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1. **INTRODUCTION**
   1. **General /Bumper Stickers**

* **Evidence** **law** is about the limits we place on the information juries hear. Evidence rules presume that certain evidence will distract juries from their search for truth and produce wrong results.
* The significance of the Advisory committee's Note that accompanies each rule is a matter of some dispute. Cleary said it is like a congressional committee report, representing the thinking of Congress. However, Scalia said it bears no special authoritativeness (*Tome v. United States* 1995)
* When a rule's language and history both fail to make its meaning clear, Judge Cleary says to look to the common law for guidance.
* USC § 1508 (2007)- It is a crime to record, listen to, or observe any federal jury deliberation.
  1. **Rule 606: Competency of Jurors As Witness**

1. **Rule 606(a)= At the trial.** Jurors may not testify as a witness before that jury in the trial in which the juror is sitting.
2. **Rule 606(b)= Inquiry into validity of verdict or indictment.**

* Jurors are incompetent to testify as to:
  1. Any "**matter or statemen**t" occurring during deliberations;
  2. The "effect" of anything upon the "**mind or emotions**" of any juror as it relates to his or her "assent to or dissent from the verdict", and
  3. The "**mental processes**" of the juror in connection with his "assent to or dissent from the verdict
* A juror may testify as to:

1. Improper **extraneous prejudicial information** (letters/phone calls from a party to the juror)
2. **Outside influence** improperly brought to bear upon any juror (threat/bribery)
3. A verdict **form** **mistake**.

* Case Law: Rule 606(b) is not applicable to juror testimony on matters ***unrelated*** to the jury's deliberations (*Tanner v. United States*).
* Policy**:** Turning the private deliberations of the jury into a public investigation destroys the frankness and freedom of discussion and conference. The *Tanner* case shows us just how much we will respect the backend of what juries do and how they reach their decisions.

1. **ADMITTING EVIDENCE**
2. **Rule 401: Relevant Evidence**
   * 1. **Definition**

* **Rule 401=** "**Relevant evidence**" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
* Rule 401 wraps two requirements together: probativeness and materiality.
* Relevancy is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a proposition sought to be proved. Thus, if an item of evidence tends to prove or disprove any proposition, it is relevant to that proposition (*George James*).
* Thus, evidence may be excluded as "**irrelevant**" for two distinct reasons:
  1. Because it is **not** **probative** of the proposition at which it is directed, or
  2. Because the proposition is **not** **provable** (*material)* in the case.
     1. **Probativeness**
* **Probativeness=** Evidence is *probative* if it has "any tendency to make the existence of that fact more probable or less probable that it would be without the evidence."
* Evidence is probative if it contributes "just **one** **brick** to the wall of proof built by a party".
  + 1. **Materiality**
* **Materiality**= Evidence is *material* if it bears on a "fact that is of consequence to the determination of the action. (i.e. a victim's lost earning potential is not material in a murder trial)
* Case Law: Evidence of past assertions by a party not known by the other party at the time of a factually disputed event **can** be used to prove or disprove the credibility of the history by the other party because one of the first principles of human nature is the **impulse to speak the truth**, and thus it is more likely that not a prior statement by the other party was truthful and corroborate the facts asserted. (*United States v. James*)
* Example: (i.e. A tells B that he has killed several people and gotten away with it. Without knowing what A told B, C kills A and claims self-defense. C can still use evidence of what A told B, because the crux of C's defense rests on her credibility, which can be directly corroborated through the statements A made to B, the evidence is material."
  + 1. **Standard of Proof= "Any Tendency**"
* **Standard of Proof=** The "**any tendency**" standard of Rule 401 is very lenient.
* The Supreme Court calls this the "**liberal** **thrust"** of the Federal Rules, a preference for more evidence.

1. **Rule 104(b): Conditional Relevance**
   * 1. **Definition**

* **Rule 104(b)= Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
  + 1. **Standard of Proof**
* Standard of Proof= After examining all of the evidence presented, the **court** decides whether a **reasonable jury could** find that the condition is (or will be) satisfied so that the evidence is relevant (*Huddleston v. United States)*. The trial court is **not** required to weigh the credibility of the evidence or to make a finding of fact (*Cox v. State)*.
  + 1. **Generalization of Conditions**
* Generalize accepted principles of probability when linking a chain of inferences:
  1. If Woman buys gun at time T1. Murder occurs at time T2.
  2. Relevancy of gun purchase depends on the fulfillment of the condition that she kept the gun.
  3. Generalization: “people who purchase items usually keep them”

1. **Rule 402: Admissibility**
   * 1. **Definition**

* **Rule 402**= **Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.** Evidence which is not relevant is not admissible. All relevant evidence is admissible, **except** as otherwise provided by:
  1. The Constitution of the United States;
  2. By Act of Congress;
  3. By these rules; or
  4. By other rules prescribed by the Supreme Court pursuant to statutory authority.
     1. **Standard of Proof**
* Rule 402 has a low standard of proof. Proof of relevancy under Rule 401= presumptively admissible under Rule 402.

1. **Rule 105: Limited Admissibility**

* **Rule 105= Limited Admissibility.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.
* **Rule 105** requires the judge, if asked, to give a limiting instruction confining jurors to the permitted, nonhearsay use of the words.
* As always, the chance that jurors will not or cannot obey this instruction poses a risk of unfair prejudice weighed by the judge under **Rule 403**.
* **Difference between Rule 104(a) Questions and Rule 104(b) Questions**
  + **Rule 104(a)** uses a preponderance of the evidence standard, which is higher than the sufficient-evidence standard of **Rule 104(b)**.
  + However, **Rule 104(b) evidence** must be fully admissible evidence to be introduced to prove contested preliminary facts, a higher standard used by **Rule 104(a)** which states that evidence used to prove facts need not itself be admissible.
  + Rule 104(a) suggests that **all** preliminary questions are to be resolved by the court "subject to the provisions of subdivision (b)." And Rule 104(b) addresses only those preliminary questions upon which "the relevancy of evidence depends." That is, rule 104(b) governs matters of conditional relevance, and Rule 104(a) governs everything else.

1. **Rule 403: Exclusion of Evidence for Prejudice, Confusion, Waste of Time.**
   * 1. **Definition**

* **Rule 403**= **Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, Waste of Time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”
* **Three Common Sources of Problems:**
  1. Photos and Other Inflammatory Evidence
  2. Evidence of Flight
  3. Probability Evidence
* **Common Solution**: Stipulations
  + 1. **Inflammatory Evidence**
* Rule: If a photograph or other evidence is of a nature ‘to incite passion or inflame the jury' the court must determine whether the danger of unfair prejudice substantially outweighs the exhibit's probative value. If a party does not contest the "fact that is of consequence," then a relevant exhibit's probative value may be minimal. (*State v. Bocharski)*
* Technology: New technology can be used to reconstruct crime scene events so long as they exclude inflammatory features that may cause unfair prejudice. (*Commonwealth v. Surge)*
* Standard**:** A trial court's decision in this regard will generally not be disturbed unless we find a **clear abuse of discretion.**"
* Procedure**:** Address inflammatory evidence issues before trial begins with a motion in limine. Juries hate objections, they think you are trying to hide something or interrupt the other side.
  + 1. **Evidence of Flight**
* Rule: Analytically, flight is an admission by conduct. Because of the inherent unreliability of evidence of flight, and the danger of prejudice its use may entail, it's probative value as circumstantial evidence of guilt depends upon the degree of confidence with which four inference can be drawn (*United States v. Meyers)*:
  1. From the defendant's behavior prior to flight;
  2. From flight to consciousness of guilt;
  3. From consciousness of guilt to consciousness of guilt concerning the crime charged; and
  4. From consciousness of guilt concerning the crime charged to actual guilt of the crime charged.
* Procedure:
  1. The intentional flight of a defendant immediately after the commission of a crime or after he is accused of a crime that has been committed is not sufficient evidence in itself to establish his guilt, but is a fact which, if proved, may be **considered** by the jury in the light of all other evidence in the case in determining guilty or evidence.
  2. Whether or not evidence of flight shows a **consciousness** of guilt and the **significance** to be attached to any such evidence are matter exclusively within the province of the jury.
  3. In considering any evidence of flight, the jury should consider the **motive** which prompted it.
* Criticisms of Flight Evidence:
  1. **Marginally probative:** Flight evidence is often criticized on the grounds that the second and fourth inferences are not support by common experience and it is widely acknowledged that evidence of flight or related conduct is "only marginally probative as to the ultimate issue of guilt or innocence.
  2. **Innocent Interpretation:** Several courts have suggested that the trouble with evidence of flight is that it often bears innocent interpretation (i.e. there are numerous reasons why a person may leave a jurisdiction, may run from someone coming at them, etc).
* Other Notes:
  1. Presence in another jurisdiction is arguably proof of flight resulting from consciousness of guilt. Use of a false name increases the probative force of this circumstantial line of proof.
  2. Because a person may leave a jurisdiction for any number of innocent reasons, courts are often reluctant to admit evidence of flight.
     1. **Probability Evidence**
* Rule: Mathematical odds are not admissible as evidence to identify a defendant in a criminal proceeding so long as the odds are based on estimates, the validity of which have not been demonstrated (*People v. Collins*).
* Policy: The use of mathematical probability statistics can inject two fundamental prejudicial errors into the case:
  1. The testimony itself had an inadequate evidentiary foundation and an inadequate proof of statistical independence;
  2. The testimony and the manner in which the prosecution used it:
     1. distracted the jury from its proper and requisite function of weighing the evidence on the issue of guilt,
     2. encouraged the jurors to rely upon an engaging but logically irrelevant expert demonstration,
     3. foreclosed the possibility of an effective defense by an attorney apparently unschooled in mathematical refinements, and
     4. placed the jurors and defense counsel at a disadvantage in sifting relevant fact from inapplicable theory.
* Bumper sticker: Trial by mathematics "casts a spell" over the trier of fact, so distorting the role of the jury and disadvantaging parties as to constitute a miscarriage of justice.
  + 1. **Effect of Stipulations**
* **Stipulations** are offered by a part regarding omitted certain pieces of evidence in exchange for conceding the validity of other pieces of evidence.
* Rule: Conditioning exclusion of proof upon the entry of a stipulation is a practical solution to the problem of removing risk that jury will perceive a ∆ in an unfairly prejudicial manner while at the same time affording the jury a concrete basis for the inference that the ∆ left a jurisdiction to escape capture. Any remaining ambiguity may be intelligently evaluated by the jury in light of the other evidence (*United States v. Jackson*).
* Standard: The district court abuses its discretion if it admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction (*Old Chief v. United States)*.

1. **THE SPECIALIZED RELEVANCE RULES**
   1. **Rule 407: Subsequent Remedial Measures**

* **Rule 407= Subsequent Remedial Measure.** 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.  This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, **if** controverted, or impeachment.
  + "Such as"= Nonexclusive list.
  + "If controverted"= can't introduce unless the adverse party introduces contrary evidence first.
  + "Feasibility of precautionary measures" The **feasibility** of a precaution may bear on whether the defendant was negligent not to have taken the precaution sooner.
* **Two divergent approaches to "feasibility":**
* Narrowly construed: disallowing evidence of subsequent remedial measures under the feasibility exception unless the defendant has essentially contended that the measures were not physically/technologically/economically possible under the circumstances.
* Broadly construed: feasibility means more than just that which is merely *possible*, but includes that which is *capable* of being utilized successful. ( i.e. if ∆ argues the reason for not installing a safety device was that it would be more detrimental than helpful, if the device is subsequently installed by the ∆, then a ∏ may introduce evidence of such to show that all reasonable care was not being taken otherwise the change would not have been made).
* **Policy**: Two justifications for excluding evidence of subsequent remedial measures to prove culpability:
  1. The subsequent conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence.
  2. The social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.
* **Texas version**: Texas version of 407 has a part (b) which relates to recalls, states that written notice notification by manufacturer is admissible against the manufacturer as to the existence of the defect.
  1. **Rule 408: Compromise Offers and Payment of Medical Expenses**
* **Rule 408= Compromise and Offers to Compromise.**
  + Prohibited uses.—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:
    1. furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim ; and
    2. conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
  + Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.
* **Case Law**: Rule 408 is not an absolute ban on all evidence regarding settlement negotiations. If one party seduces the other party during settlement talks into violating a contract and then sues for breach after the settlement is ultimately not reached. Rule 408 is not intended to block evidence that such breach was invited by the other party (*Bankcard America, Inc. v. Universal Bancard Systems, Inc).*
* **Policy:**

1. To encourage people to have free and clear arms length negotiation in settlement ( a more efficient way to settle disputes)
2. Not probative of a person’s guilt (people just want peace, etc.)

* **"Claim" Required**= Rule 408 does not protect offers to compromise made **BEFORE** a "claim" of some sort has been made. A lawsuit is clearly a claim, and courts will sometimes deem informal oral or written demands to be claims. However, even if it is obvious that one party has caused injury to another under circumstances that might result in liability, the implicit or potential claim does not meant that all offers of aid or compensation are necessarily covered by FRE 408.
* **Notes:**
  + Statements or conduct to the government will be available in a criminal case
  + When made between private parties, it is not admissible
  + Parties cannot engage in a document dump during settlement talks to attempt to keep all relevant information out of the trial
* Element of suit= settlement offer was element of the crime itself (that breach had occurred). We don’t want parties to seduce settlement, then sue someone for breach.
  1. **Rule 409: Payment of Medical Expenses**
* **Rule 409**= **Payment of Medical and Similar Expense.** 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.
* **Distinctions Between Rule 408 and Rule 409**
  + Rule 408 excludes evidence of conduct or statements made during compromise negotiations when offered to prove liability for a claim.
  + Rule 409 extends no such protection to statements **surrounding** offers to pay medical expenses; the rule excludes only the offer. (i.e. if you say it’s my fault, I will give you $100, Rule 409 will bar the offer as evidence of liability but will not bar the explicit admission of guilt made during the settlement negotiation.").
  + Neither 408 nor 409 limits its exclusionary reach to compromises or payments between the two parties in this lawsuit. These rules also bar evidence that one of the parties in the suit settled with a third party if that evidence is offered to prove liability for or invalidity of the claim.
  1. **Rule 411: Liability Insurance**
* **Rule 411= Liability Insurance.** 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**.**
* **Case Law=** Evidence of whether a plaintiff has hired an attorney is admissible for the purposes of impeachment as to a litigious plaintiff, and is relevant to rebut the existence of a plaintiff’s injuries. Under Rule 411, testimony offered to prove the existence of insurance coverage is inadmissible when offered to show whether the insured party acted negligently, but when offered for another purpose, as was the case here, such testimony is not per se inadmissible (*Williams v. McCoy)*.
  1. **Rule 410: Pleas in Criminal Cases**
* **Rule 410**= **Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
  1. a plea of guilty which was later withdrawn;
  2. a plea of nolo contendere;
  3. any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
  4. any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

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

* Case Law: Plea negotiations are inadmissible AGAINST the defendant under Rule 410. It does not necessarily follow that the Government is entitled to a similar shield from evidence favoring the ∆. Rejection of immunity offer has enough probative value to render it relevant (*US v. Biaggi)*
* Texas version- In Texas, a plea of no lo contendre (no contest) in a criminal case, is not admissible as evidence of guilt in a civil case. However, it is admissible if you plead guilty. So, you ALWAYS want a plea of no lo contendre in a criminal case.
* Notes:
  + Breadth of Exclusion- 408 bars evidence of compromise attempts only when that evidence is offered to prove liability, but not if offered to prove prejudice.
  + Evidence of Statements Used to Impeach- Statements the ∆ makes during plea negotiations may not be used to impeach her should she later testify differently at trial. This is to encourage fruitful negotiation offers, which would be hampered by fear of statements made during those negotiations of later being used against the person.
  1. **Blindfolding and Forbidden Topics**
* **Blindfolding**- a commonly used technique for controlling juror decision-making; the withholding certain information from the jury. Not allowing discussion of those topics.
  + - Blindfolding failures arise in three common situations:
      1. The topic may be introduced at trial because an attorney is able to argue persuasively that it is being offered for a legally acceptable purpose.
      2. When a witness mentions a subject in front of the jury even though the rules of evidence prohibit it. (problem: objecting to this calls greater attention to it, and anger from jurors that you are trying to hid something from them).
      3. Most common: when the jurors' pretrial experiences, attitudes, or beliefs provide them with a foundation of potentially relevant information that makes the forbidden topic likely to come to mind.
* When use of blindfolding is good:
  + - When the forbidden topic is **unlikely** to be raised spontaneously by the jury, it is an appropriate subject for blindfolding
    - Another situation that favors a blindfolding approach occurs when jurors are unlikely to have expectations about information, like subsequent remedial measures and settlement offers
  + When not to use blindfolding:
    - When jurors come to the trial with experiences that reliably lead them to speculate about an issue, ignoring their attention to the issue is tantamount to behaving like an ostrich.

