**General Things to Remember**

Always ask yourself, at what stage of the proceedings am I in? What kind of case is it? What is the issue? What is the evidence coming in for?

**Overarching Rules**

Admitting Evidence Process

**- mark it, show it, enter it, ask witness what it is, then ask whatever foundation questions necessary to get it entered, then you offer it, then you publish it/show it to jury – he made a big deal of this**

***104(a) – Preliminary Questions of Admissibility***

***Court decides preliminary questions of witness’ qualifications, existence of privilege whether evidence is admissible.***

* Judge acts as trier of fact
  + Preponderance of evidence standard
* Who decides that?
  + The judge
  + Judge is not bound by the federal rules of evidence in determining admissibility except in respect to privilege
  + You can use hearsay, as long as the court rules that it is reliability

***104(b) – Conditional Relevance***

***When relevance depends on existence of another fact, sufficient proofmust be submitted that the other fact exists.***

***May admit on understanding other fact will be proved later.***

* Judge makes preliminary determination whether foundation evidence is sufficient to support finding of relevance.
  + - Rational Basis Standard
* Jury can later decide that this condition was not met and judge removes it from their consideration

***105 – The idea of the doctrine of limited admissibility***

* For you to answer an evidence question, you have to know for what purpose is the evidence being offered in?
  + What applies to civil or criminal, can it come in for that limited purpose?
* Comes in for one purpose but is in for a limited purpose

***106 – Rule of Completeness***

* Applies to written or recorded statements
* Does not apply to an oral conversation
  + Can’t put in part of the statement, if admitting just that one part is unfair or misleading
* DVR rule – Witness is asked question about a part of the statement, you can have the whole statement put into evidence

**Direct and Cross-Examination**

**Direct Examination**

* Direct Examination should feature non-leading questions
  + Places the witness at the scene and establishes personal knowledge
  + In the case of the expert witness, develops the basis of his expertise
  + Aim is to bring out what the witness has to say, attorney should not put words in his mouth

*Exceptions Where Leading Questions are Allowed*

* Trial judges have discretion to permit leading questions, even during direct examination
* 4 Situations

1. When necessary to develop testimony
   1. Permission to lead when the witness is
      1. Young, apprehensive
      2. Timid, reticent, reluctant
      3. Ignorant, unresponsive
      4. Infirm
2. When witness is uncooperative
   1. Hostile, adverse party
      1. Lawyer may need coercive power
      2. Get to use to protect yourself
3. When the rule is more trouble than it’s worth
   1. Matters that are not contested, obvious issues
   2. If an expert is a formal professional expert, that expert likely will not be lead
4. When memory seems exhausted
   1. Lawyer is permitted to “refresh his collection”, gently

*Methods of Reviving Recollection*

* Record of Past Recollection – When a party seeks to introduce a record of past recollection, he must establish (witness’s written account of a past event prepared at a time when his memory was fresh)
  + That the record was made by or adopted by the witness at a time when the witness did have a recollection of the event, and
  + That the witness can presently vouch for the fact that when the record was made or adopted by him, he knew that it was accurate
  + The object must pass muster in terms of its evidentiary competence
* Present Recollection Revived – For a present recollection revived, no such testimonial competence is demanded of a mere stimulus to present recollection, for the stimulus itself is never evidence
  + The stimulus may have jogged the witness’s dormant memory, but it is not received in evidence
  + Opposing party has the right to inspect the aid and even show it to the jury
  + Cannot be allowed to read the writing
  + Need not have been written by witness, need not be true, need not have been made immediately or of firsthand account

***Cross-Examination***

* Purposes of Cross
  + Recast the story presented by the calling party
  + Limit or confine the impact of the testimony
  + Impeach credibility
* Uses leading questions
  + Cannot use leading questions when the witness is own client
* Rule 612 – If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying or before testifying, if the cour determines it is necessary in the interests of justice, and adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce evidence those portions which relate to the testimony of the witness
  + Even work product privileged information must be turned over if used in preparation of witnesses

*Cross-Examination as Entitlement*

* Where cross-examination is cut short by death or illness, this curtailment of the opponent’s right is viewed as so serious that the testimony must often be stricken, and sometimes a mistrial is required
* Cross is the single most critical aspect of the 6th Amendment

**Excluding Witnesses from Courtroom**

* FRE 615 – At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion
  + Rule does not authorize exclusion of
    - A party who is a natural person, or
    - An officer or employee of a party which is not a natural person designated as its representative by its attorney, or
    - A person whose presence is shown to be essential
      * Experts often fit here
    - Person authorized by statute
  + Rule does not apply to opening statements (*U.S. v. Brown*)

*The Special Case of Crime Victims*

* Victims are not covered by FRE 615’s exemption
* Victims normally are not categorized as persons essential to the presentation of a case
* 18 U.S.C. §3510 – Federal courts shall not exclude any victim of an offense from a trial merely because he may testify during sentencing

**Foundation**

* Witness must have personal knowledge or introduce evidence that would support that he has personal knowledge
* Witnesses may only testify as to their personal knowledge

**Relevance and Admissibility**

Pleadings

Defense

Credibility – Every time a witness goes on the stand, her credibility is in question

If there are too many inferences, you can keep it out

* **Rule 401 – Definition of Relevant Evidence** – 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 without
  + Probability – More probable than it would be without the evidence
    - Have to be able to state the logic of the evidence – this is where Carey gets all crazy about precision
  + The fact to which the evidence is directed need not be in dispute
    - EX: Evidence of spoken statement to prove notice, probative value is lacking unless person sought to be charged heard statement
* **Rule 402 – Relevant Evidence Generally Admissible; Irrelevant Inadmissible**
* Pleadings, Defense, or Credibility

*Direct vs. Circumstantial Evidence*

* Direct evidence is that which, if accepted as genuine or believed true, necessarily establishes the point for which it is offered
* Circumstantial evidence if that which, even if fully credited, may nevertheless fail to support the point in question, simply because an alternative explanations seems probable or more so

***Limited Admissibility – Rule 403***

* Relevant evidence may be **excluded** if its **probative value** is **substantially outweighed** by **1)** the danger of **unfair prejudice**, **2) confusion of issues**, or **3) misleading the jury**, or **4)** by considerations of **undue delay, waste of time, or needless presentation of cumulative evidence** (Rule 403)
  + You have relevant evidence which raises the danger of unfair prejudice, juror misuse, confusion of issues**. Is there any alternative available?** If there is, consider the need for this evidence and balance with the risk of prejudice
  + **Consideration** should be given as **to effectiveness** of a **limiting instruction**
* Evidence is to be excluded only if probative value is **substantially outweighed** by any of the listed dangers and considerations
* Must be able to argue exactly why evidence is prejudice/confusing/waste of time, etc.
* Often, evidence that seems perfect to prove one point also tends to prove another, on which it is incompetent
  + Or the other point is highly prejudicial
  + **FRE 105 offers a different approach** – **Admit** the evidence, on the point **for which** or against the parties as to whom **it is competent**, but **give limiting instructions to prevent misuse** on other issues or as against other parties
    - As advocate must know exactly what your evidence tends to prove
    - Again, must be able to speak w/ precision about why this piece of evidence is required
    - EX: what is the proposition behind admitting a confession? – A person would not say they had done a bad thing unless they had done that bad thing.
    - Go through process of the logic
  + **Unfair Surprise** – couple with confusion of issues and danger of prejudice – but know that it’s a grey area, a judgment call

