense
b. Other courts expanded the notion of privity somewhat more broadly to include, for example, subsidiary and parent corporations, or co-employees such as a district attorney and a city solicitor
c. More recently, courts have adopted the more liberal approach of equating "*interest*" with "*motive*"
i. Any party to an earlier proceeding who had a similar motive to develop the testimony fully is a predecessor in interest
2. It does not matter whether the *former* proceeding in which the testimony was given was civil or criminal

iii. If the former testimony is taken at a proceeding where, due to its nature or due to the conduct of the judge, a party was present but had no meaningful opportunity to develop testimony, courts have held that the prior testimony is inadmissible under FRE 804(b)(1)

c. Opportunity and Similar Motive
    i. Similar motive does not mean identical motive, thus a factual inquiry is required
        1. Factors:
            a. Questioner must be on the same side of the same issue at both proceedings, and must have a substantially similar interest in asserting and prevailing on the issue
            b. Type of proceeding in which the testimony was given
            c. Trial strategy
            d. Potential penalties or financial stakes
            e. Number of issues and parties
            f. Similarity between the factual issues in dispute in the former and current proceeding
    ii. Lawson: The law seems to be quite generous in finding prior opportunity and motive, even in preliminary events (and Lawson thinks this is questionable)
        1. Notion that if you are at a deposition, you may have reasons not to treat this person as if they were on the witness stand at trial (don't want to tip your hand too soon, cost, e.g.), so maybe there was opportunity, but not similar motive
d. FRE 804(b)(1) makes no reference to an "offered on the same legal issue" requirement
e. Primary Justification = necessity
    i. *Prior* opportunity and motive to develop testimony are also important justifications for the lack of *present* cross-examination
f. Under FRE 804(b)(1), there is no requirement that the party *offering the former testimony* must have been a party to the original proceeding in which the testimony was given
    i. It is sufficient if the party *against whom the evidence is offered* had an opportunity to develop the testimony
g. Method for Introduction of Former Testimony
    i. When former testimony is admissible, any witness with personal knowledge of the content of the former testimony can relate what was said
    ii. The most common method of getting former testimony before the fact finder is to introduce a properly authenticated transcript of the testimony
        1. Use of a transcript for this purpose actually involves multiple hearsay
            a. Ex: out-of-court statements of the now unavailable witness; court reporter taking down what the witness said; court reporter making a transcript of the testimony
            b. The business or official records exceptions of FRE 803(6) and (8) will generally apply to the court reporter's hearsay
h. Lawson: This is a relatively narrow exception

IV. <u>FRE 804(b)(2): Dying Declarations</u>
a. Foundational Requirements:
    i. The statement concerns the cause or circumstances of what the declarant believes is impending death;
        1. "Statement" Exs:
            a. Identifications of the perpetrator
            b. Descriptions of the accidents and of past events that led up to the mortal injury or disease
        2. "Impending death" means lack of hope of recovery
            a. This state of mind can be shown by:
                i. The declarant's own statement
                ii. Circumstances, such as the nature of the declarant's wound

iii. Evidence that the declarant was told that death was imminent
iv. The opinion of a physician

ii. The statement is made while the declarant believes death to be imminent; and
iii. The statement is offered in a *homicide prosecution* or a *civil case*

V. FRE 804(b)(3): Declarations Against Interest

a. Foundational Requirements:
i. The content of the statement, at the time the statement was made, was:
1. Against the pecuniary or proprietary interest of the declarant;
2. Could subject the declarant to civil or criminal liability; or
3. Could render invalid a claim held by the declarant
ii. The statement was against any of the above interests of the declarant to an extent great enough such that a reasonable person, in declarant's position, would not have made such a statement unless it was true; and
iii. If the statement exposes the declarant to criminal liability ~~and is offered to exculpate the accused~~, evidence of corroborating circumstances that clearly indicate the trustworthiness of the statement must be offered
1. Here, an out-of-court declarant has made a statement assuming criminal responsibility for a crime
a. The Rule requires additional evidence to indicate the trustworthiness of such a statement
i. Concern: out-of-court declarant making such a statement – a false confession – to the defendant's crime in order to help a friend who has not yet been convicted, e.g.
2. UPDATE: There is no specific requirement, as there was in the previous version, that the content of the statement exculpate the accused

b. The focus of the **against-interest** requirement is usually on the content of the statement
i. This content must be contrary to one of the specific interests of the declarant identified in the rule when the statement is made
1. At trial, the statement is offered to prove the truth of those facts
ii. To be against a declarant's pecuniary, penal, or civil claim interests, a statement under FRE 804(b)(3) need not have been said in the face of immediate adverse consequences

c. Declarant's **knowledge** comes up twice:
i. FRE 804(b)(3) requires a showing that the declarant had personal knowledge of the against-interest fact when the statement was made
ii. FRE 804(b)(3) applies only if the declarant knows (or reasonably should know) that the fact is against his interest

d. ***REMEMBER***: FRE 804(b)(3) is distinct from FRE 801(d)(2)(A): Party Admissions
i. FRE 804(b)(3) requires many more foundational requirements
ii. FRE 804(b)(3) applies to statements made by anyone, not just a party
iii. FRE 804(b)(3) is typically not offered against the person who made the statement (and who is unavailable), but against someone else

VI. FRE 804(b)(4): Statements of Personal or Family History

a. Foundational Requirements:
i. The content must concern the declarant's own personal or family history; or
1. FRE 804(b)(4)(A) does not require that the declarant have personal knowledge
a. Obviously a declarant has no personal knowledge of birth or birth place
b. However, any declarant meeting the requirements of subsection (A) is inevitably going to have knowledge of circumstantial evidence of personal and family relationships
ii. The statement concerns the personal or family history of one to whom the declarant is related or was intimately associated

b. This exception is limited to past facts and events of an objective, rather than subjective, nature
    i. Ex: statements as to motives or purpose for marriage are beyond the scope

VII. FRE 804(b)(6): Forfeiture by Wrongdoing
- a. Foundational Requirements:
    - i. The party engaged or acquiesced in wrongdoing;
        1. "Engaging" means participating directly in the planning or procuring
            a. Evidence used to prove the party's engagement in wrongdoing *may* include the declarant's hearsay statements, because FRE 104(a) permits the court to "bootstrap" a finding of a foundational fact by relying on the contested hearsay statement itself
        2. Exs: threats, intimidation, kidnapping, hiding, acts of violence, murder
    - ii. The wrongdoing was *intended* to procure the unavailability of the declarant as a witness against the party;
    - iii. The wrongdoing did render the declarant unavailable as a witness; and
    - iv. The declarant's statement is offered against the party
- b. Courts have held that the forfeiture rule applies to wrongdoing against both actual and potential witnesses
    - i. Actual witnesses may have given grand jury testimony or were scheduled to appear in an upcoming trial
    - ii. Potential witnesses may have assisted in an ongoing criminal investigation