1. **CHARACTER EVIDENCE**
   1. **Rule 404: The Character-Propensity Rule**
2. **Definition**

* **Rule 404= Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.**

1. Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
   1. **Character of accused** - In a criminal case, evidence of a **pertinent** trait of character offered by an accused, or by the prosecution to rebut the same, or if  evidence of  a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2),  evidence of the same  trait of character of the accused offered  by the prosecution;
   2. **Character of alleged victim** - In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a **pertinent** trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
   3. **Character of witness** - Evidence of the character of a witness, as provided in rules 607, 608, and 609.
2. Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, **such as** proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
3. **Standard of Proof**

* **Two part test for determining the admissibility of Rule 404(b) evidence** (*United States v. Trenkler)*:

1. Special Relevance: The district court must determine whether there evidence has some "special relevance" independent of its tendency simply to show criminal propensity.
2. Rule 403: If the evidence has "**special** **relevance**" on a material issue, the court must then carefully conduct a FRE 403 analysis to determine if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.
3. **"Reversible" Rule 404(b)**

* Three common situations when then defendant may use 404(b) evidence:
  1. The government induced others to commit crimes in order to show that the defendant was induced to commit the charged offense.
  2. Another person committed a similar crime, and that he (the ∆) was misidentified as the perpetrator of that similar crime.
  3. When other crimes are sufficiently numerous and similar in their execution as to form a clear pattern.
* NOTE: The list above is nonexhaustive, any evidence that satisfies the *Stevens* standard is admissible.
* Standard: A defendant must only demonstrate that the "reverse 404(b)" evidence has a **tendency** to **negate** his guilt, and that it passes the FRE 403 balancing test (*United States v. Stevens)*.

1. **General Notes/Reminders**

* Rule 404(b)= "such as" = nonexhaustive list.
* Rule 404(b) is not designed to protect just the defendant, but other persons as well. Policy: Every witness should not have every detail of their personal life made public and scrutinized just for testifying.
* Rule 404 reflects the judgment of Congress that as a matter of law, the probative value of propensity evidence is substantially outweighed by the risk it poses of unfair prejudice, juror confusion, and waste of time (the traditional balancing test of FRE 403). This protects ∆s from two forms of unfair prejudice.
  + 1. Excessive weight
    2. Preventative conviction (convict him because he is a generally bad person)
* Must have **good cause** to not give notice (i.e. if the trial was about organized crime, to protect witness).
* Early psychologists belied in **trait theory** (aka "**Allport's** **theory**"), that people had certain personality traits that were relatively consistent and would consistently direct the person's behavior over different situations. However, empirical research has **rejected** the theory, showing that behavior is simply more dependent on specific situations determinants (*Mendez-* 1998).
  1. **Routes Around the Box**

1. **Enumerated "Other Purposes"**
   * **Other purposes**, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
     + FRE 404(b) does not require trial judges to admit evidence of other acts, only that they may.
     + The permitted purposes listed by FRE 404(b) are not "exceptions" to FRE 404(a). Thinking of them as exceptions can lead a court to the wrong result. If an "identity" argument is made, but uses evidence to "prove action in conformity therewith", the proof of identity is still based on character, and thus is still banned (*see* pg 148).
2. **Modus Operandi**
   * **Modus Operandi**: One way to prove guilt when identity is in dispute is to show the crime matches the defendant's modus operandi ("M.O.") If we know the ∆ committed a particular crime in the past, and the present offense matches that crime in **idiosyncratic** (special/unique) ways, then we may infer the ∆ committed the present offense as well.
     + NOTE: This does not permit an infers that this is the defendant's *kind* of crime, but rather that this could not be *anyone else's* crime because of the idiosyncrasies present.
     + NOTE: Only works when identity is the issue. Can't use M.O. for other forms of 404(b) "other purposes" analysis.

**404(b)= conditionally relevant issues, determined by 104(b)**

1. **Identity**
   * **Identity**- If ∆ claimed someone else committed the crime (prove the pistol recovered at the crime scene had been sold by ∆ before the shooting). This is a question of fact, not a character question.
     1. Limit: In this instance, the judge should give the jury a limiting instruction, telling them not to use the evidence to establish anything other than who owned the guns found at the crime scene.
     2. Danger: if the judge goes too far and says:" …for instance, you are not to use this evidence to speculate as to the character of the defendant." By putting that thought into the jury's mind, the ∆ might be better off witrhout the judge having said the instruction so fully.
2. **Narrative Integrity (Res Gestae- 'Inextricably Intertwined')**

* Policy: The jury cannot be expected to make its decisions in a void- without knowledge of the time, place, and circumstances of the acts which form the basis of the charge.
* Case Law: There are two categories of evidence which may be considered "**inextricably intertwined**" with a charged offense (*United States v. DeGeorge)*:
  1. Evidence of prior acts may be admitted if the evidence constitutes a part of the transaction that serves as the basis for the criminal charge; that they can be fairly characterized as a "single criminal episode."
  2. Prior act evidence may be admitted when necessary for the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime.
* Important: There is no res gestae law or rule, it is just a commonly understood practice. It is completely up to the discretion of the judge to allow evidence based on a 'res gestae' argument.
* Think of Russian roulette problem.

1. **Absence of Accident/Mistake**

* Think of the cruelty to dogs problem (Past instance of dog cruelty doesn't show whether or not current instance of whether dog attacked person or not).
* The cleaning gun case (man 'accidentally' shot wife, then same thing happened to second wife. Jury allowed to consider whether this 'accident' could reasonably have happened twice. )

1. **Doctrine of Chances**

* Rule: Matter of accident or design depends on the **unusualness** of the occurrence and the **number of times** it was repeated. Each additional case increases the improbability of accident (See *Rex v. Smith*)
  1. **Rule 104(b): The *Huddleston* Standard**

(NOTE: IS THIS REDUNDANT WITH SECTION II-C? )

* Rule: After examining all of the evidence presented, the **court** decides whether a **reasonable jury could** find that the condition is (or will be) satisfied so that the evidence is relevant.The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.
* Standard: Evidence is admissible under the standard set forth in *Huddleston* if jury could find by PREPONDERANCE OF THE EVIDENCE. Because conviction is only made under the higher standard of "beyond a reasonable doubt," *Huddleston* does not preclude the jury from hearing something which wouldn't already be admissible.
* Protection from unfair prejudice does not come from a requirement of a preliminary finding by the trial court, but rather from four other sources:
  1. From the requirement of **Rule 404(b)** that the evidence be offered for a proper purpose;
  2. From the relevancy requirement of **Rule 402**, as enforced through **Rule 104(b)**;
  3. From the assessment the trial court must make under **Rule 403** to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and
  4. From **Rule 105**, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.
  5. **Rules 413, 414, 415: Propensity Evidence in Sexual Assault Cases**

1. **Background/Depraved Sexual Instinct Exception**

* **Depraved sexual instinct exception (NOW ABOLISHED)**= Pre-413/414 rule that allowed states to introduced past conduct to show conformity therewith if the charge= child sexual assault.
  + Reasons for **depraved sexual instinct** exception:
    1. Recidivist rationale- There is an assumption that sexual offenders repeat their crimes more often than other criminals. **Abolish rationale=** This is an assumption, empirical evidence suggests otherwise.
    2. Improbability of conduct- There is a need to bolster the testimony of victims: to lend credence to a victim's accusations or testimony which describe acts which would otherwise seem improbable standing alone because they are so heinous. **Abolish rationale**= Society is more jaded today, people are more willing to believe such accusations. Additional corroborations are not necessary.
  + This exception to the rule against character propensity evidence has been mostly **abolished**. (*Lannan v. State*, "The notion that the State may not punish a person for his character is one of the foundations of our system of jurisprudence.")

1. **Definitions/New Rules**

* **Rule 413= Evidence of Similar Crimes in Sexual Assault Cases.**

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. In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
3. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
4. For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved
   1. any conduct proscribed by chapter 109A of title 18, United States Code;
   2. contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
   3. contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
   4. deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
   5. an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

* Case Law: Evidence offered under Rule 413 is not excepted from Rule 403. Evidence offered under Rule 413 must also meet three threshold requirements before a court can admit it (*United States v. Guardia)*:
  1. That the defendant is **accused** of an offense of sexual assault;
  2. That the evidence proffered is evidence of the defendant's **commission** of another offense of sexual assault;
  3. The evidence must be **relevant** (FRE 402).
* Dissenting Argument: Rule 413 runs counter to a centuries-old legal tradition that views propensity evidence with a particularly skeptical eye. Our resolution of the relevant constitutional questions necessarily involves an examination of the ultimate rationality of Rule 413. Much evidence suggests the prognosticative power past sexual behavior is quite low, lower than that of any major crime other than murder (*United States v. Mound*).
* **Rule 414= Evidence of Similar Crimes in Child Molestation Cases.**

1. In a criminal case in which the defendant  is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
2. In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
3. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
4. For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--
   1. any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
   2. any conduct proscribed by chapter 110 of title 18, United States Code;
   3. contact between any part of the defendant's body or an object and the genitals or anus of a child;
   4. contact between the genitals or anus of the defendant and any part of the body of a child;
   5. deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
   6. an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

* **Rule 415= Evidence of Similar Acts in Civil Cases Concerning Sexual Assault, 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 in Rule 413 and Rule 414 of these rules.
2. A party who intends to offer evidence under this Rule shall **disclose** the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
3. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
4. **Other Bad Acts Evidence**

* Three evidentiary purposes of other bad acts evidence:
  + **Motive**- the reason that nudges the will and prods the mind to indulge the criminal intent; what prompts a defendant to engage in a particular criminal activity.
  + **Intent**- To be relevant to intent, evidence of other bad acts must be able to support a reliance inference, not dependent on the defendant's character or propensity, that the defendant had the same intent on the occasions of the charged and uncharged acts.
  + **Common plan or scheme-** It is not enough to show that each crime was 'planned' in the same way; rather, there must be some overall scheme of which each of the crimes is but a part. A pattern or systematic course of conduct is insufficient to establish a plan.
* Burden of proof: The burden is on the State to articulate to the trial judge the precise evidentiary purpose for which it seeks to introduce the other crimes evidence and the purported connection between the evidence and the stated purpose.
  1. **Rules 404(a), 405: Proof of the Defendant's and the Victim's Character**

1. **Definition**

* **Rule 404= Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.**

1. Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
   1. Character of accused - In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if  evidence of  a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2),  evidence of the same  trait of character of the accused offered  by the prosecution;
   2. Character of alleged victim - In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
   3. Character of witness - Evidence of the character of a witness, as provided in rules 607, 608, and 609.
2. Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for **other purposes**, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
3. **Case Law and Distinctions**

* Case Law: When a defendant elects to initiate a character inquiry under Rule 404(a)(1), witnesses he calls may only testify as to the defendant's **reputation or opinion** and not about the defendant's specific acts or course of conduct. The prosecution may pursue inquiry with contradictory witnesses to show damaging rumors and may cross-examine witnesses to determine credibility. An arrest without more does not impeach or impair the credibility of a witness. Only a conviction may be inquired about to undermine the trustworthiness of a witness (*Michelson v. United States*).
* Important Distinction:
  1. For Reputation: "Have you heard…∆ did x,y,z crime?"
  2. For Opinion: "Did you know…∆ did x,y,z crime?"

* **Rule** 405**. Methods of Proving Character**

**(a) Reputation or opinion.**

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

**(b) Specific instances of conduct.**

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

* Rule 405(a)
  + Whenever the ∆ offers evidence of her own character under 404(a)(1) or (a)(2), the manner of proof is controlled by **Rule 405(a)**. This rule permits the character witness to testify in the form of opinion or reputation ***only***.
  + The rule preserves the common law bar against proving character by evidence of specific acts. However, Rule 405(a) does permit inquiry into relevant specific instances of conduct on ***cross examination***.
  + The purpose is not to prove or disprove the defendant's character trait with these specific acts, but to TEST the witness's knowledge of the defendant's reputation.

* Criminal Defendant's Only: Only criminal defendants can open the matter of character under Rule 404(a)(1) or (2). There are three reasons for preserving this distinction:
  + 1. Because criminal defendants alone have life or liberty at hazard;
    2. Because character evidence has little probative power, it is therefore of little use to a civil litigant who bears a substantial burden of proof, unlike criminal defendants who bear the slightest "burden" of any litigant;
    3. Character evidence has little probative value to show a criminal with a violent past committed another violent crime, but does have more persuasive probative force to show someone has a long history of negligence or contractual breach, even if the contracts in the past were of a completely different subject matter.

* Inapplicable to Rape Shield Rules**:** Rule 405(a)'s requirement that proof be by reputation or opinion does NOT APPLY to Rules 413, 414, and 415. These rules ***require*** proof by specific acts.

* Difference from Proof of Character Under Rule 405(b): Rule 405(b) applies when the *existence* of the character trait, not *conduct* done in conformity with that trait, is the thing to be proved. This circumstance arises rarely. Here are perhaps the three most common specimens:
  + 1. Rebutting an entrapment defense.
    2. Rebutting a defense of truth in a libel or slander action.
    3. Resolving a parental custody dispute.
  1. **Rule 406: Evidence of Habit**

1. **Definition**

* **Rule 406. Habit; Routine Practice.** Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

1. **Case Law**

* To justify introduction **of habit or regular usage** (Rule 406), a party must be able to show that he expects to prove a sufficient number of instances of the conduct in question. Evidence of habit or regular usage, if properly defined and therefore circumscribed, involves more than unpatterned occasional conduct, that is, conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances; it involves a repetitive pattern of conduct and therefore predictable and predictive conduct (*Halloran v. Virginia Chemicals*).
* Has to be almost automatic, high frequency is important.

1. **Difference Between "Habit" and "Character" Evidence**

* **Habit and Character Definitions** (RB pg. 57):
  + Character- General description of disposition or general trait (i.e. honesty, temperance, peacefulness).
  + Habit= More specific, and describes one's regular response to a repeated specific situation.
* **Difference Between Evidence of "Habit" and "Character"**
  + The key difference is "**predictive**" value. The more predictive the evidence of other acts is, the more probative it is of present conduct.
    - Character evidence risks the jury punishing the actor for his past history instead of the present crime simply for having a bad character.
    - However, past bad habits such as changing a tire a certain way or habitual drinking, is not something a jury is likely to punish a person for, at least not severely.
  + Because proof of habit does not (at least in theory) involve drawing inferences from general "traits of character" it falls outside **Rule 404(a)'s** bar against evidence of character offered to show action in conformity therewith.

1. **IMPEACHMENT AND CHARACTER FOR TRUTHFULNESS**
   1. **Rule 607: Modes of Impeachment**

* **Rule 607= Who May Impeach.** The credibility of a witness may be attacked by any party, including the party calling the witness.
* The reason why Rule 607 permits a party to impeach its own witness is that sometimes a particular witness is the only person who can give essential testimony, but may try to avoid doing so willingly.
* A lawyer **impeaches** a witness by casting doubt on the witness's accuracy or trustworthiness. Impeachment can take several forms (also see flowchart pg. 249):

1. "**That's an Error!" vs. "That's a Lie!"**

* There is a difference between allegations of *mistake* and of mendacity.
  + A lawyer can call a witness *mistaken* by casting doubt on her powers of: perception, memory, or narrative accuracy. Character evidence rules impose no constraint on these modes of calling a witness *mistaken*.
  + Because perception, memory, or narrative accuracy are not traits of *character*, a lawyer may cast doubt on those capacities without regard to the character evidence rules.