*Prejudice, Gruesome Photos, Prior Crimes*

* Gruesome photographs must be relevant to an issue in the case and may be admitted in evidence to identify the deceased, to show the location of the mortal wounds, to show how the crime was committed and to aid the jury in understanding the testimony of the witness
* Court must go beyond the question of relevancy and consider whether the probative value of the exhibit outweighs the danger of prejudice created by admission of the exhibit
* Sometimes they are admitted because they demonstrate atrocity
* Courts often exclude prior crimes when relevance seems attenuated and the risk of prejudice seems large

*Evasion of Capture*

* Evidence of efforts to avoid capture is generally admissible in criminal trials
* Evidence of flight does not create a presumption of guilt or suffice for conviction
* Shows guilty conscience

**Character Evidence**

* Rule 404(a) – Evidence of a person’s character or trait of character is not admissible for the purpose of proving conformity therewith on a particular occasion

***Methods of Introducing Character Evidence***

***Rule 405 – Reputation or Opinion***

* 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**, **inquiry is allowable into relevant specific instances of conduct**
* You are trying to prove a propensity for actor to do something – can only do so through reputation and opinion – unless on cross.
* Reputation is gossip, or you need personal knowledge
  + Are you familiar with this person’s reputation?
  + Have you heard this person’s reputation discussed?
    - Must relate to pertinent character trait
    - Must be some relevant community
    - Must be recent that it was discussed
    - Must have heard others discussing the information
* For opinion, one must know the person
  + Personal, recent knowledge

***Specific Instances of Conduct - Admissibility***

* In cases in which character of 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
* When the accused calls a character witness to testify to his good character, the **prosecutor may cross-examine** about **incidents** from **defendant’s past** that **could not be proven otherwise**

***When Can Character Evidence be used?***

* **Prosecution may not introduce evidence** in their case-in-chief character evidence
  + When prosecution can call character witnesses:
    - Where the defendant introduces a character witness for his own character or victim’s character
    - Where the defendant introduces any evidence to show that the victim was the initial aggressor
      * Peacefulness, reputation or opinion only
* It is the defendant’s call whether his character can be introduced
  + Defendant can introduce evidence of a pertinent character trait in a criminal case
  + Defendant has right to introduce the evidence he chooses to protect his freedom
  + Once he does though, prosecutor can do the same

***Character of the Defendant/Accused***

* **Character** of the **accused** is **almost never** an **issue for** the **prosecution**
  + **Cannot admit evidence of prior criminal acts unless** it is introduced for some **other purpose** than to prove accused is of criminal character
    - Obvious issues of prejudice arise
      * **Exception – Evidence of Entrapment**
        + Client is caught on a clear video tape taking money from an FBI agent
        + Can use prior crimes to show that defendant is predisposed to this if he claims only reason he did it because the government entrapped
* The **defendant can raise character** evidence in **criminal cases**, **If** the **defendant introduces** evidence about his own character traits: (Is this right? Can he just admit evidence of victim?)
  + Must be a pertinent character trait – how is this proved? Foundation?
    - Character for peacefulness
    - Character for truthfulness
  + Must be in proper form – which is?
  + Prosecution can test the basis of that testimony, by?
    - Call a character witness to say that the defendant is violent, through reputation or opinion
      * Reputation – Have you heard of this heinous act?
      * Opinion – Did you know of this heinous act?
    - Inadmissible to prove predisposition

*Character of the Victim*

* If the defendant calls a character witness to testify as to trait of victim, must be reputation or opinion
  + Prosecution can:
    - Call CW on victim’s character for peacefulness through RO
    - Call CW on defendant’s character for same trait
* If the defendant puts in evidence that the victim is the first aggressor:
  + Prosecution can:
    - Call CW on victim’s character for peacefulness, RO
* D’s knowledge about specific acts in the past comes in for the accused’s fear, not as character evidence
* V’s statement of his intent to harm the accused – not character evidence, specific act that comes in to show the victim’s state of mind

***Character Evidence in Civil Cases***

* 404(a) states a general rule excluding character when offered to prove conduct, then sets out 3 exceptions, the first two of which only apply in criminal cases
* Anyone can impeach
* In a civil case, no character evidence as circumstantial evidence to prove conforming conduct
  + Exceptions:
    - Fraud
    - Car go boom
    - Child custody
    - Defamation
      * P’s character is at issue
    - Wrongful death
      * In respect to loss of income

***Character as an Element of a Charge, Claim, or Defense***

* For other acts evidence, the **standard of admissibility** is that a reasonable jury could find by **preponderance of evidence** that **person** has **committed other** **criminal act**
* 404 does not bar evidence of character when it is offered for other reasons than to prove conduct on a particular occasion
* **Evidence of other crime should be consequential to present case**
  + If defendant concedes he had motive, other criminal act displaying his motive may not be admitted
* Regardless of fit into one of these categories, if **sole purpose** of admitting evidence is to **show propensity** – **inadmissible** – (factual determination)
* 405(b) provides that proof of specific instances of conduct is admissible whenever character is an essential element of a charge or defense
  + This almost never happens
* **Specific Acts Allowed in for purpose other than character in conformity** (Other times when specific acts will be let in)
  + **Motive** 
    - probative of malice, identity of criminal or specific intent.
  + **Intent**
    - probative of identity and intent
  + **Opportunity – Special Skills/Abilities**
    - Other crimes show accused possessing special distinctive skills or abilities – probative of identity
  + **Absence of Mistake or Accident** 
    - EX: “brides of bath”, dude’s wives kept drowning in the bathtub? WTF? Slippery bitches!
  + **Modus Operandi**
* Prior act must bear **singular strong resemblance** to charged offense, and similarities must be **sufficiently idiosyncratic** to **permit inference of pattern**
* **Plan**
* True plan cases involve a single overall grand design that encompasses both the charged and uncharged offenses
* Demonstrate how each offense is part of plan
* **Design**
* Design is overarching, crimes are integral components of the plan so each amounts to a step or stage in executing it
* **Preparation**
* **Malice/Deliberation/Specific Intent**
  + History of selling narcotics may demonstrate current possession is deliberate
* **Opportunity**
* Access to the scene of the crime
* **Scheme**
* **Knowledge**
* Doesn’t have to be prior acts, can be acts during the same charge, between charge and trial
  + Doesn’t matter if you were acquitted, this does not prevent evidence of that act from coming in and being admissible for some other purpose
  + **Impeach**
* **Evidence of Good Character**
  + General propensity rule does not apply, can admit evidence with sole purpose of proving his propensity for honesty/peacefulness/etc.
  + Should only offer pertinent traits
  + RISK: Once defendant does this, his character is “at issue” and defense may admit counter evidence – may use specific instances because it will be to impeach
    - This done by cross examining character witness of whether witness knew of accused’s bad acts when he formed his opinion
    - High possibility of prejudice if abused

