**EVIDENCE OUTLINE**

* Courtroom Basics
  + Record = Clerk’s Record + Reporter’s Record
    - Clerk’s Record = Record of Entire Case, including Pleadings, Motions, etc, and kept by the Clerk
    - Reporter’s Record = Record of Trial taken by Reporter, includes testimony and colloquys (either (1) at the bench, (2) in chambers, or (3) in open court with the jury absent) (by absolute right)
    - **Record contains stuff that is not in evidence, like offered testimony that did not get into evidence, arguments of counsel, documents marked but not admitted, etc.**
  + **Direct Examination**
    - **(For the most part), ONLY NON-LEADING QUESTIONS. (FRE 611(c))**
      * Leading Question = Any question that can be answered “yes” or “no”
    - **Trial judges have discretion to permit leading questions. (FRE 611(c)). Exceptions when leading questions are allowed:**
      * **When necessary to develop testimony –** when the witness is:
        + Very young, apprehensive, uncomprehending, confused;
        + Timid, reticent, reluctant or frightened;
        + Ignorant; or
        + Infirm.
      * **When the witness is uncooperative – “hostile” or “an adverse party” or “identified with an adverse party”.**
      * **When the Rule is more trouble than it’s worth** – on preliminary matters, matters are not contested, when the witness is an expert.
      * **When the witness’s memory seems exhausted –** the lawyer is generally permitted to “refresh his recollection”.
        + **Present v.** **Past Recollection Refreshed:**

**Past Recollection – when a party seeks to introduce a record of past recollection, he must establish:**

**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, he knew that it was accurate.**

**Present Recollection Recorded – testimonial competence (like past recollection) not necessary to present recollection. Only source of evidence is the testimony of the witness, not the stimulus.**

**The opposing party has the right to inspect the memory aid IF IT IS USED DURING TRIAL – not for competence, but to test whether the witness’s memory has actually been refreshed.**

**When a document is used to refresh a witness’s memory, the lawyer waives the attorney client work-product privilege.**

* + **Cross-Examination**
    - **Leading questions are allowed on cross-examination,** except for when the witness is the lawyer’s own client (re-direct). **(FRE 611(c))**
  + **Excluding Witnesses – invoking “The Rule” (FRE 615)**
    - **Any party may invoke “The Rule” – Court will** (i.e. is mandatory if invoked) **sequester witnesses, directing them to remain outside the courtroom before testifying, to minimize the risk that they will “shape” their testimony based on how other witnesses testify**
    - **Exemptions under “The Rule” – Cannot exclude:**
      * **A party to an action (NOTE: THIS DOES NOT INCLUDE A CRIME VICTIM);**
      * **The officer/employee who is “designated as the (i.e. only one allowed) representative” of the corporation;**
      * **A person who is “essential to the presentation” of the case; OR**
        + “Essential” may include experts, if allowed by the Judge.
      * **Someone authorized by statute to be present at trial.**
    - Violating a sequestration order does not automatically call for excluding the testimony of the witness. (Govt. of Virgin Islands v. Edinborough)
    - Special Case of Crime Victims:
      * General and TX Rule: Partial exemption for crime victims to stay in court unless their testimony will be “materially affected”.
* Basics of Evidence
  + **EVIDENCE = BODY OF MOSTLY EXCLUSIONARY RULES TELLING LAWYERS WHAT THEY CAN AND CANNOT DO TO ESTABLISH FACTS AT TRIAL**
  + **Admissibility v. Sufficiency**
    - **Admissibility = a single piece of evidence can be received**
    - **Sufficiency = totality of the evidence = enough evidence that reasonable jurors could find that the standard was met.**
  + **Demonstrative Evidence**
    - **= sketches, models, pictures, recordings, videos, etc, that illustrate a witness’s testimony**
    - **Usually requires foundational testimony that the representation is an accurate demonstration.**
    - **Treated as part & parcel of the testimony - will be stricken if the testimony is stricken.**
  + **Direct v. Circumstantial**
    - **Direct = Evidence that, if accepted as genuine, NECESSARILY ESTABLISHES the point for which it is offered**
    - **Circumstantial = Evidence that, even if fully credited, MAY FAIL TO SUPPORT THE POINT IN QUESTION, because there is an alternative explanation more probable than not**
    - Note: no distinction in the rules between direct and circumstantial
  + **Only PARTIES OFFER evidence**
    - **Parties = state + defendant for criminal case OR plaintiff + defendant in civil**
      * NOT – witness, judge or a victim
    - **Process to offer evidence:**
      * **Testimonial Evidence:**
        + **Party calls on Witness and OFFERS testimony into evidence 🡪 Witness GIVES/INTRODUCES evidence 🡪 testimony is IN EVIDENCE unless Judge says otherwise**
      * **Documentary/Tangible Evidence:**
        + **Party’s Lawyer has document MARKED by clerk for ID 🡪 Lawyer LAYS THE FOUNDATION for the document by questioning the witness 🡪 Lawyer OFFERS thing into evidence** (“I offer P’s exhibit. \_\_\_\_ for identification into evidence”) **🡪 Judge says “Ex. \_\_\_ will be RECEIVED into evidence.”**
  + **What happens if YOUR OFFERED EVIDENCE IS WRONGLY KEPT OUT?**
    - **Must make an OFFER OF PROOF, ON THE RECORD, which informs the court what the evidence would have been (puts it in the record).**
    - Reasons for Offer of Proof Requirement:
      * Gives trial judge chance to reconsider exclusion
      * Gives COA info they need to decide if error was harmless
    - **3 Types of Offer of Proofs** (outside of jury’s hearing):
      * **Summary Oral Statement of Counsel** (worst way to do it);
      * **Detailed Q&A in written form**
      * **Detailed Q&A with witness on stand (“I’d like to make an offer of proof with the witness in place.”)** (best way to do this)
    - The jury is usually excused during an Offer of Proof.
  + **EVIDENCE MUST BE RELEVANT (FRE 401) + COMPETENT** 
    - **Relevant = piece of evidence makes a disputed fact MORE LIKELY OR LESS LIKELY (“more or less probable”) to be true than it was a minute before.**
    - **Competence = “admissible” because it complies with rules of evidence**
  + **“HALF OPEN DOOR RULE” - COMPLETENESS** (FRE 106)
    - **Rule: The introduction of a PORTION of a writing or recorded statement or other document by one party is a WAIVER OF ALL OBJECTIONS on any RELATED PARTS offered by the adverse party AT THE TIME the part is admitted.**
    - Rationale: Evidence that is competent on one point may be so connected with other evidence that it would be a distortion to consider one without the other.
  + **KEEPING OUT THE OTHER PARTY’S EVIDENCE – BY OBJECTION**
    - **Before Trial – by MOTION IN LIMINE:**
      * **Used when evidence would be prejudicial** (like big company, rich person, minority, etc)
      * **Effect: Lawyers can’t mention evidence in jury’s hearing + lawyers are responsible for their witnesses not mentioning it**
      * Remedy if violation of Order in Limine:
        + By Non-Moving Party:

Technical contempt;

May lead to mistrial;

Will at least lead to a jury instruction to disregard.

* + - * + By Procuring Party:

Technical contempt;

Leads to vacating the order upon motion by the original non-moving party.