1. **"You're Lying" vs. "You're a Liar"**

* Just as there are several ways to call a witness mistaken, there are several ways to say she deceived. Begin by separating character from non-character modes of impeachment:

1. **Non-Character Impeachment**: Suggesting that a witness is lying ***now*** may say little about the witness's ***general*** truthfulness. Consider these three forms of non-character impeachment:
   1. Contradiction by Conflicting Evidence- impeach Witness A's claim that a traffic signal was red by calling Witness B or offering a surveillance photo to say that it was green.
   2. Contradiction by Past Inconsistent Statement- Evidence that Witness A once before said the light was green tends to impeach her trial testimony that it was red.
   3. Evidence of Bias- Describes the relationship between a party and a witness which might lead the witness to slant his testimony in favor of or against a party. Two aspects:
      1. Like/dislike/fear of a party
      2. Self-interest in outcome of the lawsuit.
2. **Character-Based Impeachment**: Sometimes a lawyer seeks to cast doubt on a witness's words by showing she is, by trait, ***a liar*** and lied in conformity with that trait. Although **Rule 404(a)** would seem to bar such propensity-based reasoning, **rule 404(a)(3)** specifically permits propensity evidence concerning "the character of a witness, as provided in Rules 607, 608, and 609.
   1. **Rule 608: Impeachment by Opinion, Reputation, and Cross-Examination about Past Lies**
3. **Definition**

* **Rule 608= Evidence of Character and Conduct of Witness.**
  1. Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of **opinion** or **reputation**, but subject to these limitations: (1) the evidence may refer only to character for **truthfulness** or untruthfulness, and (2) evidence of truthful character is admissible **only after** the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
  2. Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in [rule 609](http://www.law.cornell.edu/rules/fre/Rule609.htm)**, may not be proved by extrinsic evidence**. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on **cross**-**examination** of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.
* Note:
  + Allows for attack on credibility for *truthfulness* only, not for other things. (i.e. if the witness is a murderer/rapist, but has always been honest about it, this rule does not apply).
  + 608 is very narrow, only applies to opinion/reputation evidence. That's why you have to live with the answer and are not allowed to give extrinsic evidence.

1. **Standard of Proof**

* Standard of Proof (*United States v. Whitmore*):
  + In order to offer reputation evidence under **Rule 608(a)**, a party must establish the character witness is qualified by having:
    1. An acquaintance with the witness,
    2. An acquaintance with the witness's community, and
    3. The circles in which he has moved, as to speak with authority of the terms in which generally the witness is regarded.
  + To ask a question about a particular subject during cross-examination, a party need only have:
  1. A **reasonable** **basis** for asking questions on cross-examination which tend to incriminate or degrade the witness.
  2. Possession of some facts which support a **genuine** **belief** that the witness committed the offense or the degrading act to which the question relates.
  3. **Rule 609: Impeachment with Past Convictions**

1. **Definition**

* **Rule 609= Impeachment by Evidence of Conviction of Crime.**

1. General rule. For the purpose of attacking the character for truthfulness of a witness,
   1. evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to [Rule 403](http://www.law.cornell.edu/rules/fre/Rule403.htm), if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
   2. evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it **readily** **can** **be** **determined** that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.
2. Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. **However**, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
3. Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
4. Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.
5. Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

**Class Notes:**

* Advisory Committee's nonexhaustive list of "readily determined" evidence:
  1. The statutory elements of the charged crime
  2. The fact of the trial court's judgment
  3. The indictment
  4. A statement of admitted facts (if any)
  5. Jury instructions.
* Rule 609(b): ten year limit on evidence begins at end of parole/release, and is measured by date of testimony in the subsequent case, not the date the subsequent charge if filed. NOTE: This is rarely preempted by judges. Usually, if the 10 year period has expired, the evidence will not be allowed by the judge.
* Rule 609(c): evidence is not admissible if resulted in pardon/annulment/rehab cert.
* Rule 609(d): If witness was a juvenile then conviction evidence is usually inadmissible
* Rule 609(e): pendency of appeal does not rend evidence inadmissible, although evidence of pendency is also admissible (i.e. you can rebut the evidence by say: hey, this has not been settled yet.

1. **Theory and History of Rule 609**

* **Ames Dilemma**= if the ∆ does not testify, the jury will readily convict him because how could he be innocent if he has no good explanation for his own innocence. However, if he does testify, the prosecution will introduce his criminal record to impeach him and that will just as easily get him convicted.
* Rule 609(a)(1) gives stronger protections to criminal defendants testifying as witnesses than it does to other witnesses.

1. **Standard of Proof**

* **Rule 609(a) balancing test-** To determine whether the probative value of admitting evidence outweighs its prejudicial effect, balance five factors (*United States v. Brewer)*:
  1. The **nature** of the crime;
  2. The **time** of conviction and the witness' subsequent history'
     + NOTE: A ∆'s continued conflict with the law, even while on parole, is a factor support admission of the convictions for impeachment purposes.
  3. **Similarity** between the past crime and the charged crime' (NOTE: as a general guide, those convictions which are for the same crime should be admitted sparingly to avoid "did it before, probably did it again"- type prejudice). Partial aid= limiting instruction to only look at evidence for impeachment, not to assume he did it again;
  4. **Importance** of defendant's testimony'; and
  5. The **centrality** of the credibility issue. Central issues favor admission.
* A criminal defendant must satisfy **two** **conditions** in order to appeal a trial court's ruling to admit past conviction evidence under Rule 609.
  1. The ∆ must have testified at trial
  2. The prosecutor must have introduced evidence of the contested conviction.
* A ∆'s failure to testify bars the ∆ from appealing. When a ∆ does not testify, it is impossible for a reviewing court to measure how badly the challenged evidence would have harmed the ∆'s case, or even if the challenged evidence would have been admitted (*Luce v. United States*)
* In **federal** court, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted (*Ohler v. United States*).
  + Dissent **(**Souter): Today's ruling will unfairly prejudice ∆s in similar cases. The jury may feel that in testifying without saying anything about past convictions that the ∆ is concealing them. This is at odds with the purpose of Rule 609.
  + Note: REMEMBER, this only applies to FEDERAL courts. State courts still have discretion.
  1. **Rehabilitation**
* **Rehabilitation=** is a party's attempt to *support* a witness's character for truthfulness, and is allowed under Rule 608(a)(2) only **AFTER** the other party has attacked the witness's character for truthfulness.
* Some forms of attack of character for truthfulness include:
  1. Offered opinion or reputation testimony of the witness's bad character for truthfulness (Rule 608(a)(1))
  2. Elicited on cross-examination evidence of specific acts of the witness that are probative of untruthful character (Rule 608(b)); or
  3. Offered evidence of a past conviction of the witness under Rule 609.
* NOTE: Evidence of bias or interest **DO NOT** qualify as an attack on the witness's character for truthfulness under Rule 608(a)(2).
* Evidence that contradicts a witness's specific testimony *may* call in question the witness's general character for truthfulness.
* The truthfulness of a witness's testimony *in this proceeding* may be corroborated by *non-*character evidence without regard to the constraints imposed by Rule 608.
  1. **Use of Extrinsic Evidence**
* There is a common law principle that extrinsic evidence will not be admitted on a collateral matter
* However, evidence tending to show a witness's bias, prejudice, or motive to lie is so significant that it is not considered a mere collateral matter but is deemed exculpatory evidence that may be established by extrinsic proof as well as by impeachment through cross-examination.
* Under the common law ***Hitchcock Rule****,* a litigant could offer extrinsic evidence on a particular subject to contradict a witness only if that subject had "such a connection with the issue in dispute, that the litigant would be allowed to give it in evidence" independent of its value in contradicting the witness.

1. **THE RAPE SHIELD LAW**
   1. **Historical Backdrop**

* **Old Case Law (Mostly Abolished):**
  + In a prosecution for rape, the female accuser’s alleged promiscuity may be inquired into, as may the general character of her truth and veracity and her general moral character, and the accuser is not privileged from answering such questions (*People v. Abbot-1838*).
  + Bad character of a man for chastity does not even in the remotest degree affect a man's character for truth, when based upon that alone, while it does that of a woman. What destroys the standing of the one in all walks of life has no effect whatever on the standing for truth of the other (*State v. Sibley)*.
  + In rape cases jures were also told to be "especially suspicious" of the woman victim because of the victim's emotional involvement and because of the difficulty in determining the truth of such activities carried out in private (*Susan Estrich*)
  1. **Rule 412: The Shield Law**
* **Rule 412= Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition.**

1. Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
   1. Evidence offered to prove that any alleged victim engaged in other sexual behavior.
   2. Evidence offered to prove any alleged victim's sexual predisposition.
2. Exceptions**.**
   1. In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
      1. evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
      2. evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
      3. evidence the exclusion of which would violate the constitutional rights of the defendant.
      4. In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its ntially outweighs the danger of harm to any victim and of unfair prejudice to any party.  Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
3. Procedure to determine admissibility.
   1. A party intending to offer evidence under subdivision (b) must --
      1. file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
      2. serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
   2. Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard.  The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

* **Notes**:
  + **'Past sexual behavior'**= all activities that involve actual physical conduct, i.e. sexual intercourse, sexual contact.
  + **'Sexual predisposition'**= evidence that the proponent believes may have a sexual connotation for the factfinder, i.e. mode of dress, speech, or lifestyle choice.
  + **'Constitutional rights**'= Confrontation Clause of 6th Amendment (incorporated to States through 14th Amt). Includes the right to conduct reasonable cross-examination.
  + The rule also excludes other evidence relating to alleged victim's sexual misconduct, such as the victim's mode of dress, speech, or lifestyle. Policy= protect victim from potential embarrassment and from stereotypical thinking.
  + **Leg History**= reputation and opinion evidence of the past sexual behavior of an alleged victim was excluded because Congress considered that this evidence was not relevant to the issues of the victim's consent or her veracity. There is no indication, however, this evidence was intended to be excluded when offered solely to show the accused's state of mind. Therefore, it is governed by Rules of Evidence dealing with relevancy in general.
  + **Third party witnesses**= Remember, the protection of Rule 412 does not apply to evidence of a third-party witness' alleged sexual activities. If a witness testifies the alleged victim and her never have sex, you could impeach that testimony with evidence of her past sexual behavior.
  1. **The Law in Force**

1. **Past Sexual Behavior with the Accused**

* See Problem 5.1 in casebook.

1. **Explaining The Source of Physical Evidence**

* See Problem 5.2 in casebook.

1. **Past Allegedly False Accusations**

* Rule: Evidence of **past false allegations** regarding sexual activity do not concern the victim's prior sexual behavior, history or reputation for chastity, and therefore do not constitute "past sexual behavior", and therefore Rule 412 is inapplicable. Such an impeachment of credibility is admissible provided that it meets all other applicable standards for admissibility (*State v. Smith)*.
* Standard of Proof: The standard to ask on cross of a specific instance of conduct is that a lawyer must have a "**good faith belief**" that the conduct occurred. Good faith belief= Does the lawyer have in her position reputable evidence that the conduct occurred. (i.e. if the evidence is triple-hearsay from a self-interested witness, it is probably not reasonable to form a good faith belief on such testimony).

1. **404(b) Uses of Evidence of Past Sexual Behavior (Bias, Res Gestae, ∆ State of Mind)**

*1. Proof of Bias*

* Rule: Exposure of a witness's motivation in testifying is a proper and important function of cross-examination. A criminal defendant states a violation of the Sixth Amendment Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of **bias** on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness (*Olden v. Kentucky*).
* Limitation: A trial court may impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that would be repetitive or only marginally relevant (*Olden v. Kentucky*).
* Standard of Review: Whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was **harmless beyond a reasonable doubt**. Whether such an error is harmless in a particular case depends upon several factors, including:
  1. The importance of the witness' testimony in the prosecution's case,
  2. Whether the testimony was cumulative,
  3. The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points,
  4. The extent of cross-examination otherwise permitted, and,
  5. The overall strength of the prosecution's case."
* Class Note: "BIAS IS ALWAYS RELEVANT!" - Houlette

*2. Narrative Integrity (Res Gestae)*

* Rule: There is no constitutional right to res gestae evidence. A state may choose to follow this concept, but it is not a constitutionally protected right. Moreover, the right to testify on one's own behalf is not unlimited and may bow to accommodate other legitimate interests such as protecting against surprise, harassment, and unnecessary invasions of privacy. Rape shield statutes are valid protections of these interests so long as they are not **arbitrary or disproportionate** to the purposes they are designed to serve. The State is required to evaluate whether the interests served by the rule justify the limitation imposed on the criminal defendant's right to testify (*Stephens v. Miller*)
* Policy: If Stephens won, then any ∆ could get around rape shield laws by simply stating that they told the victim something they knew of the victim's own past sexual behavior, so that it becomes admissible in court as res gestae evidence, even though it would be impermissible separately.
* Dissent (*Stephens*): Excluding the content of a statement made to a victim by a ∆ which the ∆ alleges motivated the victim to fabricate a sexual assault charge interferes with the ∆'s right to present his defense. This right takes priority over secondary concerns such as embarrassment of the victim.

*3. Defendant's State of Mind*

* Rule: Evidence that is otherwise inadmissible and not critical to a ∆'s defense is not guaranteed by the Constitution to corroborate the validity of the ∆'s state of mind (*United States v. Knox*).
* Note: Most state rape/sexual assault statutes do not contain an 'intent' element. ∆'s state of mind is only relevant in *Knox* because federal statute, which does contain an 'intent element, governs military cases. However, the evidence was still excluded because the victim's past promiscuity is not probative of whether victim consented or if ∆'s mistake of fact was reasonable.

1. **A Glance at Civil Cases**

* **Rule 412(b)(2)**- in civil cases, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible only if it is otherwise admissible and its probative value **substantially** outweighs the danger of harm to any victim and of unfair prejudice to any party.  Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
* Standard of Proof: **Rule 412(b)(2)** employs a **balancing test** rather than the **specific exceptions** stated in 412(b)(1) used in criminal cases.
* This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403:
  1. It reverses the usual procedure of Rule 403 by shifting the **burden** to the proponent to demonstrated admissibility rather than making the opponent justify the exclusion of the evidence
  2. The standard expressed in 412(b)(2) is **more stringent** than in the original rule, it raises the threshold for admission by requiring that the probative value of the evidence **substantially** outweigh the specified dangers.
  3. the test puts "harm to the victim" on the scale in addition to prejudice to the parties
* Policy**:** This distinction is made in recognition of the difficult of foreseeing future developments in the law. greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.
* Remember: Evidence of reputation may received in a civil cases **only** if the alleged victim has put his or her reputation into controversy. However, the victim may do so without making a specific allegation in a pleading.

1. **COMPETENCY OF WITNESSES**
   1. **Historical Overview**

* The old rules simply barred from the witness stand all parties to the proceeding, including spouses of parties, persons with financial interest, convicted felons, and atheists.
  + Policy: these sources had too much temptation to lie or lacked an adequate moral compass.
  + Two functions: 1. ensure juries based verdicts (mostly) on truthful evidence, and 2. they protected the souls of witnesses who would otherwise be tempted to commit the mortal sin of perjury.
* Today, most of these rules have been abolished. It took southern states longer because of their attachment to the old rule that nonwhite persons were barred from testifying.

1. **Modern Competency Rules**
2. **Rule 601: General Rule of Competency**

* **Rule 601= General Rule of Competency.** Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.
* State Example:A state rule barring all hypnotically refreshed testimony could not be applied in a per se manner to bar criminal defendants from the witness stand (*Rock v. Arkansas*)
* Competency of children:
  + Many states encourage close judicial scrutiny of children's capacity as witnesses, however some states take the opposite approach in certain situations. Alabama/Connecticut: child victims of physical sexual abuse are competent as a matter of law.
  + Congress took an only slightly welcoming approach toward victims' testimony in child abuse cases. A 1990 statute created a **rebuttable presumption** that children are competent witnesses. Trial courts may conduct competency hearings only upon finding "that compelling reasons exist," of which a "child's age alone is NOT a compelling reason."

1. **Rule 602: Lack of Personal Knowledge**

* **Rule 602= Lack of Personal Knowledge.** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of [rule 703](http://www.law.cornell.edu/rules/fre/Rule703.htm), relating to opinion testimony by expert witnesses.

1. **Rule 603: Oath or Affirmation**

* **Rule 603= Oath or Affirmation.** Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

1. **Rule 610: Religious Beliefs or Opinions**

* **Rule 610= Religious Beliefs or Opinions.** Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

1. **THE RULE AGAINST HEARSAY**

**Houlette's Hearsay Definition**= **Hearsay** is 1. an out-of-court statement 2. offered for the truth of the matter asserted.

**Purpose of the Hearsay Rule**= The purpose of the hearsay rule is to prevent the jury from hearing unreliable evidence.

* 1. **Historical Overview**
* Hearsay is an old concept.
* Trial of Sir Walter Raleigh for High Treason (1603).
  + Early hearsay dispute
  + Guilty verdict
  1. **Rule 801: Defining Hearsay**

1. **The Basic Rule**

**Rule 801= Definitions.** The following definitions apply under this article:

**(a) Statement.**

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is **intended** by the person as an assertion.

**(b) Declarant.**

A "declarant" is a person who makes a statement.