***Civil Cases (Element)***

* Defamation – In a defamation case, it might be necessary to find out whether there is truth in what has been said about the plaintiff, and even opinion or reputation evidence may be required, includes acts
* Negligent Entrustment – One might be required to show that another is generally careless, in order to prove that the defendant should not have allowed them to operate whatever it was that caused the accident
  + Specific instances may be shown
* Child Custody – Character, in the sense of being a good parent, is the ultimate issue in the case
* Wrongful Death – Wrongful death action in which the amount of recoverable damages may turn on the “worth” of the decedent to the plaintiff
* Catch-All – If character has been put at issue in the pleadings, evidence must be brought forth
  + In these instances when it’s at issue, can be proved by specific instances

***Habit, Routine Practice***

* Rule 406 – **Evidence of** **habit** of a person **or of the routine practice of an organization**, **corroborated or not** and regardless of the presence of eyewitnesses, is **relevant to prove** the **conduct** of the person or organization **on a particular occasion** **was in conformity** with **the habit or routine practice**
  + Much evidence is excluded simply because of failure to achieve the status of habit
    - Fails to distinguish from character, likely
    - Be careful of distinguishing between habit & character
    - **Character** – generalized description of a trait
    - **Habit** – One’s regular response to a specific, repeated situation
* In contrast to “character evidence, proof of personal habit is freely admitted
  + Habit is viewed as relevant to prove conduct
  + Most often evidence of habit is offered in civil negligence cases
* Habit is a routine response to a specific set of facts
  + **Habit evidence has to happen a lot**
  + **Has to be the same set of facts**
    - Obvious area of controversy is how often/how similar to be considered “habit”

***Sex Offenses***

*Sex Offense Cases*

* Rule 412 – Short Version
  + You may not introduce evidence of the victim’s sexual character
    - Never reputation or opinion
    - Civil and Criminal
    - **REQUIRES pre-trial motion**
* Rule 412 – No evidence is allowed as to the ***victim’s*** sexual behavior or sexual predisposition
  + Includes:
    - Fantasies, any sexual contact, dressing like a slut, illegitimate child, venereal disease, anything that could prove victim’s sexual behavior
  + **Exceptions (all subject to 403 & 401):**
    - In a criminal case, evidence of specific instances of sexual behavior in order **to prove that someone other than the accused** was the **source of injury, semen**
    - Evidence of specific instances of sexual behavior by the victim with respect to the person accused **to prove consent**
      * Can include **expressed desire/fantasy**
      * Can include **prior instances** of consensual sex activies
    - Evidence the exclusion of which would **violate the constitutional rights** of the defendant
    - In a civil case, admissible if **probative value** substantially **outweighs** danger of **prejudice** to any party. Evidence of victim’s reputation only admissible if it has been placed in controversy by the victim
  + Policy:
    - Encourage victims to come forward
* **Rule 413 – Short version**
  + If the accused is charged with sexual assault, prior instances of sexual misconduct may come in for any relevant purpose
    - Propensity, predisposition
* **Rule 413 – Evidence of Similar Crimes in Sexual Assault Cases**
  + Civil and Criminal

1. 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 is admissible**, and may be considered for its bearing on any matter to which it is relevant
2. Attorney for the Government shall disclose the evidence to the defendant, at least 15 days before scheduled date of trial
3. Not important
4. Sexual assault means a crime that involved
5. Any conduct prescribed under US Code as such
6. Contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person
7. Contact, without consent between the genitals or anus of the defendant and any part of another person’s body
8. Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person

* **Rule 414 – Evidence of Similar Crimes in Child Molestation Cases**
  + **Same as 413**, only for Child Molestation Cases
* Rule 415 – Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

1. 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 by Rule 413 and 414**
2. A party who intends…15 days

***Character in Sex Offense Cases***

* Previous False Allegations
  + Often judges decide whether prior charges were false, to provide more protection to complaining witnesses
  + Courts have concluded that 412 does apply, but the purpose of the defense is not to prove sexual acts as such; but lies about sexual acts
* Most courts extend the reach of the protective provisiosn of 412 to mode of dress, marital status or history, living arrangements where these imply something about sexual intimacy, sexual tastes or practices, sexual innuendo, flirting, porn, employment in sex industry

***Prior Offenses by Defendants in Sex Crime Trials***

* Where a **defendant is accused of sexual assault**, evidence of **other sexual assault offense is admissible** and may be considered on **any matter** to which it is **relevant**
  + 413 incorporates what is sometimes called a “lustfull disposition” doctrine, holding in effect that **specific acts may be proved** by **evidence of general sexual disposition**
  + 413 does not require convictions, according to congressional comments made when the provision was enacted
* 414 states that in trials for child molestation, evidence of other child molestation offenses “is admissible and may be considered for its bearing’ on any matter to which it is relevant
* 415 extends to civil cases
* Promiscuity, sexual intercourse, clothing, use of birth control, whether someone has an STD, none of it is admissible against or allowed to be introduced by the D in a sexual assault case
* Rape Shield Law – Policy decision, don’t want to put the victim on trial
* If you’re charged with sexual assault, proclivity, predisposition, propensity for sexual assault is coming
  + Just a more likely than not, committed prior act of sexual assault

***Subsequent Remedial Measures***

* 407
* Out – Fault, improper design
* In – Feasibility, impeachments, control, ownership
  + Can impeach on feasibility, control, ownership

*Remedial Measures*

* Rule 407 – 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 measures is not 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.
  + **EXCEPTION**
    - This rule does not require exclusion of evidence of subsequent measures when offered for another purpose, **such as proving ownership, control, or feasibility of precautionary measures, or impeachment**
    - **Show that design changes and safeguards were feasible**
  + Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct
    - Can’t be used to show that “a defect in a product or its design or that a warning instruction should have accompanied product”
    - The above would be evidence of “negligence” or “culpable conduct”
* As a matter of policy, it is thought wise to avoid discouraging efforts to make things better or safer
  + Many states do not allow in product liability cases
  + Erie doctrine does not require federal courts to follow state practice on subsequent measures
  + Permits subsequent measures may be shown to prove feasibility when the point it controverted
* Other policy matter of it’s not really an admission of guilt
* Cannot be used to impeach

*FICO*

* After injury, repair, update, something VOLUNTARY to make things safer
* FICO – Feasibility, impeachment, control or ownership if disputed
  + FICO – If contested, feasibility, COULD NOT BE ANY SAFER

***Settlement Negotiations***

* 408 – Settlement Negotiations
  + Out – Companion issues of Fault, Offer itself, settlement
  + In – Bias, refute allegations of undue delay
* 409 – Offer to pay medical expenses
  + Out – Offer itself
  + In – Any companion issues of fault

***Compromises and Offers to Compromise – FRE 408-409***

* You need a claim, that must be disputed, must be some dispute as to whether it is valid, or the amount owed
* Exclusion Rests on 2 Grounds:
  + 1. Policy of encouraging settlements
  + 2. Defendant may be wanting peace and not settling through weakness of position
* **Rule 408** – **Evidence of the following is not 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
  + **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
  + **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
  + Exception: One of the D’s settles with P, then testifies against P, can use it to show that thy have a bias due to financial dependency
* Rule 409 – **Evidence of** furnishing or offering or **promising to pay medical, hospital, or similar expenses** occasioned by an injury is not admissible to prove liability for the injury
  + Doesn’t include companion admissions of fault

