Evidence:

Intro:

- Rule 104: All Preliminary questions of admissibility of evidence is determined by the court.
- Rule 103(a) states that if a trial judge admits an erroneous evidentiary, it must cause prejudicial error for it to be overturned.
- 611(c) states that counsel except should not use leading questions as is necessary to develop witness's testimony, such as with a child, mentally challenged person or such.
    - However, the C/X can lead.
        - Two types of Questioning:
            - Narrative
            - Q & A
- After Direct, the other party can C/X to see if the witness will impeach themselves, to clarify, or to modify something.
- *Impeachment Evidence:* Evidence that attacks the believability of a witness.
- *Non-impeachment Evidence (Substantive):* This bears only on the merits of guilt and innocence, liability or not.
    - For the witness to testify, they must have personal knowledge.
- Tangible Evidence:
    - Real: this is proof-in-itself (the gun, the broken machine, the document)
        - 2 Foundational Requirements:
            - Establish the Chain of Command
            - Establish Authentication (that it is no different than when held by defendant).
    - Demonstrative: Evidence that is used to illustrate or clarify other evidence (a graph, flowchart, a model).
        - This is not proof in itself, but it illustrates other evidence.
    - Hypo: Banana peel offered as evidence of slip and fall. This is tangible, but it is not real in that it does not prove that the event actually happened, just proof that it could have happened.
- 103(a)(1): In order to get evidence out of the record, the attorney makes an objection by stating the basis for it, unless it is apparent through the situation.
    - This is to be made before the witness answers.
    - If the witness answers before objection is made, then the objecting lawyer can ask for *curative instruction*, that is, an instruction to the jury to not consider the evidence that was objected to; however, this often only draws attention to the evidence.
    - With tangible evidence, must object when the offer is made or lose all right to object to it later.
        - *The Plain Error Rule:* 104(d) gives the judge the power to recognize that evidence is coming into evidence that is violative of the rules and exclude it himself; must be egregious.
    - If the judge agrees with the objection, he will sustain the objection and not admit it into the record.
    - If the judge disagrees, he will overrule it.
    - If the evidence was kept out by the judge sustaining an objection, the lawyer can make an *Offer in Proof*.
        - Putting into the record that evidence is about to be/has been excluded, and the reason why you think it should not have been excluded.
            - This can be done either in a Motion in Limine or as a Motion to Exclude.
            - Serves 2 Purposes:
                - Try and get judge to overrule the objection instead of sustaining it.
                - To preserve the client's rights on appeal.
        - Three Types:
            - Attorney OIP: The attorney says for the record that this is what the evidence would say, and the purpose of it.
            - Witness OIP: The lawyer asks what would you have testified to, the witness says "X," and the lawyer indicates the purpose.
            - Tangible OIP: Have tangible evidence, and gives it to the court reporter to show what they were going to show.
        - Problems with OIP:
            - Since it is supposed to be excluded, the jury would have heard it and cannot properly exclude it mentally.
                - Rule 103(c) helps avoid this by saying that inadmissible evidence will be kept from the jury to the extent practicable.
                - Thus offer OIP's when jury not in room or in sidebar.
- Motion in Limine:
    - Pre-trial motion used to keep evidence out of trial, usually in complex or emotional cases.
        - The judge can make a definitive ruling on this, or a tentative one.
            - If tentative, the lawyer must renew the motion at trial.
- Cautionary Evidence:
    - Judges instruction for how to evaluate certain kinds of evidence that has been admitted.
        - Ex. The judge cautions the jury to not give to much credibility to a witness who was held at gunpoint and cannot describe much except that she was at gunpoint.
- Evidentiary Facts v. Preliminary Facts:

- Evidentiary Facts bear on the liability of the person (merits of the case).
    - Rule 602 states that a person cannot testify to which they do not have personal knowledge.
- Preliminary Facts establishes that the witness is credible and has credible knowledge to give evidentiary facts.

Relevancy: Rules 401-3

- General Rule: If evidence is not relevant, it will not be admitted. If it is relevant, then it will be admitted unless some other FRE or Const issue precludes it.
- TWO ATTRIBUTES:
    - The evidence must make more or less probable a factual proposition, and
    - That proposition at which the evidence is directed must be of consequence to the case.
        - In assessing these, you have to look at the proffered evidence from the light of the offering party—does it make it more or less probable, and is it of consequence to the *offering* party's case.
            - The judge will generally admit if there is a question tom the relevancy.
- *Directly Relevant:* The proffered evidence states within it the factual proposition at which it is directed. It states what needs to be proven directly within it.
    - Ex. "I saw X throw a grenade on Y."
- *Circumstantially Relevant:* The evidence will not be directly relevant until the judge makes some logical references.
    - Ex. "I saw X holding a grenade at the place right before Y was blown up by a grenade."

Knapp v. State: Appellant testified that he acted in s/d when he killed a man, the doctor's testimony of victim's alcoholism is relevant because it is more or less likely the event was true.

Sherod: Cop killed man who he thought was motioning for gun. When it was discovered he did not have a gun, the judge ruled this information not relevant because it did not make it more or less probable that the police man acted reasonably when the victim made a motion.

- Rule 403: Even if evidence is relevant under 401, a judge can exclude it on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
    - Under this rule, the Court should consider what other evidence is available to the party to prove the same fact. If the other available evidence is equally probative but is less inflammatory, the Court should discount the proffered evidence.
- *Ballou v. Henri Studios Inc.:* In case for a car accident allegedly involving alcohol, the trial judge excluded evidence of .24 BAC test because he determined the nurse's testimony that she did not smell alcohol to be more credible than the test. On appeal, the Court said that the Judge should not be making determinations of credibility.
    - *Hypo:* D is prosecuted for being a felon in possession of a firearm. P uses a witness whom was raped by defendant to get convicted on this charge of possession. D can make a 403 Objection saying that the probative value of the victim's testimony is unfair prejudice since the offense can be found another way.

Relevancy and Character Issues:

- Three types of Character Evidence.
    - Opinion: "In my opinion . . .," "I think . . .."
    - Reputation: "The word on the street . . .."
    - Specific Instances of Conduct: "OJ beat his wife." This is a specific instance that bears on defendant's conduct.
        - If opinion and reputation evidence is given about a person's character, then they are character evidence.
        - With the third, it is not character evidence unless it bears and is offered to show a person's character.
- Ways Character Evidence is Used:
    - Propensity Use:
        - Where evidence of a person's character is offered to show that the person acted in conformance with that character.
            - Banned in Rule 404(a)
            - Reason for Ban:
                - Common law judges thought that character was not credible such that OJ could have a violent character but not act in accord with it.
                - Also, it may lead a jury to convict a person based on OJ's character rather than whether or not he actually killed his wife.
        - Ex. If OJ has a violent character, then maybe he acted in conformance with that character when he killed his wife.
    - Non-Propensity Use:
        - Where character evidence is offered either to prove that a person has that character (because that is legally consequential) or to prove that that person has that character, because since if she had that character, it is, in some non-propensity way, relevant to the case.
            - When character evidence is offered for non-propensity, the attorney can use evidence of reputation, opinion, or specific instances of conduct.
- Methodology of Character:
    - 405(a): Proof of character is made via a testimony as t reputation, or testimony in the form of an opinion.

- 405(b): In any case where character is an essential characteristic of the charge, claim, or defense, then proof may also be made of specific instances of that person's conduct.
  - This 405(b) only applies to noon-propensity.
- 405(a): Crimes, wrongs, or other acts is synonymous with the specific instances of conduct.

- *Cleghorn:* man hit by train, used as evidence the switchman's character for intemperance. This was ruled propensity evidence because due to the character, the defendant was injured.
  - Ex. Of non-propensity: Say that by showing switchman's character for intemperance, you can infer the railroad as employer either knew or should have known that the switchman had a character flaw and should have either disciplined him or fired him.
    - Using it to show the his alcoholism is propensity, using it to show that the railroad should have done something is non-propensity.
      - It is not offered to show the switchman's character, but as a bearing on the railroad's conduct—thus, for what purpose is it offered for?
- Rule 404(a)(2): Character of the Alleged Victim in a Criminal Trial:
  - Evidence of a pertinent trait of character of accused offered by P can be substantively used to rebut the same when evidence of such character evidence is first brought up by the accused.
    - The accused can open the door to this kind of evidence if he thinks it will affect him—that is, he starts this evidence, then the P responds with any character evidence of opinion and reputation.
    - Ex. P wants to show that accused has a history of aggression. Cannot do that unless the accused enters into evidence that the victim has a history of aggression.
      - If the D enters this into evidence, then the P can enter under 404(a)(1) that the accused has a history of aggression.
      - In a homicide case, the P can offer evidence of victim's peaceable character to rebut ANY evidence that victim was first aggressor.
- Rule 404(a)(3): Character of Witness:
  - In civil and criminal cases, character and propensity evidence can be added to impeach a witness in accord with FRE 607-9.
    - This says that the 403(a) ban will not preclude counsel from impeaching an evidence without character of propensity evidence.
      - If P wants to do this, she turns to FRE 607-9.
    - Even if you comply with 404(a), you still need to comply with 403.
- Rule 405(a): In all cases where 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.
- *Michaelson v. US:* ("testing one, two, three" question) involves 405(a)
  - D was charged with bribery. D used witnesses all testifying to his honesty. On C/X, P asked if they individually were aware of D's former arrest for stolen goods. They said no, D objected.
    - This was a loaded question that not only got in character evidence, but it also challenged the honesty of the defendant.
    - When asking this type of question, the P can only ask about similar instances to the crime charged.
      - To test, First look at 404(a)(1), if the evidence is being admitted for a pertinent purpose, that is, of a pertinent trait of the accused's character.
        - Under 404(a)(1), it is also permissible for the P to rebut character evidence on the accused that the D brought up.
        - Under 404(b), evidence of other crimes or acts is not allowed to prove a point regarding the accused's character.
- *Hypo:* D and V start a fight. D hits V with a bottle, leading to permanent scars. D is charged with assault and battery. D pleads s/d. D brings in E as a witness to say that V has a short temper. Is this testimony admissible?
  - First, this is character evidence for the purpose of propensity.
  - Second, this would be allowed since this is character evidence that furthers D's s/d claim.
    - This is bringing in evidence under 404(a)(2), and this requires a pertinent trait of character.
      - This evidence makes it more likely that V acted first, this furthering D's charge that V started the fight.
      - So this is 404(a)(2) being offered to further a pertinent character trait. This is an opinion used to further the pertinent character trait and allowable.
      - Now the P can bring in character evidence to rebut E's testimony.
    - To impeach without getting into Article 6, use the second sentence in 405(a), that is, a "testing one, two, three" question on C/X.
      - D asks E on C/X, "Are you aware that V took part in a violent protest on such and such date?"
        - This undercuts the witness's testimony.
- Evidence of Specific Instances of Conduct:
  - Specific instances of character is not a character trait, it is only a conduct trait.
    - Ex. "OJ kicked the dog," does not speak to character, just his conduct.
  - Three instances when conduct can lead to character testimony:
    - "Testing one, two, three" Questions

        - When the specific use of character is used for non-propensity purposes.
        - New one, For a non-character purpose that is actually governed by 404(b), second sentence (MOIPPKIA)
    - MOIPPKIA: 404(b), 2nd sentence.
        - Motive, Opportunity, Intent, Preparation, Plan, Knowledge, Identity, or Absence of Mistake or Accident.
            - Times when you can use non-propensity evidence for character evidence.
        - This applies in civil and criminal cases
            - But only in criminal cases can you use it for the exception in the 2nd part of sentence.
- *US v. Carillo:* D was covicted of distribution of heroin. The Court ruled that each case has *Modus Operandi* (such unique facts showing that the events happened in the same way and with the mark of the accused) and that when a case does not follow the same unique pattern of past events in the MO, then the non-propensity cannot be used.
- 404b: If the evidence is offered for an impermissible purpose, (No, and objection sustained) if yes, then ask

1) are the specific instances of conduct relevant using 401 relevant purpose? If yes,
2) the 403 objection is used as the balancing test to determine its admissibility.

- *US v. Beasly:* D was convicted of trying to obtain illegal drugs with intent to distribute. He argued that he sought the drugs to use for his plants. However, prior to purchasing drugs, D shopped around for the drugs, faked pain, etc. The judge ruled that probative acts can lead to intent if the other acts are similar to the crime in charge.
- *US v. Cunningham:* D was convicted of stealing Demerol from syringes. Pros admitted evidence that she had Demerol in her system and that she was previously suspended for abuse of Demerol.
    - Court ruled that Motive is a permissible purpose under 404b. The evidence was probative by showing that she would have a reason to tamper with the Demerol.
    - When Specific Instances are used to show a crime, they may be admissible if they are similar to the charge.
- *US v. Tucker:* Cops come to house, a disheveled man says that he woke up to find a person shot in his house. Heard nothing, very suspicious. Pros offered evidence that the same situation happened to this man previously, that he found a person mysteriously dead in his house.
    - The Court ruled that the evidence of the past situation was not probative since there was no evidence D committed the murder.
- **Rule 104(b): Conditional Relvancy:**
    - Where proffered evidentiary fact A will not be relevant unless the conditional (preliminary) fact B is established.
        - This is the one type of admissibility where the admissibility of evidence is for the jury to decide rather than the judge.
        - **Ex.** P is injured by D, P claims D was speeding and calls W as witness to testify that D was speeding just before the accident. D then produces evidence that W saw a different car. Therefore, W's testimony that D was speeding will only be admissible if it is established that it was D's car.
            - If judge thinks that the jury can find fact B, then she will instruct the jury that if you can find that it is D's car, then you can consider W's testimony of D's car speeding as evidence. But if you do not find by a preponderance of evidence that it was D's car, then you must disregard W's testimony as evidence.
- *Huddleston:* D prosecuted for receiving stolen goods. His defense was that he did not know they were stolen. Thus, P had to prove that D knew the goods were stolen. W's testimony that he sold tv's to D for $28 each.
    - The judge then applies the Gatekeeper Rule and found that in a conditional relevancy situation under 104b, the judge has to find if the jury can find by a preponderance of the evidence.
        - Is this specific evidence of conduct? (404b)
        - Is this specific instance permitted by 404b to prove?
            - If no, you got the wrong rule, if yes, then
        - Is the proffered evidence, the specific instances, offered to prove the 404b?
            - If the opponent of the evidence raises conditional relevancy, then judge has to deal with the conditional relevancy as an issue. If this is met, then they have to deal with the relevancy issue and 403 would then have to be dealt with.
- **Rule 406: Habit Evidence:**
    - This rule makes *habit propensity* evidence admissible.
    - You must be able to establish the foundational element that there is a habit.
- *Perrin v. Anderson:* Cops kill a man, claim they are acting in s/d. Evidence was entered that the man had a history of acting violent with the cops.
    - Generally, violence and threats are not regarded as habit, but this case was so extreme the Court allowed it.
        - *Habit v. Character Evidence:*
            - Character is deemed to be the person's general disposition—they are violent, patient, greedy.
            - Habit is more in the nature of reactive stimuli—every night the person goes to same bar.
        - Reasons for Admitting Habit and not character:
            - Habit propensity tends to be more predictive than character,
            - Habit tends to be neutral content, whereas character evidence has a tendency to be used improperly.
        - How do you establish Habit?
            - Ultimately, it is a judgment call, but the court will use
            - Specific instances of conduct,

        - Opinion testimony,
        - Reputation would not work.
    - All admissibility determinations that require the judge to make a finding of preliminary fact are adjudged by a preponderance standard.
- *Halloran v. Virginia Chemicals Inc.:* Products Liability case, a man was injured when he improperly used an immersion coil to heat up a can of Freon.
    - P had a W testifying that D used this technique many times before (objection was raised and sustained, so the P made an OIP).
    - Appellate Court held that the W could be used as evidence if there were enough instances of H using a heating coil.
        - Habits are specific instances of conduct repeated over in response to a stimuli.
            - Alcoholism is not a specific instance of conduct.

Rape Shield Cases:

- *State v. Cassidy:* Sex that started consensual, then when she went crazy and screaming about her dead husband, she denied consent. P wanted to bring in W to testify that the same thing happened to him one year ago.
    - The Court will allow the evidence if the evidence is so relevant and material to a critical issue in the case that excluding it would violate the D's constitutional rights.
        - Here, the Court ruled that the evidence was not admissible because this past instance was not indicative that she was raped now. Then, there were different circumstances and thus the evidence does not support D's Constitutional Right to DP.
- **Rule 412: Federal Rape Shield Law:**
    - 412a: Exclusionary Rule: The following evidence is not admissible in any civil or criminal action involving alleged sexual misconduct, except as provided in b and c.
        - Evidence offered to prove the alleged victim's sexual behavior,
        - Evidence offered to prove the victim's sexual disposition.
            - The ban applies regardless of whether the evidence is offered for substantive or impeachment purposes. As such, the ban is a limit on 402, 404a2, 404b, 405, 406, 307, 608, and 609.
            - Sexual predisposition refers to evidence of a sexual connotation, but it is not evidence of the victim's sexual activities. This could include the way she dresses, her lifestyle, etc.
    - 412b: Exceptions:
        - Exceptions in Criminal Case: the following evidence is otherwise inadmissible:
            - 412b1a: Evidence of specific instnacs of the victim's sexual behvior offered by the accused to show that someone other than the accused is the source of semen, injury, or other physical evidence.
            - 412b1b: Evidence of specific instances of the victim's sexual behavior with the accused offered by prosecutor to show consent.
                - 412b1c: Evidence, the exclusion of which, would violate the Const rights of the defendant.
                - For A and B only: inherent in these is that only evidence of specific instances of conduct can be used. So not use opinion.
                - If evidence is offered under these exceptions, the 403 objection could be made.
                - For the third exception, there are no methodological exclusions on this one, and the 403 balancing test is inapplicable.
        - Exception to Rape Shield Ban in Civil Cases: In civil cases, evidence offered to prove victim's sexual behavior or sexual predisposition is admissible and if the probative value of the evidence substantially outweighs the harm to the victim and any party.
            - There is only one methodological restriction: Reputation evidence cannot be used unless the victim first puts it in issue.
            - In order for this evidence to get in, it has to get past the balancing test.
        - How is this balancing test dif from 403?
            - Harm from the evidence affecting other parties
            - The presumptions are reversed in these. That is, the evidence that the evidence is going to be excluded in this one that the probative value is outweighed. In 403, the presumption is that the evidence will be included unless the probative value is there.
                - In 403, the evidence is presumed admissible unless the probative value is substantially outweighed by the dangers of it.
                    - The objecting party has to show that the evidence should be kept out.
                - In 412b2, the evidence is presumed inadmissible unless the proponent shows probative value that substantially outweighs dangers and considerations.
            - The defendant may have a due process right to prove a specific sexual behavior by the victim that is very similar to her behavior during the incident in question.
            - The filing of a false rape claim is not covered under these laws since it is not a sexual conduct.
- *Olden v. Kentucky:* Confrontation clause: accused has the right to confront the accused. D indicted for rape and kidnapping. He says it was consensual. D tries to show that she said this was rape because she was trying to cover up on an affair she was having. She said she was living with her mom, but she was really living with Russel, the affair guy.
    - The Sc ruled for D, saying that the accused has the right to c/x the victim to show her motive to lie.
        - To test if the Rape Shield Law comes in,

- Is this a sexual Incident? Yes.
- Is this evidence used to show her sexual character? Yes, because she was living with another man.
- 412b1: covers this.
    - Is the exclusion of this affecting the D's Const rights? Yes, his 6th Amendment right.

- **Rule 413:**
    - IN a criminal case where the defendant is accused of sexual assault, evidence of a D's other commission of sexual assault is admissible for any matter to which it is relevant.
        - This allows evidence of specific instances in, and is a reversal of the specific instances ban in 401.
        - It allos it in for any purpose to which it is relevant including character and propensity.
        - This even allows the evidence of past actions that was not reported to authorities, or even if he were found ng
            - Compare with 412, you cannot bring up her prior history, but you can bring up his.
- **Rule 414:** Defines child molestation in 414d. This is the same as 413, but with child molestation.
- **Rule 415:** Evidence of Similar Acts in civil cases concerning sexual assault or child molestation. This covers both in civil cases.
- *Johnson v. Elk Lake School Dist.:* HS student claims a teacher raped her. He sent her flowers, tried to kiss her multiple times, and fondled her. She tried to get in evidence that he touched another woman's crotch inappropriately before.
    - The PA court held that it was uncertain whether he touched her intentionally, and applied the Conditional Relevancy rule to this for the jury to find if it was intentional first, then to consider it as evidence.
    - Fed Courts Split: Some say to give if there is dispute as to relevancy, that conditional relevance should be used. Other courts say that the relevancy of the proffered evidence should be decided by the judge.

Similar Happenings Evidence (aka Other Accidents Evidence):
- *Simon v. Kennebunkport:* P sued D after she tripped on sidewalk, her argument was that there was a defect in the design or construction. She tried to bring in evidence testimony from a shop owner near the disputed area saying that over 100 people tripped on the sidewalk over a disputed 2 yr. period.
    - The Court ruled that Other Happenings is admissible for determining the dangerousness of a condition, need for notice, defect, and such.
        - Did the prior acts happen under similar circumstances to the event that precipitated the law suit?
            - If no, then the other happenings evidence is not relevant. But if yes, then the evidence is admissible for one of these 4 purposes, unless there is an objection under 403.
                - The evidence was used for the purpose to establish one of the elements of negligence, this the evidence is admissible under 402.
                - These past similar acts is highly probative to determining whether there was a defect.
- **Rule 407: Subsequent Remedial Measures:**
    - When an injury or harm is allegedly cause by an event, subsequent measures are taken which if taken previously, would have made the harm or injury less likely to occur. Then evidence of subsequent measures is not admissible to prove negligence, culable conduct, a defect in a product, a defect in a product's design, or a need for a warning.
        - Social Policy: We want to encourage people and businesses to take remedial measures after an event has occurred which caused harm.
        - Evidentiary Policy: The drafters did not think this was necessary for showing the elements of negligence.
- *Tuer v. McDonald:* Med Mal suit against doctor who operated on him. Doctor took patient off Heparin for a prolonged period before the surgery, patient died. The evidence in dispute was over the P's evidence of hospital policy to keep on Heparin until right before surgery to show the feasibility of the precautionary measures and to impeach the doctor's testimony.
    - Court ruled that a D does not controvert the feasibility of a practice until he argues that the device or process was impossible, impractical, or unsafe.
- **Rule 408: Offer to Compromise:**
    - Evidence of compromise or attempt to compromise statements is not admissible; except with those involved in a criminal investigation or prosecution.
- *Davidson v. Prince:* Cattle truck overturned, cattle get loose, cattle injures man. V sues D for contributory negligence. In a letter, the driver stated something that was interpreted as a compromise.
    - The court allowed it as evidence saying that the statement in the letter was not made in an attempt to compromise, but in a demand.

Hearsay:
- This is a statement made out of court offered to prove the truth of a statement.
- A statement is a factual proposition that could be true or false.
    - Bonified questions and commands cannot be statements.. It can be an oral assertion, or a non-oral assertion intended to make an assertion.
- Rule 802 states that hearsay evidence is inadmissible unless there is an exception allowing it.
    - Elements:
        - It must be evidence of an out-of court statement
        - The statement must make an assertion
        - The statement must be offered in evidence to prove the truth of the matter asserted within the statement.

- *Estate of Murdock:* Two married people made will wills saying that whoever died first, the other person's kids from previous marriages got the property. They got in a car accident and died. Kids of Arthur try to admit statement from Deputy where he said the woman was dead when he got there, but the man was still alive.
    - The statement was made at the scence of the crash and was out of court
    - It is assertion that could be true or false because he was either dead or alive,
    - And because the statement was offered to prove that the man was alive when the deputy got there, it was thus offered to prove the truth of the matter asserted, and is thus hearsay.
- *Vinyard v. Vinyard Funeral Home, Inc.:* P slipped. Tort law of the state required that she prove the defendant had notice the ramp was slippery.
    - P offered evidence of a statement made by VP stating that he had received phone calls regarding the slippery ramp. Because the statement was made in his office, it was out of court.
    - This is a statement because it is an assertion that can either be true or false,
    - However, in proving the truth of the matter asserted, the evidence was offered not to prove that the ramp was slippery, but to show that the VP had been given notice about the ramp. Thus, this is not hearsay, and is admissible .
- *Johnson v. Mericordia Community Hospital:* Evidence at issue were documents from other hospitals showing that the D had restrictions placed on his access to certain things.
    - While the first two elements of hearsay were met, the court held that the evidence was not admitted for the truth of the matter asserted because the evidence was offered to prove that the evidence was readily available for the current hospital to look into. Thus, it is not made to show the truth of the hospital records via other hospital records.
- **Words of Legally Operative Conduct:**
- *Ries Biologicals, Inc. v. Bank of Santa Fe:* Breach of contract where Ries offered into evidence their own witness that Senior VP gave his word to a guaranteed payment if they got their advance shipments.
    - The act of guaranteeing payment was an offer. The utterance of these words had an immediate legal meaning that there was an offer of contract. The utterances by themselves constituted a legal offering.
    - Thus by offering this statement, the P sought to prove the fact that there was a contract made between the parties, and not to show the truth of the matter asserted. Thus, this is not hearsay.
- Hypo: P seeks to introduce testimony that D said out of court and in the presence of third persons, "plaintiff is a harpy praying on the vitals of the poor."
    - Statement? Yes. Assertion? Yes. However, it was offered to prove the fact that the statement was made for purposes of slander, and not to prove the truth of the matter asserted. Thus this is not hearsay.
- Hypo: D prosecuted for murdering wife. D says out of court, "I did it. I killed my wife."
    - This is a confession, and the statement is dependant on the truth of the matter asserted. Since offering this as evidence would be an example of an utterance that is depended on the content within, and is thus hearsay.
        - Key Things to be Aware of When Analyzing Evidence:
            - What is the purpose of the evidence being admitted for, and
            - If that purpose is relevant to the trial.
- **Rule 801(a): Evidence of Out –of-Court Non-Verbal Conduct:**
    - Only conduct *intended* as an assertion by the actor can be hearsay.
        - Assertive Conduct: Statement of conduct that is not true or false.
        - Nonassertive Conduct: Conduct of a person that does not assert something. However, you might be able to deduce something from the conduct.
            - An example of this is a man who tightened his coat, put collar up, and shivered. This is an unintended consequence of the cold, showing that it is cold.
            - Non-Assertive Conduct is Non-Hearsay.
- *US v. Zenni:* Case regarding illegal gambling. The evidence was a person in the courtroom testifying that there were phone-callers calling to make bets at the house. The evidence was used to show that there was evidence of illegal gambling.
    - The court ruled that this was not hearsay because the calls were verbal conduct commanding to "place a bet." A command is conduct.
        - This is thus non-assertive verbal conduct and is non-hearsay.
- *Commonwealth v. Knapp:* In a trial for aiding and abetting murder, the person who killed the man was going to testify against the aider. Before he could testify, he committed suicide.
    - While the suicide is non-verbal, it cannot be considered assertive without more from the situation, like a note.
- *Wilson v. Clancy:* P is suing D for attorney malpractice. P tries to enter into evidence the fact that D never gave P advice.
    - The court rules that this evidence was non-assertive non-verbal conduct since it was non-intentional. However, there were many reasons why Clancy was non-assertive, non-intentional.
    - However, silence can be assertive in certain circumstances. For instance, a man finds a body in living room, neighbor comes over and asks if he killed the guy. Silence here can potentially be assertive.
        - Out of Court Non-Human Animals cannot be considered non-hearsay since 802 requires that declarant be human.
- *Truck Insurance Exchange v. Michlig:* radar gun is non-hearsay since it is a verbalization of data being measured.

Exceptions to Hearsay:
Found in 803 and 804. If hearsay fits the factual requirements of an exception, then the evidence is deemed either trustworthy enough or necessary enough to be admissible.
    - Preliminary Facts: Facts from proponent that must be established by a preponderance to gain admissibility of evidentiary facts. These facts come from the exceptions.
    - Evidentiary facts: This consists of the proffered hearsay evidence which is offered on the merits, that is, offered to prove a consequential factual problem in the case.
- 803 Operates whether the declarant is available or not, and 804 operates only when the declarant is unavailable.
- Voir Dire: This is held outside the presence of the jury in which the judge will listen to disputes on whether preliminary facts at dispute are good for the case.

Excited Utterance: 803(2) (Res Gestae)
Test:
- There needs to be established by a preponderance a startling event or condition.
- The declarant's statement must refer to the startling event or condition,
- The declarant must make a statement while under the stress of excitement, caused by that event or condition.
- The declarant must have personal knowledge of the matter about which he is declaring.
    - Factors the court will look at are things like the condition of the declarant, how much time has elapsed from the startling event to the declaration, what the declarant was doing, and where was the declarant when the declarant made the statement.
- *Truck Insurance Exchange v. Michlig:* Man died in sleep. Wife said that when he came home from work, he said that he hit his head on the bulldozer.
    - First, in terms of the wife giving testimony at trial, that is evidentiary facts. Once it is compared to the rule, then it is a preliminary fact.
    - Second, the court looked at factors such as the nature of the occasion, subject of the utterance, and time of the utterance (the utterance must have been before there has been a time to contrive and misrepresent).
        - However, the court held that there must be independent proof aside from the testimony that V hit his head.
- *Lira v. Albert Einstein Medical Center:* P was husband and wife who brought a med mal suit. When they went to a second doctor post-operation, Doctor stated, "Who butchered you?" after he saw the damage.
    - P argued that this statement was an excited utterance; however, the court ruled that the doctor was using his professional experience when he made this statement, and did not act instinctively, but with deliberation.

Party Exemptions:
Exclusions and Exemptions set forth in 801(d)
When a statement fits the definition of hearsay, but fits one of the exemptions or exclusions.
Rule 801(d)(2):
- - Ex. Sam said at home "The dog is big." In trial, Sam is a witness, when asked about what he said, he responds, "I said the dog is big."
    - This meets the three req. of hearsay.
    - Party Admissions: own party statements that you said or can be attributed to another party.
    - The out of court statement must be against the party's interests (the party that made the statement) at the time offered into evidence.
- **Rule 801(d)(2)(A):** General: A statement is not hearsay if the statement is offered against the party and is the part's own statement.
    - Statement must be offered against Party A,
    - Statement must be against Party A's interest when offered into evidence,
    - The statement must be Party A's own out-of-court statement.
        - Party admissions do not have the knowledge requirement.
- *Reed v. McCord:* Witness was a stenographer whose testimony was that she heard from doctor that part of machinery was out of place. It meets the requirements of hearsay, but this was non-hearsay because the statement was offered against the employer, as evidence it goes against the witness, and it is the employer's own statement.
- **Rule 801(d)(2)(B):** General: A statement is non-hearsay if it is offered against a party, and it is one to which the party mas manifested into their beliefs.
    - Statement must be offered by Party A,
    - Statement must be against Party A's interest when offered into evidence,
    - Statement must be made by someone other than Party A,
    - Party A must have manifested his belief or adoption of the truth of the statement.
        - Ex. Personal Injury claim, 2 cars collided. P calls W to testify that immediately after the accident, W told D "You were drunk as a skunk." D says to W, "I know."
            - If this is offered to show that D was drunk, then it is non-hearsay.
            - No personal knowledge is required by either person.
- *US v. Hoosier:* W testified that D told him he was going to rob the bank. After the bank was robbed, he saw diamond rings and money at D's house and overheard D's GF saying "you should have seen all the money we had in the hotel room."

    - The statement was made by declarant (GF) out of court in the house, an assertion was made about the sacks of money that could be true or false, and the statement is used to prove the truth of the matter asserted within.
        - The Court said that the statement was non-hearsay because the defendant's silence was seen to be an adoption of the statement by the GF.
            - The admission consists of GF's statement + defendant's silence + circumstances under with the statement was made and the silence was done (after robbery in hotel room, and D previously told W that he was going to rob the bank) = admission.
            - Thus, it is non-hearsay and admissible.
                - Do the circumstances of this accusation and silence, given probable human behavior, do these circumstances give rise to an inference of an assent by Party A?
                    - These are called Negative Adoptive Admissions, aka, Tacit Admissions.
- *State v. Carlson:* PO went to scene, found evidence of meth. When the PO found D wandering a parking lot, the PO asks how he got needle marks in his arm. The man said from an accident, and the wife corrected him, saying, "No you didn't. You got those from shooting up." The man just hung his head and shook it in response. The PO took this as an adoptive admission.
    - The Court said that the shaking head was too ambiguous as to what the shaking meant, and they could thus not use it as an admission that he did the event.
        - If there is any adoption of ambiguity, the Court will not accept the evidence in, especially when there is a PO present.
- **Rule 801(d)(2)(C):** General: A statement is non-hearsay if the statement is offered against a party and the statement was authorized by a person.
    - The statement must be offered against Party A,
    - The statement must be against Party A's interest at X offered into evidence,
    - The statement must be made by a person who is not Party A, and
    - That person must be authorized by Part A to make a statement regarding that subject.
- **Rule 801(d)(2)(D):** General: A statement is not hearsay if the statement is offered against a party, and the statement is made by the person's employee or agent concerning that relationship, and during the time of that relationship.
    - The statement must be offered against Party A,
    - The statement must be against Party A's interest at X offered into evidence,
    - The statement must be made by a person who is not Party A,
    - That person must be an employee or agent of Party A,
    - That statement must concern a matter within the scope of the employment or agency, and
    - The statement must be made during the existence of the relationship.
        - The statement must be made during the existence of the relationship, and there will also have to be facts independent of the proffered statement.
- *Mahlandt v. Wild Canid:* Boy was allegedly bit by a wolf who was chained in a man's front yard. The man brought the wolf home from work at a nature preserve. Father leaves note on Man's door saying wolf bit child. At a Board Meeting, they discussed the biting.
    - Not only does this have the attributes of hearsay, and 801d2a, but it also fits the requirements of 801d2D.
        - The evidence of statement against Center against the Center's interest, the statement was made by Director (not the center), Director is an employee, and the statement was made concerning the scope of the employment or agency, and the statement was made while he was an employee.
            - Moreover, the meeting minutes from that board meeting could not be used since they did not bear any of the Non-Hearsay exceptions requirements nor did it fit any of the hearsay exceptions.
- *Big Mack Trucking Co.:* P was wife of truck driver who sued company when husband was hit by a truck—theory of negligence that truck had faulty brakes that acted up when it was parked on an incline.
    - PO talked to employee and the record of this was offered.
        - There was a statement made a/g Big Mack trucking,
        - There was a statement made a/g BM's interest,
        - Statement was made by a party not BM (LeDay made it),
        - That person was an employee or agent,
        - The statement was concerning a matter w/in the scope of the employment b/c the statement was about the brakes,
        - Statement was made while LeDay worked for BM.
            - Thus, this is Party Assertion.
            - If LeDay had been fired before making the statement, then there would be no evidence that LeDay had authority to speak on behalf of BM.
            - If LD is defendant, his discussion with PO would have come in via 801d2A.
        - Outside experts who make the admission do not qualify.
- **Rule 801(d)(2)(E):**
    - The statement must be offered a/g Party A,
    - Statement must be against Party A's interest at X offered into evidence,
    - Statement must be made by person who is not Party A,
    - Must establish that there is a conspiracy,
    - That person must be a co-conspirator of Party A,

- The statement must be made during the course of and in furtherance of that conspiracy.
    - There must be independent facts beyond proffered evidence which corroborates proffered evidence.
        - However, statements made during concealment efforts after completion of the conspiracy are not admissible under 801d2E to prove the elements of the initial conspiracy.

- Hypo: Jack and Jim are prosecuted for conspiracy to kill Ellen. Jim's defense is htat he provides an alibi he was nowhere near her house. However, Jack had stated to the arresting officer "Jim and I just walked by Ellen's house that night." In the prosecution of Jim, can the prosecutor introduce the evidence of arresting officer as against Jim? No. This is because he made the statement as he was getting arrested, not during the course of the initial conspiracy to murder Ellen. Here, the statement was made during the concealment stage, and not in the course of the conspiracy.
    - Moreover, even a late-comer to the conspiracy freight train can still be held for the whole conspiracy.
    - In a case regarding a prostitution conspiracy and a large red curtain hung up, a statement "I cannot believe you put up that red curtain since it is asking for problems from the police."
        - This statement was not made in furtherance of the conspiracy since the statement about the curtain was a narrative about a past event.

Former Testimony Hearsay Exception:

- Hypo: D fails to pull over to one side when an ambulance comes along, and then accelerates, and they crash, patient dies in ambulance. At the manslaughter trial, E testifies that D accelerated in front of ambulance. Later the children of E sue the driver for civil charges. Can the P call the stenographer from the former trial to testify to D's testimony in the former hearing?
    - Yes.
- **Rule 804(b)(1):**
    - Declarant is unavailable as a witness.
    - The declarant must have personal knowledge of the matter in which he is declaring.
    - What is being offered is declarant's testimony given at another hearing in the same or different proceeding or deposition.
    - Two Alternatives:
        - If in a criminal case, declarant's former testimony is offered against a party who had in an earlier proceeding an opportunity and similar motive to develop the testimony by direct, cross, or redirect.
        - Testimony is offered in a civil case against a party who either himself or his predecessor in interest had an opportunity and similar motive to develop testimony.
            - A proceeding for this is an official action conducted in a matter of purposes for law.
            - Testimony consists of statements made under oath subject to perjury answered on record.
                - See Wright Brother's Handout and Answers.
- **Rule 804(b)(3):** Hearsay Exception to Statements Against One's Interest:
    - Declarant must make a statement that, at the time (X) it was made, it was against declarant's interest in one or more of three ways:
        - Pecuniary or Proprietary interest,
        - Tending to subject declarant to civil or criminal liability, or
        - Tend to render invalid declarant's claim against another.
    - A statement against declarant's penal interest which is offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- *US v. Barrett:* D tried to to introduce evidence of M's testimony when M said at a card game that, "Bucky [Barrett] wasn't involved. It was Buzzy."
    - This was important to the court because it tended to show that M had insider knowledge that it was not D.
        - When M showed that he had insider's knowledge, it shows that he could possibly somehow be implicated in the crime. Thus, this was against his penal interest.
            - Can show something is a/g penal interest in 2 ways:
                - Either the facts stated are a/g declarant's penal interest, or
                - Because making the statement is a/g declarant's penal interest.
- *Williamson v. US:* Car gets pulled over, PO finds 19 kilos of cocaine, driver says he was delivering it for Williamson.
    - This statement could be seen as self serving in two ways: 1) Harris could be seen to be shifting the blam to Williamson, and 2) because he could be thinking that he is doing the authorities a favor and could get a light sent.
    - When the statement is a self-inculpatory narrative when the statement also is self-serving, can the statement come in via 804b3 as against his interest?
        - Neutral statements or self-serving statements cannot come in for hearsay purposes under 804b3 because they are not sufficiently against declarant's penal interest.
        - Without the self serving aspect, there would be nothing to redact.
            - The Court in this case did not allow the statements to come in because once the self-serving statement is redacted, there is nothing left to the statement.
- **Rule 803(3):** State of Mind Exception:
    - Declarant must be of personal knowledge of the matter in which he is declaring,
    - Statement must be of declarant's THEN EXISTING state of mind, sensation, emotion, or physical condition.
        - Exception: But not statements of memory or belief to prove the fact remembered or believed, unless the statement relates to the execution, replication, identification, or terms of declarant's will. (seduction)

- Mutual Life Case: Question as to whose body found in CO, either H or W. P contended it was W, but I contended W. I tried to introduce evidence of W's letter to his sister saying that he was going to CO (Offer of Proof made for this).
    - This is relevant because it showed that he had an intent to go to CO, then maybe he went to CO. And if he went, then maybe it is his body.
        - In the letter was an assertion of his intent to go to CO, and that it would be offered to show the truth of the matter asserted that he intended to go to CO. While this is hearsay, it is admissible.
        - Hillman Doctrine: If show then-existing intent to do something in the future that the person probably did it.
- *Shephard v. US:* Man convicted of killing his wife. D's defense was that she killed herself. The evidence in dispute was that she told her nurse that her husband poisoned her.
    - The US SC did not allow this, and created an exception to the exception.
        - This was a past statement of a belief of a past act that is offered to prove that the past act occurred.
- *US v. Feaster:* D went to parking lot to buy weed, told his GF where he was going, then was never seen again. At issue: 1) GF said that he was going to get weed, 2) testimony that he was going to parking lot to meet Angelo.
    - Court said that these statements showed D's then-existing state of mind to meet Angelo, and was thus not hearsay.
        - Nowadays, most Federal Courts will not allow into evidence under 803(3) a statement of the declarant's then existing intent to do something with a non-declarant in order to show the non-declarant's conduct, unless there is independent analysis of the non-declarant's conduct.
- **Rule 803(4):** Statements for Purposes of Medical Diagnosis or Treatment:
    - Declarant must have personal knowledge of the matter about which he declares.
    - The statement is one describing medical history; or past or present symptoms, pain, or sensatiions; or the inception or general character of the cause or external source thereof.
        - The statement must be reasonably pertinent to diagnosis and treatment.
    - The statement must be made for purposes of medical treatment or diagnosis.
        - These statements must be made to a physician, or someone who has some interest in the well-being of the patient.
            - This is a statement of some sort of condition of the person's body.
            - The person making the statement can be anyone, it can be a family member or whomever.
- **Rule 804(b)(2):** Dying Declaration:
    - Declarant must have personal knowledge,
    - The declarant must be available as a witness,
    - The statement is offered only in a homicide case or in a civil action,
    - The statement must be made by declarant while under the belief that his own death is imminent,
    - The statement must concern the cause or circumstances of what he believed to be his impending death.
- *State v. Jensen:* D prosecuted for poisoning his wife. She left a letter stating that if anything happened to her, it was probably her husband because she did not trust him.
    - This letter was not admissible because there was no imminence "If anything happens to me." Nor was their a belief something did happen "I fear . . ".
        - If this letter had never been delivered, it would still be a statement. In this case, it would be non-verbal assertive.
- **Rule 801(d)(1)(C):** Another Part Admission:
    - Declarant must have personal knowledge,
    - Statement must be one of identification of a person made after perceiving the person,
    - Declarant must testify at trial or hearing,
    - At the trial or hearing, the declarant must be subject to cross regarding the statement.
        - Hypo: W testifies at trial that X robbed her. Is W's testimony admissible?
            - Yes, because this is an in-court statement, and thus poses no hearsay problems.
            - Moreover, W was shown a line-up before trial and positively identifies X as the robber. While this out of court statement would meet all the hearsay requirements, it would qualify as non-hearsay.
                - Even if W cannot remember the results at trial but still remembers making the statement, it would still qualify as non-hearsay as long as the witness was subject to cross.
- **Rule 612: Present Recollection Revived:**
    - Hypo: Criminal trial of Laurena Bobbit. Calls forth Mr. Bobbitt to testify what she did to him that night. He says that is sorry, and pulling a blank. Ms. Bobbitt was burning incense that night, so the prosecutor uses incense to jog Mr. Bobbitt's memory, and it worked. He remembered that she tried to stab him.
        - this is a way to get the statement into evidence. The thing that does the jogging is not offered into evidence.
        - You can use anything to jog the memory.
        - If a document is used to jog the memory, you cannot have the witness read the document because the document is not offered into evidence, it is just used to try and get the witness to remember what happened.
        - IF a document is used to jog, then the other side has the side to inspect the document, and has a right to cross-examine the witness about the contents of the document, and even has the right to introduce into evidence, those parts of the document related to the witness's testimony.
- **Rule 803(5): Past Recollection Recorded:**
    - It must be a memorandum or a record,
    - The declarant is also a witness,

- The memo/record must concern a matter about which witness once had personal knowledge.
- Witness must now at trial have insufficient recollection to enable him to testify fully and accurately,
- The memo or record must have been made by the witness when the matter was fresh in his memory, and
- The memo or record must reflect witness's former knowledge correctly.
    - If it meets these requirements, the contents can be read aloud, but the document cannot be offered as evidence unless offered by the adverse party.
        - It would be considered insufficient recollection if he cannot remember at all.
            - To corroborate #6, you introduce preliminary facts that the witness was careful.
            - Thus, to distinguish from Present Recollection Revived, this is MEMORY MEMORIALIZED.

- *Baker v. State:* Witness could not remember his statement, so he read the PO's report.
    - This was not Past Recollection Recorded because #5 was not met-it was not written by the W.
    - The judge was careful to show that this was Present Recollection Revived because the report was used to jog W's memory.
- **Rule 803(6): Business Records Exception to Hearsay:**
    - Memorandum, record, report, or data compilation of any sort of acts, events, conditions, opinions, or diagnoses,
        - (Must be from these type of documents or referring to these)
    - Memoranda, etc. must be made at or near the time (of the acts, events, opinions, etc.),
    - The memo etc. must be made by or from information transmitted from a person with knowledge (that is, possessing personal knowledge),
    - Memoranda etc. must also be kept in the regular course of business, and
    - It must be the regular practice of the business activity to make the memoranda etc.
        - All these must be established by a custodian of records or another qualified worker or by certification under FRE 902(11) or (12) or under another statute.
        - Unless adversary or opponent of the document shows that the source of the information or the method or circumstances of preparation show a lack of trustworthiness.
- *Johnson v. Lutz:* Objection was made to a PO report over a motorcycle accident. Objecting to the bystander's part recited in the PO report.
    - The report must be made in the regular course of business, and must be given by someone who has a business duty.
    - If there are multiple speakers as here (the bystander, the PO, and the Court Reporter), then all must meet the all the elements of this exception.
        - Under *Lutz*, test would not be met if all parties did not have personal knowledge.
- **Multiple Hearsay:**
    - When you have two actors, and only one of them is acting under a business duty.
    - Hypo: Attorney calls him, what did you hear about how the accident occurred. The witness, if permitted, would testify that he told the lawyer that Mary told Joe that the black car ran the red light. If offered to prove that the black car ran the red light, then that is MULTIPLE HEARSAY, or DOUBLE HEARSAY.
        - This is not simple hearsay because there are two statements that meet the definition of hearsay.
- HYPO: Harry testified that Joe told him that Mary told him that a Delta Jet just nose-dove into the ground.
    - This is multiple hearsay because there are two out of court statements, there was an assertion passed from person to person (the testimony shows that the facts were passed from person to person.) Thus it is hearsay.
    - But say that Preliminary facts show that mary said this seconds after she saw this, and that Joe told W 10 minutes later while sobbing because his mother was on a Delta flight due in at just that time. Admissibility under 805 can begin if Mary's articulation fits an exception or exclusion, and if Joe's exclusion to W fits an exception or exclusion.
        - Mary's testimony would fit the presence sense exception because it falls within the things of it. Then with Joe's testimony, you can fit this under the excited utterance exception.
    - With 803(6), proponent might still be able to gain admissibility if the non-business person fits an exclusion or exception other than 803(6) and the recorder fits under 803(6).
        - Thus, this is like a Double Hearsay problem.
- HYPO: Anna sues George in <u>K</u> dispute. Anna claims the terms of the contract are that she gave title of her house to George, in return for which he agreed that she could there rent free for life. George claims that she did give him title, but that she could only live there so long as the welfare of the apartment did not object to the number of people living there.
- Anna wants to introduce the written entry made by an welfare employee showing that George told the emloyee that he had agreed that Anna could in the dwelling for life. Can the written welfare department entry come into as evidence that Anna could live in the dwelling rent free for life.
    - There are two speakers in the testimony involved, that is George, and the welfare person.
        - The welfare person is acting within the business duty, but George is. The only way that this will fit the double hearsay 803(6) excepton is if the welfare person fits 803(6), and then George fits another exception.
            - George fits the exception of party admission, he makes a statement of his own statement that can be used against him. He states that he did not give her the ability to live there forever, just that he gave her the limited ability to live there.
            - Then it must be found if the welfare person fits the category.
- *US v. Vigneau:* D was convicted of money laundering, the evidence in dispute was Western Union Forms containing his address
    - The court held that these could be admitted under the Business Records Exception since it could not be verified if a WU employee filled out the forms.

- *US v. Duncan:* If the court can avoid finding the lengthy proof for 803(6) by confirming the trustworthiness of the documents from another source (say, the Insurance company), then the courts will do that.
- *Williams v. Alexander:* V was hit by D's car while crossing the street. D argues that his car was hit from behind, propelling him into V and tried to admit ER notes stating this. V had previously admitted this record to show he was hit by a car, and D wanted to admit it as well to show he was hit by another car.
    - The Court stated that the hospital record was not admissible under this exception because the regular business practice of a hospital is to treat people, not to provide reports of accidents. Since it had no bearing on the ordinary course of business, it was inadmissible.
        - The dissent says that this report could have been considered under 801(d)(2)(A) as a party admission as non-hearsay, and then treated as double hearsay. However, even if this happened, then the doctor's note would still be subject to 803(6) and inadmissible.
            - However, the judge argues that to allow one party to use a piece of evidence and deny the other party is unfair.
                - Fairness concerns cannot be used to overrule the FRE, unless the FRE specifically allows for such concerns.
- **Rule 106:**
    - When a writing or recording is introduced by a party, an adverse party may introduce, at that time, any other part, or another writing or recorded statement which in fairness, ought to be considered contemporaneous to it.
        - When there is a distortion, the report can be admitted contemporaneously with the first admission into evidence, as long as it seeks to rectify the distortion.
            - Beyond recognizing a distortion, 106 does not govern.
            - This Rule can be used in conjunction with any other rule.
- **Accident Reports as Business Records;**
    - *Palmer v. Hoffman:* Negligence action where woman was hit by a train. P, the husband, sues the train saying that the conductor negligently failed to blow the whistle.
        - The evidence in question was an accident report prepared by the conductor 2 days after the accident when he was called into the Boss's office and made to fill out the report surrounded by his superiors.
        - For an accident to meet this requirement, it must be a regularly and routinely prepared document.
            - Thus a document is a business record if it is made in the ordinary course of business if it is
                - Routine
                - Relates to the inherent nature of the business (here, it is railroading).
        - The US SC recognized that accident reports in businesses are made to pre-empt litigation, and are often slanted towards the business's perspective. Moreover, it stated that accident reports are not in ordinary course of business.
            - Bitensky charged that it is in normal course of business to prepare accident reports.
                - Palmer has never been overturned, but it has been distinguished greatly.
    - *Lewis v. Baker:* RR struck V, P (Wife) sues saying the brakes were faulty.
        - The evidence in question was a report by RR Co. saying that the brakes 4 hours after the accident. The report was prepared by other railroaders who were not potential defendants, and who stated the brakes worked fine before the accident.
            - P argued these are accident reports and not in ordinary course of business.
        - Court ruled that accident reports are admissible as business reports if they had "earmarks of reliability," such as determined causation and remedial measures taken by the business.
            - Since none of the people who made the report were defendants, the court stated the evidence was admissible.
    - MODERN APPROACH:
        - Accident reports made by businesses are admissible hearsay if they meet all of the foundational prerequisites of 803(6). Moreover, since they are accident reports, this does not negate the fact that this is in the ordinary course of business.
            - So if Party A offers an accident report and it meets all the requirements of 803(6), but an adverse party is worried that this report is self-serving, then the adverse party should object that the source of the information or the preparation of the document was untrustworthy. (or whatever other pertinent objections)
                - Thus the burden is on the adverse party to prove that the evidence should not be admitted.
    - *Sana v. Hawaiian Cruises, Ltd.:* P worked for cruise and got sick on a cruise ship. Under admiralty, an employee is to be give care by the ship.
    - IN the statements, the coworkers say that he bumped his head on March 10 and acted abnormally afterwards. The Supervisor says that Sana stated he was sick on March 8.
    - According to the Rutherford report regarding the statement of the coworkers, there are 4 informers: Rutherford, the 2 coworkers, and Sana himself.
    - According to the Rutherford Report there are three informers in regards to the statement by the supervisor: Rutherford, the supervisor, and Sana.
        - According to the Court, this is a case involving MULTIPLE HEASAY.

- With the Coworkers statements, were the coworkers involved in the business duty? Yes, they had a duty to cooperate in the investigation by providing their information.
    - Moreover, Rutherford was acting within the business duty as well since he was relaying the information he found to the insurance company he worked for.
- The Court states that these statements to the coworkers also meet the 803(3) hearsay exception because it was about Sana's then existing mental and physical state.
    - When Sana stated, "I bumped my head" to his co-workers, this is also non-hearsay when it is used to show that he was not feeling good that day.
        - If it had been offered to prove that he bumped his head, then it is hearsay.
        - Instead, it is intended to prove the implied assertion, that he is feeling off that day because he felt like he bumped his head.
            - Implicitly, he is saying "I feel like I bumped my head."
- 801d2d shows that the coworkers statements are admissible under since it is offered against a party, and is a statement by the party's agent concerning a matter within the scope of the employment.
    - This rule applies equally to the statement by the coworker and the supervisor.
- The Court next look to see if Rutherford's statement fit another exclusion other than 803(6).
    - These declarations made to Rutherford were made near the time of the accident, it was transmitted to the person via people with personal knowledge (while the coworkers and supervisor had personal knowledge, it was ultimately Sana who had the ultimate personal knowledge).
    - Under 803(6), Rutherford's statement meets the exception to it.

- For MULTIPLE HEARSAY, all statements must be admissible under another hearsay exception not 806(3), and that the statements must all be consistent.
    - All these are established and the requirements for multiple hearsay was met.
- However, despite meeting the multiple hearsay requirements, The cruise line states that the *Palmer* was not met since this was made in anticipation of litigation.
    - Thus, this became a problem with trustworthiness of the statements.
- The Court finds that the statements were all trustworthy since the report was made by Rutherford, an employee of an Insurance Company. Moreover, the evidence was offered by Sana.
    - Thus, if the evidence was offered by the adverse party, then it is trustworthy.
        - The adverse party: Was the document offered by the party that was adverse to the party who made the document?
- Thus, Rutherford report was admissible.
- The Rutherford document is treated as simple hearsay if all the foundation prerequisites for 803(6) are met, without meeting the MULTIPLE HEARSAY and if the Insurance Co. corroborates the accuracy of the Rutherford report.
- As she stated, the Court did not need to use MULTiple Hearsay, this was just "gross" over-kill.
- Unnecessary to use all that analysis when it could have just been analyzed under 803(6)

- **Rule 803(8) Hearsay Exception to Public Records and Reports:**
    - Records, reports, etc. of public offices / agencies setting forth
        - A. Activities of the office or agency; or
        - B. Matters observed pursuant to a duty imposed by law as to which matters there is a duty to report, except matters observed by law enforcement personnel, and offered a/g the accused in a criminal case; or
        - C. In civil actions or against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law,
            - (Trustworthiness Clause) Unless source of information or other circumstances indicate a lack of trustworthiness.
                - This clause applies equally to all three parts of the rule.
        - Category B is outward terminal, that is, B took document reports of things that are happening outside the public agency. For example, Government Weather Agency taking information of weather, that is, taking information beyond itself.
        - C is also outward terminal, that is, regarding matters beyond itself for civil actions or when against government in criminal actions..
            - This is considered trustworthy hearsay because public agencies, out of care for their job, will do a fair job reporting the information. Moreover, there is a necessity requirement that shows a reliance on these.
                - Ex. A govt. document on report of radiation from Japan is not usual document, but is admissible under this.
            - With A and B, the rule contemplates that all the makers of the document are government employees.
                - C, however, can have non-government agencies or persons making the record.
            - Under all three, it is simple hearsay.
- *US v. Oates:* Government identified white powder in D as heroin; however, at trial the chemist was not able to report, so the government offered his report as evidence by getting another chemist to testify that he followed the normal procedure.
    - D's objection that he was not able to c/x the first chemist was overruled.

        - The Court ruled that the chemist, as employed by PD, worked for a public agency and has law enforcement responsibilities.
            - However, not all Federal courts take this view, some have a narrower view, saying that the person must have law enforcement responsibilities (and not just the agency she works for).
- MODERN APPROACH: With respect to hearsay documents that are inadmissible under 803(8)(B) or (C) against the accused because of confrontation concerns, those documents can be gotten into evidence through 803(6) if
    - The maker of the document takes the stand is subject to confrontation concerning the documentation.
    - Thus, this protects the document from abuse of not having the writer be confronted.
        - Exception: These documents can be used against the government, but not the accused.
        - In a civil case, you could argue that the evidence was not admissible under (B) or (C) if it was not trustworthy.
- *US v. Grady:* 2 defendants charged with weapons dealing, one Cath from Ireland, the other NYC.
    - The government tried to bring in the Irish log of the weapons with serial numbers included.
        - The Court stated that these documents are non-adversarial since they do not record the crime (just the serial numbers from the guns), and are thus admissible because it is non-adversarial and routine.
- **Rule 803(21): Hearsay Regarding Reputation of a Person's Character Among His Associates or Community:**
    - Declarant does not need personal knowledge since this is just reputation among the community.
- **Rule 807: Residual Hearsay Exception:** A statement not covered under 803 or 804, but carries certain degrees of trustworthiness for why it should be admitted.
    - The declarant must have personal knowledge of the matter about which he is declaring,
    - The statement that is offered into evidence must not specifically be covered by Rule 803 or 804,
    - The statement must have equivalent circumstantial guarantees of trustworthiness (i.e., equivalent trustworthiness to statements fitting 803/4),
    - The statements must be offered as evidence of a material fact,
    - The statement must be more probative on the point for which it is offered than any other evidence that proponent could produce through reasonable efforts,
    - The statement must serve interests of justice and other fluff.
        - Must give notice to your opponent when you are going to use this.
            - When this was first added to the Rules, people were upset about # 2.
                - As a result, the Courts developed the "near miss" test, that said if the exception was close to one f the exceptions in 803 or 4, then 803/4 applied, and the piece of evidence was not admissible.
                    - However, this is no longer used.
- *Turbyfill v. international Harvester Co.:* Man wanted to buy car, it did not start, when they poured gas into it, it backfired, P got severe burns. P wanted to introduce mechanic's (W) written testimony that was transcribed when he went into a room right after it happened and wrote down an account of what happened without anyone around. D objected because W died soon after this.
    - The Court ruled that this was admissible, and looked at factors such as the fact that it was written the day of the accident, and he did not write it under pressure surrounded by his supervisors.
        - This is similar circumstances to Past Records Recorded, but since he died and was not able to go on the stand, it was not covered by this exception.
        - This is the MODERN APPROACH, and NOT the Near-Miss Doctrine.
            - The Court will look at:
                - Whether the statement was made out of court,
                - Whether the statement was against the declarant's interest,
                - Whether it was spontaneously uttered,
                - And whether the statement was made as a matter of routine.
- **Confrontation Clause:**
    - Generally, it embraces the right of the accused to be present at the trial and to see and hear the witness's against him,
    - The clause also embraces the accused's right to be in view of the people who are testifying against him,
    - Generally speaking, the Clause embraces the accused's right to c/x those who testify against him.
- *Ohio v. Roberts:* Court said that if you are using the defendant's statement against him, you must offer him as a witness yourself, and not just have offer it from the defendant's c/x. (This is no longer the valid law)
- *Crawford v. Washington*: D ws charged with assault and attempted murder of a man who tried raping wife. The evidence was a recorded tape by W who said that D attacked V without provocation.
    - RULE: With respect to hearsay testimonial statements of a declarant who does not appear at trial, when those statements are offered against an accused, the 6th Amendment requires the statement's exclusion unless:
        - The declarant is unavailable to testify as a witness at trial, and
        - The accused had a prior opportunity to c/x the declarant.
            - At a minimum, testimonial hearsay is
                - Preliminary Hearing
                - Grand Jury testimony,
                - Testimony at an earlier trial,
                - Statements made during police investigation
                    - And more.

- *Davis v. Washington:* Are 911 calls testimonial subject to the Confrontation Clause?
    - Primary Purpose Test: Statements are non-testimonial when made in the course of police interrogation where objectively the surrounding facts show that the primary purpose of the interrogation is to enable the police to deal with an ongoing emergency.
        - Statements are testimonial however when objectively the surrounding facts show that there is no ongoing emergency and that the primary purpose of the police interrogation is to establish past events potentially relevant to a later criminal prosecution.
            - The key thing to analyze under this is the declarant's statements, and not the officer's questions.

With testimonial evidence against the accused, the evidence can come in if two things are true:

1) if declarant is unavailable as a witness
2) the accused has had an opportunity to c/x the declarant

For testimonial hearsay to come in against an accused objecting on 6th amendment grounds, the accused must have an opportunity to c/x the declarant, either at trial, or before trial.

This is because Crawford wants the accused to have the protection of c/x.

With Davis, statements in response to police investigation, how to determine if they are test. Or non-testimonial.

Primary Purpose Test: statements to the police are deemed non-testimonial when from the objective circumstances surrounding the making of the statement, if the it deals with an ongoing testimony it is non-testimonial.

- Ongoing Emergency consists of:
    - All her statements in present tense (he's jumping on me, beating me, etc.)
    - The statements were necessary to show that there was an emergency going on still.
        - If she was talking about past events and there is no ongoing emergency, it is testimonial and in admissible.
            - The dicta states that a statement can begin non-testimonial, then as the situation changes, it can become testimonial as the declarant gets out of danger.
- *Holmes v. South Carolina:*
- An accused has a const. right to present a complete defense.
    - This flows fom d/p clause, the confrontation clause, and from the compulsory process clause of the 6th amendment.
    - This route of the accused is violated by the evidence rules that infringe upon the weighty interest of the accused in making his case where the rules are really operating in an arbitrary way.
        - This is when the accused wants to make an defense with a witness, but the rules of evidence prevent him so.
        - If the rules seem arbitrary on that, and the attorney makes a convincing argument, the defendant may have a const right to use this is evidence.
- *Green v. Georgia:*
    - Two defendants committed the crime together, not tried together. One of the defendants used Pasby as a witness, who testified that Moore told Green to run an errand, and Moore shot the victim. If the testimony of Pasby is offered by Green, it is technically hearsay.
    - out of court statement Pasby saying this in the other court room, assertion that could be true or false that Moore shot victim, truth of the matter asserted that Moore shot victim while Green was not even present.
    - At trial, Green could not get the evidence admitted.
    - Is the testimony particularly trustworthy? If so, you could argue that the Georgia Rules on Evidence was keeping the trustworthy evidence out. If Pasby
    - Pasby's testimony is trustworthy because Moore told him this against Moore's interest, he told a good friend, and there was also evidence in the investigation of independent evidence corroborating Moore's statement. Thus, Court said that this violated his const right to present this evidence.
- **Rule 804(b)(6): Forfeiture by Wrongdoing:**
    - Hearsay exception for a statement offered against a party that acquiesced or engaged in wrongdoing which was intended to, and did, procure the unavailability of a declarant as a witness.
        - Rationale: We do not want a part to benefit from his own wrongdoing.
            - The idea of the waiver: a party waives his right to make a hearsay objection to an out of court statement where that party was responsible for the declarant's unavailability as a witness.
                - It can be criminal activity, but it at least must be improper, i.e., coercion, undue influence, etc.
        - If an unintended consequence, a party's wrongdoing is to make the declarant unavailable, then this exception will not be triggered.
        - If the declarant's absence was an unintended consequence of the person's action, then the action does not apply.
            - It must be the wrongdoing that caused the declarant to be unavailable for the evidence to be used.
- *Giles v. California:*
- An accused forfeits his confrontation clause objection to this hearsay if:

1) the out of court's statements were testimonial
2) the accused had no prior opportunity to cross the declarant,
3) the declarant was unavailable as a witness at trial, and her unavailability was due to the accused's wrongdoing, and

4) the accused engaged in that wrongdoing with the intent of making that witness unavailable.

Credibility Evidence:

1. Impeachment:
    a. Where you try to attack the credibility of a witness.
2. Bolstering:
    a. Trying to introduce evidence to enhance the witness's believability / credibility before the witness's credibility has been attacked.
        i. This is completely forbidden by FRE.
3. Rehabilitation:
    a. The introduction of evidence to enhance a witness's credibility / believability after his credibility has been attacked.

- Substantive Evidence: evidence that bears on the merits of the case when establishing liability or non-liability, guilt or innocence.
- Credibility Evidence: Evidence that only bears on the credibility of a witness.
    - They will look at things like:
        - sincerity or lack thereof,
            - perception or lack thereof,
            - memory or lack thereof,
            - The clarity of his mode of narration or lack thereof.

Impeachment:

- With one exception (Set forth in 806), a witness must testify in order to be impeached.
- 607 says that any counsel can impeach a witness, including the party that called a witness.
    - When witness A is impeached by c/x of Witness A, then the impeaching evidence is called *INTRINSIC* evidence.
        - That is, getting the witness to damn himself from his own evidence.
    - When Witness B impeaches with her testimony, this is *EXTRINSIC* evidence.
        - When the evidence is a document, we still call it extrinsic evidence regardless whether the author of the document is Witness A or B.

Rule 615 gives Federal judges this authority.

- At the request of a party, the court shall exclude witnesses so that they cannot hear each other's testimony.
    - Moreovoer, the Court is impelled to make that order on their own motion.
- Excluded from exclusion:
    - A party who is a natural person.
    - An officer or employee of a party who is not a natural person.
    - A person who a party can show is essential to the essential presentation of his case, or
    - A person authorized by statute to be present at trial.

5 Types of Impeachment:

1) By prior inconsistent statement.
    a. That is, inconsistent with the witness's prior in-court testimony.
2) Impeachment by Specific Contradiction: To attack the witness with evidence other than the witness's own prior inconsistent statement which contradicts the witness's in-court testimony.
    a. Ex. "the horse is black." Opposing cousel can attack this with extrinsic evidence that the the horse was white, by calling witness
3) Propensity Evidence Regarding a Witness's Character for Untruthfulness:
4) By introducing evidence of a witness's defect.
    a. A defect in the sense of his capability of perceiving, remembering, or narrating with clarity.
5) To show that a witness is biased for or against a party.
    a. Attacking counsel calls witness calls A to say that B is in love with the P.

With respect to the first two of these types of impeachment, there is a special rule from the common law, it is called the collateral matters doctrine. This applies only to impeachment by prior inconsistent statement and to impeachment by specific contradiction.

- It prohibits the introduction of extrinsic evidence to impeach the witness on a collateral matter.

Collateral mainly means not relevant.

- *State v. Oswalt:* D was convicted of murder in Seattle. His defense was that he was in Portland, and provided a restaurant owner testifying he was at his restaurant on July 14. On c/x, the restaurateur said he was there every day for months, but then the P produced a PO W who said that he had a conversation with D in Seattle on June 12.
    - The testimony of PO is extrinsic because the restaurateur is being impeached by another person
    - This is specific Contradiction because PO specifically sought to impeach restaurateur's testimony as to D's location.
        - The Court ruled that just because he was in Seattle the month before and purchased tape is not directly related to the crime at hand.
            - Thus, it is not collateral, and it would violate the *collateral matters doctrine*.
    - Extrinsic evidence of specific contradiction or prior inconsistent statement is not collateral if the impeaching evidence also has some relevant purpose to the litigation in addition to impeachment by these two modes.

- Collateral Matters Doctrine: Extrinsic Evidence may not be used to impeach evidence of a collateral matter.

The purpose of this is to impeach the witness on evidence that is substantively relative to the case at matter.

- This is useful to impeaching
- W is called to testify on a a case, he saw the accident at 11 pm, and he was out on the streets because he was going from his mothers place to his. The proffered impeaching evidence is: D calls P's sister butler. IF permitted, the butler would testify that at 10:50 pm, W left P's sister's home.
  - This would be impeachment by specific contradiction.
    - Evidence other than the witness's own testimony that contradicts the plaintiffs testimony.
    - This would also be extrinsic evidence because it is not from W's own mouth.
    - Is this extrinsic evidence on a specific collateral matter?
    - The proffered impeaching evidence of the butler is relevant for another reason we have not studied:
      - It is BIASED. If W was coming from P's sister, then maybe he has a relationship of sorts to her, and then maybe he has a friendly relationship to the plaintiff.
      - This is relevant to show the W's potential bias to P, and
  - The extrinsic specific contradiction evidence is relevant to the particular case to impeach a witness other than specific contradiction, then it is no longer impeachment on a collateral matter, and then it can come in to do both; that is, to show specific contradiction and to show witness bias.
    - Some Federal Courts do not refer to the collateral matters doctrine, but they do something similar.
    - If they are in a Federal Ct where the judge does not subscribe to this doctrine, and the opposing counsel brings forth evidence of specific contradiction, and is of a collateral matter
    - The Court will reason it that the on the one hand, the probative value of the impeaching evidence is pretty low if it is only on a collateral matter. On the other hand, the danger of waste of time or confusion of the jury is pretty high because the evidence is extrinsic. And so the Ct. would end up excluding the evidence under the 403 balancing test. Same result, but terminology and authority of 403.
- *US v. Copelin:* In order for the impeaching evidence to be a *Prior Inconsistent Statement*, the impeaching evidence is the attacked witness own out of court statement that is inconsistent with his in-court testimony.
  - A party cannot call a witness for the sole purpose of impeaching them—judges tend to not like that since the evidence is only brought forth to put forth otherwise inadmissible evidence for a substantive purpose.
- **Rule 608(b): Impeachment through Character and Propensity Evidence:**
  - Prohibitory Rule: Evidence of a specific instance of conduct offered to attack or support the witness's conduct for truthfulness or untruthfulness other than conviction for a crime may not be proved by extrinsic evidence.
    - They may however, in the discretion of the court, if probative truthfulness or untruthfulness be inquired of the witness in c/x of the witness (608b1) to show that the witness's character for truthfulness or untruth.
      - Test:
      - The evidence has to be of the witness's specific instances of conduct other than conviction for a crime under 609,
      - The specific instances of conduct must be offered to attack the witness's character for truthfulness,
      - The evidence must be elicited from the attacking witness on cross of that witness,
      - The specific instances of conduct must be probative of truthfulness or untruthfulness,
      - Before that kind of evidence can be used to impeach, the proponent must demonstrate to the judge the basis for the good faith belief that these instances of conduct occurred—that is, to prevent attacking counsel to go on a fishing expedition.
- *US v. Owens:* D prosecuted for murder of his wife. On c/x, D was asked if he knew he omitted prior charges such as assault.
  - What is key here is the evidence of the omission of this evidence, and not the evidence of the past charges themselves.
    - The Court will apply Rule 401 (evidence must be relevant) and Rule 403 (Evidence can be excluded on the grounds of prejudice, confusion, or waste of time) to weigh this.
      - Specific Instances of Conduct that are generally Probative of Untruthfulness:
        - Fraud
        - Deceit
        - False statements
      - Not Probative of Untruthfulness
        - Acts of Violence
        - Drug Crimes
        - Disorderly conduct
        - Prostitution
        - Sexual Crimes
      - There is less uniformity when an act bears on dishonesty, but may or may not bear on untruthfulness.
        - Hypo: Mike took $50. When confronted, he says, "I did."
          - Dishonest by taking, truthful in admitting.
        - With this evidence, such as embezzlement, the trend is to let this evidence in as to 608 evidence.
    - Evidence of specific instances of conduct that are offered to impeach by showing witness bias or defect or witness contradiction is not governed by 608(b).

- This rule only governs when the specific instances of conduct are offered to impeach the witness by showing he has an untruthful character.
    - The one exception to this is the first sentence of 806: When a statement as defined by 801(2)a-d is admitted into evidence, then the credibility of the out of court declarant can be attacked, and if attacked, supported by any evidence that could be used for these purposes if declarant had testified as a witness.

- *US v. Saada:* the bar on extrinsic evidence does apply, and continue to govern, even when the impeachment is of an out of court declarant and the declarant is no longer available. Thus, you can never impeach it for this reason.
- **Rule 609: Impeachment by Evidence of Conviction of Contradiction:**
    - **609(a)(1):** Evidence to attack W's credibility evidence that a witness who is not the accused was committed a crime shall be admitted subject to rule 403 if the crime was punishable by death or imprisonment of excess of one year, and evidence that a witness who was the accused has been convicted of such a crime shall be admitted if its probative value outweighs its prejudicial effect to the accused.
        - Rationale: The reason is that if W was convicted of a serious crime, even if that crime did not involve deceit or false statement, it still is probative of a character for untruthfulness since it is such a serious crime.
            - However, the Court uses a different balancing test for witness versus accused for this type of evidence.
            - If the Witness is not the accused, then they are subject to the standard 403 balancing test.
            - But if the witness is the accused, then it is not afforded 403 (she calls this the super balancing test). For these convictions to come in, the probative value of admitting these convictions must outweigh the prejudicial effect to the defendant.
                - What if you have a misdemeanor, then not fall under this. If t is a felony and not as severe as this, then as offering types of this evidence uses the rule from 608b.
                    - 608b governs convictions not covered by 609.
    - **609(a)(2):** Evidence of convictions of any witness is admissible regardless of the punishment for the crime if it can be readily established that the element of the crime required proof or an admission of an act of deceit or false statement.
        - So there is no balancing test attached to this because these are highly probative convictions for them. This is used for crimes such as deceit and false statements.

609 – Prior Convictions

- **From last class, make sure to not have a misunderstanding:**
    - **If a conviction does not fit the criteria of 609, 608 would cover the conduct, which constitutes the crime. Under 608, it would not be the conviction offered into evidence, but the conduct would be entered into evidence.**

609(a) states what you can use
(a)(2) crimen falsi
609(b) states circumstances in a that cannot be used

- **Essentially a statute of limitation**
- **Convictions under this rule is not admissible if more than 10 days have elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction or what ever is later, UNLESS the court determines the probative value of the evidence substantially outweighs the prejudicial effect (if you are going to use this balancing test, 609(b) says you have to give pretrial notice to the adversary)**

609(c)

- **Two exceptions to 609(a)**
- **A conviction is not admissible under this rule has been the subject of a pardon, annulment, certificate of rehabilitation, or an equivalent procedure, based on a finding that the witness has been rehabilitated and has not subsequently been convicted of a crime punishable by death or imprisonment more than a year**
- **The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.**

609(d)

- **Juvenile adjudications are not admissible under 609**
- **Note exception**

609(e)

- **Pendency of appeal does not affect admissibility. The fact of pendency is admissible**

- *US v. Sanders:* D indicted for assault to commit murder while in prison. Court allowed evidence of prior assault and contraband weapons charges, but not evidence of armed robbery.
    - Super Balancing Test: Requires the offering party to prove the probative value, do not use 403 because the witness is accused.
        - Consider:
            - High liklihood of prejudice that accompanies the admission of such a similar prior conviction
            - Not the same probative value as Crimen Falsi
            - Little bearing on defendant to tell the truth

        - This could also be potentially admissible under 404(b) to show intent. WATCH FOR DUAL PURPOSE EVIDENCE ON EXAM!
- *US v. Wong:* Rule 609(a)(2) does not require a 403 balancing test, and it does not matter if the accused is the witness.
    - Exceptions:
        - If you were dealing with a conviction for a crime of dishonesty or false statement older than 10 years, the Super Balancing Test does apply.
        - 609(c) and (d) also use the Super Balancing Test when used older than 10 years.
            - The following are not Crimen Falsi:
                - Violent Crimes, Assault
                - Rape Crimes
                - Drug Crimes
                - Prostitution
            - Crimes that are Crimen Falsi (not exhaustive):
                - Fraud
                - Forgery
                - Perjury
                - Counterfeiting
                - False Reports
                - Embezzlement
- *US v. Brackeen*: Congress intended 609(a)(2) to apply only to those crimes that factually or by definition entail some element of misrepresentation or deceit, and not to those crimes which, bad though they are, do not carry with them a tinge of falsification.
- **Rule 608(a):**
    - The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to 2 limitations:
        - The evidence may refer to a character for truthfulness or untruthfulness
        - Evidence of truthful character may be introduced only after the witness character for truthfulneess has been attacked by reputation, opinion, or otherwise.
- **Psychiatric Condition:** Ruled by 401-403.
    - Evidence of witness sensory or mental defect may be used to impeach a witness if the evidence shows either one of the following two things:
        - The attack witnesses impaired ability to perceive events accurately at they time that they occurred, OR
        - Witness impaired ability at the time of trial to remember events or to narrate them.
            - Ex. Witness could be impeached by saying he was drunk at time he witnessed accident or when he was on trial.

P- Rule 613: Prior Statements to Impeach or Rehabilitate
The use of the witness's prior out of court statement to impeach him by contradicting his in court testimony.

- **Under the federal rules, any material variance between the two statements will suffice**
- **In order to understand 613 you have to understand its reaction to the "Queen Caroline Case Rule."**
    - **Under this rule you had to impeach a witness by prior inconsistent statement under this condition: attacking counsel must be cross examining, prior to that, the counsel must be telling witness the contents of the prior statements, where and when he made it, who was there, then ask if he made the statement. If witness answered yes, impeachment was achieved. If witness denied making the statement, or failed to admit it, then and only then, could attacking counsel offer extrinsic evidence of the witness's prior inconsistent statement.**
- **Fed.R.Evid. took different rule. Queen rule was ineffective because if you took away the surprise element then it is harder to impeach the witness and you loose dramatic effect. Queen rule also stood in the way of either an idiot attorney or an attorney came across the prior inconsistent late in the trail.**

In court Officer testified that he had not used racial slurs in years. Lawyer impeached him that out of court he had used racial slurs. This contradicts his in court testimony with his prior out of court statements. This bears on memory and sincerity.

613(a) governs all prior out of court statements of a witness

In examining a witness a prior out of court statement made by the witness, the statement need not be shown, nor its contents disclosed to the witness at that time, but upon request the same shall be shown to opposing counsel.

613(b) governs ONLY extrinsic evidence of the witness's prior inconsistent statement
613(b) simplified:

3 ways to get in evidence of prior inconsistent statements to impeach:

1. **Ask witness A on <u>cross</u> whether he made the prior inconsistent statement, if yes you have impeached, if no, then attacking counsel can offer extrinsic evidence of witness A's prior inconsistent statements. (NOTE OPPORTUNITY TO EXPLAIN, DENY, INTERROGATE WAS DURING CROSS) (THIS IS THE SAFEST ROUTE TO GO)**
2. **Attacking counsel offers extrinsic evidence of witness A's prior inconsistent statement, (at this point witness still needs an opportunity to explain, deny or interrogate) but attacking counsel must also make sure witness A is**

available for recall as a witness so that he can be given the opportunity to explain or deny and other counsel to interrogate. (If counsel does not do this, then evidence can be tossed and a mistrial will be granted.)

3. **Extrinsic evidence of witness A's prior inconsent statements are admissible if the interest of justice requires admissibility, as such not opportunity to explain, deny or interrogate need to be given.**

- *Coles v. Harsch:* If Ws prior inconsistent statement is offered solely to impeach, then it is not hearsay because it is offered to impeach as a prior inconsistent statement.
    - Tactics to get this into evidence:
        - Ask W in c/x whether he made the statement about the Pudding River.
            - Then you can offer in as evidence extrinsic evidence to show forth prior inconsistent statements.
            - When you do this, you have to give the person an opportunity to respond to the statement, and for an opportunity to c/x the person again.
                - An opportunity must be given to W to explain or deny or clarify the prior inconsistent statement.
        - Introduce evidence of W's inconsistent statement without giving the opposing party an opportunity to interrogate if the interest of justice require an admission.
            - This is tough to do though.
            - One exclusion to this hearsay, 801d1A: A statement is not hearsay if the declarant testifies at the trial and is subject to c/x concerning the statement and the statement is inconsistent with the declarant's testimony and the statement was made under oath subject to penalty or perjury.
                - This exception not work in this case because W did not make his out of court statement in a testimony subject to perjury or hearsay.
            - What if the evidence is offered to impeach and for its substantive hearsay purpose under any hearsay exception other than 801da, then 613 does not govern.
                - The idea behind this is if the statement is offered for both purposes and is offered for a purpose other than 801d . . .
                - Would the collateral matters doctrine preclude the plaintiff from giving the extrinsic evidence fo Thompson's prior inconsistent statement
- There is an intersection of Rule 806 with Rule 613.
    - Second sentence of 806 is pertinent. "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."
    - Generally, when an out of court satement is offered solely for impeachment purposes, it may or it may not pose a hearsay problem. The definitive answer turns on whether the impeachment purpose of the evidence are the same.
    - Hypo: Assume plaintiff of acase calls Witness 1. Further assume that under 608a, defendant calls witness 2 to testify about witness 1's reputation for untruthfulness.
        - When asked on his character, If permitted, Witness 2 will testify that Witness 1 is the biggest liar.
            - It would be admissible because this is her reputation.
            - Test:
                - It is an out of court statement
                - It is an assertion,
                - It is offered to prove the truth of the matter therein.
            - If hearsay fits an exception, then it is admissible hearsay. If it not btu fits the other thing, then it is non-hearsay.
        - She likes to address this on the exam!!!
- Rehabilitation: when you do this to a witness, you are bringing forth evidence to bolster witness's credibility after it has been impeached.
    - To rehabilitate the witness with evidence of the witness's character and propensity for the witness's character and propensity, and to introduce evidence of that witness's prior consistent statement (that is out of court statement).
        - When your witness has been impeached, you use the type that is logically relevant to undoing the damage don to your witness by impeachment.
            - Hypo: Assume Witnes Wendy has been impeached by character and propensity evidence for untruthfulness. The attacking council calls Jim as a witness to testify that in his opinion has a very untruthful character. If you are Wendy's proponent, under 608a2, Wendy's proponent can call Laura as a witness to testify that in Laura's opinion, that Wendy has a very truthful character.
                - This directly rebuts Jim's testimony, and logically fits.
    - Another way to Rehabilitate a witness, 608b2. You can introduce specific instances of conduct if probative of truthfulness or untruthfulness. However, such evidence, if probative of truthfulness or untruthfulness, may be asked of a witness on cross concerning the character of another witness for truthfulness or untruthfulness as to which character the witness being crossed has already testified.
        - Under 608b2, Wendy's proponent, in an effort to rehab her, can cross-examine Jim on cross whether he knows that Wendy goes to high schools to give lectures on the need for truthfulness in one's daily life, that Wendy once returned a wallet to its owner full of money, and that Wendy once reported to her bank an error it had made in her favor.

                - Would this evidence be logically relevant? Yes because it provides specific examples of evidence that directly rebuts Jim's testimony.
                - Could Wendy be rehabbed with evidence of Wendy's prior inconsistent statement? Would this be logically relevant? No because this does not rebut Jim's testimony that she is untruthful.
        - Where the statement in her testimony is an impeachment plus the lawyer's argument with respect to the, plus impeachment by specific contradiction.
        - Although prior consistent statements are primarly used as a rehab, the primary rules are 613a and 801d1b.
        - 801d1b says that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross concerning the statement and the statement is consistent the declarant's in-court testimony and is offered to rebut an express or implied charge of recent fabrication or improper motive.
        - Why did they put rehab rule in exclusion rule?
            - When a witness's prior inconsistent statement is offered to rehab the witness, then that statement can also come in for its substantive hearsay purposes if it meets the requirements of 801d1b.
- Pre-Motive Requirement at Common Law and Under FRE 801d1b: (handout)
    - You cannot rehan the witness if the statement was made when she ahd a motive to speak falsely on the subject.
    - Hypo: Dan is charged with distribution of cocaine. On cross, W admits he has drug charges against him, and hopes for leniency. When does W have motive to fabricate? The only statement that would satisfy pre-motive requirement is A. After that, he has a motive to falsify and lie, so C and B could not come in. However, A would satisfy the Pre-Motive requirement.
- **Impeachment by Bias:**
    - This is where attacking council introduces evidence of the attitudes and feelings or emotions of a witness arising from either the witness's relationship to a party or the witness's relationship to the litigation or to another witness such that these attitudes feelings and emotions leave the witness to skew her testimony in a way that is for reasons other than the merits of the case.
        - Evidence of bias can include the witness's conduct, the conduct of others to the W, out of court statements (such as racial slurs), evidence given in testimony, evidence of conditions, circumstances, relationships, you can use any extrinsic or intrinsic.
            - For instance, in *US v. Tome*, the D showed that his 6 year old daughter was biased towards living with her mother when she claimed she was sexually molested.
- *US v. Abel:* D was indicted for robbing a bank, a cohort was going to be a witness for him, but another man says that he shared prison cell with one of them and said that they are in a secret gang where they perjure for each other.
    - Counsel can impeach by showing witness bias if evidence is as follows:
        - That the attacked witness belongs to an organization bearing on the litigation with commitment to perjure,
        - Where the evidence shows that both the defendant and the witness to be impeached,
        - And where there is no evidence that the witness to be impeached subscribes to the tenets of the organization.
            - When these are found, the evidence can come in to impeach Mills.

Privileges:

- **Rule 501:**
    - Privileges in Federal Courts is interpreted by common law in Federal Courts.
        - Exception: In Civil Actions where state law provides the rule of decision as to a claim or defense, the privilege will be governed by the applicable state law.
        - Must invoke the Privilege to benefit from it.
    - The Person who possesses the priv. is the holder. They could be a party, witness, whomever.
        - If it is to be claimed, then it must be claimed at all stages of trial.
        - A priv. can be claimed by anyone, even if they are not the holder.
- Attorney Client Priv:
    - The purpose of this is to get full disclosure so the attorney can do her job thereby furthering the administration of justice.
        - The attorney can assert the priv on client's behalf to successfully claim the priv. To claim, the attorney must establish:
            - That the client consulted someone he reasonably believed to be an attorney,
            - The consultation was for the purpose of obtaining legal service or legal assistance (even if the attorney is never retained),
            - The client must intend for the information to be kept confidential,
            - The confidentiality of the information must be maintained by the client, and
            - The communications must concern the subject matter of the clients legal problems.
                - What stays within the priv. is any information pertaining to the legal services. For instance, in criminal case, the address and contact info of the person is confidential, but not his investment strategy he shared with the attorney.

- Attorney Client Priv. When the Client is a Corporation:
    - If a corporate employee makes a communication to a corporate attorney, the communication is likely to be covered by the corporation's attorney client privilege if:
        - The employee acts at the discretion of a superior who also works at the corporation,
        - The employee seeks the advice of council for the purpose of getting legal advice for the corporation,
        - And the communication concerns a matter within the scope of the employees corporate duties.
- 3rd Person Interception of Privileged Information:
    - If the communication is overheard by an eavesdropper or otherwise intercepted, the privilege is not lost if the client took reasonable precautions to prevent disclosure.
    - A client can use an intermediary to communicate his legal problems to the attorney and the privilege will not thereby be lost if the intermediary is useful to obtaining or the rendering of legal service or assistance.
    - The privilege extends to persons employed to assist the lawyer in providing the legal service, including legal secretaries, paralegals, and investigators.
- The privilege holder has the burden of establishing the foundational requisites for it to be upheld.
    - However, sometime the judge may ask for partial disclosure.
- The Court may conduct in-camera review only if the party asserting the exception presents evidence sufficient to support a reasonable belief that in camera review may yield evidence relevant to establishing that the Crime-Fraud Exception prevails.

Waiver:

- This can be achieved by things such as the clients voluntary disclosure of the information. This can also be done to the client's consent to disclose.
- **Rule 502:** Tells how far client waiver extends when there is client's closure.
    - In b, it discusses what happens when there is inadvertent client disclosure.

Physician Patient Privilege:

- There is no provision in Federal Courts for this; however, it exists in many states.
- When we refer to this, we are referring to all kinds of physicians except psychiatrists, psychologists, psychotherapist and the like.
    - Reasons: we want patients to give full disclosure to their patients so they can get adequate diagnosis and treatment,
    - The priv exists because it is considered indecent to have these matters divulged.
    - The jurisdictions that do recognize it only find it to apply in civil cases. The holder is the patient, and if they are unable to assert priv, it can be asserted on their behalf by their personal representative.
        - The primary reason for asserting this is that the patient must consult the physician for purposes of seeking diagnosis or treatment. It is the patient's intent that is controlling.
    - What is covered by this is the confidential communications between doctor and patient. I
        - n some jurisdictions, this encompasses the doctors observations of the patient's condition.
    - This privilege continues after the death of the patient.
    - If a third party discovers the communications, that will destroy the priv unless the third person was needed for diagnosis for treatment.
- Exception: Patient-Litigant Exception:
    - Ex. Personal injury arising from car crash where the plaintiff seeks damages for car crash. IN the lawsuit, the plaintiff automatically loses the doctor patient priv with respect to doctor patient communitications regarding diagnosis or treatment of plaintiffs legs.
        - The exception comes into play whenver a party makes his physical condition an element of a claim or defense.
        - Ex. Of this is *Prink v. Rockefeller Center Inc.*, page 554.
- Patient Psychotherapy Priv:
    - In *Jaffee*, the Corut recognized this priv in Federal Courts.
    - This is a priv covering confidential communications between a licensed physcotherapist and her patients in the course of psychotherapeutic diagnosis or treatment. The professionals that are covered by this priv are not only psychologists, social workers who use psycho therapy etc.
    - Policy: To encourage psychotherapeutic patients to tell all, second for privacy reasons. The court was also very influenced by how all 50 states had recognized this priv.
    - If a 3rd person becomes aware of communication, the priv will not be waived if the third person was assisting the therapist to provide therapy, or if the third person was otherwise reasonably necessary to facilitate communitcation between therapist and patient.
    - There is a patient litigant exception to this.
- **Privilege against Adverse Spousal Testimony:**
    - Applies only in criminal cases.
        - Precludes all testimony by the witness spouse against the accused spouse.
            - For this to be successfully asserted, the two parties must be married at the time of trial.
- **Privilege for Confidential Information in Cases Between Spouses:**
    - Applies to both Criminal and civil cases
    - Covers only those acts or verbalizations intended as a communication b/t spouses
    - The communication must have been made between the spouses during a legal marriage.

        - If there is a 3rd person present, if that 3rd person was necessary for the communication, then their presence will not destroy the communication.
        - If it is intercepted or eavesdropped, that will destroy the privilege unless reasonable precautions were taken by the communication spouse to avoid interception or eavesdropping.
    - Social Policy for these:
        - To maintain the stability of the marriage during its existence,
        - Concerns for privacy
    - Neither will be honored in a criminal case involving accusations by one spouse of criminal conduct against the other spouse.
        - In *Trammel*, wife was going to testify a/g husband to a crime he committed. She could testify to any non-communicative conduct she observed, and any communication husband made to her in the presence of others.
        - THe only holder of the privilege against spousal testimony is the witness spouse, and not the accused.
- **Governmental Privilege:**
    - The government need to only satisfy the trial judge in open court from all the circumstances of the case that there is a reasonable danger that revelation of the information, either in camera or in an open court, will expose military or diplomatic secrets.
        - This cannot be overridden if found.
    - If the government cannot meet this burden in open court, then the trial judge can examine in camera the claimed material if two things happen:
        - The head of the agency responsible for the information must personally decide to claim privilege, and
        - That agency head must file a formal claim of privilege with the trial court.
    - The US President also has a privilege in a Constitutionally based presumptive qualified privilege covering confidential communications not involving state or diplomatic military secrets.
        - This is qualified since it may be overcome by the need for evidence in an impending criminal trial.
        - It is presumptive in the sense that the burden is on the party seeking to get the communications into evidence to rebut the presumption that the privilege exists.
- Governmental Priv to Protect the Identity of Those persons who profide the government with information (confidential informants) regarding crimes.
    - The government is the holder of the priv, not the crime-doer.
        - The purpose of this is to encourage people to give information on the planned commission of crimes.
    - This is a qualified priv. It can be overcome by the accussed showing that getting this information into evidence is critical to the accussed's defense. If the accussed makes such a claim, then the Court will conduct in camera review or hearings with the informant to determine whether the priv should prevail or whther the accused should prevail.
    - This priv cannot be successfully asserted by the govt if the informers identity has already been divulged to people.
        - In relation to the informers priv, the following issue has arisen.
            - At a hearing following a motion to suppress, must the prosecutor disclose the informer's identity when it was the informers identity that officer's relied on to establish probable cause for an arrest and search.
                - The Informer's priv will be upheld if two things are true:
                    - The informer's communication to the officers must bear on the existence of prob cause and
                    - The officer's prelim hearing testimony must satisfy the judge that the officer's relied on good faith upon credible information from a reliable informant.

Writings:
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.

Rule 1006: Summaries can be used in the Courtroom.
Rule 1005: Public Records

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.

- *Sirico:* P did not produce an x-ray. If the counsel is trying to prove the contents of the writing, recording or photograph, the best evidence rule applies.
    - Best Evidence Rule:
        - Is the proponent trying to prove the contents of a writing or photograph?
            - If no, then it will not be overruled.
        - If yes, then what is the evidence that the proponent is trying to produce?
        - Then is this an orginal, a duplicate or other evidence that is testimony or a deposition written against the party?
        - Does the evidence fit given the nature of the foundational requirements imposed by the rule?
            - If it does not fit, then the best evidence rule will be sustained. If it does not fit, then the best evidence rule will not be sustained.
- *Herzig v. Swift:* when the book contained an accounting leger, the court stated that failure to provide the best evidence was not dispositive since they were counsel was not trying to prove the content of the book, but a fact that was subsequently reduced to writing.
    - Best Evidence Rule: (Critical definition here)
        - If a party offers a witness's testimony ot prove a fact, and the fact is one that subsequently was reduced to writing, and if the witness's testimony doesn't expressly say that it is recounted or described in the writing, then the best evidence rule may be triggered, depending on whether the testifying witness had personal knowledge apart from observing the writing or fact, if he has independent knowledge of the fact, then the best evidence rule is not triggered. But if his knowledge of the fact comes from viewing a writing recording or photograph, then the best evidence rule is triggered.
        - Hypo: Y needs to prove that X loved Z, and offers a note saying "I love you Z." IS the best evidence rule triggered? This is a writing they are trying to prove, and by offering the original love letter, it satisfies 1002.
        - Hypo: If Plaintiff offers instead W's testimony that X loves Z, then what? This is other evidence testimony.
        - Hypo: If P offers W's testimony that X loves Z, and the preliminary facts show that W got his knowledge from seeing X and Z's Kodak moments. Best Evidence Rule is not triggered because the testifying person has no personal knowledge aside from the pictures. He has no personal knowledge as to this.
        - What if they offer a string of letters, but not mention love? No, BE Rule does not approve because what it is offered to prove is not evidenced in the writing.
    - Even if . . ., the best effot rule will still be triggered if the legal efficacy of this is affected by the their being a writing—this is talking about things like wills and deeds, things that have to be in writing for it to be legally official.

People v. Enskat:

BE Rule: need to prove the contents the contents of a writing.
They were using the content of the photograph of the moving picture to prove the contents of the photograph.
Whether the prosecutor is trying to prove the content of the writing.
The fil is dependant on the film strip.

- In federal rules, this would be a photograph.
    - Prosecutor is trying to prove the content of a writing or photograph
    - WHAT IS PROSECUTOR TRYING TO ENTER into evidence? A still photograph and officer testimony
        - First look at 1001, then see which one applies, in this case it would be 1003 as a duplicate.
            - If there is an objection under 1003(2), to admit a few stills of an entire film would not represent the content of the entire film.
    - The officer's testimony is other evidence 1004—the officer's testimony would probably fail this because the content of the film is closely related to the evidence of the trial.
- Hypo: Winston is a witness at trial, testifies that Ted the Horse was brown. Attacking council wants to impeach Winston, and offers into evidence the original of Winston's written prior inconsistent statement, that Ted the Horse is white.
    - By this evidence would the best evidence rule be triggered?
    - This would trigger it, because how else could this be achieved
- Is there a hearsay problem if the prior inconsistent statement was offered only for impeachment purposes.

    - This is not hearsay since this is n
- What if a attacking council also offers Winston's out of court statement for substantive purposes to prove that Ted the horse is white—is I thearsay if offerd for substantive purposes? Yes, this is an out of court statement offered to prove the truth of the matter asserted.
    - Will need to give all grounds for rulings.
        - IF it is inadmissible on one basis, then it is inadmissible altogether.

Authentication:

- This is the process by which the proponent of evidence shows that the evidence is what he claims it is. This is only necessary when the identity of a thing or the source of a writing is in dispute. And where it is the identity or source that makes the item of evidence relevant.
    - Most of the time it arises in other documents or writings.
    - Authentication is treated as a conditional relevancy problem. In this, the judge acts as the gatekeeper: asks, could the jury find by a preponderance the conditional fact that the defendant wrote the threatening letter. If the judge not think so, then it is inadmissible and not authenticated. But if the judge thinks it could be found by a preponderance, then admissibility would be for the jury. He would hten instruct the jury, if you find the letter was by preponderance, tehn you can use the letter as evidence. But if you do not find that the letter was written by him by a preponderance, then you may not use the letter.
- IN Common Law, judges used to say a signature was insufficient to authenticate the document.
    - Instead, they relied on extrinsic evidence.
        - That is, any evidence beyond the face of the document.
    - 901(b)(4): This says that a document can be authenticated by unique markings on it. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. Thus you need more than other a signature.

US v. Dockins:

The government tried to introduce evidence of a fingerprint card that smith was dockins. On the card was the letterheard of the Denver PD department, and offered testimony (extrinsic evidence) trying to link smith and dockins.

- the testimony was from a fingerprint expert saying that they were the same.
- However, the card was objected to on authentication, that this was not able to be authenticated as from the DPD.
    - In an admissibility hearing, voi dire, an officer from DPD testifies that the card is an exact copy as the one in the Denver Police files. The trial judge ruled on the admissibility of the card because
    - The trial ruled that the evidence was admissible. THE Judge has to determine by looking at all the evidence to see if the jury could determine if the evidence can be used by jury to find a preponderance of the evidence. Since the jury never got Jansen's testimony (it was only at vio dire), then the card could not aid the jury find by preponderance that this was not a document of DPD.
    - The appellate court found that the document was not properly authenticated since the document could not prove that it came from the DPD.
        - She says htat this is an appellate court gone rogue being overly strict. She wants extrinsic evidence that it could be found by a preponderance. As it is, the federal rules do not insist, if on the face of the document, that it is from the DPD.
            - Under 901b(4), it prolly could be found that it was authenticated.
            - Or even better, 901b7, this is a public record or report. The list under 901 is not an exhaustive list. These are only meant to be guidelines, instead of rules under 901b.
- Self-Authentication under 902:
    - This merely relieves the author of the document from introducing any extrinsic evidence to authenticate.
        - The other side can still dispute authentication, but then the burden is on the adverse party to show why the document was not authenticated.
            - A document inder seal (notarized) would be self-authenticating under 902(2).

First Bank of Denton v. Maryland Casualty Co.:

Mill's people brought suit becaue the insurance company did not pay up when the house burned down. While that matter pending, the Mills died, and the Bank took up the suit.

- THe evidence at dispute is a phone call from an officer, 15 minutes after the house caught on fire, to Mills second house. An unidentified caller answered "Mills residence." Then "JT Mills is not at home."
- According to the plaintiff, he says that the phone call was not authenticated to have reached JT Mill's residence.
    - The Court said that since phone calls are trusted to be accurate, it can be authenticated that this was the in fact JT Mills house.
    - You have testimony by dispatcher that she called the right number, and that this was the residence that was reached.
    - For insurance co. purposes, it is better if JT not answer, but that they got through to the house. To get authentication, you do not need to do everything to prove that it is authenticated, you can use common sense to get it authenticated.
    - In this case, authentication is had, but there is a hearsay issue as well.

        - THIS WOULD be present sence impressions sicne the dispatcher was at the hosue as it was burning, called JT Mills, and was told that he was not there.

Competency of Witnesses:

Article 6 also governs witness competency.
In 601, it says that every witness is competent to be a witness, unless another rule prevents them, or if it is a civil action in which the state law covers it, then the state law trumps it.

- Rule 602-6 are the rules that govern competency.
    - 601-3 apply to all persons.
        - 602 says that in order for a person to be a witness, they must have personal knowledge of the matter they are testifying.
        - 603: in order for a person to be a witness, they must either take an oath or affirm that they will testify truthfully.
        - So if a person fails or refuses to take the oath or affirm that he willl testify truthfully, then he will be incompetent as a witness.
    - 604 governs competency of a person who is an interpreter. In order for the person to be comp as a witness, she must swear or affirm that she will give a true translation.
    - 605: Governsm the comp of witnesses as judges. This says that a judge is not competent to be a witness in the case over which he is presiding.
    - 606: governs the comp of jurors to be witnesses. Get to later.
- When we are talking about witness incomp, we are focusing on some problem with that person. That person might have perfectly admissible testimony, when we discuss admissibility the focus is on the testimony, no the problem in the person.
- Impeaching a witness from incompetency:
    - If a person is imcomp, that means they can give no testimony. If a witness is impeached, he is competent to be a witness, but the impeaching council attacks his credibility and makes it look like his testimony is not believable.

Hill v. Skinner:

P sued D for a dogbight, the P was 4 years old. The only evidence of the dogs attack was the plaintiffs testimony. The judge ascertained the witness's competency in a sidebar by asking questions about truthfulness, memory, do they understand the need to be truthful.

- the child's testimony was that the dog bit him.
- On Appellate court, how would they rule on whether the trial judge erred:
    - According to FRE, truth and perception have a bearing on comp, but not motive and narration.
    - Hypo: same facts, the kid has pk, and will testify that the dog bit him. But the P's attorney says that he wants her to testify that "My friend Annie was bitten by dog last year." This has no bearing on competency, just admissbilty since that is hearsay.

State v. Moore:
The case on hypnotism.
That is testimony about facts recalled and related by the personbefore he underwent hyposis.
The other category of hypnosis is hypnotically induced, or refreshed, recall testimony. This is testimony about facts that a person recalls after hypnosis, and seemingly due to hypnosis.

- Both types of testimony pose unusual unique dangers to the search for truth. Hypnotically induced testimony is very likely to suffer from confabulation, that is, when the person who has been hypnotized, comes up with facts that did occur, but also imagines facts and thinks they are real.
    - Neither the person hypnotized nor anyone else can tell the difference between the facts imagined and the facts that occurred.
    - Another problem is Memory Hardening: the person who has been hypnotically induced becomes extr sure about they are testifying about.
    - Issues have arisen n whether a person is confident for purposes regarding hypnotically induced testimony. \
- 4 approaches to this problem:
    - 1. other than with respect to, a witness who is the accused in the criminal case, most state courts hold that persons are per se incompetent to give hypnotically induced recall testimony.
    - 2. Persons are per se competent to give hypnotically induced recall testimony.
    - 3. Persons are competent to give hypnotically induced recall testimony if certain procedural safeguards have been used.
        - Hypnosis must be conducted by a psychologist or psychiatrist who has special training in hypnosis and is independent of the litigation.
        - The hypnosis is conducted alone in a neutral setting.
        - The hypnosis sessions are videotaped.

1. **Currently Four Approaches**:
    a. Persons are per se incompetent to give hypnotically induced recall testimony.
    b. Persons are per se competent to give hypnotically induced recall testimony.
    c. Persons are competent to give hypnotically induced recall testimony provided certain procedural safeguards are used.
        i. Hypnosis should be done only by psychologist or physiatrist with special training and who is independent from the case.
        ii. Conducted alone in a neutral setting.
        iii. Sessions should be taped.
    d. Courts balance probative value of hypnotically induced recall testimony with prejudicial effect. (403 analysis)
        i. When the witness is the accused, it's not just the 403 balancing test, it's the analysis under the Rock Court test
2. Rock v. Arkansas, 1987: Vicki was charged with the manslaughter of her husband but couldn't recall the details of the shooting. Following hypnosis she recalled that the gun discharged when the husband grabbed her arm.
    a. Accused is the witness, and she wants to testify on her behalf about hypnotically induced testimony—this is ok.
    b. Safeguards need to be made available: procedural safeguards for hypnosis, traditional means at trial (opportunity to cross examine, opportunity to introduce corroborative evidence)
    c. Rationale:
        i. Inaccuracies in the testimony can be reduced by procedural safeguards, e.g. taped, specialist, jury instructions.
        ii. Traditional means of assessing the accuracy of a witnesses' testimony are still available – cross exam, etc.
3. **Bottom Line Rules**:
    a. It is unconstitutional to have a rule that witnesses who are also the accused are per se incompetent to give hypnotically induced recall testimony.
        i. Becomes discretionary with the courts – are safeguards sufficient, right to testify might outweigh insufficiencies.
    b. Whether the right is going to be upheld or not, must be determined on a case by case basis taking into account the following factors.
        i. Constitutionally based right to testify on own behalf.
        ii. Whether procedural safeguards were used.
        iii. Whether traditional methods of testing evidence were available to help assure accurate testimony
        iv. Relevancy of accused testimony to exonerating her.

B. **Competency of Juror as a Witness**:
1. **FRE 606 – Competency of Juror as Witness**:
    a. **606(a)** – Juror competency to be a witness at trial:
        i. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
    b. **606(b)** – Juror competency to be a witness during an inquiry into the validity of a verdict or indictment:
        i. During an inquiry into the validity of a verdict or indictment a juror is not competent to testify (cannot testify) as to three things:
            - Any statement or matter occurring during the course of jury deliberations.
            - The affect of anything upon the juror's or another juror's mental or emotional status as influencing assent or dissent to the verdict or indictment.
            - Juror mental processes in connection therewith.
        ii. **Three Exceptions, 606(b)** – Juror is competent to testify:
            - Whether any extraneous prejudicial information was improperly brought to the jurors attention.
                - ✓ Extraneous prejudicial information – extra record sources regarding matters not generally known.
                - ✓ Ex. newspaper or tv report on a matter not considered common knowledge.
            - Whether any outside influence was improperly brought to bear upon the jurors. Exception generally covers:
                - ✓ Efforts by outsiders to interfere with jury deliberations.
                    a. example: bribing or threatening jurors
                - ✓ Jury contacts with outsiders that might interfere with jury deliberations.
                    a. example: Juror/judge contact, attorney contact.
            - Whether there was a mistake in entering the verdict onto the verdict form.

iii. Juror affidavit or evidence of juror's statement cannot be received/admitted

2. Tanner v. US, 1987: Dealing with the exception for outside influences, D moved for a new trial on the grounds that one juror had advise D of another juror's alcohol and drug use during the case. Court held that jurors are incompetent to testify in such a hearing regarding juror use of drugs and alcohol during trial.
    a. D argued that alcohol and drugs are external because outside jurors until they consume them.
    b. Physical or mental incapacity of a juror is an internal influence not external.
    c. Good **policy rationales** for what seems to be an odd result:
        i. Slippery slope: if the physical or mental capacity of a jury is an outside influence, then everything from what juror ate to whether he had a fight with his wife or bad night's sleep could become subject of juror testimony.
        ii. If the Court is not able to take this position, the stability of verdicts would be impacted, this could impair full deliberations in the jury room, and the jury's willingness to return an unpopular verdict.

II. **JUDICIAL NOTICE**:

A. **Judicial Notice**: A means of establishing certain kinds of facts without introducing evidence.

B. Common Law – Two Kinds of Judicial Notice:
    1. **Notice of Adjudicative Facts**:
        a. Think common knowledge.
        b. Fact that concerns the particular facts that gave rise to the particular law suit.
        c. Who did what, when and why.
    2. **Notice of Legislative Facts**:
        a. Think policy. General assumptions about conditions or behavior that judges sometimes rely on in marking big policy judgments
        b. Relevant to the litigation but also transcend the case before the court.
        c. Typically sociological, economic, political, or scientific assumptions.

C. Note: Federal rules only expressly deal with judicial notice of adjudicative facts – **FRE 201**.

D. **Four Questions Concerning Judicial Notice**:
    1. **Who Takes Judicial Notice**?
        a. Only judges.
        b. Can be done at any stage of civil litigation (including appellate courts).
        c. In criminal, post-trial facts cannot be taken if it would go against the interests of the accused
    2. **What Circumstances Make Judicial Notice Proper**?
        a. **FRE 201(b)** requires that for an adjudicative fact to be noticed, it must be one not subject to reasonable dispute.
            i. **201(b)(1&2)** – not subject to reasonable dispute:
                - (1) not subject to reasonable dispute when generally known within the territorial jurisdiction of the court, or
                - (2) the fact is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
        b. Hypo: Could a federal court in Arkansas take judicial notice that Detroit is north of Windsor?
            i. Yes, 202(b)(2) fact is capable of accurate and ready determination by a map.
            ii. 201(b)(1) probably couldn't be used because it's not likely to be generally known
        c. Hypo: Movie star is being sued by ex for increase in financial support for their child. No evidence is offered by ex relating to stars finances. Can judge take judicial notice of the adjudicative fact that the star is the wealthiest man in Hollywood based on gossip columns?
            i. No, fact is subject to reasonable dispute.
        d. Hypo: Can a judge based on own personal experience take judicial notice that after an operation the effects of general anesthetic can make the patient unable to give a voluntary confession?
            i. No, personal experience does not satisfy the requirement of 201(b). Only 2 allowable roots for avoiding reasonable dispute
        e. Hypo: Could a judge in federal court in MI, take judicial notice that Vernors is a ginger ale drink with carbonation?
            i. Yes, 201(b)(1) – adjudicative fact that is generally known in the jurisdiction.
    3. **How is Judicial Notice Achieved Procedurally**?
        a. **201(c)**: The judge has discretion to take judicial notice of adjudicative facts whether requested to or not.
            i. Judge need not notify parties before taking judicial notice of an adjudicative fact on his own.
            ii. can do it at his own accord
        b. **201(d)**: The judge must take judicial notice of adjudicative facts if requested to do so by a party, provided that the judge is supplied with the necessary information established by the requirements of 201(b) [provided facts to show that the judicial notice won't be subject to reasonable dispute]
        c. **201(e)**: A party is entitled upon timely request to an opportunity to be heard upon the propriety of taking judicial notice.
            i. Request may be made after judicial notice has been taken.

ii. if the judge doesn't give you advanced warning that he is taking judicial notice of adjudicative facts, then you can make a timely request after the judge takes notice

4. **What is the Jury's Role Once a Fact is Judicially Noticed**?
   a. **201(g)** – civil cases: the judge must instruct the jury to accept the judicially noticed fact as conclusive.
      i. party that is disadvantaged by this fact CANNOT introduce any evidence in rebuttal as contradictory evidence
   b. **201(g)** – criminal case: judge must instruct jury that it may, but is not required to, accept a fact judicially noticed as conclusive.
      i. party damaged by the judicial noticed fact can introduce evidence rebutting

E. **Judicial Notice of Legislative Facts**:
1. The facts upon which judges rely in making policy judgments.
2. **Standard**: A legislative fact should be more likely than not true.
3. Brown v. Board as example: US Supreme Court took notice of social science studies at the time that sociological studies showed that when school children were racially segregated, it caused inferiority feelings that impeded the ability to learn.
4. In most cases legislative facts are not in the record:
   a. Process done informally and invisibly.
   b. Parties occasionally bring legislative facts to record.
      i. Oral argument or Brandies (about the data behind legislative fact) brief.

III. **BURDEN OF PROOF AND PRESUMPTIONS**:

A. **Burdens of Proof – how much evidence needed to survive legally determined thresholds**:
1. Think – In order to get past a summary judgment you must meet the burden of production; in order to win the case you must meet you burden of persuasion.
2. **Two Types**:
   a. **Burden of Producing Evidence**:
      i. Criminal Case – The party who has the burden of production must introduce enough evidence on a necessary fact so that a judge can find that a jury can find by beyond a reasonable doubt that a necessary fact is true.
      ii. Civil Case – The party who has the burden must introduce enough evidence on a necessary fact so that the judge can find that the jury (the trier of fact) can find that the necessary fact is true by a preponderance.
   b. **Burden of Persuasion**:
      i. Criminal Case – burden to introduce enough evidence on a necessary fact to prove that it is true by beyond a reasonable doubt.
         • Necessary fact: the statutorily defined elements of a crime.
      ii. Civil Case – burden to introduce enough evidence to establish that a necessary fact is true by a preponderance.
         • Occasionally there are variations to clear and convincing evidence.
         • necessary fact: fact that is likely to affect the outcome of the case
3. Tell a party how much evidence she has to introduce in order to fulfill certain legally designated thresholds.
4. **How to know which party has the burdens**?
   a. In civil cases it is common for both burdens to be on the same party. Usually is the party who has the burden of pleading.
   b. In a criminal case the prosecutor has both burdens with respect to EACH necessary fact that constitutes as an element to the crime being charged
      i. If the accused raises a defense, the defense usually has only the burden of production.
         • Burden of persuasion will stay with the prosecutor.
      ii. If the accused raises an affirmative defense.
         • Both burdens may be on the accused.
5. What happens if a party doesn't meet is burden of production:
   a. Civil case – it will not survive a motion to dismiss, directed verdict, summary judgment—case won't go to trial
   b. Criminal case – the judge will direct a verdict of acquittal for the accused.
6. If meets the burden of production, THEN, have to meet the burden of persuasion: What happens if a party doesn't meet its burden of persuasion:
   a. Civil and criminal cases: Party loses.
7. Smith v. Rapid Transit, 1945: P was injured when she was forced to hit a parked car when a bus pushed her off the road. Court held that the probability that the bus was D's was not enough to meet the burden of production.
   a. if she survived the burden of production, would still have to survive the burden of persuasion
   b. the burden of persuasion would be to persuade the jury by a preponderance that the offending bus was Defendants

B. **Presumptions**:

1. Definition: A shortcut to proof, relieves the proponent of having to introduce some proof.
2. **McCormick Definition**: A presumption is a standardized practice under which certain facts (basic facts) are held to call for uniformed treatment regarding their effect as proof of other facts (presumed facts).
3. If you introduce evidence and establish the existence of Fact A (basic fact), then the operation of the presumption is that Fact A will be held by the court to establish also the existence of Fact B (presumed fact), unless D is able to rebut the effect of the presumption.
    a. proponent puts into evidence Fact A (basic fact), then Fact B (presumed fact) will be presumed.
4. **Four Rationales for Presumptions**:
    a. <u>(1) Fairness</u>:
        i. Typically to correct an imbalance that results when one party has superior access to proof.
    b. <u>(2) Economic or Social policy</u>:
        i. E.g. if proponent establishes possession of Greenacre by Sam, it will be presumed that Sam owns Greenacre.
    c. <u>(3) To avoid an impasse</u>:
        i. Where there is no way to solve an issue.
        ii. E.g. Plane crash where everyone dies at once, but judges have to determine who died first. Decision made arbitrarily by a presumption.
    d. <u>(4) Probability</u> (most common):
        i. Over time judges discovered that whenever parties established Fact A, Fact B was probably true.
5. Four Examples:
    a. Basic Fact – Proponent proves that a letter is regularly and properly addressed and mailed.
        i. Presumed Fact – That the letter was received by the addressee.
        ii. based on probability
    b. Basic Fact – Prove that a vehicle lawfully stopped is struck from the rear by a second vehicle.
        i. Presumed Fact – The driver of the second vehicle was negligent.
        ii. based on probability
    c. Basic Fact – Prove that a person has been absent for 7 years without explanation or any communication with family or friends.
        i. Presumed Fact – That the absent person is dead.
        ii. based on probability
    d. Basic fact--Child conceived and born during wedlock.
        i. presumed fact: the child is legitimate.
        ii. social policy because law favors children being legitimate
6. **Presumptions in a Civil Case**:
    a. In a civil case, a real presumption has the effect of shifting burdens of proof.
        i. However, there is an ongoing dispute as to whether the presumption should shift both burdens of proof to the other party, or only the burden of production.
    b. FRE 301 only governs in civil cases
    c. <u>Federal Court</u> – Governing Rule is **FRE 301**:
        i. In a **civil case**, a presumption will have the effect of shifting only the burden of production.
        ii. The burden of persuasion stays with the party that originally had it.
        iii. FRE 301 governs litigation where federal substantive law governs the claims or defenses.
    d. **FRE 302**: tells you what to do when a factual determination in a federal suit is governed by substantive state law.
        i. If on that factual issue that comprises a claim or defense, you should look at the applicable state law for any governing presumptions.
        ii. If substantive state law governs an element of a claim or defense of the federal litigation, you look to state law to determine the existence of any relevant presumptions and how they work.
    e. **Rebutting a Presumption**: two methods!
        i. <u>Basic Fact</u>: Opposing counsel can introduce evidence to rebut the basic fact.
            - If opponent is successful the presumption never arises in the first place.
            - In this civil case the judge will instruct the jury – if you find basic fact A, then you must find presumed fact B, but if you do not find fact A then there is no presumption.
        ii. <u>Presumed Fact</u>: Opposing counsel can introduce evidence to try to rebut the presumed fact. (trying to show the presumed fact isn't true)
            - destroys the presumption, but after the presumption has arisen
            - **Bursting Bubble Jurisdictions** – if the opponent introduces enough evidence to show the non-existence of fact B, the presumption (the presumed fact) is burst and you are left with conflicting evidence.
                1. most federal courts are bursting bubble jurisdictions
            - If D meets his shifted burden of production, he automatically bursts the bubble.

- Then, there is just conflicting evidence left

f. Hypo: P files suit in federal court against Sam, jury trial. P needs to prove that Sam received a letter from P. If there are no other complicating facts, assume that P would have the burden of production and persuasion on the issue of whether Sam ever got that letter. (Burden of production: Means that P would have to introduce enough evidence to determine by a preponderance that Same received the letter. Burden of persuasion: persuade the jury by a preponderance that Sam did receive the letter)
   i. Complicating factors:
      - Presumption that if you prove the basic fact that the letter was properly addressed and mailed, then it will be presumed that the letter was received by the addressee.
      - Federal court governed by FRE 301 → presumption shifts the burden of production from plaintiff to Sam.
         1. burden of persuasion will stay with the plaintiff
         2. this means that Sam will have to produce enough evidence that the jury could conclude by a preponderance that Sam didn't receive the letter
   ii. Complicating Factor – bursting bubble approach.
      - If Sam produces enough rebuttal evidence that a judge could find a jury could find by a preponderance that Sam did not receive P's letter, the presumption bursts.
   iii. Sam's rebuttal evidence is sufficient to pop the bubble when it is also sufficient for Sam to meet his shifted burden of production.
   iv. When the bubble is popped, then there is just conflicting evidence in the case—then up to the jury to weigh the conflicting evidence

g. Legille v. Dann, 1976: Ps were applying for patents and the date which the applications were received was important. Ps offered the presumption that the mails run properly when a letter is properly addressed and supplied with postage. D offered the presumption of the regular practice of the office. Court held that **the basic fact of each presumption burst the bubble of the other and thus no presumption held**.
   i. Illustrates just one approach used by federal courts in bursting bubble jurisdictions dealing with dueling presumptions where both presumptions are based on **probability**.
   ii. The basic fact of one side bursts the presumption of the other side, and vice versa.
      - Each basic fact is one side meeting its shifted burden of production.
   iii. In 301 jurisdictions, the appellate courts decision is a common approach, if they are both based on probability. (Popping both bubbles)
   iv. NOTE: Some jurisdictions take a different approach when there presumptions are based on social policy. Then, instead of the bursting bubble approach, courts will weigh the two presumptions.

- In 301 jurisdictions, a common approach to the problem from *Legille* is the one adopted by the appellate court, and that is to treat the presumptions as basic facts that show an evidentiary showing.
  - This approach is used only where both presumptions are based on probability.
  - If both assumptions are not based on probability, but on something like social policy, then the court will pick the presumption with the stronger social policy.
  - A common approach where there is a basis of presumptions on social policy, the federal courts give credence to the one that is stronger
    - So if the social policy undergirding one presump is stronger than the other, then the courts will uphold the stronger of the two.
  - In Federal Court, a real presumption has the effect of shifting the burden of presumption, but not the burden of persuasion.
  - In a civil case, a real presumption has the burden on the jury to find the presumed fact—unless the opposing party is able to rebut the opposing facts.
  - There is sometimes terminology of a conclusive presumption.
    - This is not a real presumption—this is instead a substantive state of law.
      - An example of this is that a child below the age of seven cannot commit a crime.
  - An inference is a deduction which may be made form the basic facts that have been permuted.
  - In criminal cases, the possibilities are that we are dealing with a permissive presumption, or a mandatory presumption.
    - There is a basic const problem: it would deprive the accused of a jury trial with respect to each element of the crime.
- A permissive presumption is the only one operating against the accused, and it actually is the same thing as an inference in a civil case.
  - That is,the jury may infer from the established basis of facts an inferred fact. There is no shifting of burdens with a permissive presumption.
- A mandatory presumption: if the basic fcts are proven, the trier of fact must find it so. These shift one or more burdens of proof.
  - This is const if it meets the **rational connection test**:

- The permissive presumptiuon will be const if there is a rational way, considering all the evidence in the case, that a jury could infer the presumed fact form the proven basic facts.
- Generally unconst if they operate against the accused.