**(c) Hearsay.**

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

**(d) Statements which are not hearsay.**

A statement is not hearsay if--

(1) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) **inconsistent** with the declarant's testimony, **and** was given **under oath** subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) **consistent** with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of **identification** of a person made after perceiving the person; or

(2)*Admission by party-opponent.* The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

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

**Rule 802= Hearsay Rule.** Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

* **Justifications for the Hearsay Rule**:
  + Necessity- clearest when the declarant is unavailable. Do not confuse unavailability ( Rule 804(a)), with the physical absence of the witness. A witness may be on the stand and yet "unavailable," because she asserts a privilege or simply refuses to testify or testifies to a loss of memory.
  + Reliability/Trustworthiness- Unreliable evidence will confuse and prejudice the jury.
* Observations are different from statements because a witness can be cross-examined about observations.
* Remember, **Rule 105** requires the judge, if asked, to give a limiting instruction confining jurors to the permitted, nonhearsay use of the words.
* As always, the chance that jurors will not or cannot obey this instruction poses a risk of unfair prejudice weighed by the judge under **Rule 403**.
* **Non-hearsay testimony has four possible sources of unreliability ("testimonial capacities"):**

1. Perception**:** i.e. "the witness saw *Tom* pull the trigger, but mistook him for John.
2. Memory: i.e. The witness saw and recognized Tom, but now *thinks* it was John.
3. Narration: The witness *means* to say Tom, but says John.
4. Sincerity: The witness means to deceive.

* **However, there are three courtroom tools used to restore confidence to such testimony:**

1. The Oath: Witness must swear or affirm that they will tell the truth. Witnesses are subject to the penalties of perjury.
2. Demeanor Evidence: Jurors scrutinize faces and mannerisms, watch for signs of stress, and judge intellect, precision, and trustworthiness.
3. Cross-Examination: the opposing lawyer probes for deficiencies in perception, memory, narration, and sincerity. In criminal cases, the witness normally must answer questions while facing the accused.

* **Two questions to determine if evidence is hearsay:**

1. Is the litigant offering the statement to **prove** (the truth of) what it says or was meant to say?
2. Did the declarant **assert**- that is, did she mean to communicate- that fact?

* **Nonhearsay Uses of Out-of-Court Statements:**

1. Words Offered to Prove Their Effect on the Listener : To prove the impact of the statement on someone who hear it (i.e. emotional effect);
2. Legally Operative Words (Verbal Acts): To prove a legal right or duty that was triggered by- or an offense that was caused by- uttering the statement (i.e. "I accept" has contract-law significance); and
3. Inconsistent Statements Offered to Impeach: To impeach the declarant's later, in-court testimony.
4. Nonassertive Words. The category of truly nonassertive words is quite small. Involuntary expressions are perhaps the only clear example, i.e. saying "OUCH" after banging your knee.
5. Words Offered to Prove Something Other Than What They Assert- Although almost all verbal conduct is assertive, not all out-of-court assertions are hearsay. Sometimes a lawyer offers the declarant's words to prove something *other* than what the declarant intended to communicate.
6. Assertions Offered as Circumstantial Proof of Knowledge- i.e. a girl accuses a man of raping her in his house. He says that she has never seen the girl. She describes his house in great detail.
7. **Defining Assertions**

* Basic Rule: "A man does not lie to himself."
* Forms of Assertions:
  + **Words** are not always an assertion (i.e. 'ouch').
  + **Questions** are not always an assertion (not assertion= "what time is it?", assertion= "when did you stop beating your wife?"
  + **Conduct** is not always an assertion (i.e. captain inspecting ship).
* Case law: Conduct consistent with a belief in a fact is hearsay when offered to prove the existence of that fact (*Wright v. Tatham-* Letters of consequence were exchanged between two parties. The letters did not discuss the content of the will, but indirectly asserts the parties believed each other to be of sound mind)
  + NOTE: The approach taken by **Rules 801(a)** does not yield the same result, as it requires that there be an **intention** to assert, which was absent from the "statement" in *Wright v. Tatham.*
* In the list of nonhearsay uses of out-of-court statements (above), uses #4-#6 are not hearsay because they are nonassertive.
* **Importance of context**- The distinction between an assertion and a nonassertion often depends on context.
  + Most oral and written expressions are manifestly assertive. The declarative sentence, "This ship is safe," presumes an audience and relies for its meaning on the sincerity of the speaker.
  + However, assertions need not be declarative sentences. Commands also have assertive content, and are equally impermissible hearsay ("Don't run that stop sign" is intended to inform the listener that there is a stop sign ahead. The statement is therefore an assertion.
* **Other forms of assertions**
  + Implied assertions: i.e. Laura ought to give that dog a bath, naturally implies that the dog is dirty. That is what is intended to be communicated. There is no reason to distinguish sharply between express and implied assertions.
  + Indirect assertions: Sometimes the matter asserted is just one link in a chain of inferences leading to the ultimate fact to be proved. i.e. "she spent all morning with a retirement planer." Indirect assertion= she is not suicidal because she would not have met with her retirement planner first.

1. **Exceptions to the Hearsay Rule: An Introduction**

* **Difference between 'non'hearsay and 'exceptions' to hearsay**
  + Rule 801= Nonhearsay
  + Rule 803= Exceptions to hearsay.
* **Purpose of Hearsay Exceptions**: Exceptions are made to the hearsay rule for evidence which is by definition hearsay, but would not further the **justifications** for the hearsay rule (1. Reliability and 2. Necessity (i.e. the witness is unavailability)). The liberal thrust of the Rules of Evidence compel evidence to be admitted unless there is a reason not to do so.
* The various exceptions to the hearsay rule are largely the product of slow common law evolution. It would be a mistake to look for a single unifying theme or to seek deep meaning in the organization of the Rules.
  1. **Rule 801(d)(2) Statements of Party-Opponents**

1. **General Rule**

* **Rule 801(d)(2) Admission by party-opponent.** A statement is not hearsay if the statement is offered against a party and is:
  1. the party's own statement, in either an individual or a representative capacity or
  2. a statement of which the party has manifested an adoption or belief in its truth, or
  3. a statement by a person authorized by the party to make a statement concerning the subject, or
  4. a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
  5. a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

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

* **Admissions (statements) by party-opponents take four forms:**
  + The Party's Own Words [Rule 801(d)(2)(A)]
  + Adoptive Admissions [Rule 801(d)(2)(B)]
  + Statements of Agents [Rule 801(d)(2)(C)&(D)]
  + Statements of Coconspirators [Rule 801(d)(2)(E)]

1. **The Party's Own Words [Rule 801(d)(1)(A)]**

* **Rule 801(d)(2)(A).** A statement is not hearsay if the statement is offered against a party and is:

1. the party's own statement, in either an individual or a representative capacity.

* **Policy:**  This rule allows for confessions which would otherwise constitute hearsay, because:
  1. A statement that harms the declarant's interests is more likely to be truthful than is ordinary hearsay. (i.e. Generally, people don't confess to crimes they didn't commit).
  2. The declarant is available for cross-examination.
  3. It is necessary to adversary system to hold adverse party accountable to their words

1. **Adoptive Admissions [Rule 801(d)(2)(B)]**

* **Rule 801(d)(2)(B).** A statement is not hearsay if the statement is offered against a party and is:

1. the party's own statement, in either an individual or a representative capacity.

* **Four preconditions to using silence as evidence of an adoptive admission:**
  1. The statement was heard and understood by the party against whom it is offered;
  2. The party was at liberty to respond;
  3. The circumstances naturally called for a response; and
  4. The party failed to respond.

1. **Statements of Agents [Rule 801(d)(1)(C)&(D)]**

* **Rule 801(d)(2)(C) &(D).** A statement is not hearsay if the statement is offered against a party and is:

1. a statement by a person authorized by the party to make a statement concerning the subject, or
2. a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

* Case Law: Once the "agency", and "making the statement while the relationship continues", requirements are established, the statement is exempt from the hearsay rule so long as it relates to a matter within the scope of the agency. Rule 801(d)(2)(D) does **not** include an implied requirement that the declarant have personal knowledge of the facts underlying his statement (*Mahlandt v. Wild Canid Survival & Research Center*).
* Standard of Proof: The standard for deciding whether or not a person is an agent of a party-opponent is supplied by Rule 104(a) [questions of admissibility generally], a **preponderance of the evidence** standard.
  + Remember, Rule 104(a) explicitly states the court is not bound by the rules of evidence in making its determination, except the rules respecting privilege and conditional relevance.
* Rule 801(d)(2)= does not apply to the government in the prosecution of a criminal case. (i.e. A criminal ∆ can't get up and say, 'the cop said this, the cop said that'..)

1. **Statements of Coconspirators [Rule 801(d)(1)(E)]**

* **Rule 801(d)(2)(E).** A statement is not hearsay if the statement is offered against a party and is:

1. the party's own statement, in either an individual or a representative capacity.

* Case Law: The standard for allowing in statements by an alleged co-conspirator, when used to prove the very existence of the conspiracy, is a **preponderance of the evidence standard,** as determined by a preliminary fact finding by the judge. The judge can consider the content of the hearsay statement in weighing whether it was made in the furtherance of the conspiracy.
* Policy: The preponderance of the evidence standard ensures that the court will have found it more likely than not that the technical issues and policy concerns addressed by Rule 104 have been afforded due consideration. Although prior to the enactment of the FRE, the court had held that the hearsay statement by the alleged co-conspirator could not “**boostrap**” itself (see below) into being competent evidence of proof of the conspiracy, absent some independent proof, the FRE 104(a) contains no limitations other than privilege. Since the existence of the statement, although presumed unreliable, is probative on the existence of a conspiracy, when it is taken together with surrounding circumstances, it may be more probative.
  + Bootstrap Rule (NOT required by Rules of Evidence)**:** Coconspirators' statements are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* ("from another source; from elsewhere) that he is connected with the conspiracy. Otherwise, hearsay would left itself by its own bootstraps to the level of competent evidence (*Glasser*)
  + James Hearing: A **James** **hearing** is often held in criminal cases, before trial, for the prosecutor to show how he will “**connect up**” the hearsay statements of the alleged co-conspirator with other evidence to establish the existence of the conspiracy. If the hearing is successful, the hearsay statement is admitted. However, if it is not practicable for the prosecution to provide a showing before trial, the statement will come in if the judge believes that there **was more likely than not** a conspiracy, and the judge may have to give a limiting instruction if the prosecution does not later “connect up” the statement with other evidence.
* Required steps to enter a statement as coconspirator evidence under Rule 801(d)(2)(E**):**
  1. Show a conspiracy existed
  2. Show the conspiracy included both the declarant and the alleged coconspirator; and
  3. That the declarant made the statement during the course and in the furtherance of the conspiracy.
* IMPORTANT NOTE: The coconspirator exception almost never applies to a confession made **knowingly** to the police and implicating one' associates. The rule requires the statement be made "during the course and in furtherance of the conspiracy." Such a confession may well terminate the conspiracy. It almost never "furthers" the conspiracy.
* NOTE: Application of the coconspirator exception does not depend on whether the government has formally charged conspiracy. Any joint venture is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged.
* NOTE: The evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case or a civil case.
* NOTE: Rule 1101(d)(1) states that the Rules of Evidence, other than with respect to privileges, shall not apply to the determination of question of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.
  1. **Rule 612, 613, 801: Past Statements of Witnesses and Past Testimony**

1. **Introduction/ Summary Chart**

* Having dealt with statements of party-opponents, we not take up most of those exceptions to the hearsay rule that address either a witness's past statements or testimony from a previous proceeding.

|  |  |  |  |
| --- | --- | --- | --- |
| **PAST STATEMENTS OF WITNESSES AND PAST TESTIMONY CHART** | | | |
| **Rule** | **Topic** | **Conditions Regarding Declarant's Availability or Memory** | **Conditions Regarding Past Statement** |
| Rule 613 | Past Inconsistent Statements Offered to **Impeach** | Declarant Must Have Testified | Questioning Lawyer Must Have **Good-Faith Belief** That Witness Made Past Statement |
| Rule 801(d)(1)(A) | Past Inconsistent Statement Offered **Substantively** | Declarant Must Testify at Trial or Hearing **and** Be Subject to Cross-Examination "Concerning the Statement" | Past Statement is Inconsistent and Was:   1. Given Under Oath **and** 2. At a "Proceeding" or Deposition |
| Rule 801(d)(1)(B) | Past **Consistent** Statements | Same | 1. Past Statement is **Consistent**, 2. Is Offered to **Rebut** Charge of Recent Fabrication or Improper Motive, **and** 3. Meets ***Tome*** Rule |
| Rule 801(d)(1)(C) | Statement of **Identification** | Same | Past Statement **Identifies** a Person **and** Was Made **After** Declarant Perceived the Person |
| Rule 804(b)(1) | Past **Testimony** | Declarant Must Be **Unavailable** as Defined by Rule 804(a) | Past Statement was:   1. "**Testimony**" (i.e. given under oath 2. At a "**Proceeding**" or Deposition, **and** 3. Subject to **Examination** by Party Against Whom Now Offered (or by Civil "Predecessor in Interest"), who Then Had "**Similar Motive"** |
| Rule 612 | **Refreshing** Witness's Memory | Witness Must Be on **Stand**; Memory Must Be **Exhausted** | None (Note That Memory May be Refreshed with Many Things; If a Writing is Used, Rule 612 Imposes Conditions). |
| Rule 803(5) | Past Recollection **Recorded** | Witness Must Be on **Stand**; Must Have "**Insufficient** **Recollection**" | Record:   1. Was Made or Adopted When Witness's Memory was **Fresh**, **and** 2. Reflected Witness's Knowledge **Correctly** |

1. **Rule 612: Writing Used to Refresh Memory.**

* **Rule 612= Writing Used to Refresh Memory.** Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--
  + 1. while testifying, or
    2. before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

* NOTE: Rule 612 does not concern hearsay, the rule deals with the mechanics of refreshing a witness's memory.
* Rejected Proposed Alternative:*Prof Morgan: The Hearsay Dangers***-** Adversary has all the protection which oath and cross-examination can give him. Trier is in a position to consider the evidence impartially and to give it no more than its reasonable persuasive effect. Consequently, there is no real reason for classing testimony as to prior statements made by the declarant as hearsay.
  1. **NOTE**: Despite the logic of Professor Morgan's arguments, the rule-writers rejected his proposal that all past statements of testifying witnesses be exempt from the hearsay ban.

1. **Rule 613: Inconsistent Statements Offered to Impeach**

**Rule 613= Prior Statements of Witnesses.**

1. Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
2. Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is **not** **admissible** unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

* Case Law:
  + Under Rule 613(b), to be received as a prior inconsistent statement, a contradiction need **not** be in plain terms. It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords **some indication** that the fact was different from the testimony of the witness whom it is sought to contradict (*United States v. Barrett*)
  + Moreover, Rule 613(b) does **not** require immediate attention to be drawn to any alleged contradictory statement and asking a witness if he made it. The rule requires instead that the witness be afforded at some time an opportunity to explain or deny, and for further interrogation (*United States v. Barrett*).
  + A trial judge should rarely, if ever, permit the Government to "impeach" its own witness by presenting what would otherwise be inadmissible hearsay if that hearsay contains an alleged confession to the crime for which the defendant is being tried (*United States v. Ince)*.
    - Policy: When the prosecution attempts to introduce a prior inconsistent statement to impeach its own witness, the statement's likely prejudicial impact often substantially outweighs its probative value for impeachment purposes because the jury may ignore the judge's limiting instructions and consider the "impeachment" testimony for substantive purposes (*United States v. Ince*).
    - Admission of Guilt: That risk is multiplied when the statement offered as impeachment testimony contains the ∆'s alleged admission of guilt, making it exceptionally unfairly prejudicial to the ∆ (*United States v. Ince).*
* Silence as Impeachment Evidence:
  + If you are arrested and:
    - **have been**, if you have been Mirandized, your silence cannot be used against you.
    - **have** **not** **been** Mirandized, and you choose to stay silent, your silence can be used against you.
    - **NOTE:** recent decision= “must expressly state that you are choosing to remain silent”
  + Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative. It does not violate due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. (*Fletcher v. Weir*).
  + Pre-arrest, pre-Miranda silence can probably constitute an adoptive admission as long as the accusation the defendant failed to rebut was made by a friend or private employer rather than a police officer, and no police officer was nearby (*United States v. Tocco*, casebook pg 436)

1. **Rule 801(d)(1)(A): Inconsistent Statements Offered Substantively**

* **Rule 801(d)(1)(A).** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is **inconsistent** with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.
  + Policy: The requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.
  + NOTE: CLARIFY WITH HOULETTE It seems that 'silence' would be insufficient to constitute 'inconsistent' with a prior statement (i.e. it's not an affirmation or a rejection). However, the answers given by Houlette to Problem 7.20 suggests that silence can in fact satisfy the 'inconsistent' requirement of the rule, although the rationale for the 'inconsistent' requirement (above) strongly suggests otherwise.
* Review Problems 7.19 and 7.20 in the casebook.