***Settlement Negotiations***

* FRE **bars proof of civil settlements**, offers to settle and “conduct or statements made” during settlement negotiations, when offered to prove “liability for or invalidity of the claim or its amount” or **to “impeach through a prior inconsistent statement or contradiction”**
* Civil settlements are excludable not only in later civil suits, but in criminal cases
  + Exception: Settlements in government enforcement suits are not excludable in criminal cases
* Main reason is public policy
* FRE 408 applies to both “furnishing” or “promising” to pay a civil settlement, and the language is **broad enough to reach fines**
* Where a person pays for injuries or other expenses incurred by another, in the belief that he is responsible or even simply as a good Samaritan, FRE 409 provides that proof of such behavior is excludable if offered to prove liability
* Rule 408 **cannot be waived unilaterally** by **any party**, **even if its damaging** to your ends

***Plea Deals***

* 410 – Plea bargains, withdrawn pleas of guilty, no contest
* Out – Guilt
* In – Nothing

*Plea Deals*

* Rule 410 – Except as otherwise provided by 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
  + Plea of guilty which was later withdrawn
  + Plea of nolo contendere
  + Any statement made in the course of any proceedings under Rule 11 of FRCP
  + 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
* Such a statement is admissible 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 in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel
* Policy: Encouraging pleas.

*Plea Bargaining in Criminal Cases*

* Plea bargaining statements are excludable for many of the same reasons that apply to civil settlement negotiations
* Present policy strongly favors plea bargaining as a way of disposing of criminal cases, and without protection such bargaining would not occur
* FRE 410(2) makes inadmissible a plea of nolo contendere
* FRE 410 prohibits only introduction of plea bargaining statements against the defendant
* Guilty pleas are admissible in subsequent civil lawsuit, but no contest pleas are not

***Proof of Insurance***

* 411 – Proof of insurance
* Inadmissible to prove fault
* In – Bias, ownership, agent, companion admissions of fault

*Liability Insurance*

* Rule 411 – Evidence that a person was or was not insured against liability is not admissible upon the issue of 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

*Proof of Insurance Coverage*

* 411 bars evidence of coverage offered in support of arguments such as these
* 411 does not always succeed in keeping the involvement of insurance
  + Not airtight, recognizes several situations where the fact of insurance is admissible

**Hearsay**

BE VERY CAREFUL ABOUT WHO THE DECLARANT IS, JUST BECAUSE IT SAYS TESTIFYING DOESN’T MEAN THAT PERSON IS THE DECLARANT

* Hearsay is an out-of-court statement offered to prove the truth of the matter asserted
  + Inadmissible unless it falls within an exception
  + Every level of hearsay must meet an exception
  + Lying generally not considered to be hearsay
  + If it’s relevant regardless of whether it’s true, it’s not hearsay
* Out-of-court declarant is not under the gaze of the trier of fact, so the trier lacks those impressions and clues which voice, inflection, expression, and appearance convey
* Absence of Oath
* Put the statement on the left, what it’s offered to prove on the right, if they are the same, it is hearsay

***Types of Hearsay***

* Can come in one of 3 forms:
  + Spoken
  + Written
  + Conduct intended as an assertion
    - FRE – If you’re **objecting to conduct** **as hearsay**, you have to object, and it is **your burden to demonstrate** that 1) the **actor intended** the **conduct as an assertion** and 2) that’s what it’s being offered into evidence to prove

*Statement or Conduct?*

* *Singer* – Writing on the envelope – Conduct to evict, intended to evict, not to show that the person lives there
* “I want to buy some cocaine” – mixed conduct assertion, not hearsay
  + If a person is not thinking of the proposition the statement is being offered for when he made it, it is non-assertive
* *Pacelli* – In a criminal case, where the prosecution’s theory is that the meeting, the gathering, and the actions of the people is evidence that they believe he is guilty
  + Could characterize as conduct, but in this case it would be unfair to allow the meaning because the only reason they’re having the meeting is because they believe Pacelli is guilty, and they believe he’s guilty because he confessed to them.

*Non-Verbal Conduct of a Person*

* Only hearsay if it was intended by him as an assertion (FRE 801(a)(2)

*Half-Conversations*

* One cannot testify as to half of a conversation in an attempt to circumvent the hearsay rules when it is clear that the testimony is paraphrasing the alleged statements of the out-of-court witness
  + If this were allowed, there would be no practical use of the rules (*U.S. v. Check*)

***Things That Are Not Hearsay***

* There are generally categories of statements offered for purposes other than proving what it asserts:
  + Absence of complaint
  + Impeachment
  + Verbal Acts (or parts of acts)
  + Effect on listener or reader
  + Verbal objects/Labels
  + Circumstantial evidence of state of mind
  + Circumstantial evidence of declarant’s knowledge
  + Circumstantial evidence of memory or belief
  + Machines and Animals
  + Not for truth of the matter asserted
  + Admissions
  + Indirect Hearsay

***Absence of Complaint***

* Absence of a complaint to prove the non-occurrence of an event
  + Must have similarly situated people who must have had the same motive to make the complaint
  + *Cain v. George* – **Silence is not hearsay** when **1)** it is by **someone** who could **reasonably** be **expected to report** a problem, and **2)** would have **similar motivation to report**, if used to prove that there was a problem
    - Son died in a hotel from CO poisoning. Defendant motel offered evidence of a number of people who had stayed there previously without complaint, P objected that the silence was hearsay
      * Was not hearsay

***Statements for Impeachment***

* Prior inconsistent statements offered to impeach the declarant are not hearsay, as long as they are not offered for the truth of the matter asserted, but rather to impeach the declarant
  + Only a sworn statement may come in for substance

***Verbal Acts***

* Verbal Acts are Words or statements that have independent legal significance, or are performative
  + Saying these words is like doing something
* 2 main types:
  + **Transactional language** 
    - Example: Language that says money is about to change hands
    - Words of contract, legal conveyance of property, offer to marry
  + **Tortious Language**
    - Examples: Words of defamation, words of coercion or duress, lying to the police
* **Solicitation – Words alone are a crime**
  + Words stated as an element of a charge
* **Words that accompany an otherwise ambiguous physical act and give it definition**
  + Look for any transfer of money or property
  + “Will you park my car” while handing your keys over

***Effect on Listener or Reader***

* Offered to prove what a reasonable person would have done after hearing or reading the statement
  + Essentially this shows hearer/reader’s state of mind, not proving the validity of the statement they are reacting to
  + Assumption of risk
  + Put on notice
  + Emotional reaction
  + Behaved reasonably/unreasonably under the circumstances
  + Under duress, coercion or harassment as a result of statement

***Labels and Verbal Markers, Verbal Objects***

* Labels are not hearsay, unless they go to prove the truth of the matter asserted
* Words as labels or logos being used to identify a person, agent, thing
  + Requires 2 people, witness who makes incomplete statement, witness of the statement who can testify in court to mark when the event or ID occured

***Circumstantial Evidence of State of Mind and Memory***

* Evidence which circumstantially infers the declarant’s state of mind regardless of the truth of the statement
  + *Betts v. Betts* – Divorced wife moved in with a man who was charged with killing their other son. The daughter believed that he did kill him, was terrified of the stepfather
    - Admissible, because it goes to show the mental state of the child during the custody hearings
* Statements admitted under the state-of-mind exception cannot be used to prove a “fact remembered or believed”