* + - **During Trial:**
      * **Objection must STATE A SPECIFIC GROUND by TIMELY MOTION TO STRIKE**
        + Timely Motion to Strike = AFTER question is asked but BEFORE witness leaves the stand. Ideal = before the answer is given.
        + If objection is not timely = waiver.
      * **If MOTION IS GRANTED:**
        + **(1) Jury is told to disregard the evidence.**

Note: Jury isn’t really able to disregard the evidence, but this still puts a red flag in the record (on appeal) + shows what the party is NOT ALLOWED to argue in closing arguments.

* + - * + **(2) In a gross case, a mistrial may be declared.**
  + **Impact of Erroneous Rulings on Evidence (Rule 103):**
    - **No ground for reversal unless:**
      * **A substantial right was effected** (i.e. error is not harmless);
      * **Steps were taken to “preserve error” OR the error was “plain”**
    - Kinds of Error:
      * Reversible Error
        + = Kind of mistake that did affect the judgment and was properly preserved on the record.
        + Reversible error DOES NOT mandate a reversal of the judgment when there is cumulative or overwhelming evidence that essentially makes the error a moot point.
      * Harmless Error
        + = Kind of mistake that did not affect the judgment
      * Plain Error
        + = Kind of mistake that warrants relief on appeal but was not necessarily preserved on the trial record (i.e. “an error so obvious that the trial judge should have known better”)
* **COMPETENCE (FRE 601)**
  + **Every witness is PRESUMED COMPETENT, unless it can be shown that the witness:**
    - **Does not have PERSONAL KNOWLEDGE about which he is testifying,**
    - **Does not have the CAPACITY TO RECALL, OR**
    - **That he DOES NOT UNDERSTAND THE DUTY TO TESTIFY truthfully.**
      * FRE 603 – “Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation…”
  + **A witness who testifies must submit to cross-examination.**
    - If the witness refuses to do this…
      * Prior to testimony:
        + Ruled incompetent if the adverse party so moves, and
        + Can be held in contempt if summoning party so moves.
      * After direct examination:
        + Direct evidence can be stricken, and
        + Will be held in contempt.
  + Note:
    - Testimony under/refreshed by hypnosis:
      * A currently hypnotized witness is not competent to testify.
      * State cannot make per se rule excluding all testimony that is refreshed by hypnosis – Court must make individual determination for each witness.
    - DEAD MAN’S STATUTES:
      * Most states limit testimony about transactions with deceased persons – bars testimony about any fact occurring prior to the other’s death.
      * TX Rule: If an estate is a party, no one can testify as to a conversation with the deceased, UNLESS testimony can be corroborated OR is elicited by the other side.
    - LAWYER AS WITNESS:
      * Testimony is probably okay under Rules of Evidence, but problems arise with Code of Professional Responsibility.
      * Areas where the Code encourages Counsel testimony:
        + Uncontested matters,
        + Testimony on fees, or
        + Where disqualification of the lawyer would pose an undue hardship to the client.
    - JUROR AS WITNESS
      * FRE 606 - Juror testimony prohibited before the jury panel on which he serves.
      * **TESTIMONY BEFORE JUDGE**
        + **Pre-Verdict – Testimony allowed.**
        + **Post-Verdict – Only testimony of OUTSIDE INFLUENCES allowed OR that the jury MADE A MISTAKE IN ENTERING THE VERDICT ONTO THE VERDICT FORM – NOT testimony of INTERNAL INFLUENCES.**

Ex. for verdict awarding too much damages, no juror testimony allowed 🡪 the other side must move for a JNOV.

Ex. testimony where evidence shows multiple jurors were drunk, on drugs, sleeping, etc during trial not allowed (Tanner v. US)

* + - JUDGE AS WITNESS – testimony not admissible (FRE 605).
* **RELEVANCE**
  + **EVIDENCE MUST BE RELEVANT (FRE 401)** 
    - **Relevant = piece of evidence makes a disputed fact MORE LIKELY OR LESS LIKELY (“more or less probable”) to be true than it was a minute before.**
      * **(1) Is it relevant? – most likely yes**
      * **(2) Is AMOUNT OF RELEVANCE > TIME TO PUT THING INTO EVIDENCE + POSSIBILITY OF UNFAIR PREJUDICE/CONFUSION**
      * Note: Relevance is based on context:
        + Criminal cases: relevance based on issues raised in information or indictment and defendant’s plea
        + Civil cases: pleadings raise issues generally, and they are refined by discovery and motions
    - **An objection based on prejudice must always be supported with HOW/WHY the evidence is prejudicial.**
    - **Offering party should be prepared to put forth an EVIDENTIAL HYPOTHESIS explaining why his proof is relevant. The adverse party should be ready to REFUTE THE HYPOTHESIS.**
  + **AUTHENTICATION (FRE 901)**
    - **Before tangible evidence is admitted, the proponent must authenticate the exhibit – he must show that the piece of evidence he offers is what he says it is** (note: this doesn’t mean showing that the item is truthful)**.** This comes before a showing of relevance.
    - **Testimony evidence doesn’t need to be authenticated.**
    - The proponent controls how much foundation evidence is needed by how specific the proponent’s contention is.
    - **The trial judge plays a screening function for evidence, passing the ultimate decision on authenticity to the jury.** The judge is not bound by evidence rules for judging foundation (except for privilege rules). If the proponent offers no proof (or not enough proof), the exhibit will be excluded. If he does offer enough proof, the exhibit will be admitted and the jury will make the ultimate decision on authenticity (**the judge’s decision is not binding on the jury**).
    - **Voir Dire:**
      * **It is generally improper to take the authenticating witness on voir dire prior to time when the document/object is offered into evidence. (Rule 611).**
      * Questions are limited to that document or physical object being authenticated.
    - **Authenticity does not assure admissibility – it is only one prong. Documents may still contain hearsay or be otherwise objectionable.**
    - **10 Ways to Authenticate Evidence (FRE 901)** (note: list is illustrative, not exhaustive):
      * **Testimony from a** (lay or expert) **Witness with Knowledge;**
        + Note: This is the most traditional way and most dramatic.
        + May be by Affidavit:

Often used in bench trials b/c the court is not bound when considering foundation proof. In jury trials, affidavits are often inadmissible hearsay and the jury can’t hear such evidence.

* + - * + Ex. for photograph – admissible if a witness who is familiar with what the photograph purports to represent identifies it as a fair and accurate representation of what it purports to be.
      * **Non-Expert Opinion on Handwriting;**
        + “Genuineness” must be known “by familiarity not acquired for the purposes of the litigation”.
      * **Comparison by Expert Witness or by Jury (to previously admitted specimens);**
        + Note: The problem with using the jury is that there’s no way for the jury to announce their ruling on authenticity before the verdict – this method is really only useful for a bench trial.
      * **Distinctive Characteristics;**
        + = “Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.”
        + Note: This is really only workable in bench trials, but the problem is pointing out the distinctive characteristics without a witness.
      * **Voice Authentication;**
        + Note: Requires familiarity, but can be acquired AFTER the phone call in question. Ex. By hearing parties speak in courtroom or in a deposition.
      * **Alternate Voice Authentication Method for Phone Calls;**
        + = X’s phone number was dialed and circumstances suggest X was on the line (can include self-authentication)
      * **Evidence authorized by law to be kept in public records really is the record of X;**
        + May be by affidavit by record keeper.
      * **Ancient documents or data compilation – authentic if:**
        + **Looks old**
        + **Kept where such a document would usually be kept; and**
        + **Document is 20+ years old.**
      * **Process or System – Electronic records or evidence of process or system that produces transaction will authenticate. The exhibit is the output of the system.**
    - **Self-Authenticating Documents (Rule 902) – Certain exhibits will authenticate themselves – no action by the proponent necessary.**
      * **Examples:**
        + **Public documents under seal.**

Note: Any consulate has a seal.

* + - * + **Public documents not under seal, but with sealed attestation sheet attached (“authenticating document”)**
        + **Foreign Public Documents**

Note: tedious and difficult self-authenticating standard that involves embassies and consulates, etc.

* + - * + **Certified copies of public records,**

Copy must be certified as correct by the custodian of such a copy, and the certification must be with seal and signature.

* + - * + **Government publications.**
        + **Newspapers and periodicals.**
        + **Certified records.**
        + **Trademarks on goods or premises** (including corporate logos).
        + **Documents with private signatures, but acknowledged before a notary.**
        + **Business records with declaration.**

Three requirements must be met (FRE 902(1)):

Record was made at or near time of occurrence of matters set forth by, or from information transmitted by, a person with knowledge in those matters;

Record was kept in the course of regularly conducted activity, and

Record was made by the regularly conducted activity as a regular practice.

Must make the record available for inspection in advance of offering it into evidence so the adverse party has a fair opportunity to challenge it.

* + - * Affidavit v. Acknowledgement:
        + Affidavit = “I swear I saw X execute this document”
        + Acknowledgement = No one is swearing to anything, just signing the document (i.e. like Deed)
    - **Chain of Custody Authentication**
      * **Is a way of authenticating items that could have been altered.**
      * **How: By calling a sequence of witnesses to testify that the item has not been altered and been in continuous possession.**
      * **No rule that says you have to prove chain of custody, but this is usually the most logical way to authenticate these types of items.**
      * The ultimate question is whether the authentication testimony was sufficiently complete so as to convince the court that the original item had not been exchanged or tampered with.
    - Special types of tangible evidence:
      * Tape recordings:
        + Seven elements that must be established before a tape recording can be admitted:

A showing that the recording device was capable of taking testimony;

A showing that the operator of the device was competent;

Establishment of the authenticity and correctness of the recording;

A showing that changes, additions and deletions have not been made;

A showing of the manner of the preservation of the recording;

Identification of the speakers; and

A showing that the testimony elicited was voluntarily made without any kind of inducement.

* + - * + Requires familiarity with the voice – either before or after the phone call in question.
  + **BEST EVIDENCE RULE (FOR WRITINGS)**
    - **Rule: To PROVE THE CONTENT of a writing, where such terms are called into question, the ORIGINAL WRITING MUST BE PRODUCED, not testimony about its contents, unless it is shown to be unavailable for some reason other than the serious fault of the proponent.** (US v. Duffy)
    - Note: Under FRE 1001 and 1003, a photocopy of a document is called a “duplicate” of that document. The duplicate is admissible to the same extent as the original, unless there is a “genuine question” about the authenticity of the original or it would be “unfair” to admit the duplicate.
    - **Exceptions:**
      * **Document has been lost or destroyed (after a reasonable and diligent search has been made);**
      * **Document is no obtainable (i.e. withheld by a distant third party);**
      * **Document is in hands of the adverse party;**
      * **Evidence is on a minor point OR**
      * **Secondary evidence is offered to prove the contents by deposition or trail testimony of the adverse party, or by his written admission.**
    - Writings Include:
      * A recording;
      * A photograph;
      * Movies;
      * Normal writings.
    - Writings DO NOT Include:
      * A shirt with a laundry mark or other such (technical) writing does NOT fall under the best evidence rule.
  + **RELEVANCE V. TIME + PREJUDICE (FRE 403)**
    - Non-Offering Party may OBJECT to the evidence because it is PREJUDICIAL (party tells judge WHY evidence would be prejudicial 🡪 judge uses balancing test)
    - **Judge may EXCLUDE relevant evidence if RELEVANCE is SUBSTANTIALLY OUTWEIGHED by DANGER (UNFAIR PREJUDICE, CONFUSION OF THE ISSUES, MISLEADING THE JURY) or OTHER CONSIDERATIONS (UNDUE DELAY, WASTE OF TIME, ETC.).**
    - But, under RULE 105 – Judge may ADMIT EVIDENCE but give LIMITING INSTRUCTIONS to prevent misuse on other issues by the jury
  + **CHARACTER EVIDENCE (FRE 404, 405)**
    - Habit v. Character Evidence
      * Character = a generalized description of one’s disposition in respect to a general trait; evidence of a “moral trait”. May also be called PROPENSITY evidence.
      * Habit = HIGHLY SPECIFIC; one’s REGULAR AND REPEATED response to a repeated situation, or a reflex behavior in a specific set of circumstances. Must offer proof of SEVERAL instances. Offered to show identity, and circumstances must match act on trial.
    - **GENERAL RULE = CHARACTER EVIDENCE IS NOT ALLOWED to prove conduct in a specific instance UNLESS character is an ESSENTIAL ELEMENT of a charge or defense** (think civil cases; ex. child custody case).
      * **EXCEPTIONS – Where character evidence is admissible:**
        + **Evidence of REPUTATION and OPINIONS (personal or general) okay, but EVIDENCE OF SPECIFIC INSTANCES is admissible ONLY on cross. (RULE 405).**

Note: Even if your own witness becomes adverse, you are still on direct 🡪 cannot use specific instances to show character.

* + - * + **Evidence of dishonesty (to impeach) is admissible.**
        + **Criminal Cases – Character of Defendant**

Prosecutor MAY NOT offer evidence of Defendant’s character during his case-in-chief BUT

**ACCUSED MAY use initiate evidence regarding HIS OWN CHARACTER (either good evidence or “he doesn’t have a bad reputation” evidence). May also initiate evidence regarding ALLEGED VICTIM’S CHARACTER.**

**ONCE THE ACCUSED OFFERS CHARACTER EVIDENCE, THE PROSECUTION MAY FOLLOW WITH CHARACTER EVIDENCE.**

* + - * + **Prior bad acts are admissible as proof of Motive, Intent, Plan, Knowledge, Identity, etc to show conformance. (FRE 404).**
    - **HABIT/ROUTINE PRACTICE EVIDENCE (RULE 406)**
      * **Proof of personal habit is freely admissible to prove conformance with that habit.**
    - **In SEXUAL ASSUALT/CHILD MOLESTATION CASES**
      * **Evidence of Defendant’s Acts (FRCP 413-415)**
        + **Evidence of SPECIFIC SIMILAR OFFENSE or OFFENSES with others is admissible, on direct and cross.**

What exactly is admissible?

Confessions, Convictions are admissible.

NOT arrests, charges, police reports, indictments, verdicts 🡪 these are all hearsay.

Specific acts may be proved by evidence of general sexual disposition (“lustful disposition”).

* + - * + **No “door-opening” by Defendant is required.**
        + **Judge DOES NOT have the discretion to weigh relevance v. prejudice/time/etc.**
      * **Rape Shield Rule (FRE 412):**
        + **Restricts the use of evidence relating to the sexual history of the victim. “SLUT EVIDENCE”** (opinion/reputation) **not allowed.**
        + **Victim’s sexual propensity/character is now limited to:**

**Acts with the Defendant OR**

Note: this is not subject to any time restriction.

**Near-term acts with others, to show others are source of scratches, bruises, etc.**

Note: Acts with others must be within time for healing of scratches and bruises (ex. within 4 days – Janicke suggestion)

* + - * + Civil Cases (Rule 412(b)(2)) – Prior sexual history is okay if relevant > prejudice, time, etc. and if it has been placed in controversy by the victim (unless in TX – victim doesn’t have to put it into play). Still no “slut-reputation” evidence allowed, just the facts.
        + Before any evidence is admitted, an *in camera* hearing is required in advance, before admission (so advance notice must be given). Record of this hearing must be and remain sealed.
  + **REMEDIAL MEASURES (FRE 407)**
    - **Evidence of subsequent remedial measures** (repairs, re-designs, etc) **is NOT ADMISSIBLE to show negligence, culpable conduct, a defect in a product, a defect in a product’s design or the need for a warning instruction.**
    - Notes:
      * Applies in product liability cases.
      * **Repairer holds the key, and risks opening the door by making broad contentions 🡪 May be shown to prove “ownership or control” or “feasibility of better condition/design possible” if the point is “controverted” – may be used for IMPEACHMENT**
  + **PAYMENT OF MEDICAL EXPENSES (FRE 409)**
    - **Not admissible to prove liability (negligence/product liability cases, etc).**
  + **INSURANCE**
    - **Evidence of insurance is not admissible to prove negligence. (Rule 411).**
    - But, proof of insurance is still admissible to show proof of agency, ownership, control, or bias or prejudice of a witness.
  + **SETTLEMENT NEGOTIATIONS**
    - **CIVIL (FRE 408)**
      * **Proof of SETTLEMENTS, OFFERS TO SETTLE and conduct/statements made during settlement negotiations, is NOT ADMISSIBLE when offered to prove liability for/invalidity of a claim/its amount.**
      * Comments made during failed settlement CAN BE USED TO SHOW points other than liability –
        + Bias or prejudice of a trial witness
        + On contention of undue delay – to defeat laches defense
        + Proving an obstruction charge (note: this would arise when obstruction of justice is one of the charges at trial)
    - **CRIMINAL (FRE 410)**
      * **A guilty plea that sticks – CAN BE USED in later cases** (i.e. later civil case)
      * **A nolo plea that sticks – NOT ADMISSIBLE**
      * **Withdrawn pleas of guilty or nolo – NOT ADMISSIBLE**
      * **Statements during plea bargain - NOT ADMISSIBLE**
      * **FAILED PLEA BARGAIN DISCUSSIONS (Rule 410)**
        + **Remarks of Defendant are protected IF:**

**Defendant is SPEAKING TO A PROSECUTING ATTORNEY AND**

**If the TOPIC IS PLEA BARGAINING.**

* + - * + Remarks must be WITH PROSECUTING ATTORNEY – defendant’s conversations with others about the bargain, or his later testimony about the bargain, are not covered.
      * **Application of “Half-Open Door” Concept:**
        + **Protection is lost for all of the settlement negotiations IF Defendant testifies:**

**To another part of what was said in plea bargain meetings,**

**OR contra to what was said in the plea bargain meeting.**

* + - * **In a later prosecution for perjury, prosecutor CAN INTRODUCE what Defendant said at plea bargain meeting as the TRUE STORY.**
* **OPINION EVIDENCE**
  + **LAY WITNESS - may give testimony on fact in issue (Rule 704). Opinion evidence is generally inadmissible (Rule 701).**
    - **Exception where opinion evidence IS admissible – allowed ONLY IF:**
      * **Rationally based, and**
      * **Based on a physical perception by the witness,**
      * **Helpful to the trier of fact (i.e. no other feasible way to convey the impression), and**
      * **Not based on scientific, technical or other specialized knowledge** (i.e. what an expert should be testifying about).
    - **Opinions of law** (but, foreign law may be established by expert)**, medical testimony by a non-doctor, and opinions about someone’s state of mind are NEVER admissible (because not rationally based).**
    - Note: proper objection is “Objection, your honor; it calls for an opinion.”
    - Examples of generally allowed lay opinion testimony:
      * Handwriting or voice recognition,
      * Sanity (i.e. visible signs of irrational behavior)
      * Emotional states
      * Drunkenness/Inebriation
      * Vehicle speed
      * Taste and smell
      * An owner’s perception of the own worth of his chattel
  + **EXPERT WITNESS**
    - **May testify if what he says will “assist the trier of fact to understand the evidence or determine a fact in issue” – MUST BE HELPFUL (Rule 702).**
    - **The expert’s testimony must be based on** (whether scientific or not)**:**
      * **SUFFICIENT facts or data;**
      * **RELIABLE principles and methods; and**
      * **The witness has APPLIED THE PRINCIPLES AND METHODS reliably to the facts of the case.**
      * Note: “general acceptance” is not required
    - **May base testimony on 3 types of information (FRE 703) –**
      * **On facts or data the expert has learned by firsthand observation “before the hearing”;**
      * **On facts or data the expert learns “at the hearing”; or**
      * **Outside data – what the expert gleans before trial by consulting other sources.**
        + Here, facts or data need not be mentioned at trial, but may need to lay a special foundation to show the facts/data relied upon by experts in the field.
        + BUT, the expert cannot put forth the opinion of another person.
    - Laying the foundation for the expert 🡪 “qualifying the witness as an expert”
      * When introducing the expert, the calling party usually brings out:
        + Educational background, including degree and certificate or license to practice of the expert;
        + Experience, such as employment or practice in the area of the expert; and
        + Familiarity with the subject in suit of the expert.
      * The other party may “stipulate” to the expertise of your expert witness, but you should not agree to it for your witness – you should still go through the credentials of your witness in front of the jury.
    - **The expert’s methodology is screened/ checked by the judge before trial 🡪 if the judge finds it to be reliable, the evidence is admitted for jury evaluation. The jury is the ultimate determination of credibility.**
    - Special Issues:
      * Mental state – Experts are prevented in criminal trials from stating opinions that the defendant had or lacked a certain mental state or condition “constituting an element of the crime charged or of a defense.” (Rule 704(b)).
      * An expert’s testimony can embrace an ultimate issue of the case, but cannot state that in their opinion, X met an element of the crime (i.e. like, X “had malice aforethought”)
* **JUDICIAL NOTICE** = the process by which a court determines certain matters without need of formal proof
  + **4 DIFFERENT AREAS:**
    - **Adjudicative Facts (FRE 201)**
      * **= facts that normally go to the jury in a jury case, that must be proved by evidence if notice is not taken (notice = substitute for evidence)**
    - **Evaluative Facts – Unregulated** 
      * **= matter of general knowledge**
    - **Legislative Facts – Unregulated** 
      * **= facts considered by a trial or appellate court in ruling on a question of law.**
    - **Law (conflict of law doctrines)**
      * **= the process by which the court determines controlling law.**
  + **2 alternate bases for judicial notice (Rule 201):**
    - **Facts generally known in the locale; and**
    - **Facts not generally known, but ascertainable from references of indisputable accuracy.**
    - **NOT THE JUDGE’S PERSONAL KNOWLEDGE.**
  + Procedural Details:
    - Judicial notice can be taken at any time during the case – can even be taken on appeal.
    - Asking party asks, ON THE RECORD, for the Court to take judicial notice of X.
    - The adverse party is entitled to object before judicial notice is taken, and if judicial notice is taken too fast, he can object afterward and has a right to be heard.
    - **Criminal v. Civil Case Judicial Notice (FRE 201)**
      * **Civil – Court instructs the jury to accept as CONCLUSIVE any fact judicially noticed.** It is grounds for contempt for the opposing party to offer opposing evidence to argue against judicial notice, BUT, the opposing party may move to vacate the judicial notice.
      * **Criminal – Court shall instruct the jury that it MAY accept, BUT IS NOT REQUIRED TO, accept as conclusive any fact judicially noticed.** It is not contempt for the adverse party to put in opposing evidence (controvert).
  + Examples:
    - Will usually take notice of:
      * A court’s ruling or holding on a matter,
      * All official notices and functions of other courts in other jurisdictions (seen as honoring the Full Faith and Credit Clause).
    - Will NOT usually take notice of:
      * Laws of a foreign country,
      * Where it is a critical element of the case (vs. collateral/peripheral matters).
* **IMPEACHMENT OF WITNESSES:**
  + **Impeachment = the process of attempting to weaken the perceived credibility of a witness (and only a witness). Most commonly done on cross.**
  + You can only impeach a live person, CANNOT IMPEACH A COMPANY OR ORGANIZATION.
  + **CRIMINAL CASE: ONCE DEFENDANT DECIDES TO TESTIFY, THEY ARE SUBJECT TO IMPEACHMENT JUST LIKE ANY OTHER WITNESS.**
  + **5 Ways to Impeach a Witness** (note: can use multiple methods of impeachment on same witness)**:**
    - **General** (i.e. attacks credibility across the board) **– Types:**
      * **IMPAIRED GENERALY COMPETENCY - showing a defect in sensory or mental capacity that undercuts testimony**
        + I.e. influence of drugs/alcohol, unable to observe/remember things in general, bias for/ against a party.
      * **POOR CHARACTER FOR VERACITY - showing that he is by disposition untruthful** (FRE 404(a)(3) – character evidence rule exception)**.**
        + Note: This may occur by:

Offering opinion or reputation evidence on his character for truthfulness.

Cross-examining him about certain kinds of convictions; and

**The cross-examiner may ask about:**

**If general witness:**

**Convictions for crimes “punishable by death or imprisonment in excess of one year” admissible (after weighing of probativeness and prejudice); OR CONVICTIONS crimes involving “dishonesty or false statement” admissible** (doesn’t include theft, assault, rape, battery, murder) (with no balancing test).

**Within a 10-year time period.** (FRE 609(b))**; and**

**If the witness HAS NOT BEEN rehabilitated** (FRE 609(c)) or **IT WAS NOT A JUVENILE CONVICTION.** (FRE 609(d)).

Cannot use extrinsic evidence (any evidence that doesn’t come out of the witness, who was convicted) to prove conviction if the witness admits to it.

IF NO CONVICTION 🡪 treat as prior bad act analysis

Testimony by a character witness that the target witness is untruthful (FRE 608(a)).

**Character witness may say what he personally thinks of the veracity of the principal witness, after a FOUNDATION is laid and a PERIOD OF PERSONAL AQUAINTANCE is proved.**

* + - **Specific** (attacks credibility of direct testimony IN THIS CASE ONLY)**:**
      * **Prove impaired specific competency on the occasion in question.**
        + I.e. drunk, night-time, looking the other way, etc.
        + May use extrinsic evidence.
      * **Show bias or prejudice in this case.**
      * **Showing that the witness has made a prior inconsistent statement.**
        + Notes:

Proved by testimony of target witness or of another witness. Cross-examiner no longer has to approach the subject gently. Cross-examiner may go straight to the point. BUT, opposing counsel is entitled to see the statement/learn of its contents. (FRE 613).

If PRIOR INCONSISTENT STATEMENT= IS PROVED BY “EXTRINSIC EVIDENCE”, witness must have the opportunity to “explain or deny” it during trial, and the adverse party must have a chance to interrogate her. (FRE 613(b)).

Non-Miranidized Statements:

Can be used to impeach, but cannot be introduced on the merits. BUT, if the statement was compelled or coerced, it usually cannot be used at all.

Use of Silence: Pre-Miranda silence may be used to impeach. But once the Miranda warning is given, silence can no longer be used to impeach.

* + **Using Extrinsic Evidence to Impeach:**
    - **Extrinsic = any evidence other than the testimony of the target witness on cross.** Includes:
      * Calling an impeaching witness;
      * Introducing an impeaching document.
    - **Limitations: Can go extrinsic on any kind of impeachment except:**
      * **Can’t go extrinsic against the target witness re: prior dishonest acts with no conviction;**
      * **Can’t go extrinsic when using a criminal conviction beyond introducing the conviction record.**
  + The judge is authorized to protect the witness from harassment or undue embarrassment in the face of impeachment techniques. (FRE 611).
  + Impeachment attempts that attack credibility on the basis of “beliefs or opinions… on matters of religion” not allowed. (FRE 610).
  + **Repairing Credibility** (FRE 611)
    - **The “supporting party” may examine the witness in an effort to refute points suggested during the attack or explain away any aspirations cast upon his veracity. This may include offering prior consistent statements.**
    - **What constitutes an attack of credibility that allows for repair?**
      * **Evidence that simply contradicts or refutes testimony by a witness is not enough 🡪 character for truthfulness must have been attacked by opinion or reputation evidence.**
    - **Two conditions:**
      * **Cannot repair credibility before the attack has come.** (FRE 608(a)).
      * **Repair must be made at the point of attack.**
    - May occur by:
      * Opinion or reputation evidence of good character,
      * Specific instances of conduct (maybe on re-direct… Rules state only cross, but if the witness is attacked on specific events on cross, it might be considered a waiver for specific events to be used on re-direct).
* **PRIVILEGE**
  + Purpose = to protect certain relationships, communication, and values that society deems more important than the costs they impose on the litigation process (i.e. even though relevant, crucial or not prejudicial).
  + FRE 501 – Privileges are matters of common law developed in light of “reason and experience”.
  + **ATTORNEY CLIENT PRIVILEGE**
    - **CLIENT OWNS THE PRIVILEGE.**
    - **Basic Requirements for Privilege to Apply:**
      * **Must be communication (speaking or writing) or observations made as a consequence of protected communication** (does not block underlying facts)**;**
      * **Communication must be made for the purpose of obtaining legal advice; and**
      * **Must be intended by the client to be confidential.**
        + But, the attorney can disclose the communications to certain assistants/intermediaries without the privilege being lost.
        + The relevant consideration is NOT whether the communication was actually kept between the attorney and client, but whether the client INTENDED the communication to be confidential.
    - **BOTH sides of the attorney client communication are privileged – what the client says AND what the lawyer says (including the lawyer’s staff) (modern understanding**; old only covered what client said).
    - **For a corporate client –** 
      * **CORPORATION OWNS THE PRIVILEGE** (and holds the right to waive the privilege)**.**
      * **An employee of a corporation is sufficiently identified with the corporation so that his communication to the corporation’s attorney is privileged where:**
        + **The employee makes the communication at the direct of his superiors in the corporation; and**
        + **Where the subject matter is the performance of the employee of the duties of his employment.**
    - **In cases of Joint Representation:**
      * i.e. where the lawyer represents two or more entities/parties in the same matter (requires waiver/consent by all clients)
      * **Joint Representation 🡪 privilege owned jointly by all clients.**
      * **BUT, no privilege on “internal” matters** (if party A sues party B, both represented by lawyer L) **🡪 communication only privileged from “someone from the outside world”.**
    - **In cases of Joint Defense** (but not joint representation):
      * **Communication among the parties is privileged.**
    - **Exceptions to Coverage by Privilege:**
      * **Handling of Evidence – If the defense counsel removes/alters evidence, the statutory privilege does not bar revelation of the original location or condition of evidence in question** (will waive privilege).
      * **Attorney v. Client suit (i.e. malpractice, action to collect a fee);**
      * **A lawyer who is an attesting witness on a document executed by his client (like a will);**
      * **Identity, address or whereabouts of the client** (where disclosing information is not in substance a disclosure of the confidential communication by the client)**; and**
      * **Communications in furtherance of a crime or fraud.**
        + The client’s main purpose must be to involve the lawyer in assisting in a crime or fraud (not just to get legal advice) for privilege to not cover it.
      * **IT IS NOT AN EXCEPTION that the other side “needs” the information or that the information cannot be gotten any other way 🡪** the other side must get the info another way if it has been covered by privilege.
    - **Assertion of Privilege**
      * **CLIENT OWNS THE PRIVILEGE – they must claim it at the right moment or risk losing protection. The attorney is presumptively authorized to assert the privilege, but cannot claim it if the client wishes to disclose.**
      * A third party may draw the privilege to the attention of the court, who will then consult with the client/lawyer.
    - **Waiver of Privilege – occurs when the holder VOLUNTARILY DISCLOSES OR CONSENTS TO DISCLOSURE of any significant part of the matter or communication. May occur by express waiver or by conduct.**
      * Only the client or his authorized representative may waive the privilege.
      * Negligent disclosure by the lawyer may = waiver.
      * Privilege ≠ waived if the lawyer discloses communication without client’s consent.
      * **Inadvertent disclosure + reasonable precautions + action taken promptly after discovery = NO waiver**
      * **Half-Open Door Rule applies – REVEALING ONE OPINION BUT WAIVES PRIVILEGE ON OTHERS ON SAME TOPIC, up to date of waiver.** Limited by “in fairness” (FRE 502).
  + **SPOUSAL PRIVILEGES (TX Rule 504)**
    - **2 types:**
      * **Testimonial privilege (i.e. privilege not to be called by the prosecution)**
        + **The witness spouse alone has the privilege to refuse to testify adversely against his spouse – they cannot be forced to testify or foreclosed from testifying by another party.**
        + **Privilege ends with divorce.**
        + Exception cases:

Where the witness-spouse is the victim;

Crime against a minor child;

Matters occurring prior to marriage (TX Rule only).

* + - * **Marital Communications privilege**
        + **Provides that communications between the spouses, privately made, during the marriage, are generally assumed to have been confidential, and are therefore privileged.**
        + **Requirements:**

**Extends to words and acts intended as communication** (but not to contemporaneous, non-communicative actions)**;**

**Requires a valid marriage at the time of communication; and**

**Applies only to confidential communications.**

* + - * + **Privilege belongs to the speaking spouse** (blocking communication made to the listening spouse), but the listening spouse may claim it FOR the speaking spouse.
        + **The Speaker’s privilege covers what the Speaker said, as well as communication by the original Listening spouse that either reveals or suggests what the original Speaker said.** If the response is entirely unrelated and in so way suggests what the original Speaker said, then the privilege covering the original Listening spouse’s response is only that of the original Listening spouse.
        + **Privilege survives divorce.**
        + Exception cases:

Actions between spouses (i.e. divorce);

Criminal case where the alleged victim was the spouse or a minor child;

Furtherance of crime or fraud;

Commitment or similar proceeding.

* + **PRIVILEGE AGAINST SELF-INCRIMINATION**
    - **5th Amendment – “No person shall be compelled in any criminal case to be a witness against himself.”**
    - **Privilege means that you:**
      * **Can’t be required to testify by the government; and**
      * **Can’t be obliged to write out a confession by the government.**
        + BUT, if a person writes out a document on his own initiative, there is no privilege and the document can be discovered by the prosecution. This would include the making of a file.
      * Privilege applies where the response/testimony could “further a link in the chain of evidence” needed to prosecute.
    - **Privilege only…**
      * **Belongs to natural persons – cannot be asserted by legal entities (like corporations and legislative proceedings).**
      * **Applies to evidence that is “testimonial” – it does not protect against compelled production of incriminating evidence that is not communicative in nature or has the effect of making a forced statement (i.e. like a blood sample).**
      * **Applies where a danger of criminal liability still exists.**
    - Effect in Civil Cases (in TX):
      * Plaintiff invoking – will likely be non-suited.
      * Civil Defendant invoking – will have a heavy negative judicial comment for invoking the 5th.
  + Other Notes about Privilege:
    - Where a lawyer talks to a potential client and later declines the representation, there is no effect on the privilege. No relationship is needed to have privilege.
    - There is no effect on the privilege if there happened to be an unknown eavesdropper 🡪 APPARENT confidentiality is enough.
    - Special Cases:
      * Clergyman-Penitent Privilege (TX Rule 505)
        + Similar to lawyer-client privilege, and applies in both civil and criminal cases.
        + Penitent/Parishoner (speaking to Clergyman) owns the privilege.
      * Political Vote (TX Rule 506)
        + Privilege exists to refuse to disclose tenor of a person’s vote at a political election conducted by secret ballot.
        + DOES NOT APPLY if the vote is cast illegally.
      * Trade Secret
        + Quasi-Privilege – the court can override it if maintaining the privilege would “work injustice”.
        + This privilege is easy to break today with a protective order.
      * Physician-Patient Privilege (TX Rule 509)
        + Criminal Cases = NO privilege
        + Civil Cases – almost non-existent due to exception in Rule:

No privilege exists where the patient’s condition is a part of a party’s claim or defense – blocks privilege in most cases because if this doesn’t apply, the evidence probably isn’t relevant.

* + - * Mental Health Professionals (including drug abuse workers) (TX Rule 510)
        + Criminal Cases = NO privilege
        + Civil Cases - almost non-existent due to exception in Rule:

No privilege exists where the patient’s condition is a part of a party’s claim or defense – blocks privilege in most cases because if this doesn’t apply, the evidence probably isn’t relevant.

* + - * Party’s Work Product “Privilege”
        + Note: Is not really a privilege, but acts like one.
        + = A party’s materials prepared in anticipation of litigation, or for trial, are covered.
        + Tex. R. Civ. P. 192 –

Counsel impressions are “core” work product.

The rest is called “other work product” and can be had by the opposing party by showing “substantial need”.

* + - * + Exceptions:

Work product has NO applicability in criminal cases.

* + - Judge’s Commentary:
      * CIVIL:
        + Either side may comment freely or adversely about the other party (or a witness’s) failure to testify.
      * CRIMINAL:
        + Neither the opposing party nor the Judge can comment adversely on the Defendant’s failure to testify.
        + The Defendant has an affirmative right to have the Judge instruct the jury that they are not to draw any inference from his failure to testify.
* **HEARSAY (APPLIES TO STATEMENTS)**
  + **Basic Test:**
    - **Is it a spoken/written statement (recitation of past/present fact, express or implied)?**
      * Notes:
        + Future oriented phrase ≠ hearsay
        + Short phrase = marker ≠ hearsay
        + Question ≠ hearsay
        + Command ≠ hearsay
        + Promise ≠ hearsay
      * **No 🡪 Not Hearsay**
      * **Yes 🡪 Has the statement been offered to prove its truth** (the truth of THAT statement)**?**
        + **No 🡪 Not Hearsay**

Things that are NOT offered to prove the truth of the statement ≠ not hearsay:

Something with independent legal significance (i.e. element of the claim, like trade terminology in a contract claim)

Impeachment (if not offered for purpose of proving truth – offered to impeach)

State of Mind of Listener (that is an element of the case/defense, i.e. like permission, consent, duress, etc)

* + - * + **Yes 🡪 Does it fall under an exception?**

**No 🡪 HEARSAY**

**Yes 🡪 Not treated as hearsay**

* + - **Is it a mixed statement and conduct? 🡪 Treat as conduct.**
    - **Is it conduct?**
      * **Is the conduct intended to make a statement?**

Ex. Pointing, shaking head 🡪 are usually intended to make statements

* + - * + **If in doubt 🡪 No 🡪 Not Hearsay**
        + **Yes 🡪 Has the statement been offered to prove it’s truth** (the truth of THAT statement)**?**

**No 🡪 Not Hearsay**

**Yes 🡪 Does it fall under an exception?**

**No 🡪 HEARSAY**

**Yes 🡪 Not treated as hearsay**

* + **GENERAL RULES:**
    - **A party can always testify to WHAT HAPPENNED, but not what they (a) wrote down, (b) reported by phone, or (c) told others orally.**
    - **Witnesses ARE NOT ALLOWED to testify to out-of-court statements of themselves OR of others when OFFERED TO PROVE THE TRUTH of the matter asserted.**
      * **Statement**
        + **= ORAL/WRITTEN OR NON-VERBAL CONDUCT INTENDED TO MAKE A STATEMENT**
        + **= Intended to make an assertion of present or past fact OR opinion**
    - The general rule is subject to exceptions:
      * Definitional Exceptions: certain things are not hearsay
      * Hearsay Exceptions: it is hearsay, but an exception allows it in.
  + Items where there is no exception:
    - Gossip 🡪 offered to prove gossip 🡪 Hearsay
  + **EXCEPTIONS – 5 Categories**
    - **DEFINITIONAL - Statements by Declarants who Testify at Trial** (FRE 801(d)(1)) **– 3 Types:**
      * **Prior Inconsistent Statements** (Rule 801(d)(1)(A))
        + Note: A prior inconsistent statement is always admissible to impeach 🡪 this covers when the statement is being offered for its truth as well.
        + **Three conditions must be met:**

**The witness must be cross-examinable “concerning the prior statement”;**

**The statement must be “inconsistent” with his present testimony; and**

**It must have been MADE UNDER OATH in a formal “prior proceeding” or “deposition”.**

Must be in prior formal proceeding – trial hearing, other proceeding, deposition.

Grand Jury Proceedings – special case:

IN TEXAS: CANNOT use a third party’s prior grand jury testimony to convict.

Everywhere else: Grand jury proceedings count as prior proceedings and can be used.

* + - * + Doesn’t have to be before any motive to falsify occurred (that is only for CONSISTENT); and it isn’t necessary that there was motive/opportunity to cross at the time testimony was made.
      * **Prior Consistent Statement** (Rule 801(d)(1)(B))
        + **Three conditions must be met:**

**The witness must be cross-examinable “concerning the prior statement”;**

**The statement must be “consistent” with his present testimony; and**

**The statement must be offered to rebut a charge of “recent fabrication or improper influence or motive”.**

Note: ANY prior consistent statement falls under here 🡪 didn’t have to be made under oath.

* + - * + Timing: Offered statement must have been made BEFORE the onset of a motive to falsify 🡪 this timing line is at discretion of the Judge.
      * **Prior Statements of Identification** (Rule 801(d)(1)(C))
        + **Here we are talking about testimony of what the witness said, out of court, that she saw.** This prior “thing” that she saw and identified need not have been under oath in a proceeding.
        + Note: may include prior composite sketch
        + The declarant MUST BE PRESENTLY AVAILABLE AND AVAILABLE FOR CROSS-EXAMINATION for this to meet the hearsay exception.
    - **DEFINITIONAL - Admissions of the Opposing PARTY** (FRE 801(d)(2)) – DEFINITIONAL EXCEPTION TO HEARSAY
      * Either written statements (i.e. documents) or oral statements.
      * **We don’t analyze which way the statement cuts 🡪 if it’s a party’s statement, and offered by the opposing party, it qualifies.**
      * **Includes:**
        + **Individual Admissions** – Statements made by a party are broadly admissible against him. Includes prior guilty plea, confession.
        + **Adoptive Admissions** – If a person “manifests his adoption or belief in the truth” of a statement, then the person becomes the “declarant” and the statement becomes his own.

Note: this may occur by silence after a question like “why in the world did you ever run that stop sign?”

* + - * + **Admissions by Speaking Agents** – When a person authorizes an agent to speak for him, statements by the agent can be offered in evidence against the principal. Includes the party’s lawyer, press spokesperson, and anyone else authorized.
        + **Silence as Admission** (in criminal cases, must be Pre-Miranda silence to qualify)
        + **Admissions by Employees and Agents** (regardless of whether the statement was actually authorized, as long as made by agent or employee in the scope of their representation/employment)

Note: The employee cannot just say he is an employee – that is hearsay. There must be independent proof of his employment. The exception only applies once his employment is proved.

* + - * + **Co-Conspirator Admissions:**

Admissible if:

Declarant and defendant conspired, and the statement was made

DURING the course of the venture

And IN FURTHERANCE of the venture.

Note: Most co-conspirator type statements are actually made after arrest, and are therefore no longer during the course of the venture and are hearsay.

* + - * Keep in mind who the parties are – Remember that the victim is NOT a party in a criminal case.
    - **ALLOWANCE - Unrestricted (Miscellaneous) Exceptions (FRE 803)**
      * **Present Sense Impressions**
        + **= Testimony that the Declarant said something about what she perceived at that very time, or immediately thereafter.**
      * **Excited Utterances**
        + **To satisfy the exception, the party must show:**

**That there was an event startling enough to cause nervous excitement;**

**The statement must be made while the person is under the stress of the excitement caused by the event and personally observed the startling event;**

**The statement must related to the startling event that prompted it;**

**The statement was made before there is time to contrive or misrepresent.**

* + - * + Difference from Present Sense Impressions:

Present Sense is for any type of event; Excited Utterance must be from a startling event.

For an excited utterance, the time period may last for a longer time frame – the excitement may last for hours.

* + - * + Who is saying the excited utterance:

Can be a bystander or someone actually involved in the event; and

Needn’t be identified by the person giving the in-court testimony about what the declarant said.

* + - * **Then Existing Mental, Emotional, Physical Condition of Declarant**
        + **No “Beliefs” allowed under this exception – we are only admitting the most basic levels of feeling (i.e., joy, pain), not the underlying motivations or causes or the actual or expected conduct of others.**

**DOESN’T include “a statement of belief to prove the fact believed.”**

* + - * **Statements to Physicians (Past or Present)**
        + **Evidence must be pertinent to diagnosis or treatment.**
        + **Here, onset or general cause information is included, BUT statements of fault are generally not included** (unless pertinent to diagnosis or treatment, like child abuse case). **Medical history is included.**
      * **Past Recollection Recorded**
        + **This is different from memory refreshing – here the witness testifies her memory CANNOT be refreshed, but it was fresh at one time, and at that time, she (or a helper) made a record of the recollection.**
        + **Foundation:**

**Witness can’t NOW recall;**

**Witness AT ONE TIME could recall; and**

**Witness caused record to be made.**

* + - * + After the foundation is laid, the record can be read in, but the document cannot be introduced except by the other side.
      * **Business and Public Records**
        + Need not be a commercial business – any regular activity will qualify.
        + Only applies to facts generated inside the business – reports from outside the business are not covered and must be masked out.
        + **Elements to the exception:**

**Regular Business Activity**

**Regularly kept record in the course of the regular business activity;**

**Contemporaneity** – The information must be recorded (or gathered) at the time of the act or event, or when the condition was observed (OR CLOSE TO THE TIME).

**Personal Knowledge of Source** – The source of information must be someone with personal knowledge (but not necessarily the person who made the entry).

**It was the regular practice of the business to keep records of this type.**

* + - * + **This exception will not apply “if the source or method or circumstances of preparation indicate a lack of trustworthiness”.**
        + **Texas v. Federal Rule:**

**The FEDERAL rule specifies that the Affiant swear the entries were made by a person with knowledge, etc.**

**The TEXAS rule specifies that the affiant swear it is the usual practice to have the entries made that way.**

* + - * **Absence of a Business Entry**
        + **This serves as proof that the event did not happen (so requires showing of the usual practice of the organization).**
      * **Official Records**
        + **Three types of records allowed:**

**Ones that recite the general activities of the office.**

**Ones that recite matters observed pursuant to duty imposed by law AS TO WHICH MATTERS THERE WAS A DUTY TO REPORT.**

Only covers direct observations by officers.

**Factual findings from investigation.**

Can be based on input from non-officials.

* + - * + May include:

Police Reports in a CRIMINAL CASE

IF OFFERED BY DEFENDANT – (after considering Baker v. Elcona Homes Corp.):

Un-Trustworthiness must be SIGNIFICANT for the police report not to get in – a hard to read signature probably isn’t enough.

CANNOT BE OFFERED BY THE PROSECUTION.

* + - * + NOT:

Law enforcement records in a criminal case. BUT, THE RESTRICTIONS ON USE OF POLICE RECORDS DOES NOT APPLY IF THE RULES OF EVIDENCE DO NOT APPLY (in sentencing, grand juries, hearings on revocation of probation, habeas proceedings, warrants 🡪 no exceptions needed in these cases).

* + - * **Records of Vital Statistics**
        + i.e. birth or death certificates
      * **Learned Treaties**
        + **Foundation: Need someone credible in the field to say that this is an authoritative treatise in the field.**
        + Procedure: Read relevant passages (not entire book or treatise) to the jury – treatise itself can’t be treated as an exhibit.
      * **Reputation Topics - Allowed regarding:**
        + **Personal or Family History**
        + **Boundaries (of land/cities)**
        + **Character (under character rules)**
      * **Judgments of Felony Convictions – admissible to prove any underlying essential fact.** 
        + Does not include arrests, indictments or verdicts.
        + Does not include civil judgments.
      * **Statements of Present Intent**
        + **Are admissible to show intent of the Declarant and their later conforming conduct.**
        + **May be conduct of the person speaking, or of another person listed in the statement of intent.**
      * **Records of Documents Affecting Interests in Property**
      * **Absence of a Public Entry** (i.e. to prove something did not occur)
      * **Statements in Ancient Documents – if:**
        + **Looks old**
        + **Kept where such a document would usually be kept; and**
        + **Document is 20+ years old.**
      * **Market Reports, Commercial Publications**
    - **Where the Declarant is UNAVAILABLE AS A WITNESS (FRE 804)**
      * **Unavailable = physically cannot appear (by death, illness or infirmity,** NOT by the declarant being in jail**) OR TESTIMONY IS UNAVAILABLE because the witness cannot remember, refuses to testify or properly invokes a privilege OR the witness’s presence cannot be had at trial by subpoena or “other reasonable means”.**
      * **Exceptions – When the statement was:**
        + **A Former Testimony;**

Where the testimony was made at a hearing or deposition in this case or another AND

Note: DOES NOT INCLUDE affidavits or grand jury testimony (because no opportunity to cross-examine).

Where the now-opponent has had the OPPORTUNITY and MOTIVE to CROSS-EXAMINE directly, or through a party with a similar interest (in civil cases only) (this means that the now using party didn’t necessarily need to be a party in the prior case).

* + - * + **A Dying Declaration;**

Applies when person THINKS his death is imminent.

Only allowed in HOMICIDE or any kind of CIVIL CASE.

Embraces those statements “concerning the cause and circumstances” of impending death, including remarks identifying the assailant, descriptions of the accident/circumstances.

Does not require that the speaker actually die, but his testimony must still be unavailable at trial.

* + - * + **A Declaration Against Interest** (by a non-party)**;**

A statement by a non-party was made against their interest. (Pecuniary or Penal)

Considerations (casebook):

Context,

Conflicting interests,

Circumstantially adverse facts,

Declarant’s understanding,

The effect of later events, and

Whether remarks were conclusory.

Most are offered by Defendants, Civil and Criminal, through Witnesses (OFFERED TO DEFLECT BLAME).

**A non-self-inculpatory statement CANNOT be admitted as a declaration against interest – only if the PARTICULAR declaration is against the declarant’s interest can the statement come in.**

* + - * + **Statements of Personal or Family History;**

Usually statements by relatives about “who’s who” in the family.

* + - * + **Statements Admissible Because of Forfeiture by Misconduct;**

Applies to statements against a party who “engaged or acquiesced in wrongdoing that was intended to, and did make the speaker unavailable as a witness”.

If the remover is a party, these are now admissible AGAINST him: earlier affidavit, earlier grand jury testimony, earlier oral remark, earlier letter, etc.

* + - * **Restriction – When Offered to Exculpate an (Criminal) Accused:**
        + **Must have corroborating circumstances that “clearly indicate its trustworthiness” – ALMOST NEVER DOES.**
        + Most cases hold these type of statements inadmissible based on a general mistrust of the criminal community.
        + This applies either in a criminal case OR when there is a potential of criminal liability.
    - **The Catchall Exception – Authorizes the Court to admit hearsay that does not fit another “categorical” exception, but that is nevertheless trustworthy and necessary. (FRE 807):**
      * Requirements for the exception to apply:
        + Material fact,
        + Probative and diligence,
        + Interest of justice, and
        + Notification of the adversary.
  + HEARSAY WITHIN HEARSAY 🡪 EACH STATEMENT MUST BE OKAY, OR ELSE THE ENTIRE STATEMENT IS HEARSAY.
  + **BUT, REMEMBER CONFRONTATION CLAUSE (6TH AMENDMENT)**
    - **ONLY APPLIES IN CRIMINAL CASES, and constrains only prosecutors.**
    - **The 6th Amendment says that the accused has the right “to be confronted with the Witnesses against him” – this has been understood to block the use against the accused of some out-of-court statements, even if they fit a hearsay exception.** At the heart of the Confrontation Clause is the right to cross-examine (which is affected by using hearsay statements).
    - All exceptions are available in civil cases. BUT, a lot of the hearsay exceptions are only available to defendants in criminal cases – issue is whether the exception addresses something that is TESTIMONIAL.
      * Note: typical 911 NOT INTENDED TO BE testimonial.
    - **For exam – know Crawford generally… but don’t really let it affect hearsay exceptions b/c so up in the air.**