The Residual Exception

I. **FRE 807: Residual Exception**: A statement not specifically covered by FRE 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, ***if*** the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant
- a. Foundational Requirements:
    - i. The statement must have circumstantial guarantees of trustworthiness;
        1. Two principal means of establishing trustworthiness:
            a. Reliability of Testimonial Qualities
                i. The most common means of satisfying the trustworthiness requirement is to show that one or more of the declarant's testimonial qualities appears to be reliable because of the circumstances within which it was made
                    1. Factors to consider: facts relating to the identity, knowledge, qualifications, and motivation of the declarant (incentive to lie, e.g.); content of the statement; and circumstances in which it was made
            b. Independent Corroboration
                i. This method shows by way of corroborating evidence that the facts asserted in the particular hearsay statement are probably accurate
    - ii. These guarantees should be "equivalent" to the exceptions in FRE 803 and 804;
        1. Factors to consider: spontaneity, against interest, or careful routine, e.g.
    - iii. The statement is offered to prove a material fact;
    - iv. The statement is more probative on the point for which it is offered than any other evidence that can be secured through reasonable efforts;
    - v. Admission will serve the general purposes of the FRE and the interests of justice; and

vi. Notice is given to the opponent

b. This is <u>not</u> a categorical exception
   i. There are no categorical requirements concerning the identity of the declarant, content of the statement, circumstances in which the statement was made, or the (un)availability of the declarant
   ii. Principal requirements are:
      1. "Circumstantial guarantees of trustworthiness," and
      2. "More probative" than other reasonably available evidence
      . . . these are individualized judgments to be made by the trial judge

c. A "near miss" occurs when a hearsay statement almost, but does not quite, fits within one of the categorical hearsay exceptions and would thus be admissible but for the residual exception
   i. Many courts have held that a near miss does not necessarily prevent admission under the residual exception, and that closeness to an established exception may be viewed as enhancing trustworthiness
   ii. Other courts have expressed concern that admitting near miss statements will undermine the categorical approach of the FRE and violate the intent of the drafters that the residual exception be used sparingly
   iii. Majority of Circuits now agree → statements found to be inadmissible under the FRE 803 and 804 categories may still be considered under FRE 807

II. If FRE 403 is the judge's magic wand for exclusion (i.e. to keep stuff out if he wants it out), then FRE 807 is the judge's magic wand for inclusion – at least as far as hearsay is concerned

Hearsay and the Constitution

I. Most hearsay admitted through the exceptions and exemptions does not require the presence of the hearsay declarant as a witness in court
   a. Thus the admission of hearsay presents an immediate threat to the criminal defendant's confrontation right
      i. <u>Sixth Amendment</u>: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …"
         1. What does it mean "to confront" someone?
         2. What does it mean to be a "witness"?

II. *Ohio v. Roberts* (U.S. 1980)
   a. In *Roberts*, SCOTUS had seemed to establish a two-pronged test – unavailability and reliability – for satisfying the accused's confrontation right when hearsay is admitted but the declarant does not testify
      i. "When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable
         1. Even then, his statement is admissible only if it bears adequate indicia of reliability
            a. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception
            b. In other cases (i.e., evidence does not fall within a firmly rooted hearsay exception), the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness"
   b. In *White v. Illinois* (U.S. 1992), SCOTUS virtually abandoned the unavailability requirement, by limiting it to statements admitted as former testimony under FRE 804(b)(1)
      i. Thus for most hearsay, the Confrontation Clause under *Roberts* imposed only an inquiry whether the hearsay statement fits within a "firmly rooted" exception and, if it does not, whether there are "particularized guarantees" of the statement's trustworthiness
         1. Firmly Rooted?
            a. Most of the exceptions under FRE 803 and 804 were found to be "firmly rooted"
               i. Exs: business records, dying declarations, public records, and statements falling within the traditional exceptions for

present sense impression, excited utterances, statements of state of mind, and past recollection recorded are firmly rooted

ii. *Cf*: statements against penal interest admitted under FRE 804(b)(3) are <u>not</u> "firmly rooted" [*Lilly v. Virginia* (U.S. 1999)]

c. Summary:
   i. *Roberts* sought to minimize the disruption that the Confrontation Clause would pose to the criminal process and the FRE
      1. Remember: it was not until 1965 that the Confrontation Clause of the Sixth Amendment became applicable to the states (i.e., 99% of criminal cases) through the Fourteenth Amendment
   ii. The goal of the Confrontation Clause was seen as being to keep out crappy, unreliable evidence, and that is similar to hearsay law
      1. So standard, traditional hearsay exceptions served as a conclusive proxy for reliability where they apply
      2. And if the evidence does not fit within a firmly rooted hearsay exception, the Confrontation Clause will still nonetheless be satisfied if the particular circumstances indicate a degree of reliability/trustworthiness

III. *Crawford v. Washington* (U.S. 2004) (Scalia)
   a. Reliability is not in the text of the Confrontation Clause, so *Crawford* radically departs from the *Robert*'s analysis and focuses on: (1) what does it mean to confront a witness, and (2) who is a witness
   b. Who is a "witness"?
      i. Witnesses against the accused are those who "bear testimony"
         1. "Testimony," in turn, is "*(i)* a solemn declaration or affirmation [i.e., something likely to have legal consequences] *(ii)* made for the purpose of establishing or proving some fact"
            a. At a minimum, "testimonial" applies to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations
               i. So an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not
                  1. But what else is qualifies as testimonial?
   c. What does it mean to confront a witness?
      i. The Framers would not have allowed admission of testimonial statements of a witness who did not appear a trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination
         1. So to confront someone means a right to cross-examine them
            a. Therefore, testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine
   d. Summary:
      i. Is the statement testimonial?
         1. If not, the Confrontation Clause inquiry is over because there is no "witness"
      ii. If we have a testimonial statement, and therefore a witness – was there confrontation (either at or before trial)?
      iii. If we have a testimonial statement, then we have an unavailability inquiry
         1. Need to make an unavailability determination (?)
            a. If you can get the witness, get them
               i. If you just choose not to, can't use the statement