***Circumstantial Evidence of the Declarant’s Knowledge***

* Paper-meche man
  + What someone says is in a room is hearsay for what is in the room, but not for proving that they were in the room
  + Proof that that person has specialized knowledge that could only have been acquired by being in the room

***Indirect Hearsay***

* Instances where statements are technically hearsay, yet they are still allowed
  + **Easy questions**, your parents were born in England, correct? **Hearsay**, **but allowed**
* 602 instructs that every witness must have personal knowledge as to what they are testifying about
* Not allowed if a party seeks to rely on indirect hearsay to prove contested and substantial points in his case

***Machines and Animals***

* For a machine, the issue is with authentication, not hearsay
  + If a person told our witness information what a machine did, clearly the testimony would be subject to either a personal knowledge or hearsay objection
* For animals, hearsay questions arise in connection with proof of canine tracking and identification, and such evidence is usually held admissible
* Animals cannot be a declarant

***Identification of a Person after Perceiving the Person***

* So long as the Victim is available at the trial and can be cross-examined, then the out-of-court assertive conduct can be described

***Prior Statements***

***Prior Inconsistent Statement***

* Prior inconsistent statement made under oath at a prior proceeding, trial, hearing, disposition, not a stationhouse affidavit, must be subject to cross, can come in (Rule 801(d)(1)(A))
  + Comes in to impeach the declarant and for the truth of the matter asserted
  + *Smith v. Smith* – V named Smith as assailant, signed under oath before a notary. At trial, named another man. Court allowed her prior inconsistent statement to be used as substantive evidence
  + If the statement was **not made at a proper proceeding**, **only admissible to impeach**

***Prior Consistent Statement***

* Prior consistent statements to rebut accusations that the witness has recently made the statement up or there is some undue influence (Rule 801(d)(1)(B))
  + **Triggering event**: Statement or current act challenged
  + Comes in both to rebut the statement and for the truth of the matter asserted
  + Usually only admissible if it was made before the supposed fabrication moment or improper influence or motive
  + *Tome v. United States*
  + Did not need to be under oath

***Prior Statement of Identification***

* Can come in, as long as it was 1) sworn in and 2) crossed at deposition, etc., and 3) the witness is available to testify (Rule 801(d)(1)(C))
  + Even if they get it wrong now, it doesn’t matter, **as long as they are able to be cross-examined.** Even if they don’t remember anything now, they are available to testify.
  + *State v. Motta* – V was robbed at gunpoint, and a police artist composite sketch was drawn from her description, argued that it was inadmissible hearsay
    - Sketch was valid form of prior identification as long as the declarant testifies it trial
* Exception embraces descriptions made to police

***Admissions by a Party Opponent***

* Sometimes impeachment does not tell the whole story, so **admissions come in as positive proof of what they assert**
  + Treat the same as Nonhearsay or as hearsay exceptions
  + One should not be able to complain that his words are proved against him
* 5 types of admissions by a party opponent, civil or criminal, not hearsay
  + Individual Admissions
  + Adoptive Admissions
  + Authorized Spokesperson
  + Admissions by agents or employees
  + Admission by co-conspirator
* ***ADMISSIONS CAN ONLY BE USED BY OPPONENT***
  + You can’t use the exception for admissions to get your own words into evidence

***Individual Admissions***

* Anything you say can be used against you
  + Fact, opinion, legal conclusion
  + Statements of apology are sometimes admitted
  + Sleep statements don’t count
  + Must be conscious, not induced by force or coercion
  + Drunkenness is ok

***Adoptive Admissions***

* Agreeing to terms
* Agreeing to some sort of writing, article example from E&E
* Adoptive admission by silence
  + Must have heard it, understood it, and a reasonable person would have taken exception. HURT
  + Once arrested, no adoptive admission by silence
  + *U.S. v. Hoosier –* Bank robbery, witness testified that Hoosier told him he was going to rob the bank and that 3 weeks after the robbery, he saw the D with money and what he thought were diamond rings. When he commented, Hoosier’s girlfriend said, “that ain’t nothing, you should have seen the money we had in the hotel room.” Appellant contended that this was inadmissible hearsay
    - Not hearsay, boyfriend did not deny the comment, and he did hear it
    - **Essentially manifested his belief in the statement**

***Authorized Spokesperson***

* Must be person **1)** authorized to speak on your behalf, **2)** independent proof of the authority, relationship

***Admissions by Agents or Employees***

* Admissible against the principal employer if it is made by the declarant while the declarant is 1) working for them, 2) within the scope of the employment, 3) need some other evidence besides the statement that he works for the company
  + No personal knowledge required
  + Under 805, multiple or layered hearsay is admissible if each statement fits an exception
  + *Mahlandt v. Wild Canid Survival and Research Center* – Boy wandered into a place where a D’s wolf was being held. Employee left a note on the employer’s door claiming the wolf had bitten he child, and minutes of the board of D’s meeting discussed liability.
    - Note was admissible, minutes were not admissible against Mr. Poos

***Admission by Co-conspirator***

* More likely than not that there was some agreement to do something illegal (constitutes proof of existence of conspiracy) (Rule 801(d)(2)(e))
  + Can use in a criminal or civil trial
  + Must be made while the conspiracy is ongoing
  + Must promote the ends or goals of the conspiracy

***Admissions in Judicial Proceedings***

* Pleadings from prior lawsuits, as well as pleadings superseded by amendment in the pending suit are generally admissible against the party who filed them

***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:

***Present Sense Impression (Rule 803(1))***

* Present sense impressions, if made during and/or immediately following the incident in question, are admissible and not hearsay
  + Perceiving **embraces** not only **what the declarant sees** but what he **hears**
    - EX’s: “He said ‘It’s Cold’” or Witness contends someone else said “We’re moving fast”
  + Paves way for statements identifying perpetrators of crime, often moments before the event or moments later
  + *Nutall v. Reading Co.* – Nuttal was suing the railroad for making her dead husband go to work when he was ill. Wife had a testimonial account of her husband’s phone conversation. Conversation took place in the presence of his wife, and there was an additional statement made to her after he had hung up.
    - Qualified as a present sense impression
  + Time between event and statement affects admissibility
  + Should be level of spontaneity

***Excited Utterance (Rule 803(2))***

* Must relate to the startling event, must be made while the declarant was under the stress of excitement caused by the event or condition
  + Time between event and statement affects admissibility
  + No time for fabrication or thoughtful reflection
    - Limits dangers of hearsay

***Then Existing State of Mind, Emotional, or Physical Condition (to Prove Future Conduct) (Rule 803(3))***

* Can use what a person said as proof of what they thereafter did or did not do
  + Ok for you to imply what you’re doing, not what others are doing
  + Statement refers to future acts, unless there is a will, then it looks back as well
* Also covers:
  + Intent, plan, motive, design, mental feeling, pain, bodily health
    - NOT MEMORY OR BELIEF (of hearsay declarant)
  + Statements of belief are covered by the mental state exception if a speaker’s possessing that belief is relevant independent of whether the belief is accurate

***Statements for Purposes of Medical Diagnosis or Treatment (Rule 803(4))***

* Statements for purpose of medical treatment or diagnosis, not for blame
  + Anyone who can provide medical treatment
  + Why you’re sore and nothing more
    - These are statements to a physician for purposes of diagnosis and treatment
    - Can prove perceived symptoms it seems
    - EX: Declarant says “I was struck by car that ran red light”
      * “Struck by car” – admissible – it’s why you’re sore
      * “that ran a red light” – inadmissible – violates “nothing more”