1. **Rule 801(d)(1)(B): Past Consistent Statements**

* **Rule 801(d)(1)(B)**. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: (B) **consistent** with the declarant's testimony and is offered to rebut an express or implied charged against the declarant of recent fabrication or improper influence or motive.
* Case Law: The prior consistent statement has no relevancy to refute the charge unless the consistent statement was made **before** the source of the bias, interest or incapacity originated. (*Tome v. United States*)
* Policy: Hearsay is often relevant, and relevance is not the sole criterion for admissibility. Balancing each statement involves considerable judicial discretion; reduces predictability; and enhances the difficulty in trial preparation b/c the parties will not know in advance which statements will be admitted.
* Rationale for adherence to common-law 'premotive' rule:
  1. Very similar rule language to common-law rulings
  2. Committee's unwillingness to countenance the general use of prior prepared statements as substantive evidence.
  3. Congress did not amend the Committee's draft in any way.
  4. Predictability of rulings; decreasing difficulty of trial. Hearsay provisions fall outside of the Federal Rules liberal approach argument.

1. **Rule 801(d)(1)(C): Statements of Identification**

* **Rule 801(d)(1)(C)**. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: (C) one of **identification** of a person made after perceiving the person.
* Policy: A pre-trial identification is regarded as having equal or greater testimonial value than one made in court because:
  1. the circumstances of the earlier identification are often less suggestive; and
  2. The earlier identification occurs closer to the time of the offense.
* Case Law- *Owens*: The hearsay rule, Rule 802, is not violated by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification. A witness is regarded as "**subject to cross-examination**" when he is placed on the stand, under oath, and responds willingly to questions. Nothing more is required. The witness' assertion of memory loss- is often the very result sought to be produced by cross-examination and can be effective in destroying the force of the prior statement (*United States v. Owens*)
* *Owens* Dissent (Brennan): I dissent on the ground that a ∆'s Sixth Amendment right to confront his accuser does not merely guarantee an opportunity for cross-examination, but opportunity for***effective*** cross-examination. The victim was unable to testify at trial, and could not even recall making the statements the court relied on, but somehow is certain the statements true. Two of the three hearsay dangers: misperception and failure of memory, are not be mitigated by the cross-examination of someone who cannot remember the basis of their prior statements.
* Case Law-*Weichell*: Under Rule 801(d)(1)(C), out-of-court identification testimony is admissible as **substantive** evidence of guilt even where there is no in-court identification by the person making the out-of-court identification. A pre-trial composite sketch identification is one such form of permitted out-of-court identification.
* *Weichell* Dissent: This exception to the hearsay rule is premised on the relative **reliability** of different methods of identification. Unlike extrajudicial photographic or in-person identifications, composites have not as yet been shown to possess a fair degree of reliability.
  1. **Rule 804: Hearsay Exceptions for "Unavailable" Declarant**
* **Difference between Rule 804 and Rule 803.** 
  + Rule 803 is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or not is not a relevant factor in determining admissibility.
  + Rule 804 proceeds upon a different theory. Hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. .
  + Rule 804, therefore, expresses **preferences**: testimony given on the stand in person is preferred over hearsay, and hearsay, if of one of the specified qualities, is preferred over complete loss of the evidence of the declarant.

1. **Rule 804(a): Definition of "Unavailability"**

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

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

* **Notes:**
* Ruling required: The judge is required to make a ruling of 'privilege' for it to be exercised. This implies that an actual 'claim' of privilege must first be made, it cannot simply be assumed.
* Justification: Considerations of **practicality** justify the rule that a witness is rendered unavailable if he refuses to testify despite judicial pressure.
* Required Presence: Unavailability rendered by 'lack of availability' must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.
* Disbelieving Memory Claims: A court may **choose** to disbelieve a declarant's testimony as to unavailability by 'lack of memory'. If the court does not believe the lack of memory claim , the judge may refused to admit evidence under the lack of memory exception.

1. **Rule 804(b)(1): Former Testimony**

* **Rule 804(b)(1)= Former Testimony.** The following is not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) **Former testimony**. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

* Case Law: In determining if testimony at a past proceeding satisfies the '**similar motive**' requirement of Rule 804(b )(1), a court must consider (*United States v. DiNapoli*):
  1. Whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue;
  2. The **nature** of the two proceedings- both what is at stake and the applicable burden of proof; and
  3. To a lesser extent, the cross-examination at the prior proceeding- both what was undertaken and what was available but forgone.
* Case Law: A previous party having like motive to develop the testimony about the same material facts is a predecessor in interest to the present party. In the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party (*Lloyd v. American Export Lines*).
  1. *Lloyd* Dissent: "predecessor in interest" is a term of art, and was intended as such by the drafters. The term connotes "privity" with the preceding party. If there is no formal relationship between the two parties, one is not a predecessor in interest of the other, simply for attacking or defending against the same witness of an adverse party as the subsequent party.

1. **Rule 804(b)(3): Statements Against Self-Interest**

* **Rule 804(b)(3)= Statements against interest.** The following is not excluded by the hearsay rule if the declarant is unavailable as a witness: (3) **Statement against interest**. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
* Case Law: Rule 804(b)(3) does not allow for the admission of non-self-inculpatory statements, even if such statements are made within a broader narrative that is generally self-inculpatory." The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believe it to be true," and this question can only be answered in light of all the surrounding circumstances (*Williamson v. United States*).
* Standard of proof: 104(a): preponderance of the evidence.

1. **Rule 804(b)(2): Dying Declarations**

* **Rule 804(b)(2)= Dying Declarations.** The following is not excluded by the hearsay rule if the declarant is unavailable as a witness: (2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
* Case Law: To make out a **dying declaration**, the declarant must have spoken without hope of recovery and in the shadow of impending death. The state of mind must be exhibited in the evidence, and not left to conjecture. The declarant must have spoke with the consciousness of a **swift** and **certain** doom. Fear or even belief that illness will end in death will not suffice, there must be a settled hopeless expectation that death is near at hand and presence (*Shepard v. United States*).
  + NOTE: the "belief" requirement is necessary for the testimony to be competent because "**personal** **knowledge**" is the most basic competence rule that must be present in a non-exert witness. By the same principle, hearsay declarants must abide by the opinion evidence rules that govern lay witnesses.
* Standard of Proof: 104(a): preponderance of the evidence.

1. **Rule 804(b)(6): Forfeiture by Wrongdoing**

* **Rule 804(b)(6)= Forfeiture by Wrongdoing.** The following is not excluded by the hearsay rule if the declarant is unavailable as a witness: (6) **Forfeiture by wrongdoing**. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.
* Case Law: Rule 804(b)(6) requires only that the defendant intend to render the declarant unavailable "as a witness." The text does NOT require that the declarant would otherwise be a witness at any PARTICULAR trial, therefore it does not limit the subject matter of admissible statements to events distinct from the events at issue in the trial in which the statements are offered (*United States v. Gray*).
* Standard of Proof: In order to apply the forfeiture-by-wrongdoing exception of Rule 804(b)(6), a court must find, by a **preponderance of the evidence**, that:
  1. The ∆ engaged or acquiesced in wrongdoing;
  2. That was intended to render the declarant unavailable as a witness; and
  3. That did, in fact, render the declarant unavailable as a witness.
  + The court does NOT need to hold an independent evidentiary hearing if the requisite findings may be made based upon evidence presented in the course of the trial.
  1. **Rule 803: Hearsay Exceptions When Availability of Declarant "Immaterial"**
* **Distinction between Rule 803 and Rule 804**
  + In Rule 803, the declarant's availability is "**immaterial**" to admissibility.
  + In Rule 804, hearsay is allowed only when the declarant cannot not **meaningfully** testify.
  + The reason for this distinction is that not all hearsay is equal, that some forms are just as good as live testimony whereas other are not, but better than nothing at all if live testimony is impracticable.

1. **Rule 803(1) & (2): Present Sense Impressions and Excited Utterances**

* **Rule 803(1) &(2)= Present Sense Impressions and Excited Utterances.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression**. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

* **Notes:**
  + Remember, these still need to be relevant under Rule 401. Just because an excited utterance *can* be admitted under this rule, that doesn't mean it is relevant.
  + The underlying theory of 803(1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. It is recognized that in most instances precise contemporaneity is not possible, and hence a slight lapse is allowable.
  + The underlying theory of 803(2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.
  + In both 803(1) and 803(2), **spontaneity** is the key factor is each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling. The time element= **however long can excitement prevail**, and is largely determined by the significance of the event.

1. **Rule 803(3): Statements of Then-Existing Condition**

* **Rule 803(3)= Statements of Then-Existing Condition.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness: **(3)** **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
* Think of Rule 803(3) as a specialized application of Exception (1), presented separately to enhance its usefulness and accessibility. The exclusion of statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule.
* **Distinction between “intention” and “memory”:** Declarations of intention, casting light upon the **future**, have been sharply distinguished form declarations of memory, pointing backwards to the **past**. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.
* **\*\*\*** Testimony of a **victim's** purported desires are **backwards** facing, and reflect declarations of memory and not declarations of intention (i.e. “Dr. Shepard is trying to poison me”= future), unlike ( “Dr. Shephard tried to poison me.”=backwards).
* Case Law: A person's state of mind or intent can only be expressed by gesture, sound or words. When the intent is expressed, it is typically contemporaneous with the declaration of the party. Thus, it is not subject to faulty memory and is independently reliable (*Mutual Life Insurance v. Hillmon*).
  + When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention.
  + **BUT**, whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party
* The *Hillmon* Doctrine's Policy
  + When a declaration of intention is used as tending to prove the performance or non-performance of a future act, we take only one of the risks inherent in hearsay, the risk of misstatement. No question of memory is involved, and a man is usually capable of perceiving accurately his own state of mind. However, when a declaration of intention is used as evidence of a past fact, our risks of inaccuracy correspondingly increase from the dangers of faulty perception and imperfect memory.
  + Thus, when a declarant's statement of intention is offered to prove her future act, we need not worry about two of the four sources of unreliability that normally infect hearsay:
    - Faulty memory poses no concern because the declarant is speaking of her *present* intention to do some *future* act.
    - Faulty perception is not at trick because she is not relating an external event but merely the contents of her mind.
  + **NOTE**: Because the Hillmon court actually uses the past-existing condition of state-of-mind to prove a fact ("..probably more likely to have gone with Hillmon") the Court actually made **bad** **law** and did that which Rule 803(3) specifically limits the use of such evidence from doing.
* Consistent Purpose: A trial becomes unfair if testimony accepted at trial may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected (*Shepard v. United States*).
* Rebuttable: By introducing evidence of then-existing conditions such as state of mind a party opens the door to the offer of declarations evincing a different state of mine from the other party (*Shepard v. United States*).

1. **Rule 803(4): Statements for Medical Diagnosis**

* **Rule 803(4)= Statements for Medical Diagnosis.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (4) **Statements for purposes of medical diagnosis or treatment**. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the **cause** or external **source** thereof insofar as reasonably pertinent to diagnosis or treatment.
* Case Law: Under Rule 803(4), the fact that the cause of an injury does not lead to a fundamentally different exam does not mean the discussion is not reasonably pertinent to diagnosis. It is enough that the information **eliminated** potential physical problems from the doctor's examination (*United States v. Iron Shell*).
* Policy: Rule 803(4) focuses upon the patient and relies upon the patient's **strong** **motive to tell the truth** because diagnosis or treatment will depend in part upon what the patient says. It is thought that the declarant's motive guarantees trustworthiness sufficiently to allow an exception to the hearsay rule.
* Differences between Rule 803(4) and prior common law:
  1. The rule adopted an expansive approach to allowing statements concerning past symptoms and those which related to the cause of the injury.
  2. The rule abolished the distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only; the latter usually refers to a doctor who is consulted only in order to testify as a witness.
* Melody Herbst- Young Children's and the Medical Hearsay Exception
  + Children in study did not really seem to understand the *medical* consequences of lying to doctors, only that they might get in trouble.
  + Importance of accuracy and completeness should be **explicitly** **conveyed** to children.

1. **Rule 803(5) & 612: Refreshing Memory and Recorded Recollections**

* **Rule 803 (5)= Recorded Recollection.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (5) **Recorded recollection**. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
* Standard of Proof: The predicate for past recollection recorded is set forth in Rule 803(5) and requires that four elements be met (*Johnson v. State*):
  1. The witness must have had firsthand knowledge of the event,
  2. The written statement must be a memorandum made at or near the time of the event while the witness had a clear and accurate memory of it,
  3. The witness must lack a present recollection of the event\*, and
  4. The witness must vouch for the accuracy of the written memorandum
* To meet the fourth element, the witness may testify that she presently remembers recording the fact correctly or remembers recognizing the writing as accurate when she read it at an earlier time. But if her present memory is less effective, it is sufficient if the witness testifies that she knows the memorandum is correct because of a habit or practice to record matters accurately or to check them for accuracy, or if she signs the memorandum, testifying that it is her signature and that she would not have signed it without believing it to be true at the time.
* HOWEVER, the witness must **acknowledge** at trial the accuracy of the statement. An assertion of the statement's accuracy in the acknowledgement line of a written memo made previously under oath will not be sufficient. No statement should be allowed to verify itself, especially by boilerplate language.
* Policy: The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them.
* Knowledge requirement: Multiple person involvement in the process of observing and recording is entirely consistent with the rule. This applies to other situations, i.e. (employer dictating to secretary.)
* Controversy: The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed.
* **Rule 612= Writing Used to Refresh Memory.** Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, **excise** any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

1. **Rule 803(6) & (7): Business Records (VERY IMPORTANT!)**

* **Rule 803(6)= Records of Regularly Conducted Activity.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (6) **Records of regularly conducted activity.**  A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with [Rule 902(11)](http://www.law.cornell.edu/rules/fre/Rule90211.htm), [Rule 902(12)](http://www.law.cornell.edu/rules/fre/Rule90212.htm), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
* Policy= Rule's purpose is to avoid the difficulty of finding witnesses who could speak from firsthand knowledge about a business's routine and often nondescript activities. Business records exception= reliability comes from: 1. regularity of recording + 2. business incentive of the business to keep accurate records (*United States v. Vigneau*).
* Case Law: Business records admissible under the hearsay exception rules do not include accident reports prepared for litigation even if the reports are prepared in a routine, systematic process (*Palmer v. Hoffman*).
* "**Regular course of business**" connotes:

1. A regularity serving to counteract the possible temptation to misstatements;
2. A situation which would lead to detection of falsification, so that misstatements "cannot safely be made";
3. A relationship, when a writing is made by an employee under a duty to his employer, which includes the "risk of censure and disgrace" for misstatements.

* Records taken in the normal course of business are an exception to *hearsay* under **FRE 803(6)**, but only records that are produced by or verified by the business fall under the exception (*United States v. Vigneau)*.
  + Policy: Records kept by a business but made by someone else (i.e. even the customer) may not be sufficiently trustworthy (i.e the sender on a money wire transfer form was not required to show ID, only the receiver. Thus, a sender could have easily used someone else's name).
* Note: the records don't have to come from THE custodian, other qualified witness could be someone who regularly uses or creates the record before giving it to THE custodian.
* You can't backdoor in anything you want simply by putting it in a business record. Whatever you are recording that is routing and data-centered.

Three ways business refords

1. Employee to record: I saw X
2. Employed to employee
3. Employee to other (customer, etc.) the record came from somewhere else.