IV. *Davis v. Washington* & *Hammon v. Indiana* (U.S. 2006)

a. Everyone agrees that if declarant in these cases had gone to the police station to give a statement, gave a written affidavit, or testified in a deposition = testimonial
    i. But what about 911 calls?
b. *Crawford* analysis applied to *Davis*:
    i. A witness is someone who bears testimony → testimony is a solemn declaration to prove or establish past facts → solemnity is satisfied here by calling 911, but declarant's statements to the 911 operator were not to prove or establish *past* facts … they were made in the midst of an emergency to get *current* action/help → therefore declarant is <u>not</u> bearing testimony → therefore declarant is <u>not</u> a witness → Confrontation Clause is <u>not</u> implicated → only concern is whether a hearsay exception is implicated (but we would have already done this step before getting to Confrontation Clause analysis)
        1. "Testimonial" Considerations:
            a. Declarant was speaking about events as they were actually happening
                i. Not describing past events
            b. Nature of what was asked and answered was such that the elicited statements were necessary to be able to resolve the present emergency
                i. Not such that the elicited statements were to learn what had happened in the past
            c. Level of formality (or lack thereof) – declarant was franticly answering questions, over the phone, in an environment that was not tranquil or safe
                i. Not responding calmly to questions at a police station while a recording and note taking it occurring
c. *Hammon*: Declarant was deemed to have beared testimony
    i. Declarant similarly called 911 because of a domestic disturbance, but her statements to police were made while he husband was safely secured in the kitchen
        1. The emergency was not ongoing
            a. This was simply a situation of the police station coming to declarant
d. Summary:
    i. <u>We need to ask: what is the "primary purpose"?</u>
        1. "Statements are nontestimonial when made in the course of police interrogations under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency"
            a. *Davis* situation
        2. Statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"
            a. *Hammon* situation
    ii. A conversation which begins as an interrogation to determine the need for emergency assistance can evolve into testimonial statements once that purpose has been achieved

V. *Melendez-Diaz v. Massachusetts* (U.S. 2009) (Scalia)
a. At issue is the admissibility of "certificates of analysis" which stated that the substance in the bags found in defendant's possession was cocaine
    i. SCOTUS found these certificates to be testimonial because they were akin to affidavits, which are solemn declarations made for the purpose of establishing past facts, and therefore the analyst is a witness
        1. So the Confrontation Clause applies
            a. Absent a showing that the analysts were unavailable to testify *and* that petitioner had an opportunity to cross-examine them, the

certificates were inadmissible (because analysts were not available to testify)

b. Scalia thought this was an easy case because the certificates clearly fell within the "core class of testimonial statements":
    i. "***Ex parte*** **in-court testimony or its functional equivalent** – that is, materials such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially …
    ii. **Extrajudicial statements contained in formalized testimonial materials**, such as affidavits, depositions, prior testimony, or confessions …
    iii. **Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial**" (*See Crawford*)

VI. Unavailability and Prior Opportunity for Cross-Examination Determinations
- a. Unavailability
    i. Typically the federal or state requirements of "unavailability" under the hearsay rule, such as FRE 804(a), will be used to determine unavailability for Confrontation Clause purposes as well, with one (two?) addition
        1. The Sixth Amendment requires the prosecution to demonstrate in court that it had made a good faith effort to produce the hearsay declarant, even if its effort was unsuccessful
        2. Prosecution cannot offer a testimonial statement when the unavailability of the declarant was caused by the prosecution's own negligence
- b. Prior Opportunity
    i. Where defendant had strong motive and a full opportunity to cross-examine the declarant at a prior trial, the requirements of *Crawford* have been found to be satisfied

VII. Exceptions to the Requirement of Confrontation
- a. The *Crawford* opinion mentioned two possible exceptions to the confrontation requirement under which testimonial statements could be admitted
    i. **Dying Declarations** – grounded on the historical admission of such statements during the trial when the right to confrontation was developed
        1. *Giles v. California* (U.S. 2008): dying declarations may be admitted as an historical exception to the Confrontation Clause
    ii. **Forfeiture by Wrongdoing** – grounded on the notion that defendant can forfeit the right to confrontation when their wrongful conduct made the declarant unavailable to testify
        1. *Crawford*: "The rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability"
        2. Remember: the forfeiture doctrine requires the defendant's *purpose* in making a declarant unavailable was to prevent his testimony

VIII. *Michigan v. Bryant* (U.S. 2011)
- a. Declarant is unavailable to testify because he died, and the prosecution wants to admit the police account of what declarant said to them in the 30 minutes before he died
    i. Do we have a hearsay exception?
        1. Sure, dying declarations or excited utterance might work
    ii. Does the Confrontation Clause allow?
        1. We have unavailability
        2. We do not have a prior opportunity to confront
        3. So question becomes: are declarant's statements testimonial?
            a. If they are testimonial, then declarant is a witness and the statements are inadmissible
                i. (And the forfeiture doctrine is not applicable here)
- b. Result: Statements are not testimonial

i. One factor was that the defendant had a gun, which poses a danger to the police and public at large, which suggests that the emergency is ongoing and statements from declarant were for the purpose of assisting the current emergency

c. Concern: we do not know how broadly the *Bryant* exception will apply – how many circumstances it will apply to …

ETC.

I. NOTE: Remember that other rules may operate to exclude a hearsay statement even if it fits within a FRE 803 exception – relevancy, authentication, best evidence, the relevancy rules such as the character prohibition, privilege, and FRE 403

II. If you are trying to figure out whether a hearsay statement is admissible, need to consult several places:
   a. FRE
   b. Federal Rules of Civil & Criminal Procedure
   c. Constitution/Sixth Amendment Confrontation Clause for *criminal* cases

<u>Opinions and Experts</u>

Introduction

I. Lay opinions relate not to what the witness observed, but instead a conclusion or inference about a situation
   a. Witnesses are allowed, but not encouraged, to give lay opinions
      i. Opinions always rest on underlying generalizations, and the value of the opinion is in direct proportion to the reliability of the underlying generalization
         1. It is the fact finder's task to determine the pertinent underlying generalizations and the extent to which they should be credited
         2. It is the witness's task to provide an accurate recitation of what was observed
            a. And the lay opinion rule policies this boundary
   b. If the trial judge determines that a witness is offering a lay opinion, FRE 701 applies

II. Expert opinions are based on the expert's special training or experience and include information not within the general run of human knowledge and experience
   a. When such knowledge exists and would be helpful to a fact finder it may be presented through the offering of expert opinions
      i. Often expert opinions provide information and opinions about scientific matters, but expert opinions are not limited to science
         1. It can extend to any knowledge that might be helpful but is not likely to be possessed by the fact finder
   b. If the trial judge determines a witness is offering an expert opinion or testifying about specialized knowledge, FRE 702 – 706 applies