***Recorded Recollection* *(Rule 803(5))***

* If the witness cannot recall, you can use a past record she made if she made it when the events were fresh in her recollection and it was accurate
  + 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
    - Trustworthiness lies in fact events were fresh
  + Witness must be having trouble “testifying fully and accurately”
  + Possibility of abuse where record is prepared by claims adjustor or lawyer and not declarant
  + **Still need to establish 1) initial knowledge, 2) contemporaneity and accuracy of record**
    - Dealt with on case by case basis

***Business Records (Rule 803(6))***

* Need someone on the witness stand who is the keeper of records, or an otherwise qualified witness, who can say that this record was made at or about the time the events occurred
  + Person should be a witness with firsthand knowledge of the system
  + Should come about during regular course of business
  + Documents prepared solely for litigation - self-serving, viewed with suspicion
  + Everyone in the business record must work for the business, or the statement meets some other hearsay exception Hearsay within hearsay
    - Business record, declarant doesn’t work for the business
  + Covers illegal businesses, single person who is in business for himself
  + Covers schools, churches, hospitals, political committees, charities
  + Should be regular business
    - If not its breaks a link of presumed scrupulous accuracy
    - *Norcon, inc. v. Kotowski* – P filed suit after being terminated when she complained of sexual harassment by her supervisor. Issue was whether a document detailing a security company’s investigation and interviews with witnesses was admissible. Yes it was
      * It was regular business for the security to document behavior and violations, the documents were clearly prepared in regular course of business
  + Usefulness of biz records lies in “systematic checking by regularity and continuity of practice which produce habits of precision”
    - If the business relies on it – why shouldn’t a court?
    - Focus on routine and repetition of such records
    - Even if giving opinions, useful as long as in ordinary course of business
      * Think: Medical diagnoses
  + Motivation behind record may taint it and affect its admissiblity

***Absence of Records (Rule 803(7))***

* Some proof that action didn’t occur
  + Absence of a record is satisfactory evidnece that the event did not occur

***Public Records (Rule 803(8))***

* **Activities of office or agency often admitted w/o controversy**
  + Court transcripts to prove testimony given, marshal’s return to indicate service of process
* **Matters observed by public officials often admitted w/o controvery**
  + Reports by building inspectors indicating code violations, IRS assessment liens indicating unpaid taxes
* **Factual findings from official investigations**
  + Finding of employment discrimination based on race and gender prepared by EEOC
* **Police reports in criminal cases are inadmissible against a defendant in a criminal case**
  + Police officer who wrote it down can testify to what he saw
  + Exception: Non-adversarial public records
    - Driver’s license number, VIN
* *Baker v. Elcona Homes* – Appears to permit statements made by those who do not work for the agency, as it goes to someone’s opinion
  + Must come in for the truth of the matter asserted, not merely the effect on the agency
* **Includes escape clause allowing exclusion if circumstances indicate lack of trustworthiness**
  + Probably for similar reasons that affect biz records
* Doesn’t come in for the truth of the matter asserted, but only for how it is that the agency arrived at the conclusion
* Watch out for hearsay within hearsay
* Based on assumption public official will perform duty properly and unlikelihood he will remember the details
* **Controversy over public records concerns mostly “evaluative reports”**
  + Factors that determine admissibility of evaluative report:
    - 1) Timeliness of investigation
    - 2) special skill or experience of public official
    - 3) whether hearing was held and at what level it was conducted

***Records of Vital Statistics (Rule 803(9))***

* Birth, death records

***Learned Treatises (Rule 803(18))***

* To the extent called to the attention of an expert witness upon cross 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.

***Other Exceptions under 803***

* Exception for records of documents affecting interests in property (Rule 803(14))
* Evidence of judgments of felony convictions (Rule 803(22))
* Reputation testimony (Rule 803(21))
* Judgments on matters of personal, family, or general history (Rule 803(23))
* Proof of the absence of a public entry (Rule 803(10))

***Rule 804 Exceptions – Declarant Unavailable***

*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 cross, direct, or redirect examination (Rule 804(b)(1)
  + Pay attention to what kind of proceeding it was, whether there was a chance to develop the testimony, whether the previous hearing was equal in terms of criminal or civil, termination of employment as opposed to criminal

*Unavailability Requirements*

* Physically unavailable, or unavailable because he cannot remember, refuses to testify, or properly invokes a privilege
  + For refusal, an attempt to secure cooperation is essential
* Death, illness, infirmity (Rule 804(a)(4))
  + Minor ailment from which speedy recovery is expected should not satisfy the requirement, even though the declarant cannot attend trial on a given day
  + Mental condition may make a witness unavailable

*Unavoidable Absence*

* Declarant is unavailable if her presence cannot be had at trial by subpoena or other reasonable means
* Must make a diligent search

*Dying Declaration*

* Comes in for any civil case, but only for homicide in criminal cases (Rule 804(b)(2))
* A person must understand that his death is imminent and speaks of his circumstance
  + Statements concerning the cause and circumstances of impending death
  + Reaches remarks identifying the assailant, and also descriptions of the accident or catastrophe
  + Probably embraces descriptions of prior threats and quarrels, physical pain
  + Must be a settled hopeless expectation, certain doom
* Issue of Law

*Declarations against interests, and criminal interests*

* Declarations against interest are thought to be trustworthy, and are admissible (Rule 804(B)(3))
  + If intent is to limit or reduce obligation, it is not against interest
  + Conflicting interests, where one interest is furthered and another is impaired, court decides whether to admit whole statement or exclude it
  + Declarant must have understood interests, must have been damaging at the time
  + Statements against social interests may apply
* Prosecution seeking to introduce statement against criminal interests
  + Exposes the declarant and the declarant alone to criminal liability
    - Post-arrest statement against criminal interest which implicates anyone but the declarant is inherently unreliable

***Rule 806 – Attacking and Supporting Credibility of Declarant***

* You can impeach a hearsay statement by attacking or supporting the credibility of the declarant

***Rule 807 – Residual Exception***

* A statement not covered specifically by 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if:
  + Statement is offered as evidence of a material fact
  + 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
  + General purposes of the rules and the interests of justice will be best served by admission of the statement into evidence
  + Must be made known in advance to opposing party
* Not really important for the test

**Crawford and the 6th Amendment**

TREAD LIGHTLY IN ADMITTING HEARSAY AGAINT THE CRIMINALLY ACCUSED WITHOUT CONSIDERING THE 6th AMENDMENT

* If it’s testimonial hearsay, by an unavailable declarant, with no chance to cross, it will be tuned out
  + What is testimonial?
    - Deposition, any statements made in a police station where they are writing down or recording what you say, custodial examinations, prior testimony that D was unable to cross-examine, similar pretrial statements that declarants would reasonably expect to be used prosecutorially
    - Emergency doctorine, 911 cases – If it’s a true emergency, if the declarant fears for safety, imminent danger, it’s not testimonial
      * When the danger passes, and information is being provided, that is testimonial
      * *People v. Davis*
  + May be an exception when there was a prior chance to cross-examine
* 6th Amendment guarantees a right to confront your accuser
* Applies only in criminal cases