* **Rule 803(7)= Absence of Entry in Records Kept in Accordance with 803(6).** The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (7) **Absence of entry in records kept in accordance with the provisions of paragraph (6)**. Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

1. **Rule 803(8) & (10): Public Records and Reports**

* **Rule 803(8)= Public Records and Reports.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (8) **Public records and reports**. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
* **Rule 803(10)= Absence of Public Record or Entry.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (10) **Absence of public record or entry**. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with [rule 902](http://www.law.cornell.edu/rules/fre/Rule902.htm), or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.
* Policy: The rationale for Rule 803(8) is a broad assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.
* Beech Aircraft v. Rainey: **Rule 803(8)(C)** does not distinguish between "fact" and "opinion" statements. As long as the conclusion is based on factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report. The trustworthiness inquiry- and not an arbitrary distinction between "fact" and "opinion"- is the Rule's safeguard against the admission of unreliable evidence, and it applies to all elements of the report.
* **Police Reports and Business Records**
* If a report satisfies the criteria of the business records exception under Rule 803(6), should courts admit the report against criminal defendants under that rule, even though such records are not permissible under Rule 803(8) as public records evidence? The Second Circuit (*Oates*) and the Tenth Circuit (*Hayes*) take divergent approaches. A later case from the Ninth Circuit (*Weiland*), finds common ground between the two decisions
* *United States v. Oates (2nd Cir- 1977)*- We conclude that the Advisory Committee and Congress shared an overriding concern that the rules be formulated so as to avoid impinging upon a criminal defendant's right to confront the witnesses against him, and therefore, to make law enforcement reports absolutely inadmissible against defendants in criminal cases. We find clear legislative intent to not only exclude records by police officers and law enforcement personnel under **FRE 803(8)** [public records] but from the scope of **FRE 803(6)** [business records] as well.
* *United States v. Hayes (10th Cir- 1988)*- Rule 803(8)(C) does not compel the exclusion of documents properly admitted under Rule 803(6) where the authoring officer or investigator testifies. This is because such testimony protects against the loss of an accused's confrontation rights, the underlying rationale for Rule 803(8) and the basis of the court's concern in *Oates*. Thus, we agree with the 5th Circuit, which rejected *Oates* as overly broad, concluding 803(8(B) only excluded observations made by law enforcement officials at the scene of a crime or in investigating a crime, and not to reports of routine matters made in nonadversarial settings (United States v. Quezada)
* *United States v. Weiland (9th Cir- 2005)*- The government may not circumvent the specific requirements of Rule 803(8) by seeking to admit public records as business records under Rule 803(6). Nor may the government attempt to combine Rules 803(6) and 803(8) into a hybrid rule to excuse its failure to comply with either. However, neither Rule 803(6) nor Rule 803(8) bars such reports when they concern "routine and nonadversarial matters.
  1. **Rule 807: Residual Exception (The 'Catch-All' Provision)**
* **Rule 807= Residual Exception.** A statement not specifically covered by Rule 803 or 804 but having equivalent (1) circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that

(2) The statement is offered as evidence of a material fact;

(3) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; **and**

(4) The general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

* Case Law: The requisites of an exception to the hearsay rule are: 1. **necessity** and 2. **circumstantial guaranty of trustworthiness** (*Dallas County v. Commercial Union Assurance*):
  + **Necessity**-
    - This requisite means that unless the hearsay statement is admitted, the facts it brings out may otherwise be lost.
    - However, the ‘necessity’ requirement is NOT to be interpreted as uniformly demanding a showing of total inaccessibility of firsthand evidence.
  + **Circumstantial Guarantee of Trustworthiness**- There are three sets of circumstances when hearsay is trustworthy enough to serve as a practicable substitute for the ordinary test of cross-examination:
    1. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;
    2. Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;
    3. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

* Case Law: If a statement is admissible under one of the hearsay exceptions, that exception should be relied on instead of the residual exception. However, the phrase 'specifically covered' by a hearsay exception means that the analysis of a hearsay statement should not end when a statement fails to qualify under a traditional hearsay exception, but should be evaluated under the residual hearsay exception (*United States v. Laster*).
  + *Laster* Dissent: I adopt the plain-language interpretation. The residual exception was only intended to provide an exception for statements of a character not contemplated by the traditional exceptions. It was not intended to circumvent those exceptions if specifically covered evidence was inadmissible under those rules.
  1. **Rule 806: Attacking and Supporting Credibility of Declarant**
* **Rule 806= Attacking and Supporting Credibility of Declarant.** When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) [i.e. spokespersons, agents, and coconspirators], has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.
* Note: Logically, this rule will apply to Rule 804 exceptions more than Rule 803 exceptions because 804 exceptions are **only** made when the declarant is unavailable, whereas 803 exceptions are made regardless of whether the declarant is available but for which 806 affirms also affirms a right to cross-examination if the declarant does in fact get called as a witness.
* Policy: The principal difference between using hearsay and an actual witness is that the inconsistent statement of the witness, almost inevitably of necessity be a ***prior*** statement, which is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a ***subsequent*** one, which practically precludes calling it to the attention of the declarant. In the case of a hearsay declarant, insisting on the impossible requirement of affording the declarant an opportunity to refute or explain the inconsistent statement would deny the opponent, already incapable of cross-examining the declarant, the benefit of attacking the credibility of the defendant, an important technique of impeachment (see rulebook page 298 for more).

1. **CONFRONTATION AND COMPULSORY PROCESS**
   1. **The Confrontation Clause and Hearsay**
2. **Brief Summary of Confrontation Clause**

* **When, if ever, will allowing hearsay into evidence constitute a violation of the defendant’s Confrontation Clause rights?**
* The Confrontation Clause has been interpreted to mean that an out-of-court declaration may not be admitted against a criminal defendant unless the declaration contains “**indicia of reliability.”** (*Ohio v. Roberts*).
* However, if the out-of-court declaration is introduced under a “**firmly rooted hearsay exception**,” this will by itself be enough to establish the required reliability. Therefore, the court does not have to look at the facts surrounding the particular declaration in question (and may allow the declaration in even though there’s reason to believe it may be unreliable in the particular case). However, “declarations against interest” probably don’t qualify as a “firmly rooted hearsay exception” because this category is too broad.
* Where the out-of-court declaration does not fall within a firmly rooted exception (either because the jurisdiction has its own non-standard set of hearsay exceptions or because the trial judge makes a mistake and lets in hearsay that is not in fact within any exception), the Clause is violated unless there are “**particularized facts”** surrounding the statement to show it’s **probably reliable**. One important fact is whether the ∆ at some point (either at trial or previously) got the right to **cross-examine** the declarant about the statement.
* Example: D1 gives a confession to the policy implicating D2 and D1 then pleads the 5th Amt at D2’s trial, the use of the out-of-court confession against D2 would violate the Confrontation Clause because D2 gets no chance to cross-examine D1.
* **What exceptions to the hearsay rule have been held to be “firmly rooted” for purposes of Confrontation Clause analysis?**
* The Supreme Court has held the following exceptions to the hearsay rule are “firmly roted”:

1. **Rule 804(b)(1)**: Former testimony at a prior proceeding
2. **Rule 803(2)**: Excited utterances; and
3. **Rule 801(d)(2)(E):** Statements by a co-conspirator during the course and in furtherance of the conspiracy.

* The following are **likely** to be found “**firmly rooted**” if the Court were to consider them:

1. **Admissions** by a party-opponent (Rule 801(d)(2))
2. **Recorded recollections** Rule 803(5)
3. **Business Records** (803(6))
4. **Dying Declarations** (804(b)(2))
5. **Statements against interest** (other than against penal interest), 804(b)(3)

* **Constitutional Text:**
  + Sixth Amendment Confrontation Clause: “In all criminal prosecutions, the accused shall enjoy the right to… be **confronted** with the witnesses against him…”
  + This is an **exclusionary** tool, unlike the Compulsory Process Clause, which is **inclusionary**.
* **What is the underlying purpose of the Confrontation Clause?**
* The Confrontation Clause is intended to guarantee a criminal defendant the right to be confronted with the witnesses against him or her. It provides certain **procedural** guarantees at trial, including:
  1. The right to be present at trial (to ‘confront witnesses’),
  2. The right to learn what evidence is being offered against him, and
  3. The right to cross-examine witnesses.
* **General Purpose**:
  + Historical: Prevent ∆ from testifying to hearsay statements unless they fell within an exception.
  + Modern: Prevent trial by affidavits.
* **Limitations of Confrontation Clause:** 
  + Applies ONLY in criminal cases, not civil cases.
  + Applies ONLY to defendant, not to prosecutor.
  + Applies ONLY to hearsay evidence not given opportunity for cross-examination, not if the declarant could have been cross-examined, or is in-court and available for cross-examination.
  + Applies to both federal and state courts, FRE only applies to federal courts unless state-adopted.
  + CC is a ***higher*** law than FRE, but not always a ***stricter*** law. Because the stricter law prevails:
    - Evidence permitted by the FRE, but forbidden by the CC is inadmissible.
    - Yet, evidence permitted by the CC but excluded by the FRE is al**s**o inadmissible.

1. **Confrontation Clause in Detail**

* *The Mattox Era*

* Pointer v. Texas (1965**)**- The Supreme Court held the Sixth Amendment's Confrontation Clause was incorporated by the Due Process Clause of the Fourteenth Amendment, and is therefore binding on the states.
* California v. Green (1970)- The Supreme Court rejected the notion that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. The Court made two broad holdings:
  1. If the declarant is present, testifies at trial, and responds to questions about the previous hearsay statement, "the out of-court statement for all practical purposes regains most of the lost protections" of in-court testimony. The Confrontation Clause therefore does not bar admission of the out-of-court statement. This is true whether or not the out-of-court statement was made under oath and subject to cross examination.
  2. If the prosecutor has made "**every effort"** to produce the declarant, but the declarant proves unavailable, and if the out-of-court statement was made under oath and subject to cross-examination, the Confrontation Clause does not bar its admission.
* *Roberts v. Ohio* (Overruled by Crawford)
  + 2-part test for out-of-court statement given under oath:
    1. State must show that they made a reasonable effort to procure a witness (that made statement).
    2. Must be demonstrated that out-of-court statement of witness who is not available for cross is reliable and trustworthy
  + Confrontation clause will not ban hearsay if they come with **particularized** **guarantees** of **trustworthiness**
    - Spontaneous or excited utterances
    - Medical treatments or diagnosis
    - Dying declarations
    - Prior testimony
    - Business and public records
  + Not in Sphere:
    - Statements against penal interests
    - Child testimony
* *Crawford v. Washington*
  + ***Crawford* overrules *Roberts* 2 prong test.**
  + **Rule*:*** Confrontation clause applies only when the out of court statement is **testimonial** in nature.
* *Davis/Hammon*
  + The Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford v. Washington*, does not apply to "**non-testimonial**" statements.
  + **The Primary-Purpose Test:**
    - **Testimonial v. Nontestimonial:**
      * Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an **ongoing** **emergency**.
      * Statements are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the **primary purpose** of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.
  + **Factors bearing on "Primary Purpose**":
    1. Whether the declarant was speaking about events as they were actually happening.
    2. Whether the declarant was facing an on-going emergency**.**
    3. Whether the statements elicited were necessary to be able to resolve the present emergency, rather than simply to learn what had happened in the past; and
    4. Whether the interview was conducted at a higher-level of formality.
  + **Whose Purpose Controls**:
    - The Court seemed more concerned with the police officer's purpose, objectively assessed, in posing the questions, than the declarant's purpose, objectively assessed, in seeking out the police.
    - The Primary Purpose Test does NOT turn on the actual subjective intent of the declarant or anyone else. In stating the test, Scalia twice referred to what circumstances ***objectively*** ***indicate***." By the end of the opinion, he had specified the *objective* nature of the evaluation five more times.
  + **911 Call (could go either way)**
    - D speaking about events as they were actually happening
      * Not describing past events
    - D in middle of ongoing emergency
    - D seeking help against an immediate physical threat
    - Questions asked by 911 operator were necessary to resolve emergency
      * I.e. name of attacker so police could know who they would be getting
      * Rather than learn what happened in past
    - Formality of questions low, frantic answers
* **Ways to Avoid Confrontation Clause:**
  + **Nonhearsay statements**- You never need address the Confrontation Clause issue unless you face evidence that is hearsay, as defined by Rule 801(c). ***Crawford*** tells us that the Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Out of court statements offered for a nonhearsay purpose therefore evade Confrontation Clause scrutiny.
  + **Civil Case /Against Prosecution-** Confrontation Clause analysis is also avoided if the challenged hearsay is offered in a civil case or against the government in a criminal case. The Claues protects only criminal defendants. Hence, we engage the Confrontation Clause, which occupies the lower two-thirds of the flowchart, only if the government offers otherwise admissible hearsay against a criminal defendant.
  + **Nontestimonial Statements**-
    - Clearly, **Testimonial** are "prior testimony at a preliminary hearing, before a grand jury, or at a former trial."
    - Clearly, **Nontestimonial** are "casual remarks to an acquaintance," "off-hand, overheard remarks," and statements in furtherance of a conspiracy."
    - To classify other statements as testimonial or nontestimonial demands longer and less certain analysis.
  + Important: Review Hearsay and Confrontation flowchart on page 609.

* **The Confrontation Frontier**:
  + 1. *Statements of Child Victims*
       - **The more an interview of a child victim resembles a formal police interrogation, even if conducted by a parent, the more likely it will be deemed testimonial.** i.e. if purpose= end an ongoing emergency (abuse), then the evidence is not testimonial, but if it is to gather evidence/statements for litigation, then it is testimonial.
    2. *Certificates and Affidavits*
       - **Business records are by their nature NOT testimonial** (page 580).
       - Post-Crawford courts in turn rejected Confrontation Clause objections to classic business records- routine entries made in a nonadversarial setting by private employees unaware of any pertinent litigation.
         * Exceptions: drug analysts, blood analysts, motor vehicle registrars, tax examiners- people whose "regularly conducted business" is to uncover evidence for prosecutorial use and document it in formal reports.
    3. *Nontestimonial Statements*
       - See *Davis.*
* **Forfeiture by Wrongdoing**
  + CC is not an absolute right, **equitable estoppel** prevails: “The law should enable a party to profit from its own wrongdoing.”
  + If Δ intentionally prevents/intimidates an adverse witness from testifying, then the ∆ loses all rights to confront that witness.
  + Even if the ∆ prevents/intimidates an adverse witness for **other** **reasons** (i.e. to keep them from testifying at someone else’s trial, the ∆ still loses their right to confront the witness (*Giles*)
  + **Policy**:  *Giles* avoided the problem of a ∆ being denied his confrontation right anytime a prosecutor could show that the ∆'s abusive or assaultive acts scared witnesses away. *Giles* avoided this result by requiring proof of **intent** by the ∆ to cause the unavailability of the witness.
  1. **The *Bruton* Doctrine**
* **Up to now, we have asked two hearsay questions:** 
  1. Would admission of the statement violate the hearsay rule?
  2. Would it offend the Confrontation Clause?
* **The** **Bruton** **Doctrine** (*Bruton v. United States*) address a third question:

1. May the trial court permit the jury to hear the accomplice's out-of-court confession so long as the court carefully instructs the jury to consider the statement only against its maker? Answer: **NO.**

* **Traditional Ways to avoid Confrontation Clause Violation:**
  1. ***Sever Trials***
     + Idea: Separate trials for each ∆
     + Pro: Allows self-inculpatory statements against one ∆, without confrontation right of other being offended.
     + Con: Expensive (need to trials), Witnesses, including vulnerable victims, must endure the ordeal of testifying twice
  2. ***Separate Juries***
     + Idea: Use two juries at same time, one for each ∆, that can hear the shared evidence/testimony against both, and removing one or the other when evidence specific to one of the ∆'s that would violate the confrontations rights of the other ∆ are introduced.
     + Pro: Minimizes expenses, prevents witnesses from needing to testify twice
     + Con: Difficult to manage, logistical challenges. Many courtrooms are physically too small.
  3. ***Testimonies by the Confessing Accomplice***
     + Idea: If one ∆ takes the witness stand and submits to cross-examination, the Confrontation Clause rights of the other ∆ are not violated.
     + Pro: reduces expenses, avoids logical problems.
     + Con: prosecutors typically present evidence before ∆ faces the choice of taking the witness stand. Thus, a wise prosecutor must not offer statements of one ∆ against the other at a joint trial unless the testifying ∆ has already taken the stand (so 5th Amendment rights are not an issue).
  4. ***Redaction/Stipulation***
     + Idea: Redact statements or stipulations of the parties as to the testimony allowed if it avoids the mention of the other ∆, avoiding confrontation clause altogether (no right to confront a witness who isn't testifying against you).
     + Pro: simple solution
     + Con: Testifying ∆ could object that altering her statements to focus more place on her violates her due process right to a fair trial. It would not be fair to change "Michael and I attacked John" to simply "I attacked John," because any injuries/harm get blamed entirely on one person.
  5. ***Bench Trial***
     + Idea: Use a judge instead of a jury, idea is that the law presumes judges more able that jurors to segregate evidence in their minds
     + Pro: Simple and effective
     + Con: Judges presiding as fact finders over joint trials are trusted to consider an accomplice's statement only against its maker while disregarding it against codefendants. Even judges are human and can lose sight of this.
  6. ***Admissibility of Statement Against Non-Maker***
     + Idea: If a ∆ confessions were directly admissible against the other ∆ (i.e. coconspirator statements), then there is no Confrontation Clause violation.
     + Pro: No problem.
     + Con: Such confessions rarely occur during the course of the conspiracy, and they never further the conspiracy.
  7. ***When None of These Options Applies:*** 
     + Joint-Trials: Look to the Bruton Doctrine
* *Bruton v. United States*
* **Rule**: There is a substantial risk in a joint-trial that the jury, despite instructions to the contrary, will look to incriminating statements in determining the guilt of both defendants. Admitting such a statement would violate the other defendant’s Confrontation Clause right to cross-examination.
* **Simple** **Solution**: Must have two trials, two juries, or some other method that won’t cause prejudice to the defendant against which the statement is being offered.
* Civil Distinction: Limiting instruction suffices in civil trial because 5th and 6th aren’t involved in civil cases.
* Cruz v. New York (“Devastating Test”)
  + **Rule**: When a co-defendant’s confession implicates a criminal defendant, and the co-defendant does not testify at trial, the admission of the confession violates the criminal defendant’s rights under the 6th Amendment Confrontation Clause, even when the defendant’s own confession corroborates the co-defendant’s confession and jury instructions are given that instruct the jury to disregard the co-defendant’s confession in deciding the criminal defendant’s guilt.
  + **Cruz Test**:
    - If the codefendant’s testimony **backs-up** the defendant’s then it is barred from admission because it is devastating to the defendant.
    - If the codefendant’s testimony is **contrary** to the defendant’s, then it is not devastating and not barred.
  + **Problem**: The **devastating** **test** doesn’t come out so well here because the court says that you don’t really know if it is devastating until later in the trial when it is already in evidence.