Lay Opinions

I. **FRE 701: Opinion Testimony by Lay Witness**: If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness [i.e., FRE 104(a) foundational question], and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of FRE 702 [i.e., not about stuff that you'd have to qualify someone as an expert to testify about]
   a. FRE 701 states a preference for witnesses not to testify in the form of opinions
      i. In the traditional language of the common law, witnesses were to testify to what they observed (i.e., facts) rather than to any inferences about, summaries of, or conclusions of fact – all of which together were referred to as "opinions"
      ii. So it would be best if witnesses only testified to the facts, but that is not the conventional manner of speaking
         1. In the end, the rule is one of common sense – of trial judge discretion
            a. The legitimate concern underlying the prohibition against lay opinions, upon which common sense will operate, is that we do not want

witnesses to substitute their conclusions for facts that would be helpful to the jury

II. The line between what is a fact and what is an opinion is unclear because the distinction is not an analytical one – it is a question of degree
    a. Despite the fact that the distinction is analytically untenable, the FRE makes the distinction to push witnesses towards relating sensory impressions that are less rather than more thickly varnished
        i. Testimony can be more or less loaded with opinions (inferences, summaries, and conclusions), and the FRE prefer to have less rather than more
        ii. Even though relating sensory impressions ("I saw the blue car run the red light") involves opinions ("I believe I saw …"), the more testimony concentrates on relating sensory impressions, the easier it is for the fact finder to mediate among conflicting versions from the various witnesses, and thus to decide what actually happened
    b. Virtually all judges would agree that the statement "the platform was dangerous" is an opinion whereas the assertions "John shot me" or "the object is a chair" are statements of fact
        i. In the case of the opinion, the FRE would prefer that the witness describe to the jury the condition of the platform in some detail, so the jurors can decide for themselves whether the platform was dangerous

III. Section 701(a) → The lay opinion rule does not excuse or substitute for the requirement of firsthand knowledge
    a. This section restates the firsthand knowledge requirement
        i. The rule merely allows firsthand knowledge to be summarized in the form of an opinion
    b. The conclusion of a trial judge to permit opinion testimony is conditioned by all the events at trial, including behavioral cues from the witnesses that are not reflected in the record
        i. This in turn means that trial court decisions on lay opinions are largely unreviewable
            1. Proper Q: Is the witness testifying rationally from firsthand knowledge?

IV. Section 701(b) → If a judge is convinced that a witness is testifying from firsthand knowledge, even though expressed in the form of an opinion ("The defendant was belligerent," e.g.), the judge may allow the testimony if it is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue
    a. Remember: The purpose of the lay opinion rule is to facilitate a certain mode of proceeding at trial
        i. The more opinions are allowed, the more the witness usurps the role of the fact finder
            1. The fact finder is the one charged to draw inferences
            2. The witnesses are to relate factual observations, leaving to the fact finder the inferences to be drawn from those factual observations
    b. Lay opinions are not helpful when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion
    c. Helpfulness has two sides to it:
        i. Being helpful to the fact finder
        ii. Being helpful to the orderly presentation of testimony by permitting individuals to testify consistent with their normal use of language
            1. If insisting on testimony about "facts" rather than "opinions" proves difficult if not impossible, and impedes rather than facilitates inquiry at trial, lay opinions should be allowed
            2. There is a line of cases that fairly directly indicates that FRE 701 permits the trial courts to align testimony at trial with our normal conventions of both observing and relating what we observe
                a. Appraising the state of mind of another person is something that is done constantly in life, but often is done on the basis of nonverbal cues that are difficult to describe

V. Section 701(c) → a lay opinion cannot be based on scientific, technical, or other specialized knowledge within the scope of FRE 702

a. SCOTUS has interpreted FRE 702 to require trial judges to act as gatekeepers to the admissibility of expert testimony
    i. The trial judge must be convinced that the expert is testifying on the basis of knowledge acquired in a reliable way and applied appropriately to the case at hand
        1. The form of knowledge most likely to meet such standards is the results of controlled scientific studies, but the scope of expert testimony reaches far beyond "scientific knowledge" to "scientific, technical, or other specialized knowledge"
b. SCOTUS also instructed lower courts that "technical or other specialized knowledge" must be justified in ways at least roughly analogous to the justifications for the admissibility of "scientific knowledge"
    i. This increased the difficulty of gaining admission of certain forms of testimony that previously had passed muster under FRE 702
    ii. In response, trial lawyers began offering such testimony as lay opinions under FRE 701, directly contravening the Court's interpretation of the rules
        1. FRE 701 was amended in 2000 to put a stop to this practice
            a. Advisory Committee → FRE 701 has been amended to eliminate the risk that the reliability requirements set forth in FRE 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of FRE 702
c. FRE 701 and 702 distinguish between expert and lay testimony rather than expert and lay witnesses and so it is possible for the same witness to provide both lay and expert testimony in a single case

VI. The common law prohibition against lay opinions was also informed by the desire to forbid witnesses from expressing an opinion on the ultimate issue in the case
a. Interestingly, even though FRE 704 has eliminated the common law prohibition of opinions on ultimate issues, it remains true that the more germane an opinion is to an ultimate issue, the more likely the courts seem to be to require a recitation of the facts underlying the opinion
    i. The closer the subject of the opinion gets to critical issues, the likelier the judge is to require the witness to be more concrete

VII. Problem 9.1
a. Witness 1 will testify that D, when he exited his car, was wobbly and looked like he was drunk, and that the smell of alcohol was detectable
    i. Testifying that the smell of alcohol was detectable is clearly going to be OK, even though there is an element of opinion in there – typically when people describe smells they use exemplars and there are certain obvious smells
    ii. Testifying about D being wobbly is going to be OK, even though it contains something like an element of opinion – it is within the bounds of what normal people say in normal conversation
    iii. Testifying about D looking drunk might not be allowed under FRE 701(b) – if W1 already testified about D smelling of alcohol and being wobbly, then the testimony that he looked drunk might not be helpful
        1. No right answer
        2. Lawson would exclude it because it is not that helpful and can only hurt
b. Witness 2 will testify that he observed D's car whiz by the barber shop going about 70mph
    i. Witness are allowed to testify about their impressions, inferences, opinions about speed, provided it was a rational inference or opinion from what the witness actually perceived [FRE 701(a)]
        1. Need to know what was the witness's opportunity to actually observe the car

c. Witness 3 will testify that she heard the squeal of tires that could only be made by a car greatly exceeding the speed limit trying to stop quickly, that she looked up and thought she saw D's car enter the intersection while the light was against him but she isn't positive
    i. **Red Herring** = that W3 is not sure
        1. This is OK – the law is perfectly happy for people to be honest about the limitations of their inferences and observations
    ii. W3 hearing the sound is similar to "smells like alcohol" in the sense that you describe sounds in terms of exemplars and it is hard to figure out how else you would want W3 to testify about what she heard
    iii. W3 testifying about the red light is an observation that people make all the time
d. Witness 4 will testify that the first thing D did when he got out of his car after the wreck is walk towards P's car, trip, and say that he needed another drink – but W4 is not sure about the "another" part
    i. There is not a hearsay problem with this statement because (a) the statement is not being admitted to prove the truth of the matter contained therein, and (b) even if it was admitted to prove the truth of the matter contained therein, it would be an admission because declarant is a party to the case
    ii. No lay opinion problem here – all of the observations seem fairly routine

VIII. Problem 9.3
a. Under GA law, the death of an insured spouse during a domestic dispute is considered accidental for the purposes of redeeming life insurance if the decedent reasonably believed that his wife would not respond to his aggression with force; Mrs. Sheley's daughter testified that she believed that Mr. Sheley never thought that Mrs. Sheley would shoot him; daughter's testimony challenged under FRE 701 because daughter could not have had personal knowledge of Mr. Sheley's subjective state of mind and therefore her opinions were not rationally based upon her perceptions
    i. Daughter's testimony was allowed by the trial court and was affirmed on appeal
        1. How else could you possible prove what Mr. Sheley was thinking?
        2. Daughter might not be the most credible witness (because she gets some $$), but FRE 701 is not concerned with credibility – rather, whether someone offering an opinion has a rational basis based on their perceptions for that opinion
            a. If daughter is living with Mr. Sheley, she is in as good of a position as anyone to know what he was thinking
            b. *Cf.* If daughter was estranged from Mr. Sheley and had no contact

IX. Problem 9.4
a. Skinner (a lay witness, representing the real estate developer's potential lender and otherwise uninvolved in the project) testified that based on projected earnings of $1M/year, the value of the Project to the real estate developer was $8M – i.e., a damages evaluation; Skinner was a knowledgeable financial consultant, but his testimony revealed that he had little significant actual knowledge about the real estate developer and its operations
    i. This testimony clearly should not be allowed under FRE 701(a) – it is an opinion about what the likely damages are and this is the kind of stuff we need experts for
    ii. It is possible for non-experts to give reasonably informed opinions on business matters, as long as there is a possibility for firsthand knowledge
        1. Here, the witness at issue is too far removed from the Project to offer a lay opinion – testimony was not based on a rational basis or firsthand knowledge

X. Problem 9.5
a. Witness testified that he saw a man fire a rifle into the kitchen and that it was dark, but the man looked to be about the same size and height of Don Duncan (who the witness saw earlier in the day), but there are hundreds of people in town the same size and height; witness also testified that the rifle sounded like a .22 and in his opinion was a .22
    i. Testimony that he saw a man shoot a rifle is OK – a direct description of what he saw

ii. Testimony that it was dark and he couldn't tell who the shooter was but the shooter was same size and height as Duncan is also OK – a direct description of what he saw
    1. Using Duncan as an exemplar is not problematic, although in this case it might be unduly prejudicial (but likely OK)
iii. Testimony that there are hundreds of people in town the same size and height could count as an opinion, but it likely falls within the scope of FRE 701 (assuming he had a foundation based on living in the town for a while, e.g.)
iv. Testimony about the rifle –
    1. Editors think this runs afoul of FRE 701 and you would need expert testimony
    2. Lawson thinks it is plausible that in certain jurisdictions everyone could tell you what a .22 sounds like, so you would not need an expert opinion
        a. Suggests that the application of a FRE can absolutely depend on where you are and the composition of the jury
            i. And surely FRE 701 – dealing with situations when opinion testimony may be helpful to the jury – is an instance where this makes sense
                1. Lawson would let the testimony in under FRE 701

XI. Nutshell → we prefer that witnesses testify about what they saw and what they know . . . Not so much what they think or what they believe
    a. However, we put up with this when it is convenient and/or when it is too difficult to stop the witness from doing so, since that is how people communicate

Experts

I. Expert witnesses present evidence based on knowledge acquired through specialized study or unusual training and experience that permits them to generate, piece together, or interpret data in a manner that would not be readily apparent to the fact finder
    a. Experts can generate evidentiary facts themselves
    b. Experts can educate the jury regarding specialized or scientific information that is needed to draw inferences about evidentiary facts
    c. Experts may present inferences and conclusions to which fact finders may defer
        i. This is the most prevalent use of experts
        ii. And the least justifiable in the Editors' opinion

II. Common Law
    a. Problem CL solved: closing the gap between hearsay and expert testimony
        i. Expert opinion is supposed to be based only on admissible evidence – notion that we do not want the expert to be a conduit for introducing hearsay or other inadmissible evidence
            1. However, this is only a partial solution because a great deal of what the expert will testify to is still based on hearsay
    b. Problem CL caused: if experts are only supposed to testify about what will be admissible and therefore proven at trial, the process of eliciting that testimony will be very cumbersome and inconvenient
    c. CL standard for evaluating when experts could testify as experts = when they are testifying about something that was generally accepted in the field
        i. This caused some restraint on the use of novel theories

III. FRE 702
    a. **FRE 702: Testimony by Experts**: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case

b. FRE 702 makes admissible a broad array of testimony from a multitude of sources covering an enormous range of affairs
    i. It includes scientific, technical, and medical experts, but its pragmatic phrase "other specialized knowledge" extends the scope of the rule far beyond those confines
        1. Advisory Committee → The expert is viewed, not in a narrow sense, but as a person qualified by knowledge, skill, experience, training, or education. Thus within the scope of the rule are not only experts in the strictest sense of the word (e.g., physicians, physicists, and architects), but also the large ground sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values
c. Any knowledge that is not likely to be possessed by the fact finder qualifies for admission under this rule, no matter how the knowledge is obtained
    i. Thus, a person possessing a "skill" can testify to it and its implication, even if the skill was gained through experience rather than traditional formal study
    ii. Moreover, the knowledge that qualifies for admission is relative to the fact finder
        1. If a potential witness possesses knowledge that the fact finder is not likely to possess, even though some other fact finder somewhere else might, the testimony is admissible
d. If specialized information will assist the trier of fact, the trial judge must then determine whether the person offered to present the information is qualified to do so
    i. The qualifications need not include formal education in the subject matter
        1. One can be qualified as an expert based on "knowledge, skill, experience, or training," as well as education
    ii. Qualifying an expert involves a voir dire of the witness that brings out the person's expertise
        1. The trial judge decides if the person qualifies as an expert pursuant to FRE 104(a)

IV. Whether scientific evidence or specialized evidence should be admitted turns on an evaluation of the relevance of the evidence and the countervailing FRE 403 factors

V. <u>"Scientific Evidence" Under FRE 703: *Frye* and *Daubert*</u>
a. *Frye* Test (a.k.a. General Acceptance Test) (1923) = the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs
    i. This test has been the subject of criticism in recent years though, primarily because a rigorous application of the test prevents use of scientific evidence based on emerging disciplines or cross-disciplinary studies
    ii. The *Frye* Test is still the law in about a dozen jurisdictions though
b. Ex: *Daubert* (U.S. 1993): this case has been taken to be a transformation in the way federal courts handle expert testimony; in the actual case, there were "professional" witnesses testifying for Ps in Benedictine trials and this was a classic instance of junk science; under the *Frye* standard, the court would ask whether this was a generally accepted methodology, and the answer would be no, so the expert would not be allowed to testify; note: could also not allow the expert to testify on straight FRE 403 balancing because junk science is not worth the time
    i. Holding: The *Frye* test was superseded by the adoption of the FRE
        1. Expert testimony post-FRE is governed by statute (i.e., FRE), so need to satisfy the statute to be an expert
            a. FRE 401 and FRE 402 relevancy rules
                i. FRE 402 provides the baseline: "All relevant evidence is admissible, except as otherwise provided by the Constitution, an Act of Congress, or these rules"
                    1. And FRE 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence"

b. FRE 702 expert testimony rule
    i. Nothing in the text of the rule establishes "general acceptance" as an absolute prereq to admissibility
    ii. FRE 702 requires only that the expert testimony assist the trier of fact to understand the evidence or determine a fact at issue
        1. And it would not be crazy for the judge to say that certain expert testimony is not helpful if it does not meet a general acceptance test

ii. "That the *Frye* test was displaced by the FRE does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the FRE the trial judge must ensure that any and all scientific testimony or evidence admitted it not only relevant, but reliable"
    1. "The primary locus of this obligation (i.e., on the part of the trial judge to keep junk out) is FRE 702 (i.e., *not* FRE 403), which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify"
        a. The subject of an expert's testimony must be "scientific knowledge" → "scientific" implies a grounding in the methods and procedures of science, and "knowledge" connotes more than subjective belief or unsupported speculation
            i. Lawson: *Daubert* is leaping onto "*scientific* knowledge; whereas in five year *Kuhmo Tire* leaps onto "*knowledge*"

iii. Faced with a proffer of expert scientific testimony, the trial judge must determine at the outset, pursuant to FRE 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue
    1. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue
        a. *Daubert* Factors (illustrative):
            i. Whether a theory or technique can be (and has been) tested
            ii. Whether the theory or technique has been subjected to peer review and publication
                1. While publication is not an absolute necessity, submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected
            iii. Consider the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation
            iv. "General acceptance" can have a bearing on the inquiry
                1. Widespread acceptance can be an important factor in ruling particular evidence admissible
                2. A known technique that has been able to attract only minimal support within the community may properly be viewed with skepticism

c. Ex: *Kumho Tire* (U.S. 1999): *Daubert* explicitly dealt only with scientific evidence; immediately following the case, the circuits split on how, or whether, *Daubert* applied to "technical or other specialized knowledge"

i. SCOTUS held that *Daubert*'s general holding – setting forth the trial court's general gate keeping obligation – applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge
ii. FRE 702, in respect to all expert matters, establishes a standard of evidentiary reliability
    1. It requires a valid connection to the pertinent inquiry as a precondition to admissibility
    2. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline
        a. *See Daubert*'s factors (not a definitive checklist or test though)

d. Lawson does <u>not</u> see much of a change in the doctrinal framework of expert testimony pre- and post-*Daubert*, other than what you need to cite (i.e., what language parties and courts should use)
    i. Pre-1993: cite *Frye*
    ii. Post-1993: cite 702 and 403
        1. *Daubert*: focus is on the word "scientific"
        2. *Kumho Tire*: focus is on the word "knowledge"
        3. Lawson thinks that the focus should be on FRE 403
            a. And FRE 403 can incorporate the *Frye* standard through the back door
    iii. The big difference that *Daubert* generated was one of **mood**, rather than doctrinal
        1. Court wants to crack down on the use of junk science, so they want lower courts to be tough on who qualifies as an expert
            a. This is the universally understood message

VI. Problem 9.10
a. P argues that a court can only review the methodology of the expert, not his or her conclusions (under *Daubert*); correct? Lawson – yes, no, and maybe
    i. *Kuhmo Tire*: the trial court must have the same kind of latitude in deciding how to test an expert's reliability, as it enjoys when it decides whether that expert's relevant testimony is reliable
        1. Our opinion in *Joiner* makes clear that the trial judge <u>can</u> exclude testimony because of a lack of reliability – that is, lack of connection between the methodology (which may be accepted) and the expert's conclusions (the actual numbers or facts he arrives at, e.g.)
            a. And if the trial judge excludes such testimony, it is reviewable only for abuse of discretion
    ii. Expert needs to have a plausible methodology *and* something to link this methodology to his conclusions
        1. It is not enough to state legal principles and arrive at the conclusion
        2. Need to explain how the legal principles lead to this conclusion
    iii. Judge could leave it up to the attorneys to draw out the conclusions during direct and cross examination
        1. And if he is not satisfied that the connection is established he could strike the testimony

VII. Problem 9.11 (51 yr old Mary Kay saleswoman falls in Kmart, hurts her back, can't work)
a. Qualifications of Expert Given:
    i. PhD in psych training
    ii. Experience 20 years ago helping drug addicts enter the workplace
    iii. Experience primarily in the last two years in the Virgin Islands helping 50-60 people return to their jobs after an injury/disability
    iv. Past experience as a witness – i.e., other judges have let him in
        1. Factor = Irrelevant

v. His attendance at two seminars about vocational rehabilitation – i.e., this is an interest of his
vi. Membership in two vocational rehabilitation organizations, but there are no restrictions on membership – i.e., this is an interest of his
vii. When he was in school, a degree in vocational rehabilitation was not available, but he received non-degree training

b. 3d Cir. ultimately qualifies him as a witness – heavily relying on the fact that a vocational degree was not available when he was in school and the training of psychologists is similar, along with his practical experience
    i. Court was concerned, however, that he appeared only qualified to testify at a micro level – that is, returning to a specific job – and that he did not appear qualified to testify at a macro level – that is, returning to any job in the national economy; but court notes that he kept abreast of the relevant literature and he possesses a degree that is tangentially related
        1. Court notes that if the district court had failed to qualify him as an expert, they likely would have affirmed

c. Kmart also took issue with the fact that they wanted the trial judge to hold a hearing as to whether the expert's methodology was established enough to qualify as reliable – trial judge did not conduct a FRE 104(a) hearing to determine the reliability of expert's testimony
    i. 3d Cir. holds that the trial judge needed to make a decision under the correct legal standard – they did not hold a *Daubert* hearing – and trial judge should have at least conducted a hearing about the testimony's reliability

d. Kmart wants to question the expert about his $330K embezzlement conviction – and this is OK because it is a crime of dishonesty and they are calling into question the credibility of a witness – *but* Kmart also wants to go into all of the damning details of the conviction (rather than jut introducing the guilty plea); trial judge lets them introduce the guilty plea but not go into all of the details during cross
    i. FRE 608(b): "Specific instances . . . may, *in the discretion of the court*, if probative of truthfulness or untruthfulness, be inquiry into on cross-examination of the witness"
    ii. FRE 611: gives the trial judge the general power to control the flow of trial
    iii. FRE 403: if the cross-examination would waste time or confuse, then the judge can exclude

    … this all adds up to a whole lot of discretion, so the appellate court affirms, but they note that if they were the trial court, they likely would have admitted some of the gory details

VIII. Problem 9.15
- a. Doctor wants to testify as an expert that P's fall caused her condition, even though the doctor admitted that medical science does not know what causes the condition
    i. Easy case for exclusion on reliability grounds
        1. An expert's conclusion has to be derived from a reliable methodology
        2. Here, the doctor has no chain of reasoning that led her to reach her conclusion
            a. 104(a) will keep this testimony out

IX. Problem 9.17
- a. An expert's history of testifying in over 100 court cases as an expert is irrelevant
- b. Qualifying an expert based on his published article in a law review is not going to work
    i. Law Review ≠ Peer Review (a *Daubert* factor)
- c. Qualifying an expert based on the fact that he attended courses and seminars on handwriting identification, was employed by the secret service as a handwriting expert – this looks like a serious interest ramped up a bit
    i. Result: qualify him as an expert – jury can decide whether or not they want to give the expert weight/credibility

X. Summary re: Admissibility of Expert Testimony
- a. Can you *qualify* the expert? (i.e., will the expert even be allowed to testify?)

i. Pretty easy standard to satisfy
ii. 104(a) hearing

b. Is the expert's testimony based on a *reliable* methodology?
   i. The method employed by the expert has to be plausible – has to meet the minimum standard of "knowledge" in FRE 702

c. Does the expert's testimony "*fit*" – is there a connection between their methodology and conclusions?
   i. Expert's testimony has to have something to do with the case – to help the jury understand the evidence or determine a fact of consequence relevant in the case
   ii. This is where courts ramp up the standard slightly, requiring a connection

Expert Witness Additional Details

I. FRE 703 & FRE 705

a. **FRE 705: Disclosure of Facts or Data Underlying Expert Opinion**: The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data [i.e., expert does not have to build up to his conclusion first], *unless* the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination
   i. The most important innovation of FRE 705 is its elimination of the requirement of experts testifying in the form of a response to a hypothetical question
      1. FRE 705 gives the direct examiner the flexibility to elicit the opinion or conclusion before developing all the details that support it
         a. In fact, <u>the rule permits the opinion without requiring the proponent ever to produce the underlying basis</u>
            i. The advantage to this approach is that it permits the proponent of the evidence to structure its case most effectively
               1. The proponent might want the expert to give the facts though in order to make his testimony more credible and knowledgeable
            ii. The disadvantage is that if there is reason to suspect that the information on which the expert bases the opinion is so unreliable that it may be appropriate to exclude the opinion altogether, the opponent will often desire to test that suspicion before rather than after the jury hears the opinion, and by explicitly giving the judge authority to require that the basis for an opinion be elicited before the opinion is given, FRE 705 provides a reasonable means for solving this type of problem
         b. Rather than ensuring in every case that direct examination will reveal the basis for an opinion, FRE 705 leaves these matters to cross examination

b. **FRE 703: Bases of Opinion Testimony by Experts**: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type *reasonably relied upon* by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need <u>not</u> be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury *by the proponent of the opinion or inference* unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect [i.e., reverse 403 test]
   i. FRE rejects an aspect of the CL by providing that experts <u>can</u> testify on the basis of data that would be legally inadmissible, so long as the data is "of a type reasonably relied upon by experts in the particular field"

1. Thus under FRE 703 experts no longer must conform their practices to the law's conventions, but rather the law bends to accommodate the practices of other disciplines
    a. Ex: the nurse's observations written on the patient's chart, radiological and pathological evaluations, lab reports, and so on may legitimately form the basis of a medical expert testifying at trial
2. Though the law bends to accommodate other disciplines, judges are not obligated to bend over backwards
    a. The "reasonably relied upon" requirement is taken seriously by courts and can be a basis for finding an expert's testimony inadmissible

c. Lawson, although not the Editors, thinks that the phenomenon of using experts as vehicles/conduits for getting otherwise inadmissible evidence admitted is a problem – and the real action is generated by the interplay between FRE 703 and 705
    i. Notion that what if a good portion of the expert's background is evidence that would be inadmissible – because experts often rely on hearsay that does not fit into a hearsay exception (past behavior of people from which the expert predicts future action in conformity therewith, e.g.)?
        1. Q: "Expert, who did you conclude this was arson?"
        2. A: Expert: "The person found at the scene has committed arson eight times in the past and it is only natural for me as an expert to take that into account"
    ii. The FRE recognize that there is a problem, but there is no real solution – their way of accommodating the tension if FRE 703 and 705
        1. FRE 703's reverse 403 test *only* constraints **the proponent of the testimony**
        2. There is no such restriction on the cross-examiner
            a. The cross-examiner is subject only to the normal 403 test
                i. And there are situations in which the cross-examiner might want to bring out the facts and data underlying the expert's conclusion [we're in <u>civil</u> cases only]
                    1. Hypo: victim was killed by a snow plow mount and P is trying to establish liability of the snow plow manufacturer; P's expert was there to calculate the loss of income for the victims over their lifetime as well as hedonic damages (i.e., the enjoyment of life that they lost by virtue of being killed) …
                        a. On cross, D asks P's expert if in the course of calculating P's lost income he took into account that the day before P got into the accident he was released from prison
                            i. Relevancy: If we have an expert testifying about lost income, the fact that someone was a convicted criminal would be something that would affect their earning potential over time
                            ii. If the expert did not take this into account (i.e., just looked at age and education level), that does in fact rationally go to the credibility of the calculation
                        b. Trial judge let the defense bring this stuff out in cross with a limiting instruction (i.e., can only use this evidence for economic reasons, not to think he is a "bad" guy)

        i. **Under FRE 705, it is OK for the cross-examiner to ask about the factual basis for the other side's expert testimony, and there is only a straight-up 403 balancing**
        ii. Note: It would not be unreasonable for a trial judge to say too much prejudicial impact, but he did not here and he did not abuse his discretion
    c. On cross, D handed P's expert a report – the driver's treatment record from rehab after his DUI – and asked if he considered when calculating damages
        i. Relevancy: P's life enjoyment and life span go into the economic calculations and if he is a drunk that will surely affect
    d. Trial judge permitted D to question the expert about whether the report would be the type of report he would consider when making his economic calculations
    e. On cross, D asked P's expert about P's drug and alcohol use
        i. Relevancy: If there is not an expert on the stand, this evidence is not going to be relevant to a strict liability/civil damages case, but if there is an expert on the stand this stuff is potentially admissible if you can connect it to the expert's testimony/economic calculations
    f. P can still object on standard FRE 403 balancing
        i. But, trial judge let it in, with a limiting instruction
2. Hypo: now imagine that the defense is countering P with their own expert testifying about economic damages; expert says he considered all sorts of things: that a career criminal does not have great job prospects, if someone is using five different types of drugs the changes of them succeeding is not so high, e.g.
    a. Now we have a FRE 703 problem → the proponent of the testimony (now D) is trying to bring out the background and they cannot do that unless they satisfy the reverse 403 test, which operates under a presumption that the stuff is not coming in
3. Hypo: P wants to bring into the case that there were fourteen prior lawsuits against the snow plow manufacturer

a. Relevancy: One of their claims is failure to warn, and this evidence shows that the manufacturer had notice that they should be doing something
b. Trial judge kept out the testimony on FRE 403 grounds because the prejudicial impact substantially outweighed its probative value
    i. Why? Because in the actual case, D agreed to stipulate to pretty much everything P wanted

d. A new wrinkle may be added to the implications of FRE 703 by way of *Crawford* [and remember that *Crawford* is only implicated in criminal cases]
    i. At least one case has held that statements to psychiatrists are testimonial, thus triggering the *Crawford* analysis (a 2005 N.Y. case)
    ii. Much of the hearsay that experts rely on does not implicate *Crawford* because it is not testimonial, and therefore there is no Sixth Amendment violation
        1. But it is not difficult to image circumstances in which expert opinions in criminal cases are based on statements by other people that meet the testimonial rule, especially if we have *Melendez-Diaz* that says all these lab reports are testimonial
            a. So if an expert relies on lab reports, and the lab reports are deemed testimonial, then we may have a Confrontation Clause problem
                i. Answer: forthcoming

e. Problem 9.18
    i. D is charged with criminal murder and arson; P's theory is D killed his wife and set fire to the house to make the death look like an accident; D's theory is that it was bad wiring because he was nowhere near the house; P's expert is a fire marshal who offers to testify that in his opinion the fire was the result of arson; expert's bases: interviews from the next door neighbors who say they saw D running from the house, a written police report saying the officer observed an adult male running from the house at the same time, and D had twice previously been convicted of arson
        1. One assumes that the fire marshal can qualify as an expert – not a particularly demanding hurdle – and what he is testifying about is relevant
        2. Is this a reliable methodology – is this the type of stuff experts about fire causation rely on?
            a. Maybe, we don't know
            b. Lawson would keep the testimony out, even if experts in this field do rely on this type of stuff
                i. Trial judges are supposed to be serving as gatekeepers for expert testimony (*Daubert*)
            c. What if experts generally rely on a methodology that the judge thinks is crap?
                i. Authority both ways:
                    1. Judges have a responsibility to look through the whole case – so they are entitled to consider the fact that they think the methodology is crap
                    2. Judge do not know what they are doing, so if it is an accepted methodology, then is it OK for an expert to use

f. Problem 9.21
    i. P died by falling from a platform; D's defense is that the P could have just been going up the ladder and he fell off (i.e., nothing to do with the design of the ladder or platform); P has an expert that testifies it is more likely than not that P fell through the opening in

the platform ladderway that was missing safety guards – based in part on statements from P's father and co-workers that he was always careful and it was his practice to wear gloves while climbing; D objects

1. P is not normally allowed to bring in evidence that someone was careful, but experts are allowed to do so, ***if*** it is the sort of thing upon which experts in the field generally rely
    a. So if this methodology (i.e., talking to others about how careful the victim was) is typically relied on by experts, then the stuff is probably coming in

g. Problem 9.22
    i. In a criminal trial, D pleaded NG by reason of insanity; P called a psychiatrist as an expert to testify to an opinion that D was insane at the time he committed the criminal act; during direct, the witness was asked how confident he was in his opinion – "Very confident. Indeed, I called Dr. Smith, the world's leading expert in this area. I explained the case and my diagnosis to him, and he concurred in my conclusions"; D objects
        1. Court: testimony is <u>not</u> admissible – Dr. Smith is not the witness here, the psychiatrist on the stand is
            a. The law very clearly does not want experts simply to report what other experts have said
                i. A witness on the stand <u>cannot</u> be a conduit for another expert's opinion
                ii. A witness on the stand <u>can</u> mention Dr. Smith in explaining the context of how he formed his own opinion
                    1. Witness must be conveying his own opinion, even if this is shaped by what other experts have said

II. <u>Opinion on an Ultimate Issue</u>
    a. **FRE 704: Opinion on Ultimate Issue**:
        i. (a) Except as provided in (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact
        ii. (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.
    b. Potential Problems:
        i. Even if jurors have all of the underlying facts and data and are fully capable of resolving the ultimate issues, the mere fact that they hear witnesses express opinions on those issues may mislead them into believing that they should give some special deference to the opinions
        ii. If an opinion on an ultimate issue embraces a legal concept or conclusion, there may be uncertainty about whether the expert is using that concept in the same manner in which the law uses it
    c. Adequate means exist for dealing with these potential problems without altogether prohibiting opinions on an ultimate issue:
        i. The judge has the discretion to exclude opinions that are not helpful [FRE 701 and 702] or whose probative value is substantially outweighed by the possibility of confusing or misleading the jury [FRE 403]
        ii. If there is a concern that the underlying facts and data may not be forthcoming, the judge can require that they be set forth before the opinion is offered [FRE 705]
        iii. If there is a concern that the expert's use of a particular term may differ from the legal definition of a term, the judge can deal with this possibility in the instructions to the jury

III. <u>Court Appointed Experts</u>

a. FRE 706: Court Appointed Experts

i. (a) Appointment: The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness

ii. (b) Compensation: Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs

iii. (c) Disclosure of appointment: In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness

iv. (d) Parties' experts of own selection: Nothing in this rule limits the parties in calling expert witnesses of their own selection

b. FRE 706 permits courts to appoint their own experts

i. The advantage in doing so is the securing of disinterested, objective testimony concerning the issues in the case

ii. The disadvantage is that many disciplines have internal disputes so that any expert selected by the court would not be truly “objective,” but instead would be testifying from the perspective of one not universally shared view of the field