*Forfeiture of Right to Confrontation*

* If you make someone unavailable with the intent of making them unavailable to testify against you, the court will allow in anything the declarant said, and you have no 6th amendment right
  + Intent is key
  + Don’t have to be convicted, only must be demonstrated that it was more likely than unlikely that you got rid of them to prevent them from testifying
* Supreme Court has never found a defendant to have forfeited his right to confront simply by committing a criminal act that results in a witness’s unavailability to testify
  + Speaking of the original crime here
  + *People v. Moreno*

**Impeachment of Witnesses**

*Example of how to stop your client from getting impeached as a defendant*

* File a motion in liminae – motion at the threshold
* If it’s a conviction involving a false statement, automatically in
* Balancing test if it’s not involving a false statement
  + D has a prior burglary conviction, from 2004
    - More probative than prejudicial, in
    - How recent or remote?
    - Look at other factors
* We lose the motion, what are the remedies?
  + If you choose not to testify, you lose that opportunity to appeal
  + You say yea, we’ve had some problems, but I don’t do that anymore
    - Take the sting, no appeal
    - Can’t complain about evidence that you introduce yourself
    - Make no mention, get fucked on cross, then you can appeal
* 5 ways to impeach a witness
  + Showing that the witness has some bias, animus, motivation, or corruption that might lead him to fabricate or shade his testimony to help or hurt one of the parties
  + Showing a defect in sensory or mental capacity that undercuts his testimony (perception or memory)
  + Showing that he is by disposition untruthful. Party may mount this witness attack in 3 different ways
    - Cross-examining the target witness about nonconviction misconduct casting doubt on his honesty (Rule 608(b))
      * Rules limit the attacking party to cross of the target witness
    - Cross-examining him about certain kinds of convictions (Rule 609)
      * Rules allow extrinsic evidence without restriction on timing
    - Testimony by a character witness that the target witness is untruthful (Rule 608(A))
      * Both extrinsic evidence and cross allowed
  + Showing that the witness has made a prior inconsistent statement that conflicts with his current testimony
  + Contradicting the witness – showing that he is just plain wrong on one or another point in his testimony
* Usually mounted on cross-examination of the target witness
  + Most may also be mounted by extrinsic evidence

*Sensory and Mental Capacity*

* Attacking party may seek to show that a witness had only a brief chance to see or hear what she has described in her testimony, or that she labors under defects in sensory capacity that may affect her observation, or that human perceptive processes work in ways suggesting that her testimony is not so persuasive as it seems
* Drugs or alcohol
* *U.S. v. Gutman* – Judge has power and sometimes duty to hold hearing to determine whether witness should be permitted to testify only if he agrees to psychiatric examination

*Generic Felony Impeachment*

* Doesn’t relate to embezzlement, perjury
* Only applies to criminal law, it does not permit a court to block cross-examination of a civil plaintiff on his prior conviction
* Must be a felony, not more than 10 years old, measured from the later of the date of final release or the date of conviction
* 2 ways to apply:
  + If it is the defendant, and not a conviction that relates to false statements, the rules favor exclusion
    - Test: On the issue of impeaching this dude, I’ve considered what the prior felony is, its relationship to honesty or dishonesty, how similar it is to what he’s charged with, how recent or remote it is, has the accused rehabilitated himself, what’s the importance, is it the only witness? Does the jury need to know? More probative than prejudicial
  + If it’s not the accused, Rule 403
* *Manske Views*
  + *Manske* describes a broad, narrow, and middle view of the breadth of questioning under FRE 608(b)
    - Broad view has been rejected
    - Narrow view confines the cross-examiner to acts that are themselves false or misleading
      * Generally allow questions that satisfy the narrow view by asking directly about deceptive statements or behavior
    - Middle view reaches conduct “seeking personal advantage by taking from others in violation of their rights”
* No use of convictions to impeach in some circumstances where formal procedures indicate that the witness has been rehabilitated (pardon, annulment, certification) (FRE 609(c))
* Youthful brushes with the law are “generally” inadmissible, but that in crimincal cases such adjudications may be raised in the case of “witnesses other than the accused” (FRE 609(d))
* Permits cross-examination on convictions despite pendency of an appeal (FRE 609(e))

*Prior Conviction Involves a False Statement*

* Doesn’t matter what the punishment is, felony or misdemeanor, within 10 year limit, 403 doesn’t apply, doesn’t matter whether witness or defendant, it’s coming in

*Impeachment with Prior Inconsistent Statement – Rule 613*

* Only comes in to discredit the witness/statement
  + If you’re going to introduce extrinsic evidence, witness must be given some opportunity to review and explain the inconsistent statement
    - If he denies the inconsistency, the statement itself can be introduced as extrinsic evidence if it goes to a material issue
    - Unless it’s a party opponent
  + If the statement includes something that was omitted at the prior proceeding, and the statement is something that the person would have included in order to profess their innocence, etc., they can impeach

*Miranda Rights*

* *Harris v. New York* – The defendant is arrested, questioned without his Miranda rights
  + If that occurs, whatever statement he says to the police is inadmissible to prove the defendant guilty
    - Defendant can’t take the stand to say anything, if they do, say something contrary and the prior inconsistent statement is not the product of coercion, it’s coming in to impeach or discredit you
      * 5th Amendment is not al license for perjury
* *Jenkins* – Pre-arrest silence may come in to impeach
  + *Post*-arrest, pre-Miranda warning silence may come in to impeach

*Impeaching a Witness with Hearsay Evidence*

* A prosecutor may impeach a witness in good faith if the witness’ prior inconsistent statement would otherwise be prohibited hearsay
  + Can’t call a witness with the pretext of impeachment to get in inadmissible evidence
  + Get something else on the record, that makes it a prior inconsistent statement

*Impeachment by Contradiction*

* Impeachment by contradiction is always permitted
  + Issue is, under what circumstances can you use extrinsic evidence to prove up impeachment by contradiction
    - If it goes to any other issue besides contradiction, we’ll allow extrinsic evidence
    - If all the extrinsic evidence does is go to contradiction, it’s not allowed

*Repairing Credibility*

* Supporting party may examine the witness in an effort to refute points suggested during the attack or explain away any aspersions cast upon his veracity
  + In certain situations, he may offer proof o good character of the witness for truth and veracity or evidence of prior consistent statements
* Rehabilitation must meet the attack

*Cross-Examining Paid Witnesses*

* While “high informant fees” are suspicious, an informant’s testimony is not excluded “unless there is evidence that he was promised payment contingent upon conviction”

**Authentication**

* Best Evidence Rule – When a party wants to admit as evidence the contents of a document at trial, but that original document is not available. In this case, the party must provide an acceptable excuse for its absence. If the document itself is not available, and the court finds the excuse provided acceptable, then the party is allowed to use secondary evidence to prove the contents of the document and have it as admissible evidence. Best evidence rule applies when a party seeks to prove the contents of the document sought to be admitted as evidence
* For every writing you want to get into evidence:
  + Original writing
  + Privilege
  + Relevance – 401
  + Authenticity – 901/902 – prove it’s genuine
* If the writing is central to the lawsuit, produce the writing, or explain its absence
* Original, or a copy if it’s fair
* Need a witness with personal knowledge to authenticate
  + To support a finding that the matter in question is what the proponent claims it to be
* You can authenticate a writing circumstantially (a nickname, something only the parties would know)
* Good faith explanation for the absence of a document Rule 1002, 1004 talks about under what circumstances it is not needed
  + 1002 – Requirement of Original
    - To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required
  + 1004 – Admissibility of Other Evidence of Contents
    - Original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if –
      * All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
      * No original can be obtained by any available judicial process or procedure; or
      * At a time when an original was under 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
      * The writing, recording, or photograph is not closely related to a controlling issue

*Photographs*

* Original of a photograph includes a negative, data stored in a computer, any output readable by sight, is an original
* If the photo is shitty, you can bring in a witness that says “yes, this photo is accurate, etc.