* Gray v. Maryland (“Redaction Test”)
  + **Rule**: Testimony attempted to be redacted with “deleted” in the place of the names of the codefendants. The court says the redaction doesn’t help and may even hurt. If the testimony isn’t neutral then it just attracts more attention to the other defendant on trial. Particularly unfair when there is only one other defendant on trial.
  + More ∆= more vague=, more acceptable, because its generic enough that you don’t know who it applied to.
  1. **Compulsory Process**

1. **Brief Summary of Compulsory Process Clause**

* **Constitutional Text**: Sixth Amendment Compulsory Process Clause: “In all criminal prosecutions, the accused shall enjoy the right … to have **compulsory** process for obtaining witnesses in his favor.”
* This is an **inclusionary** tool, unlike the Confrontation Clause, which is **exclusionary**.

1. **Compulsory Process Clause in Detail**

* The CPC allows ∆ to compel a witness to testify in his favor (∆ may subpoena W).
* The CPCis an inclusionary tool that allows Δ to get evidence admitted that is otherwise inadmissible under the FRE.
* **Example**- The CPC enables a ∆ to introduce someone else’s confession to the crime charged against the ∆, even though that testimony would normally be inadmissible hearsay.
* **Application**- CPC test applies to ANY evidence rule, not just hearsay. So if you can’t get a piece of evidence in any other way, and it’s critical to the issue, and has assurances of trustworthiness, then make a compulsory process argument
* **Look for Hearsay:**
  + Excited Utterance – spontaneous confession
  + Made to close friends = more reliable
  + Declaration against interest
  + Corroborative evidence of an eyewitness
* **State or Federal Rules Restricting Evidence:**
  1. Hearsay - 3rd Party’s Confession to Crime (*Chambers*)
     + **FACTS**- Δ tries to show that X has confessed to crime that Δ is trying to show innocence. Statement was Declaration Against Interest but excluded originally b/c state-law excluded statements of penal interest
     + **RULE**: Statement is relevant and material to Δ case - Trustworthy facts corroborating X’s confession.
       - X is unavailable to testify
         * Excluding could violate Δ CP rights
         * UNLESS - Π shows that X was in jail at time.
  2. Arbitrary or Disproportionate Standard (*Holmes*)
     + **RULE**: A court may not bar ∆ from introducing evidence that someone else committed the crime at issue, simply because the prosecution’s evidence against the ∆ is compelling. The hearsay rule may not be applied mechanistically when the right to cross-examine a witness is necessary to preserve a more fundamental right than the hearsay rule.
     + **EXAMPLE**: Accomplice testimony statute banning A from testifying on **behalf** B, charged as co-participants, but doesn’t ban A from testifying **against** B.
     + **LIMITATION**: However*,* a court may **exclude** Δ’s evidence if it has little probative value and risks unfair prejudice or confusion (403 test).

1. **LAY OPINIONS AND EXPERT TESTIMONY**
   1. **Rule 701: Lay Opinions**
2. **Definition**

* **Rule 701= Opinion Testimony by Lay Witnesses.** If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

1. rationally based on the perception of the witness, and
2. helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
3. not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

* **Two traditional (common law) categories of lay witness opinions:**
  + 1. Inferences That Resist Reduction Fundamental "Facts"-
       - Source: Advisory Committee Notes list "**prototypical** **examples**" of this sort of opinion evidence: "size, degree of darkness, sounds, etc.)
         * i.e. "he walked unsteadily, "she spoke loudly," "the package weighed about 40 pounds, "the sky was very bright," "the voice sounded as though it came from the next room."
         * Most courts permit a business owner/officer to testify to the projected profits of ***their*** **business** without the necessity of qualifying the witness as an accountant, appraiser, or similar expert.
    2. Opinions That Can Be Reduced to More Fundamental Facts, but Still Gain from the Inference
       - At a somewhat more complex level, most judges also permit lay people to opine on such matters as intoxication.
       - i.e. "he appeared drunk" could be reduced to "he had bloodshot eyes, walked unsteadily, etc." but the opinion gains from the inference of how these factors together appeared to the witness.
       - Foundational facts may be especially critical if intoxication goes to the heart of the case
       - A lay witness's opinion that the ∆ is the same man she saw fleeing the crime scene depends on many foundational facts, i.e. height/age, hair color etc.
* **Distinction between lay and expert witness testimony:**
  + Lay testimony "results from a process of reasoning familiar in everyday life.”
  + Expert testimony "results from a process of reasoning which can be mastered only by specialists in the field.
  + Life experience can produce either “particularized knowledge” (lay testimony) or “specialized knowledge,” (expert testimony), depending on the nature of the subject matter and how familiar the process of reasoning required is in everyday life
* **Case Law:** 
  + Limitation (c) incorporates the distinctions set forth in *State v. Brown* (1992), which precluded lay witness testimony based on "special knowledge."
  + The use of forensic software or evidence constitutes “specialized knowledge” instead of "particularized knowledge” when comprehension of the evidence relies on special training in or education on a process of reasoning which can only be mastered by specialists in the field (*united States v. Ganier*).
  + When a law enforcement office is not qualified as an expert by the court, her testimony is admissible as lay opinion only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred (*United States v. Ganier*)
* **Policy**: The rule retains the **traditional objective** of putting the trier of fact in possession of an accurate reproduction of the event.
* **Additional Notes**:
  + The rule does not distinguish between expert any lay ***witnesses***, but rather between expert and lay ***testimony***. It is certainly possible for the same witness to provide both lay and expert testimony in the same case.
  + A party must qualify a witness to EACH THE TYPE OF testimony they will offer. If a single witness will testify in part as a lay witness, and in part as an expert witness, they must be qualified as each separately.
  + Limitation (a) is the familiar requirement of first-hand/personal knowledge.
  + Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. .
  + Limitation (c) incorporates the distinctions set forth in *State v. Brown* (1992), which precluded lay witness testimony based on "special knowledge."
  + The rule assumes the **adversary** **system** will lead to an acceptable result, since the detailed account carries more conviction than a broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness.
  + **Least Severe Sanction Necessary Doctrine**- Suppression of relevant evidence as a remedial device should be limited to circumstances in which it is necessary to serve remedial objectives (*United States v. Ganier).*
  1. **Rule 702: Expert Testimony**

1. **Definition**

* **Rule 702= Testimony by Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

(1) the testimony is based upon sufficient facts or data,

(2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles and methods reliably to the facts of the case.

* **Notes**:
  + **Policy**: An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the **expert witness**, although there are other techniques for supplying it.
  + Experts do not only testify in the form of opinions. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.
  + The rule is broadly phrased, and not limited merely to the "scientific" and "technical" but extended to all "**specialized**" **knowledge**. The rule is not limited to just experts in the strictest sense (i.e. doctors, physicists) but also the large group sometimes called "skilled" witnesses (i.e. bankers, landowners testifying to land values).
  + It is a well-accepted principle that Rule 702 embodies a **LIBERAL STANDARD OF ADMISSIBILITY** for expert opinions, representing a departure from the previously widely followed, and more restrictive, standard of ***Frye v. United States*** (overruled by ***Daubert v. Merrell Dow Pharmaceuticals*)**
  + The shift under the Federal Rules to a more permissive approach to expert testimony, however, did not represent an abdication of the screening function traditionally played by trial judges. To the contrary, as Daubert explained. Rule 702 governs the district court's responsibility to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 509 U.S. at 589.
  + Rule 702 has been amended in response to *Daubert v. Merrell Down* (1992), which charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. The Court in *Kumho* clarified that this gatekeeper function applies to **all** expert testimony, not just testimony based on science.
  + *Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are:
    1. Whether the expert's technique or theory can be or has been tested for reliability (challenge in an objective sense, or whether it is subjective, conclusory approach that can't be tested).
    2. Whether the technique or theory has been subject to peer review and publication;
    3. The known or potential rate of error of the technique or theory when applied;
    4. The existence and maintenance of standards and controls; and
    5. Whether the technique or theory has been generally accepted in the scientific community.
  + The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of **non-scientific** expert testimony, depending upon "the particular circumstances of the particular case at issue.” The Court clarified that, whether a witness's area of expertise was technical, scientific, or more generally "**experience**-**based**," Rule 702 required the district court to fulfill the "gatekeeping" function of "mak[ing] certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.
  + Nice closing: we stand up twice at the beginning of the trial, once for the judge and once for the jury. We do this because:
    - Sole judge of the law is the judge.
    - Sole judge of the credibility of the witness is the jury.

1. **Who Qualifies as an Expert?**

* Case Law:
  + It is within the province of the jury to weigh conflicting expert opinions, not for the court to decide, so long as minimum qualifications to testify as an expert are satisfied by each such witness (*United States v. Johnson*).
  + A person may not testify as an expert as to the reputability of a party unless the witness has personal knowledge of the party. Generalizations based on a skewed sample are insufficient facts to satisfy the reliability requirement of expert testimony (*Jinro America v. Secure Investments)*.

1. **Rule 702 & 704: (Im)proper Topic of Expert Testimony**

* **Rule 702= Testimony by Experts.**
  + See above.
* **Rule 704= Opinion on Ultimate Issue.**
  1. Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
  2. No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact **alone**.
     + 1. *Matters of Common Knowledge*
* Matters of common knowledge are within the province of the jury. Expert opinions **do not assist** the trier of fact in understanding or determining an issue of fact if the matter in question is one of common knowledge. Thus, it is not admissible under Rule 702
* See Problems 9.7-9.9.
  + - 1. *Opinions on Law and Opinions on Ultimate Issues*
* Expert witness opinion testimony must be based on experience. No legal conclusions ought to be made through or by such testimony (*Hygh v. Jacobs).*
* **Policy**: The basis of expert capacity is summed up in the term 'experience'. The danger is that the jury may think that the "Expert" in the particular branch of the law knows more than the judge- surely an inadmissible inference in our system of law.
* See Rule 704(b)
* See Problem 9.10
  + - 1. *Opinions on Credibility*
* Expert testimony in child sexual abuse cases is inadmissible when it usurps or unduly influences the jury (or any trier of fact) by telling the jury what legal conclusion to reach; such testimony is only admissible when it is **relevant**, the witness is an **expert**, and the testimony **assists** the jury in comprehending something not commonly known or understood (*State v. Batangan).*
  + - 1. *Opinions on Eyewitness identification*
* An expert witness can only provide a jury with the tools to analyze the eyewitness; he has no more specific information. The science may make no pretensions that it can predict whether a particular witness is accurate or mistaken (*United States v. Hines*).
* Rationale: Because the expert had not identified the witness, it is less likely the jury will think the expert is saying that the SHE (this particular witness) was wrong.

1. **Rule 703 & 705: Proper Bases of Opinion Testimony**

**Rule 703= Bases of Opinion Testimony by Experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type **reasonably relied upon by experts in the particular field** in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

* **NOTES:** 
  + Remember, Rule 602 (Lack of Personal Knowledge) is subject to Rule 703.
  + Third sentence allows for expert to rely on hearsay if reports are "of a type reasonable relied upon by experts in the particular field…" i.e. an aeronautics expert testifying at a plane crash may rely on statements made to him/her by reports from ground controllers' who witnessed the crash. .

**Rule 705= Disclosure of Facts or Data Underlying Expert Opinion.** The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

**NOTES:**

* **Two distinctions between expert opinions and lay opinions**- the background knowledge that informs them and the specific facts on which they rest.
  + Rule 701(c)- Only expert opinions may draw upon the witness's "scientific, technical, or other specialized knowledge." Rule 701(c).
  + Rule 701(a)- Only lay opinions must be based on facts within the perception of the witness. The personal knowledge rule is imposed on lay witnesses only; expert witnesses need not testify from personal knowledge.
* When a lawyer asks an expert witness hypothetical questions, the lawyer may not simply make up the facts. There must be "enough evidence to support a finding that the necessary facts exist." This standard is similar to that governing questions of conditional relevance under Rule 104(b).
  + Expect on cross-x for the opposing to counsel to say, "suppose instead...the road was dry instead of icy...would that change your analysis?" As long as there is enough evidence in the record to support each lawyer's factual assumptions, both questions are proper.
* Congress amended Rule 703 in 2000 to "**emphasize**" that the expert's reliance on otherwise inadmissible facts *does not make those facts admissible*. Only the expert's *opinion*, based in part on those facts, is admissible. Rule 703 completely disengages the admissibility of the expert's opinion from the admissibility of the facts supporting it. The expert witness may not disclose the otherwise inadmissible facts "unless the court determines probative value outweighs prejudice."
* **RULE 803(18) EXCEPTION:** There is one context in which the expert's reliance on inadmissible hearsay actually ***makes*** that hearsay admissible as substantive evidence. Under Rule 803(18), an expert's reliance on a learned treatise during direct examination or acknowledgement of it on cross-examination **dissolves** any hearsay objection to pertinent parts of the book. The rule extends broadly to "published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art."
* ***In Re Melton, 597 A.2d 892 (D.C. 1991)***
  + The weighing test is very difficult here! The dilemma presented by the limiting instruction under rule 703 is most pronounced when a party offers through an expert factual evidence that goes to the heart of the contested issues in the case.
  + For example, in In re Melton, a civil commitment proceeding, attorneys for the District of Columbia presented expert psychiatric testimony that Tommy Lee Melton constituted a danger to others. That conclusion was based in part on the statement of Melton's mother that Tommy Lee had punched her in the nose, which the expert was allowed to repeat to the jury despite Melton's objections that the statement was hearsay. The mother did not testify and was not subject to cross-examination.
  + To tell the jurors that they are to consider the testimony about the punch as a basis for the expert's finding of dangerousness, but not with respect to whether Mr. Melton punched his mother, is to expect the jury to make an impossibly technical distinction. However, the court admitted the background statements as having "probative value in assisting the jury to evaluate the expert's opinion substantially outweighing its prejudicial effect." And as per the Adv. Comm. Notes, gave a limiting instruction informing the jury that the underlying information "must not be used for substantive purposes." (RB 193). The Adv. Comm. Notes state that "The trial court should consider the probable effectiveness or lack of effectiveness of such a limiting instruction" when evaluating the unfair prejudice caused by the hearsay statement (however, the judge was operating under an old version of rule 703 that did not contain this note).

1. **Assessing the Reliability of Expert Scientific Testimony**
   * + 1. *The Doctrine*

* ***Frye v. United States- “*General Acceptance in the Field” Test:** 
  + Rule: While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be **sufficiently** **established** to have gained **general** **acceptance** in the particular field in which it belongs.”
* ***Daubert v. Merrell Dow*- "Good Fit" Test:**
  + Rule: Trial courts are the procedural gatekeepers of scientific evidence. Scientific evidence, pursuant to Rule 104(a), must be (1)scientific knowledge that will (2) assist the trier of fact to understand or determine a fact at issue Scientific evidence need not be "generally accepted" but it must be a **good** “**fit** for the purpose for which it is introduced. General guidelines to be considered in determining whether scientific evidence is a good “fit” include (but are not limited to):
    1. The theory has been tested,
    2. The theory has been subjected to peer review and publication,
    3. The potential rate of error,
    4. The existence and maintenance of standards controlling the technique's operation;"
    5. The theory is “generally accepted.”
* In any event, Rule 403 is still available to exclude confusing or misleading evidence.
* **IMPORTANT SUMMARY-** Following *Daubert v. Merrell Dow* and its progeny, there are five demands the law places on expert opinion:
  1. Proper Qualifications: The witness must be "qualified as an expert by knowledge, skill, experience, training, or education (Rule 702)
  2. Proper Topic: The expert's testimony must concern a topic that is **beyond the ken** of jurors, and may not simply tell the jurors what result to reach (Rule 702 and 704)
  3. Sufficient Basis: The expert must have an adequate factual basis for her opinion (Rule 702 and 703).
  4. Relevant and Reliable Methods: The expert's testimony "rests on a reliable foundation and is relevant to the task at hand” so as to form a “**good fit**” for the purpose for which it is introduced. Nonexclusive list of factors in determining “good fit” = *Daubert’s* FiveFactors:
     1. the theory has been tested,
     2. the theory has been subjected to peer review and publication,
     3. the potential rate of error,
     4. The existence and maintenance of standards controlling the technique's operation;"
        + i.e. whether research started before or after the litigation= factor
     5. the theory is “generally accepted.”
  5. Rule 403 Challenge: The evidence, if challenged, must survive a Rule 403 weighing test.
     + 1. *A Focus on Polygraph Evidence*
* Case Law: The use of polygraph evidence at trial must be (*United States v. Crumby*):
  1. **Narrowly** **tailored** to the circumstances for which it is relevant and
  2. Circumscribed so as to **limit** its potential **prejudicial** **effects**.
  3. Only used to **impeach** or **corroborate** the credibility of the ∆.
     1. If ∆ takes the stand and **testifies** he did not commit the crime, and
     2. the government **impeaches** his credibility, then
     3. ∆ may use polygraph evidence to support his **credibility**
  4. ∆ must provide **sufficient** **notice** to the government.
  5. Opposing party must be given a reasonable opportunity to have its **own** **competent** **examiner** administer a polygraph examination.
* In *United States v. Scheffer* (1998), the Supreme Court held that a criminal ∆ does not have a right under the Compulsory Process Clause to present polygraph evidence.

1. **Assessing the Reliability of Non-Scientific Expertise**
   * + 1. *The Doctrine*

* Case Law:
  + Review admissibility decisions using abuse of discretion (*Joiner*)
  + The expert testimony gatekeeping obligation of the court imposed by Rule 702 in *Daubert* applies to **all** expert testimony, regardless if based on science, technical, or other specialized knowledge (*Kumho Tire*).
  + The courts have broad leeway to determine the appropriate factors for determining the reliability of expert testimony, the *Daubert* factors are only illustrative (*Kumho Tire*).
* Policy arguments:
  + The 2000 Amendment to Rule 702 (as a result of *Daubert*) will impose **substantial litigation costs** due to "the proliferation of motions to preclude expert testimony and voir dire hearings."
    - Response= Cost will go down over time.
  + It will also infringe on the role of the jury in weighing the credibility of expert testimony.
    - Response: The ‘infringe on role of the jury argument is meaningless. That argument applies to every rule of evidence.
      1. *A Focus on Syndrome Evidence*
* A long study found enough consistency among rape victims' emotional and physical reactions to identify a syndrome called Rape Trauma Syndrome ("RTS").
* **Counterintuitive behaviors of a rape victim:**
  + Controlled response (i.e. not crying hysterically) is a counterintuitive behavior.
  + Denying that a rape occurred illustrates another counterintuitive behavior.
  + Victims' memory (usually unclear and vague) of the rape can also be counterintuitive .
* These counterintuitive behaviors can devastate a victim's credibility in court because in non-rape contexts, such behavior would be interpreted as strong evidence the victim is lying.
* THEREFORE: RTS testimony plays a vital role in rape trials by providing much-needed knowledge about these behaviors to the factfinder so that he/she is better informed to determine the credibility of the victim.
* Case Law: Although scientific evidence must be shown to be reliable and relevant, a party is not required to satisfy all of the *Daubert* factors. A court is permitted to find that evidence satisfies the reliability requirement (*State v. Kinney):*
  1. Because its reliability equals that of other scientific or technical evidence they have admitted before or
  2. Because “the evaluation of other courts allowing admission of the evidence is complete and persuasive.”
* **Case Notes on Syndrome Evidence-** 
  + The DSM-VI is simply an agreed upon set of terms and descriptions. It does not provide, and was not intended to provide, documentation of the general acceptance of the existence of disorders. i.e. PTSD and MPD (multiple personality disorder) are **labels**, not theories.
  + Some states do not allow PTSD as substantive evidence to prove abuse occurred (L.A.), other states find it to be valid and probative to show consistent symptoms of victim evidence abuse.
  + Argument against: Highly prejudicial. It gives the jury the impression that because a person who beats their spouse will often go overboard when the spouse tries to leave (separation violence), the fact that the victim was killed shortly after leaving her husband is a result which is consistent with the actions of a spouse batterer.

1. **AUTHENTICATION, IDENTIFICATION, AND THE "BEST EVIDENCE RULE"**
   1. **Rules 901 & 902: Authentication and Identification**
2. **Definitions**

* **Rule 901= Requirement of Authentication or Identification.**

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

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

(1) *Testimony of witness with knowledge*. Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting*. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity **not** **acquired** for purposes of the litigation.

(3) *Comparison by trier or expert witness*. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations*. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports*. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation*. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system*. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule*. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

* **CLASS NOTES:**
  + This list is illustrative, not exhaustive.
  + There is an important difference between "(2) nonexpert opinion on handwriting" is limited to that “not prepared for litigation”, (5) Voice identification" is not limited in this way.

* **Rule 902= Self-authentication.** Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) **Domestic public documents under seal**. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) **Domestic public documents not under seal**. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents**. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified copies of public records**. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) **Official publications**. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and periodicals**. Printed materials purporting to be newspapers or periodicals.

(7) **Trade inscriptions and the like**. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged documents**. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) **Commercial paper and related documents**. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) **Presumptions under Acts of Congress**. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) **Certified domestic records of regularly conducted activity.**  The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under [Rule 803(6)](http://www.law.cornell.edu/rules/fre/Rule8036.htm) if accompanied by a written declaration of its custodian  or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) **Certified foreign records of regularly conducted activity.**  In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under [Rule 803(6)](http://www.law.cornell.edu/rules/fre/Rule8036.htm) if accompanied by a written declaration by its custodian  or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a  manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

* **Notes:**
  + These are self-authenticating. These are situations in which extrinsic evidence is not required.

1. **Summary and Distinctions**

* (Potential Exam Question) What is the difference between authentication and admissibility?:
  + **Authentication** answers the question, “is this evidence what its proponent claims it to be?”
  + **Admissibility** answers the question, “is this evidence allowed in under the Rules of Evidence?”
* Standard of Proof:
  + Rule 901(a) concerns a matter of conditional relevance just like Rule 104(b). Therefore, the Supreme Court's elaboration of Rule 104(b)'s standard in *Huddleston* presumably applies to Rule 901(a) as well.
  + Therefore, proper authentication demands that the proponent produce sufficient evidence that that **the jury could reasonably** find by a **preponderance of the evidence** that the exhibit is what its proponent claims it to be.
* Chain of Custody requires questions of whether the evidence is:
  + 1. The **same item** and
    2. Is in **substantially the same condition.**
  + The importance of the condition depends on the evidence. i.e. with a cocaine possession charge it is important to know the power has not been messed with since seizure.
  + The judge must decide whether the integrity of the chain of custody is able to satisfy Rule 901(a)'s standard, "to support a finding that the matter in question is what its proponent claims."
  + **Demonstrative evidence** is subject to chain of custody issues (i.e. show the same type of weapon). This is subject to all kinds of 403-type prejudice arguments, but it might be better than trying to use the original if the original has a weak chain of custody.

1. **Documents**

* Case Law: A strict chain of custody is not necessary for documents to be sufficiently authentic to satisfy Rule 901(a). If there is no evidence of inauthenticity, simple conjecture is insufficient to deny admission of self-authenticating documents under Rule 901(b). Rule 901(a) is written in general terms as authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it to be.
* IMPORTANT NOTE ( EXAM) ): Thus, under 104(b), You CAN’T use hearsay evidence to authenticate an exhibit (i.e. the judge can use evidence that is not otherwise admissible in order to prove that the evidence that IS sought to be admitted is what its proponent claims it to be.

1. **Phone Calls**

* Case Law: The mere fact that a caller identified himself as the defendant is insufficient to satisfy Rule 901(b)(4). Rather, the contents of the conversation, the characteristics of the speech itself, or the circumstances of the call, must render it improbably that the caller could be anyone other than the person the proponent claims him to be.

1. **Photographs/Diagrams**

* Predicate for photographs/diagrams (KNOW **VERBATIM** FOR EXAM): "Does this photograph/diagram fairly and accurately depict the situation as it was on that day?"
  + Saying "on that day" is important to firming up relevancy, i.e. that the picture is of the thing at the relevant time of the crime/tort/etc.
  + Diagramsfollow the same predicate as photographs. .
    - NOTE: Diagrams may contain inadmissible hearsay, so pay attention to the diagrams of the adverse party (i.e. if the diagrams have assertions on them, like an arrow and caption stating where the weapon was located).Make sure to object if the hearsay is harmful to you.
    - Questions of whether a diagram is to scale relate more to **weight** than **admissibility.** A diagram that is not to scale probably won’t be excluded on those grounds, but may be addressed by the other side as a factor to weigh against the diagram.
* Case Law:
  + The photographer is not necessary to lay a proper foundation for the admissibility of proffered photographs. The photograph must be identified by a witness as a portrayal of certain facts relevant to the issue (proper day), and verified by such a witness on personal knowledge as a fair and accurate representation of the facts (*Simms v. Dixon*).
  + Photographic evidence does not necessarily need to be authenticated with "**pictorial testimony**." Photographic evidence may be admitted into evidence on the "**silent witness theory**" when the judge determines it to be reliable, after having considered the following (*Wagner v. State*):
    1. Evidence establishing the time and date of the photographic evidence;
    2. Any evidence of editing or tampering;
    3. The operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product;
    4. The produced employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic producing, including the security of the product itself; and
    5. Testimony identifying the relevant participants depicted in the photographic evidence.
  1. **Rules 1001-1004: The "Best Evidence Rule"**
* The "**Best Evidence Rule**" (aka "requirement of original" rule), requires that to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.
  + The rule does not apply to most other kinds of physical evidence or the quality of oral testimony. It only applies to those forms of evidence which attempt to communicate in writing or visually an event or thought to the viewer.
  + Behind the rule lies a belief that when a case turns on the content of a writing, recording, photograph, a litigant must present such evidence in the most **precise** **form** possible.

1. **Definitions**

* **Rule 1001= Definitions.** For purposes of this article the following definitions are applicable:

(1) **Writings and recordings**. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs**. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) **Original**. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

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

* **Rule 1002= Requirement of Original.** To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

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

* Notes
  + One example of limitation (2) is when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered.

* **Rule 1004= Admissibility of Other Evidence of Contents.** The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) **Originals lost or destroyed**. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) **Original not obtainable**. No original can be obtained by any available judicial process or procedure; or

(3) **Original in possession of opponent**. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) **Collateral matters**. The writing, recording, or photograph is not closely related to a controlling issue.

* + Notes**:**
    - One example of category (2) is when the original is in the possession of a third person who is not within the jurisdiction of the court.
    - One example of category (4) is the original newspaper in an action for the price of publishing ∆'s advertisement. A copy of the newspaper is just as acceptable, because the content of the newspaper itself aren't closely related to a controlling issue.

1. **Summary and Distinctions**

* The **Best Evidence Rule** rests on four propositions:
  1. Writings, recordings, and photographs are far more detailed and nuanced than many other forms of evidence.
  2. Differences in fine details often sway the outcome of a case.
  3. Proving such details with the needed precision is particularly hard because writings, recordings, and photographs are susceptible to forgery.
  4. Even when forgery and fraud are not issues, the human memory simply fails in the task of reproducing a writing, recording, or photograph with the precision of the thing itself.
* ***The "Requirement of Original"***
  + In Rule 1002's "Requirement of Original" the term "**original**" is defined in Rule 1001(3). Original includes many things we think of as copies, even a "carbon copy" is an "original" (RB 320)- and the carbonless copy of a credit card receipt qualifies as well.
  + A "**duplicate**" as defined in Rule 1001(4) is permitted under Rule 1003 to be admitted to the same extent as an original. A "duplicate" is broader than one might expect, and includes a re-recording of an old tape, or a photographic print made from another print. It includes just about any mechanical reproduction of a writing, recording, or photograph so long as the reproduction process excludes the possibility of human transcription error. "Copies subsequently produced manually, whether handwritten or typed, are not within the definition."
  + **Policy**- The rule aims to bar litigants form presenting *human recollections* of the content of writings, recordings, or photographs in place of the physical item itself. The best evidence rule aims to assure that whenever possible, the jury has access to an original or duplicate if a case turns on the content of a writing, recording, or photograph.

* ***Proof of Content*** 
  + The rule does not forbid a witness from testifying to what they saw. They are representing nothing more than what they remember. Nor does the rule forbid a witness from viewing a video and testifying that it is a fair and accurate representation of the events depicted. In such a situation the videotape is admissible, but **NOT** "to prove its content," only to ILLUSTRATE the teller's testimony. In a sense, the witness is adopting the videotape as his testimony.
  + HOWEVER, **Proof of Content** doesbecome an issue in two contexts:
    1. Where the writing, recording, or photograph ***is itself at issue***. i.e. Copyright lawsuit disputing similarity between two books.
    2. Where the writing, recording, or photograph has attained ***independent probative value*** (RB 322). i.e when there is no witness, and the tape is used to prove the content of the tape. When the evidence is NOT being offered simply to illustrate or enhance a witness's memory, but to prove the truth of what it depicts or describes.
       1. The most common example of this is the **X-ray**, with substantial authority calling for production of the original.
* Case Law:
  + Drawings and similar forms of artwork are 'writings' within the meaning of Rule 1001(1); they consist not of 'letters, words, or numbers' but of 'their equivalent.' (*Seiler v. LucasFilm).*
  + A duplicate must accurately reflect the entire conversation between two parties as if it were the contents of the original in order to be admissible under Rule 1003 (*United States v. Jackson*).

1. **MISCELLANEOUS RULES**
   1. **Rule 615: Exclusion of Witnesses. AKA “THE RULE”**

* **Rule 615= Exclusion of Witnesses.** 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. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.
* Policy: This rule prevents pending witnesses from having their testimony affected by hearing the testimony of prior witnesses. The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion.
* Notes:
  + This is not automatic, you must invoke the rule.
  + A party who is a “natural person”= human. “non-natural person”= corporation.
  + You don't always want to invoke the rule, i.e. if you know your first witness is strong and you want others to hear it.
  + **Rule 1006: Summaries**

**Rule 1006= Summaries.** The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

* **Class Notes**:
  + Sometimes you exchange demonstrative evidence in pretrial
  + The court does make a judgment call on whether the “others” can be conveniently examined.
  + You have to show **the need** to do a chart/summary.

1. **RANDOM NOTES/REMINDERS**

* Credibility issues are ALWAYS relevant.
* NOTE: Consider moving "*Huddleston* standard" under Conditional Relevancy/104(b).
* Review the "Huddleston Standard" still unclear as to what the appropriate standard should be. Is it the "reasonable jury could find" or is "preponderance of the evidence?" Are these the same thing?
* Create a section which summarizes the difference between "impeachment" evidence" and "substantive" evidence.
* Create summary of the study guides included in the book (i.e. page 259)
* Figure out if the location of Rule 806 is important. In the book, it is shoved between Rule 804(b)(2) and (b)(6). However, you moved it to its own separate section. Double check the appropriateness of the new location, and also review the Rule itself. It seems like that Rule is A LOT more important than the little attention it receives in the book would suggested.
* Remember, the hearsay rules are the result of highly evolved and scattered common law rules, do not worry if the order/organization of the hearsay rules seem stranger. Feel free to reorganize in a more logical order (i.e. putting 806 after 807).
* NOTE: The mini-practice exam provided by Houlette seems to have a lot of questions that depend on whether the trial is civil or criminal. Make sure to pay attention to these distinctions.
* Particularized knowledge=lay testimony, specialized knowledge= expert testimony?