*902 – Jury is free to disregard*

* Just because something comes in to evidence doesn’t mean it’s settled

**Opinion and Expert Testimony**

*Lay Witnesses*

* Lay witnesses may give opinion testimony, speaking in generalities or conclusions, when these are “rationally based on his perception and helpful to the trier of fact in understanding his testimony or determining a fact in issue”
* Must have personal knowledge, must assist the trier in fact
  + Size, speed, emotions, intoxications, mental stability if you know them well enough
  + Handwriting, must be familiar before it starts

*Expert Witnesses*

* After *Daubert*, in Federal Courts
  + Gatekeeper – motion in liminae
  + Reliable
  + Relevant
  + Evidence
  + Assist
  + Trier of fact
* Reliability
  + Peer review
  + Acceptance in the relevant community is good
  + Standards, known standards
  + Test method?
  + Error rate?
* An expert is someone with specialized knowledge
* Qualifications for being an Expert:
  + Formal education or training
  + Person with suitable training or education can be an expert even if he is not a specialist or not renowned, and even if he lacks a certification of experience
  + People with practical experience but no formal training
  + Skilled witnesses, such as bankers or landowners testifying to land values
* When an expert is not necessarily required, the following test is used:
  + Experts may well help the jury understand even familiar matters, in virtue of experience or training that provides a more thorough or refined understanding than ordinary experience
  + Where expertise is only marginally helpful because the subject is simple or familiar, a special education or experience may not add much to the common understanding
    - Becomes a 403 issue
* Experts must giver their own opinion, even if they rely on others
* The more heavily an expert relies on hearsay instead of experience, the more likely a court will exclude it

*Bases for Expert Testimony*

* Expert witnesses base testimony on facts or data of 3 sorts, provided they are of a type reasonably relied upon by experts in the particular field
  + Firsthand observation before the hearing
    - Question is whether he has sufficient data to support an opinion, and on this point the expert himself is likely to have a view worth hearing
  + Facts or data that he learns at the hearing
    - Unique to experts
    - Testimony heard by the expert while sitting in the courtroom listening to other testimony before taking the stand himself and information conveyed in hypothetical questions summing up evidence previously admitted
  + What amounts to outside data, meaning information he gleans before trail by consulting other sources, even if it’s inadmissible
    - If it’s based on inadmissible evidence, this cannot be the only basis
    - Unique to experts
    - Broad and somewhat problematic
    - 703 lets experts rely on facts or data reasonably relied upon by other experts in the field
    - 703 blocks the proponent from disclosing to the jury “otherwise inadmissible” facts or data underlying expert testimony unless the court rules that the probative value substantially outweighs the prejudicial effect

*Ultimate Issues, Legal Elements*

* An expert cannot testify that a person had the capacity to make a will, but could testify that he knew the nature and extent of his property and the natural objects of his bounty
* Cannot state that a defendant had or lacked a mental state or condition constituting an element or the crime charged or of a defense

*Presentation of Expert Testimony*

* 1st – Questions that establish that the matter at hand could benefit from expertise
* 2nd – Foundation
  + Educational background, experience, familiarity
  + If the adverse party believes he has a shot at undercutting the credentials, may request an opportunity for “voir dire” – Question him on credentials, court resolves point
* 3rd May ask directly for opinion without disclosure of basis
  + Court may require otherwise
  + Lay witnesses can never come out directly
* *Hypothetical Questions*
  + Not necessary, or used that often, but they may be used

*FRCP Requirements for Expert Testimony*

* Party must automatically supply the names of anyone “who may be used at trial to present expert testimony”
* Each party may depose any person “identified as an expert whose opinions may be presented at trial”
* Parties exchange medical reports that come out of court-ordered examinations
* May seek discovery of facts known or opinions held by an expert retained or specifically employed for litigation

*Unconstitutional Information*

* Can’t base opinion on evidence obtained unconstitutionally

**Privileges**

* Privileges are matters of common law developed in light of “reason and experience”, barring the Court from adopting its own rules

*Lawyer-Client Privilege*

* A confidential communication between a client and an attorney will not be disclosed unless it was made in front of someone, or seeking advice about a future crime or an ongoing fraud, or there’s a dispute between servers
  + Client suing lawyer for being shitty

*Spousal Privilege*

* Adverse spousal privilege – In a criminal case, neither spouse may be compelled to give adverse testimony about the other, witness need not testify
  + Doesn’t count if they are working together, co-conspirators
* Confidential communications, civil or criminal, made during a valid marriage, may not be disclosed by either spouse
  + Privilege survives the marriage

*Psychotherapist-Patient Privilege*

* *Jaffe* confirms the existence of a federal psychotherapist-patient privilege
* *Jaffe* extends privilege protection to sessions with licensed clinical social workers
  + Might not be the case now

**Hearsay Checklist**

**Not hearsay**

* Absence of complaint
* Impeachment
* Verbal Acts (or parts of acts)
* Effect on listener or reader
* Verbal objects/Labels/Verbal Markers
* Circumstantial evidence of state of mind
* Circumstantial evidence of declarant’s knowledge
* Circumstantial evidence of memory or belief
* Machines and Animals
* Not for truth of the matter asserted
* Admissions
* Indirect Hearsay

**Prior Statements**

* Prior inconsistent statement
* Prior consistent statement
* Prior statement of identification

**Admissions by a Party Opponent**

* Individual Admission
* Adoptive Admission
* Authorized Spokesperson
* Admissions by agents or employees
* Admission by co-conspirator

**803 Hearsay Exceptions; Availability of Declarant Immaterial**

* Present Sense Impression
* Excited Utterance
* Then existing state of mind, emotional, or physical condition (to prove future conduct)
* Statements for purposes of medical diagnosis or treatment
* Recorded Recollection
* Business Records
* Absence of Records
* Public Records
* Records of Vital Statistics
* Learned Treatises
* Exception for records of documents affecting interests in property (Rule 803(14))
* Evidence of judgments of felony convictions (Rule 803(22))
* Reputation testimony (Rule 803(21))
* Judgments on matters of personal, family, or general history (Rule 803(23))
* Proof of the absence of a public entry (Rule 803(10))

**Rule 804 Exceptions – Declarant Unavailable**

* Former Testimony
* Unavoidable absence
* Dying declaration
* Declarations against interests, criminal interests

**Impeachment**

Extrinsic evidence is external, outside evidence or evidence that is inadmissable or not properly before the court, jury, or other determining body. Extrinsic evidence is often referred to in the context of interpretating a will that is vague. Arguments to bring in extrinsic evidence in such a situation include: