Evidence

I) Relevance

A) **Rule 401. Definition of "Relevant Evidence"**: "Relevant evidence" means evidence having **any tendency** to make the existence of any fact that **is of consequence** to the determination of the action more probable or less probable than it would be without the evidence.

1) Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved?
2) The standard of probability under the rule is "more * * * probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, "A brick is not a wall"
3) Probative value: the tendency of evidence to establish the proposition that it is offered to prove. Relation to a fact that you are trying to prove. Rational relation or ***logical relation*** to prove a matter sough to be proved. (Only tends to prove consent) Does this evidence make it either more or less likely that the disputed fact is true?

4) Characteristics
   a) Relevance depends on what the applicable law is. What is the proposition trying to be proved.
      i) Legal irrelevance: The item in question dos not tie in with the legal elements for a claim or defense.
   b) Relevance v. weight
      i) Judge determines relevance
      ii) Jury determines the weight
   c) Evidence is relevant if it would make some fact more or less probable (even by a small amount) with the evidence than without the evidence.
   d) Instances where evidence is really irrelevant is really rare.
   e) The issue does not have to be in dispute in order for the evidence to be admissible: eg, the D admits liability:
      i) In some circumstances the evidence is still admissible: to give the jury a more complete view of the facts.

5) "Conditional" relevancy: In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. Rule 140(b).

6) Direct evidence: Evidence which if believed, resolves the matter in issue.(I saw A stab B)
   a) Circumstantial evidence: may be testimonial, but even if the circumstances depict are accepted as true, additional reasoning is required to reach the desired conclusion. Issue of A stab B: I saw A fleeing the seen where B was stabbed. Circumstantial requires an inference to be drawn

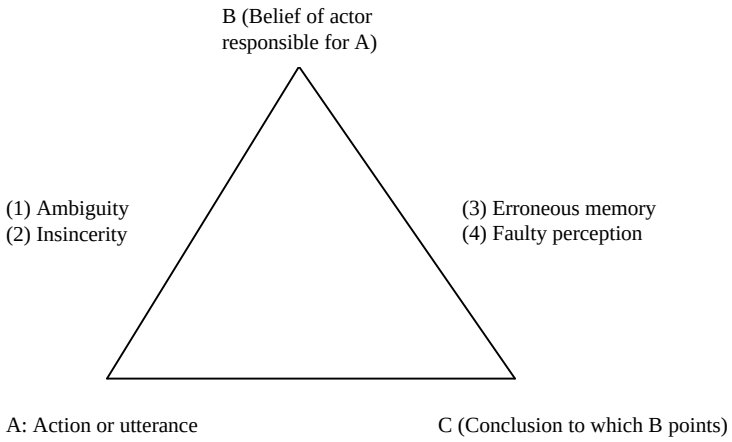
B) **Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**: **All relevant evidence is admissible**, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.
   1) Exceptions to admissible relevant evidence
      a) Those things precluded by the constitution, statutes, and congress

C) **Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time:** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
   1) Six exceptions when the probative value of the evidence is substantially outweighed by:
      a) Unfair prejudice
      b) Confusion of the issues
      c) Misleading of the jury
      d) Undue delay
      e) Waste of time
      f) Cumulative evidence

   2) These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.
   3) The rule does not enumerate surprise as a ground for exclusion, the granting of a continuance is a more appropriate remedy than exclusion of the evidence.
   4) In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.
   5) Balancing the probative value with unfair prejudice or the other 403 exclusions is a discretionary determination (Old chief case).
      a) The ruling of the TC will usually be affirmed
      b) The TC is in a better position than the AC to judge the evidence.

II) Hearsay

A) Introductory Note: The Hearsay Problem
1) The factors to be considered in evaluating the testimony of a witness are perception, memory, narration, and sincerity.
   a) Cannot cross-examine the party making the assertion to test their:
      i) Perception: test the witnesses recreation (Did the salesman accurately perceive who he sold the poison to)
      ii) Test their memory (Does he really remember)
      iii) Test their sincerity (Is he sincere in his belief)
      iv) Narration: Do we actually understand what the witness said. (Is he really saying what he means, his ability to communicate)



2) Three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.
   a) Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the general requirement that testimony be taken orally in open court. The Sixth Amendment right of confrontation is a manifestation of these beliefs and attitudes.
   b) (3) Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental.

3) Since no one advocates excluding all hearsay, three possible solutions may be considered: (1) abolish the rule against hearsay and admit all hearsay; (2) admit hearsay possessing sufficient probative force, but with procedural safeguards; (3) revise the present system of class exceptions.
   a) (1) Abolition of the hearsay rule would be the simplest solution. The effect would not be automatically to abolish the giving of testimony under ideal conditions. If the

declarant were available, compliance with the ideal conditions would be optional with either party.

b) (2) Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards. The bases of the traditional hearsay exceptions would be helpful in assessing probative force. This approach would give too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases.

c) (3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

4) Confrontation and Due Process

a) An accused is entitled to have the witnesses against him testify under oath, in the presence of himself and trier, subject to cross-examination; yet considerations of public policy and necessity require the recognition of such exceptions as dying declarations and former testimony of unavailable witnesses. the Court began to speak of confrontation as an aspect of procedural due process, thus extending its applicability to state cases and to federal cases other than criminal.

5) Hearsay and relevance connection: Hearsay and Relevance inter-relate b/c some statements if not offered for TOMA, are irrelevant. However some statements or conduct is relevant even if not offered for TOMA.

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

1) (a) **Statement**. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
2) (b) **Declarant**. A "declarant" is a person who makes a statement.
3) (c) **Hearsay**. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
4) (d) **Statements which are not hearsay**. A statement is not hearsay if—

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

5) Rule 801(d)(1) Explanation:
   a) (1) Prior statement by witness. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth.
   b) The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay.
   c) (B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

C) Not hearsay

1) Statement not offered to prove the **truth of the matter asserted**
   a) Statement offered only to prove the fact that the statement was made (Where that fact by itself is relevant).
   b) If the making of the utterance is the ultimate thing sought to be proven, rather than the device for proving that thing, the suspicion of hearsay attaches the least
      i) Printing of libel and the speaking of marriage vows
      ii) This is a verbal act of independent legal significance.
   c) US v Rhodes p. 119: The evidence was not offered to prove that the D was a spy, but to show that the D had an inordinate Soviet interest; This is a debatable theory

2) Verbal act of independent legal significance
   a) The verbal act creates the legal significance. It is the fact that the statement is made that creates the K.
   b) The statement is a "verbal act", or an operative fact that gives rise to legal consequences.
   c) Verbal part of the act: Words that accompany an ambiguous physical act (The words that accompany the payment give the payment its particular legal effect.)

3) Circumstantial evidence of the declarant's state of mind:
   a) Not actually trying to prove that the declarant is the "pope", but their state of mind.
   b) Direct evidence of state of mind: the party actually says what her state of mind is (eg. I am afraid). Falls under 803 (3).

4) Circumstantial evidence of state of knowledge
   a) Knowledge or effect on the hearer: if the statement is offered to show that the listener was put on notice, had certain knowledge, had a certain emotion, or behaved reasonably or unreasonably
   b) Potential knowledge of the hearer (The hospital should have known)

c) Knowledge of the speaker.

5) <u>Not a statement</u>

a) **Nonassertive conduct**: The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that **nothing is an assertion unless intended to be one.**
   i) It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration.
   ii) The burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility.

b) **A person's silence** will be treated as a statement only if it is intended by the person as an assertion.
   i) But a person's silence in the face of accusations against him, where the silence is offered to show the accusation is true, usually be held to be intended as an assertion (But the hearsay exception for admissions will usually apply anyway).

c) **Absence of complaints**: The fact that one or more people have not made complaints about a situation will not usually be treated as the equivalent of a statement by them that there is nothing to complain about, therefore, usually admitted. Silver

d) Machines: Not a person

e) Animals: not a person

6) Exempt: Can be admitted both for the fact that the statement was made and for the truth of the matter asserted.
   a) Prior statements: 801(d)(1), three kinds of statements.
   b) Admissions: 801(d)(2), five kinds of statements.

III) Exceptions to the hearsay rule

A) Inherent grantees of trustworthiness given the nature of the statement

	804 (b)(2)	803(1)	803(2)	804(b)(1)
Perception	X	X	X	T
Memory	X	T	?	T
Sincerity	T	T	T	T
Narration	X	X	X	T

1) X means that there is no guarantee that the statement is accurate
2) T Means there is an implied guarantee of accuracy.

803 exceptions to the hearsay rule apply even though the declarant is available as a witness.

B) **Present sense Impression and excited utterances**

1) Present sense impression rule 803(1): A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
   a) The underlying theory is that substantial contemporaneity of event and statement negative the likelihood of deliberate of conscious misrepresentation.
   b) Look at the time lapse between the event and the statement (immediately thereafter).
   c) If the party making the statement states an opinion about the other person, or the statement is solicited, this may affect the weight in determining admissibility.
   d) Permissible subject matter of the statement is limited under exception to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In excited utterances, however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage.

2) When the person testifying does not actually see the event happen, but the person making the statement says it just happened:
   a) Problem: Need to prove if the event actually just happened and the statement is the only proof.
   b) Rule 104(a): Allows bootstrapping where the condition can be proven by the statement itself. The court can base its admissibility determination on the hearsay statement itself.
   c) See note p. 150
   d) Bootstrapping is also available for a determination of personal knowledge.

3) **Excited utterance rule 803(2):** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

a) The theory is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.
b) The standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor."
c) Participation by the declarant is not required: a nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor.
d) On occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing,"

4) Both of these exceptions are used to get child testimony in domestic cases
   a) Some courts, because of pressure, may be more willing to allow this type of testimony under these exceptions.
   b) There may be a problem with the confrontation clause of the 6th amendment.

C) **Admissions (exemption to the hearsay rule) 801(d)(2)**

1) 801(d)(2): A statement is not hearsay if the statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

2) A party's words or acts may be offered as evidence against him, even though these would be inadmissible hearsay if said or done by someone other that the party.
   a) Distinguish from a declaration against interest: An admission need not be against the party's interest, and may be self serving.
   b) An admission can contain an opinion or conclusion of law and does not have to be based on the maker's first hand knowledge.
   c) Rational of the exemption is not the trustworthiness of a statement that was made against the person making it, but the adversarial system itself.
   d) The statement has to be offered by the opponent, a party cannot offer the statement on behalf of themselves.

3) Rule 602 (personal knowledge), Rule 701 (opinion), and the best evidence rule do not apply to admissions by a party opponent.

4) Admission by a party opponent is a very powerful tool because many hearsay rules do not apply:
   a) Any statement by a party can be admitted.
   b) The party making the statement can always get up and testify about the statement, although a party in a criminal case may not want to testify for other reasons.

5) Independent proof of agency: There must be independent evidence, other than the statement itself, that the person qualifies as an agent and the statement was within the scope of employment.
   a) The court can take the statement itself into account, but the majority requires that (and the rule requires) that there also be independent evidence: Just because someone says they are an agent or are authorized does not mean that they actually are.

6) Five categories of statements
   a) (A) A party's own statement. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to represent affairs. Mahlandt p. 175
      i) A party's conduct, even if intended as an assertion, is admissible.
   b) (B) an admission may be made by adopting or acquiescing in another person's statement.
      i) While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about."
      ii) Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. Reed p. 165: Mahlandt, Hoosier 167 (Implied admission by silence: Carlson 170.
      iii) In criminal cases, the D's failure to respond to accusations made by the police while the D is in custody are not admissible as adoptive admissions.
   c) (C) a statement authorized by a party to be made. The question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. Mahlandt
   d) (D) statements made by agents, as admissions, by applying the usual test of agency. Mahlandt.
      i) Statements made arising from a transaction within his authority are authorized admissions.
      ii) The proponent of the statement will have to show other evidence, other than the statement itself, that there was an agency relationship.
   e) (E) statements of co-conspirators to those made "during the course and in furtherance of the conspiracy". A statement made by one co-conspirator is admissible against other members of the same conspiracy, so long as the statement is made (1) during the course of the conspiracy, and (2) in furtherance of the conspiracy. Bourjoulay 190. (Doerr 187 did not qualify)

i) During the course of: Statement made after the conspiracy has ended are admissible only against the declarant (after arrest).
ii) In furtherance: Only if it was made to advance the conspiracy's objectives (But not strictly complied with.
iii) There is no need to charge conspiracy.
iv) Procedure: it is the judge who decides if a conspiracy has been shown by a preponderance of the evidence. I making the determination, he con consider the statement itself (Unclear whether there must be additional evidence).

f) Implied admission by conduct ie. suborn perjury: McQueeny: nonassertive conduct

7) A prior statement of a witness at a trial or hearing which is inconsistent with his testimony is, of course, always admissible for the purpose of impeaching the witness' credibility.

D) **State of mind**: 803(3)

1) A statement of the declarant's **then existing** state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), **but not including** a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

2) This exception is essentially an extension of the present sense impression and the excited utterance exception.
3) Characteristics
   a) **Presently existing**: The statement must relate to the declarant's presently existing state of mind, not a prior mental or emotional state.
   b) **Surrounding circumstances**: If statement of present mental state includes reference to surrounding circumstances, the entire statement will normally be admitted, but with a limiting instruction (Can't use the statement as proof that the husband is an adulterer)

4) **Hillmon Doctrine: Proof of subsequent event**: Rule also applies where a declaration of present mental state (Especially intent) is offered not because the mental state itself is in issue, but because the mental state is circumstantial evidence that a subsequent event took place.
   a) Can be used to show intent or future conduct of the declarant, not the future conduct of another person.
      i) Can infer that he actually carried out his intent.
   b) **Cooperation of another**: If the statement of present intent concerns an act which requires the cooperation of another, most courts will allow the statement. However, the courts usually require that there be independent evidence either that the declarant actually did the act, or that the third person actually participated. Pheaster Case.

5) Statements of memory or belief to prove the fact remembered or believed are excluded:

a) Not exceptions to hearsay when offered to prove that the past action or event took place.
b) Ex: I believe my husband poisoned me cannot be offered to prove the poisoning, even though it is a present state of mind.
c) Intent (Hillmon) coupled with recital of past acts: If the statement is mainly an expression of intent to do a future act, the fact that it contains a brief recital about some past, relevant, fact will not cause the statement to be excluded. This is especially true where the declarant explains a past motive for his contemplated action.

6) Guarantee of trustworthiness
   a) Sincerity element, memory: The declarant's then existing state: There is no time lapse, has to be the state of mind at the time of the making of the statement.
   b) Necessity: Only that person can tell you what their state of mind is.

7) Problems with this exception
   a) The statement may tend to prove other things also. May show more than just the person's state of mind.
   b) Party could ask for a limiting order or get the statement excluded under 403 as prejudicial (if the jury would use the statement for impermissible purposes).

8) Zippo v. Rodgers
   a) This deals with a public opinion poll
   b) 703: advisory committee note: admissibility of expert testimony.
   c) Also see the second sentence of rule 703.

E) **Medical diagnosis: 803(4)**

1) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as **reasonably pertinent to diagnosis or treatment.**

2) These statements are allowed if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes.

3) Statements as to fault would not ordinarily qualify under the reasonably pertinent language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light.

4) Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.
   a) A statement made **by** a third person (ie., a friend or relative of the patient) is also covered, if made to help the patient get medical treatment.

5) Statements to a physician consulted only for the purpose of enabling him to testify are included (Not covered by the common law exception). This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field. The statement can be for diagnosis only and can be cross-examined for bias.

6) Question of what is or what is not pertinent for treatment or diagnosis:
   a) Usually follow the intent in the advisory committee note: Leave out the part relating to fault.
   b) Rule has been expanded in cases dealing with child abuse. "Identity of the abuser could be relevant to the diagnosis or treatment."
   c) Also extended to an assailant in an adult case because the victim was bitten and necessary to keep the assailant out of the hospital.

F) **Prior identification**
1) 801(d)(1)(c): A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (c) one of identification of a person made after perceiving the person.

2) This statement is substantively admissible if the declarant testifies at trial and is subject to cross-examination. Unlike a prior inconsistent statement, a statement of identification is admissible under this provision even though it was not made under oath or at a formal proceeding.

3) Would not apply if the declarant is unavailable because the statement would be untested hearsay (must be subject to cross).
   a) If the person cannot remember it is still admissible because this is not an 804 exception.
4) See US v. Owens: Look at the underlying purpose of the rules.
   a) Covers all kinds of identification
   b) Lineups must be carried out correctly or they can be excluded under 403 as not probative.

G) **Recorded recollection**: Present recollection refreshed and past recollection recorded (**803(5)**)
1) A memorandum or record concerning a matter about which a witness once had knowledge but now has **insufficient recollection** to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

2) Four requirements under this rule
   a) **First hand knowledge**: The memo must relate to matters of which the witness once had first-hand knowledge

b) **Made when fresh in memory**: The record must have been made when the matter was fresh in the witness's memory. Even a record made several days after the event may be sufficient if there is evidence that the person making the recording would still have a clear memory of it.
c) **Impaired recollection**: The witness's memory of the event recorded must now be impaired. If he can clearly remember the vents then he must testify from memory rather than have the writing admitted. (Must merely have **some** impairment of memory)
d) **Accurate when written**: The witness must testify that the record was accurate when it was written.

3) **Status as exhibit**: The record does not become an exhibit. The theory is that the writing is in lieu of testimony, so it should not be given greater weight than testimony. But the record is evidence (This makes the past recollection recorded different from a document used to jog the witness's memory under the present recollection refreshed exception- the later is not evidence but is merely used to stimulate testimony)

4) The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them.

5) **Multi party problem**: If A knows the facts and B records them, A and B will probably both have to testify at the trial for the record to be admissible: A will testify that the facts he told B were the ones the he, A, knew to be accurate; then B will testify that he accurately recorded them.

6) No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording is entirely consistent with the exception.

7) It is Ok if it someone else's report if it was adopted by the witness.
   a) Can use any report to refresh past recollection.

H) **Business records (Records of a regularly conducted activity): 803(6)**
1) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, **made at or near the time by**, or from information transmitted by, **a person with knowledge**, **if kept in the course of a regularly conducted business activity**, and **if it was the regular practice of that business activity to make** the memorandum, report, record or data compilation, all as shown by the **testimony of the custodian or other qualified witness**, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation **indicate lack of trustworthiness**. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

2) Requirements
   a) Routine of business: The record was made in the routine of the business
   b) Knowledge: The record was made by, or from information supplied by, a person with personal knowledge of the matter recorded and who is working in the business; and
   c) Timeliness: The entry was made "at or near the time" of the matter recorded.

3) **Purpose and policy**: Businesses use records and rely on their accuracy. The rules are aligned with modern business practice. The opposing party could always provide proof as to the record's inaccuracy.
   a) **Reliability:** supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

4) **Person supplying the information**: The person who originally supplies the information must satisfy two requirements
   a) He must have first hand knowledge of the facts reported; and
   b) He must do his reporting while working in the business: if the source of the information is not an employee of the business that keeps the record, it may not be admissible (Statements made by a witness to an accident used to compile a police report, will not be admissible: Johnson v. Lutz)

5) **Regular course of business**: even reports that are rarely made may qualify.
   a) If the business makes a practice of making accident reports, the exception will apply even if accidents happen rarely.
   b) But rareness within a certain type of record keeping may suggest that the particular type of record is untrustworthy.

6) **Untrustworthy**: If the surrounding circumstances make the record seem untrustworthy, the court has the discretion to exclude it. If the facts indicate that the business had a strong motivation to make a self-serving record.
   a) Train crash case: The railroad made an internal investigation and there was a strong incentive to cover up.

7) **Absence of entry**: 803(7): If the record would otherwise qualify, it may usually be admitted to show that a particular entry is absent, if such an entry would normally have been made had the particular event occurred.

8) Oral reports: Most courts hold that the record must be in writing.

9) **Proving the record**: The business record is not self-admitting. A sponsoring witness must be called who can testify that the requirements of the rule are met. Someone who knows about the record keeping routine who can testify that the records were appropriately kept in the particular situation.

10) Special situations

a) **Hospital records**: Often introduced to prove the truth of the statements made in them. Even if the statements in the records are not declarations of symptoms they will be admitted as part of the record. Totally extraneous matter (Patient says that it was D who hit him) will not be admitted.
b) **Computer print-out**: Often admissible to prove the truth of the matter asserted by the print-out: The proponent must show that:
   i) The print-out comes from data that was entered into the system relatively promptly; and
   ii) The procedure by which the data was entered, the program written, etc. are all reasonably reliable.

11) **Entries in the form of opinions**: Trend is to accept opinions if these would be admissible if given as part of live testimony. Medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

12) The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage.

13) Limitations
   a) Questions about their trustworthiness.
   b) Hearsay within hearsay (The report or record contains information provided by third persons) Johnson v. Lutz: Records are not allowed if they are made by a person not engaged in the business and having no duty to make the report.
      i) Getting around the hearsay within hearsay problem is done by using another exception.

I) **Public records and reports: 803(8)**
1) Records, reports, statements, or data compilations, in any form, **of public offices or agencies**, setting forth (A) the **activities** of the office or agency, or (B**) matters observed pursuant to duty** imposed by law as to which matters there was a duty to report, **excluding**, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2) Rule allows three different types of records and reports
   a) **The agency's own activities**: If offered to show that those activities occurred (P uses FBI records to show wiretapping)

b) **Matter's observed under duty**: Observations admissible if made in the line of duty and the official had a duty to report those observations.
c) **Investigative reports**: Admission of factual findings resulting from investigations, except when used against a criminal defendant.

2) **Criminal cases**: Special issues
   a) Subsections B and C may not be used against a Defendant in a criminal case. (Could be used by the D against the govt).
   b) Other law enforcement personnel: Subsection B does not apply in criminal cases to matters observed by police officers and "other law enforcement personnel." Lab technicians could be excluded under this provision.
   c) Use of other exceptions: it is not clear whether a report that would come within B or C, and therefore be excluded, may nonetheless be admitted under some other exception:
      i) Minority view: Some courts have rejected such evidence (Oates)
      ii) Majority view: Would allow the report to be admitted if the maker of the report is in court and subject to cross.
      iii) In circumstances where 803(8) is more restrictive (like using a police report against a criminal defendant) this rule applies even though it fits under 803(6). Policy is that the person who made the report should be subject to cross.
      iv) In civil litigation, the police report gets the same treatment (or 803(8) is more permissive) so it would not matter if 803(6) were used.
      v) G/R: If it falls under 803(8), use that rule.
      vi) Judge made exception: US v. Bradey p. 297: When it is a routine procedure done by the govt. it is admissible under 803(8)(B). Aim is not to prepare for a specific prosecution. Routine and non-adversarial materials like 911 calls.

3) Other Issues:
   a) **Evaluations:** C refers to factual findings, so long as the report includes factual findings, other evaluative parts of the report (opinions, evaluations, and conclusions) may also be admitted
      i) Comment: Factors which may be of assistance in passing upon the admissibility of evaluative reports include; (1) the timeliness of the investigation, (2) the special skill or experience of the official, (3) whether a hearing was held and the level at which conducted, and (4) possible motivation problems The rule assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present.

   b) **Multiple hearsay**: Carefully scrutinize for this problem.
      i) Report by one govt agent to another: If govt employee A tells facts too employee B who writes them up in a govt report, A's statements will be admissible if A had a duty to give the report to B.
      ii) Statement by one without a duty to talk: If the information is supplied by someone who does not work for the govt and does not have a duty, the report may not include the statement unless another exception applies.

c) **Trustworthiness:** If the sources of the information or other circumstances indicate a lack of trustworthiness, the judge can keep the report out.

J) **Other 803 exceptions**

1) Records of vital statistics
2) Absence of public record or entry
3) Records of religious organizations
4) Marriage, baptismal, and similar certificates
5) Family records
6) Records and documents affecting an interest in property
7) Statements in documents affecting an interest in property
8) Statements in ancient documents
9) Market reports, commercial publications
10) Learned treatises
11) Reputation concerning personal or family history
12) Reputation concerning boundaries or general history
13) Reputation as to character
14) Judgment of previous conviction
15) Judgment as to personal, family, or general history, or boundaries

IV) Exceptions to the hearsay rule: Declarant unavailable

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

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

   3) Declarant unavailable (hypos p. 206)
      a) Hypo (1): Need to exhaust every reasonable means to locate the unavailable witness (804(a)(5)). Could have checked the previous address or the union.
         i) What is reasonable means: Depends on the circumstances: whether a prosecutor or a private party; what is reasonable to one may not be reasonable to another.
      b) Hypo 2: Question, were reasonable means exhausted depends on what power the prosecutor had. Other methods to get the witness.
      c) Hypo 3: The cost to procure the witness is considered for unavailability. In this case you can take advantage of the more permissive rule in the federal rules of civil procedure.

B) **Dying declarations (Rule 804(b)(2)**
   1) In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

   2) While the original religious justification for the exception may have lost its conviction for some persons over the years, powerful psychological pressures are present.
   3) The declaration must **concern the cause or circumstances** of what the declarant believed to be impending death.
      a) The declarant must be unavailable, but does not actually have to be dead.
      b) The statement may be admitted on behalf of the accused, although it is usually admitted against him.
   4) First hand knowledge: If the dying person was shot in the back:

a) Rule 602: the witness must have personal knowledge
b) The fed rule does not require personal knowledge but court opinions and the Cal evidence code do require it.
c) The advisory committee note requires first-hand knowledge.

5) 804(a)(5): Cannot get the hearsay in under 804 if you could have deposed the witness but failed to do so. (See comment)
6) If a declarant makes a statement believing in imminent death, but later recovers, it does not fall under this exception because he is available as a witness.
   a) Unless he is unavailable for another reason: coma, lack of evidence
   b) Anyone who heard the statement can testify to it.
   c) The judge is the one who decides if the declarant actually thought he would die or if he could actually remember.

C) **Former testimony**

1) 804(b)(1): Testimony given as a witness at another hearing of the **same or a different proceeding**, or in a **deposition** taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an **opportunity and similar motive to develop the testimony** by direct, cross, or redirect examination.

2) Under the exception, the testimony may be offered (1) against the party against whom it was previously offered or (2) against the party by whom it was previously offered
   a) The proponent of the former testimony need not have been a party to the taking of the former testimony, only the opponent must have been present
   b) **Similar motive**: There must be enough overlap between the issues existing at the time of the prior hearing, and the issues existing at the present trial, that the above opportunity for cross-examination was a meaningful substitute for cross-examination at the present trial

3) Predecessor in interest:
   a) Broad interpretation: Almost read out of the rule.
   b) Usually just has to have the same motive to develop the testimony. Does not matter who the person in the first case is.
   c) In a criminal case, there is no predecessor in interest provision.

4) Hearing and proceeding: Include any official inquiry in which sworn testimony is taken. Prior trial, a preliminary hearing in a criminal case, grand jury, and deposition all qualify.

5) The party just has to have the chance of direct or re-direct.
   a) Policy: The opposing party at the first trial had a chance at the first trial to cross-examine. (Chance to check the witnesses recollection, memory, sincerity, and narration)

6) Rule 804(b)(1)
   a) The rule divides into two categories:

i) Criminal case: The party himself must have a chance to develop the testimony (Hypo 5 p. 206)
ii) Civil case: The party himself, or a predecessor in interest, must have a chance to develop the testimony.

b) A party in a civil case can have testimony offered against it from a criminal case the party was not a part of if the party in the criminal case was a predecessor in interest and had the same motive to develop the testimony. (Travelers v. Wright (p. 195))

D) **Statement against interest: 804 (b)(3)**

1) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

2) Generally: hearsay exception for declarations which, at the time they are made, are so against the declarant's interest that it is unlikely that they would have been made if they were not true. (Sincerity factor is present but not the others).
   a) Common law: three requirements
      i) Must have been against the party's pecuniary or proprietary interest
      ii) Declarant must now be unavailable
      iii) Declarant must have first hand knowledge of the facts asserted in the declaration
   b) The fed rule follows this approach except that declarations may also be against the party's penal interest.
   c) The judge decides whether a reasonable person would have made it believing it to be true.

3) Against interest
   a) **When made**: The declaration must have been made against the declarant's interest at the time it was made. (Cannot be later found to have been against interest). The statement has to be contrary to interest at the time of its making.
   b) **Pecuniary interest**: Property: A statement limiting property rights, or a creditors statement that a debt has been paid. Also statements subjecting the declarant to trot liability.
   c) **Penal interest**: Statements tending to subject the declarant to criminal or civil liability. A statement against penal interest that is offered to exculpate the accused is not admissible unless Corroborating circumstances clearly indicate the trustworthiness of the statement.
      i) A statement subjecting the declarant to ridicule, hatred, or disgrace is not admissible under (a)(3) exception.
   d) **Collateral statements**: If the statement includes a diserving part but also a self-serving part, the court will try to exclude the self-serving part. If the statement has both a disserving part and a neutral part, the court will probably let in the whole

statement. (The statement "it was Joe and I that pulled off that bank job." Will probably be admissible against Joe, even though that part was not against interest.)

i) Each individual statement must be scrutinized to see if it is against interest. Determine objectively that the statement is against interest.
ii) The only statements in a series of statements that are admissible are those that are themselves self inculpatory.
iii) Disagreement on what is self inculpatory: One who shows knowledge of a criminal scheme may show involvement.

4) Constitutional issues
   a) **Use by the prosecution**: When the prosecution tries to introduce a third party's declaration to inculpate the accused, the confrontation clause may keep the statement out. A statement exposing the declarant to criminal liability, given while the declarant is in police custody, will almost always be excluded, because of the declarant's motive to try to gain favor by inculpating the accused.
   b) **Use by accused**: Where it used by the accused to exculpate himself, the accused may be able to rely on the due process clause and the sixth amendment right to compulsory process to get the statement in.

5) Difference between statement against interest and statement by a party opponent
   a) Party opponent: there is no unavailability requirement; Does not have to be against interest; must be offered against a party opponent; is an exemption to hearsay, not an exception; Conspiracy, agency, privity bootstrapping MAY be allowed (need additional facts).
   b) A statement against interest allows bootstrapping; Party opponent does not require personal knowledge while the statement against interest does.
   c) Statement exposing to criminal liability under statement against interest requires corroborating evidence.

E) **Other 804 exceptions**
   1) Statement of personal or family history
   2) Forfeiture by wrongdoing

V) Constitutional limitations on hearsay evidence

A) **Confrontation clause**: The confrontation clause of the sixth amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him". This clause may give the defendant the right to keep out evidence of out-of-court declarations that are unreliable, where the declarant is not available to be cross-examined in court.
   1) Preference for live testimony: The trial judge is more likely to find a confrontation violation where the declarant is not available.
   2) Indicia of reliability: Whether or not the declarant is not available, the out-of-court declaration will not be allowed into evidence unless it contains "indicia of reliability."
      a) Firmly rooted exception: If the declaration is introduced under a firmly rooted hearsay exception" this by itself will be enough to establish the required reliability. The court will not look at the facts surrounding the particular statement, and will allow it even if there is reason to believe it is unreliable.
      b) Particularized facts: If the statement does not fall into a firmly rooted exception, the prosecution must show that the facts surrounding the statement demonstrate that it is probably reliable. One important factor in this determination is whether the D has ever gotten a chance to cross the declarant about the statement.
         i) Cannot use corroborating evidence: In determining if the statement is trustworthy, only the facts surrounding the statement can be used, not those that tend to corroborate the statement's truth.
   3) Right to confront a testifying witness: Clause may give the D the right to cross a testifying witness, even though the usual rules of evidence would prohibit or limit such an examination.
      a) Right to be face-to-face: Generally gives him the right to be face-to-face with the witness against him.

   4) Specific contexts
      a) Witness present and testifying: If the witness is present and testifying, the only time the confrontation rights are violated is if the witness denies any recollection of the underlying event, and the court believes that the witness is lying.
      b) Co-conspirator's statement: D is very unlikely to succeed with a confrontation claim, this is true whether or not the person is available to testify. The court will probably not look at the reliability of the statement since it falls within a firmly rooted exception.
      c) Declarant's unavailability immaterial" exception: Will probably not succeed because these are all firmly rooted exceptions.
      d) Declarant available: Those exception that require the declarant to be unavailable: still hard for the D to win:
         i) Former testimony: Where the D had the opportunity to cross, there is no problem. Ohio v. Roberts.
         ii) Dying declarations: Firmly rooted exception
         iii) Statements against interest: This is the best opportunity to argue confrontation clause. If the statement is a co-defendant who has given a confession that implicated the D, the only way that it will be allowed is if the facts surrounding it

give a special assurance of reliability. Even if it is reliable, the prosecution must produce him at trial if he is available. Lee v. Illinois.

B) Cal v. Green (See su
C) Ohio v. Roberts: The statement was allowed as former testimony

VI) Residual hearsay (Rule 807)

A) A statement not specifically covered by Rule 803 or 804 but having **equivalent circumstantial guarantees of trustworthiness**, is not excluded by the hearsay rule, **if** the court determines that (A) the statement is offered as evidence of **a material fact**; (B) the statement is **more probative** on the point for which it is offered **than any other evidence** which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of **justice will best be served** by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

B) Generally: The court will admit hearsay evidence that does not fall within any well defined exception, if it is highly reliable and badly needed in the particular case.

C) **Circumstantial guarantee of trustworthiness**: the guarantee must be equivalent to those inherent in the other, more specific, hearsay exceptions. Consider these factors:
   1) Oath: whether the declaration was made under oath
   2) Time lapse: How much time has lapsed between the event and the statement. (The longer the time the less reliable)
   3) Motive: Declarant's motive for telling the truth.
   4) First-hand knowledge: If he merely repeated what someone else said it less reliable.
   5) Written v. Oral: Written statements are presumed to be more reliable.
   6) Corroboration by other evidence: Some courts allow corroboration by other evidence (The fed courts do not allow under Idaho v. Wright)
   7) Recanted statement: A statement that has subsequently been recanted is less reliable.

D) **More probative**: The statement must be more probative on the point that any other evidence that is available through reasonable efforts.

E) **Interests of justice**: Use of the evidence must be consistent with the fed rules and the interests of justice.

F) **Notice**: The proponent of the evidence must give notice of his intention to offer the statement. The notice must include particulars of the statement, including the declarant's name and address. (Some fed courts allow use of the evidence without notice if the need does not become available until the trial starts when the court will usually grant a continuance).

G) **Near miss**: When a particular fact pattern comes very close to matching the requirements for a recognized exception, but just misses, a few courts refuse to apply the residual exception. But most courts are willing to apply the residual exception in this situation, if the other requirements are met.

H) US v. Lyon: 8th Cir.
   1) D was prosecuted for building bombs in shoe boxes
   2) Witness for the state, after 11 years, forgot what her earlier statement was. Govt. tries to get in the police transcript of what the witness said. There were no hearsay exceptions that worked.
   3) Under residual hearsay the Govt. must show that the report was trustworthy
      a) Should have required that the witness's statement itself was trustworthy.

I) Problem with child testimony
   1) The child could become re-traumatized simply because of being there in court. It could also be easy to get the child to lie.
   2) Uniform rule 807 p. 327 of supp allows for child testimony upon satisfaction of a list of trustworthy factors.
   3) Idaho v. Wright: child hearsay under the residual hearsay rule violated the confrontation clause. (It was not a firmly rooted exception).

VII) Probabilistic evidence

A) General: Courts increasingly accept probability evidence where it supplies a scientifically reasonable way of estimating the probability that a disputed event occurred
   1) Speed detection: The results of radar to prove how fast a car was going are commonly admitted. Most courts require proof that the equipment in question was properly calibrated and properly used.
   2) Voice prints: Courts are evenly split as to the admissibility of voice print analysis.
   3) Psychiatry and psychology
      a) Mental condition of the criminal defendant: Courts usually allow an expert to testify on the mental condition of a criminal D. Courts try to keep the expert from crossing over into areas that are the province of law rather than medicine (Whether the D knew right from wrong: see rule 704(b))
      b) Reliability of evidence: Courts hesitant to allow the expert to testify about the reliability of another witness's testimony.

B) Issue
   1) Even if the evidence is admissible, question is how to present it to the jury without it being misleading.
   2) Dealt with 401, 402, 403 and the rules on expert testimony.
   3) There is no per-se rule against admissibility.

VIII) Character, habit and custom

A) General question
   1) When can character evidence be used
   2) What evidence can be used to prove it

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

   3) Character questions arise in two fundamentally different ways:
      a) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue."
      b) Character evidence is being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence

   4) Problem with character evidence: "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to

reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

a) Even though a person who has committed past crimes is more likely to commit future ones, that probative value is outweighed by the prejudicial effect of the jury giving that information too much weight.

5) Subdivision (a): This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

6) Character in issue:
   a) Essential issue: A person's general character, or his particular character trait, is admissible if it is an essential element of the case. (Only rare cases: Libel or slander, negligent entrustment, entrapment)
   b) Types of evidence: When character is in issue, all three types of character evidence (specific acts, witness's opinion, or the subject's reputation) are admissible.

7) Other crimes (and bad-acts) evidence:
   a) General rule: The prosecutor may not introduce evidence of other crimes committed by the D for the purpose of proving that because the D is a person of criminal character, he probably committed the crime with which he is charged. (Sam for "bad-acts").
   b) Proof of elements: Can be admitted to prove circumstantially some element of the crime charged: Motive, opportunity, ect..
      i) Signature: If the person's identity is in doubt, proof that the D has committed prior crimes that are so similar in method that they constitute his signature are admissible. This is described as "modis operandi".
      ii) Intent: Other crimes may be used to prove that the D had the particular intent required for the crime charged. Generally this is done to rebut the D's contention that he did the act charged innocently or unknowingly as in US v. Beechum.
      iii) Motive: Ex: The D escaped from jail and thus had a motive to steal a car.
      iv) Identity: Common plan or scheme: Stole from other employers the same way as it happened here.

   c) Other aspects of other crime evidence:
      i) No conviction: The other crimes need not have led to a conviction. In fed courts, evidence of the D's guilt of the crime does not even have to be a preponderance of the evidence (Huddleston)
      ii) Acquittal: The fact that the D was acquitted of the other crime is only evidence in determining whether there was guilt. Most courts will not automatically exclude the evidence.
      iii) Balancing: Even where other crimes by the D circumstantially establish an element of the present charge, the judge must still balance its probative value against prejudice, and must exclude it if the prejudice substantially outweighs.

iv) Use by the D: The D may show someone's past bad acts or crimes to suggest that it is another person who did the present crime.

8) Character of the victim
   a) V's violent character: The D in a homicide or assault case who claims that the victim was the first aggressor, may introduce evidence that the victim had a violent character. This is true even if the D cannot show that he was aware of the victim's violent character at the time of the assault of murder. This evidence must generally be in the form of reputation of opinion evidence, not specific acts of violence by the victim.
   b) Fed rules: 404(a)(2) also allows any evidence of a pertinent trait of the character of the victim of the crime offered by the accused, but this is limited to rape cases.
   c) Rebuttal by prosecution: Once the D introduces this type of evidence, the prosecution may rebut the evidence by showing the victim's peaceable character. Under the fed rules, if the D claims that the victim was the first aggressor, even though they do not put on any evidence of the victim's character for violence, the prosecution may put on evidence of the victim's peaceable character.

9) Rape: At common law the D could usually put on evidence of the victim's unchasity to show that the victim consented. But now rape shield statutes control
   a) Rule 412: Completely disqualifies reputation or opinion evidence concerning the victim's past sexual behavior. It also prohibits evidence of specific acts concerning the victim's past sexual behavior in most situations. D is never allowed to offer evidence of past sexual behavior with persons other that himself if offered on the issue of whether there was consent.
      i) Civil: This rule also applies to civil suits like if the P sues for sexual harassment. The D can't usually show that the P was promiscuous with other and dressed seductively and thus indicating her willingness to accept sexual advances at the work place. Character in a civil case; (perrin)

10) Character evidence in civil cases
   a) The courts have held that the rules apply when the civil case is a functional equivalent of a criminal case.
   b) The rules, however, only use terms implying criminal cases and the committee notes say they do not apply to civil cases.

11) Evidence of the D's good character
   a) Allowed: Evidence by a criminal defendant that he has a good general character is allowed by all courts. Evidence that he possesses a narrow favorable trait is allowed, but only if it is relevant to the crime charged.
   b) Method of proof:
      i) Common law: Must be made by reputation, not by opinion evidence.
      ii) Fed: 405(a) allows not only reputation testimony but also opinion testimony as the D's good character. (But do not allow proof of specific incidents of good character)

c) Rebuttal by the prosecution: If the D puts on evidence of good character, the prosecution may rebut this evidence. (Rebutting means after the D has finished putting on his case.)
   i) Own witness: The prosecution may put on its own witness to say that the D's character is bad.
   ii) Cross examination: The prosecutor may cross and may even ask the witness about specific instances of bad conduct by the D, provided that (1) The prosecutor has a good faith belief that the D really committed the bad act, and (2) the specific bad act is relavant to the specific character trait testified to by the witness. Even an arrest that did not lead to a conviction may be brought in cross, if relevant to the character trait in question.
   iii) No extrinsic evidence: Prosecutor's ability to show specific bad acts is limited to cross examination. He may not put on extrinsic evidence (eg other witnesses) to prove that the specific bad act occurred, even if the witness denies that the act happened. The defendant also cannot put on another witness to show that the specific act referred to by the prosecutor on cross never took place.

12) When the evidence is admissible for one thing but not for another
   a) Kleghorn case; Could use the evidence to show the punitive damages but not the negligence in the specific case.
   b) Get a limiting instruction as to what the evidence should be considered for. The instruction may be more harmful than it is helpful because it may help the jury draw an inference.
   c) 404(b) and 404(a): Limited rule of exclusion: Only bars character traits to show that action at issue is in conformity with that trait. Exception in 404(b)

13) 404(b): Heavily litigated
   a) Prosecutors always want to put the evidence in, sometimes as an insurance policy.
   b) Wyo: Bishop factors; Other crimes must not be too remote in time, must be introduced for a purpose stated in 404(b), must be for a material issue, and there must be a substantial need for the evidence.
   c) Wyo: Tightened up 404(b): the state must articulate which exception the evidence is for and how it is relevant and the TC must articulate reasons. The TC must identify the particular purpose.
   d) Wyo: Careful reasoned judgment is essential and the TC should be skeptical of its admittance.
   e) Wyo: Prosecutor does not have to give notice under the Wyo rule but the D can still ask for notice.

14) Subdivision (b) deals with the general rule excluding circumstantial use of character evidence. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.

15) Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. No specific time limits are stated; as to what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Likewise, no specific form of notice is required. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

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

1) (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
2) (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

3) Three methods of proving character provided by the rule
   a) Evidence of specific instances of conduct is confined to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry.
   b) Reputation
   c) Opinion

4) Whenever proof of the character trait is allowed (under 404), that proof can be either by opinion or reputation testimony.

5) D's good character evidence: A D in a criminal case can show his won good character by a witness's testimony that the D has a good reputation for honesty or non-violence or by testimony that in W's opinion D possess these character traits (But the D cannot show specific instances of his own good character)
   a) Rebuttal: If the D makes this showing (Opening the door) the prosecution may rebut by reputation or opinion evidence of the D's poor character. The prosecution may also use specific acts evidence during its cross of the D's character witness.
      i) Good-faith basis for the specific act question: Prosecutor must have a good faith basis for believing that the specific act really occurred.
      ii) Extrinsic evidence: The prosecution cannot use extrinsic evidence of the specific acts, can merely ask the defense witness about them.

   b) 405(a): When the D puts on character evidence, on cross-examination inquiry is allowable into relevant specific instances of conduct.
      i) Situations must be relevant to the character trait and there must be a truthful basis to the situations (Foundation laid out of the hearing of the jury)
      ii) On re-direct, there is no authority in the rules on whether the D can also bring up specific circumstances if the prosecutor does so on cross.

iii) (p. 20) #1: If the D witness testifies to the D's honesty, that is the only thing the prosecution can cross on, not the D's sexual behavior. The inquiry must be relevant.
iv) Can only do specific instances during cross, not later by bringing it on direct.

6) Character of the victim: The D can show the character of the victim by opinion or reputation evidence and the prosecution can rebut using specific acts on cross.

7) Proof for "other purposes": Where the party (usually the prosecution) is using the D's prior crimes or bad acts for some other purpose (motive, or identity) this proof can be by specific acts.

8) Different from when the D uses past acts to impeach the witnesses credibility
   a) Rule 608: likely that the past convictions will be admissible.

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

2) 'Habit,' in modern usage describes one's regular response to a repeated specific situation. A habit is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic."

3) Generally: Evidence of a person's habit is admissible to show that the person followed this habit on a particular occasion.

4) Three factors: Factors to look at to decide if it is habit or a character trait
   a) Specificity: The more specific the behavior the more likely the more likely it is to be deemed a habit.
   b) Regularity: The more regular the behavior the more likely it will be a habit. Regularity means ratio of reaction to stimulus.
   c) Unreflective behavior: The more unreflective or semi-automatic the behavior, the more likely it is a habit

5) Business practices: All courts allow evidence of the routine practice of an organization to show that the practice was followed on a particular occasion.

6) Similar happenings

a) **General rule**: Evidence that similar happenings have happened in the past is generally allowed. The proponent must show that there is substantial similarity between the past similar happening and the event under litigation.

i) Accidents and injuries: Evidence of past similar injuries or accidents will often be admitted to show that the same kind of mishap occurred in the present case, or to show that the D was negligent in not fixing the problem after the prior mishaps. The P will have to show that the conditions were the same in the prior and present situations.

ii) Past safety: D will usually be allowed to show due care or absence of a defect, by showing that there has not been past accidents. The D must show that (1) conditions were the same in the past when the accident occurred, and (2) had there been any injuries in the past, they would have been reported to the D.

IX) Rape shield statutes (Rules 412 to 415)

A) Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition
   1) (a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
      a) (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
      b) (2) Evidence offered to prove any alleged victim's sexual predisposition.
   2) (b) Exceptions.
      a) (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
         i) (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
         ii) (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
         iii) (C) evidence the exclusion of which would violate the constitutional rights of the defendant.
   3) (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
   4) (c) Procedure to determine admissibility.
      a) (1) A party intending to offer evidence under subdivision (b) must—
         i) (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
         ii) (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
      b) (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

   5) The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

B) **See Rules 413-415 in rules book**

C) Past sexual assault or child molestation by the D generally
   1) Under Rule 413, if the D is accused of sexual assault, evidence that the D has committed a sexual assault in the last is admissible, and may be considered on any relevant matter.
      a) If the D is charged with raping V, the prosecution may show that 20 years ago the D raped someone else. The prosecution may also argue" the fact that D raped before means he's extra likely to have committed the present rape".
   2) Child molestation; civil suits: Similar rules (414 and 415) allow:
      a) Proof that the D previously molested a child to be introduced in his present molestation trial, and
      b) Poof of D's prior sexual assaults or child molestations to be introduced in a civil proceeding where the P claims that D sexually assaulted or molested P.

X) Certain inadmissible evidence (407-411)

A) Policy: Evidence in these rules is not inadmissible for prejudice but for some other policy reasoning.

B) **Rule 407: Subsequent remedial measures**
   1) G/R: courts do not allow evidence that a party has merely taken subsequent remedial measures when offered to show that the party was negligent or was conscious of being at fault.
      a) Other purposes: may be show to prove elements other than culpability or negligence. Ex: rebut the D's claim that there was no safer way to handle the situation or if the D claims they did not own or control the property involved, the fact that he subsequently repaired the property can rebut this assertion.
      b) Product liability: Most federal courts reject evidence of subsequent re-design to prove the product was initially defective.

C) **Rule 409: Payment of medical and similar expenses**
   1) The fact that a party has paid the medical expenses of an injured person is not admissible to show that party's liability for the accident that caused the injury. But only the fact of payment, not related issues of fact, are excluded.

D) **Settlements and plea bargains (Rule 408 and 410)**
   1) Settlements: The fact that the party has offered to settle a claim may not be admitted on the issue of the claim's validity.
      a) Collateral admissions of fact: Admissions of fact made during the course of settlement negotiations are generally admissible at common law but not under rule 408.
      b) Other purposes: settlement offers may be admissible to prove issues other than liability (The fact that the witness received money from the D in a settlement may be used to show bias) The rule has a list of situations where it is admissible.

   2) Guilty pleas
      a) D's Offer to plea: The fact that the D has offered to plead guilty may not be shown to prove that the D is guilty or is conscious of his guilt. Not only is the offer excluded, but any other statement made in the course of plea discussions with the prosecutor are excluded.
      b) Withdrawn plea: cannot be admitted against D.
      c) Later civil case: the plea offer or withdrawn plea, and the accompanying factual admissions, are not admissible in any later civil case.
      d) Waiver: When the prosecutor conditions the bargain on a waiver of admissibility of discussions during the plea agreement it is OK.

E) **Rule 411: liability insurance**

1) G/R: Evidence that a person carried or did not carry liability insurance is never admissible on the issue of whether he acted negligently. But the existence or non-existence of liability insurance is admissible for purposes other than proving negligence. (The fact that W, a witness for the D in a tort suit, works for D's liability insurance company, could be admitted to show bias on W's part).

XI) Examination and impeachment of witnesses

A) **Rule 611. Mode and Order of Interrogation and Presentation**

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

4) Subsection (a): The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.
    a) Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b).
    b) Item (3) calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule.

5) Flow of the examination generally: Four stages
    a) Direct: The party who called the witness engages in the direct examination.
    b) Cross: After the calling side has finished the direct, the other side may cross the witness.
    c) Re-direct: done by the calling side
    d) Re-cross

6) Direct examination
    a) Leading questions: The examiner may not ask leading questions (Except as may be needed to develop testimony)
        i) Definition: A leading question is one that suggests to the witness the answer desired by the examiner. Problem with leading questions: Getting the lawyer's formulation of the facts and not the witness's. Jury wants to weigh the credibility of the witness.

ii) Hostile witness: Leading questions are allowed if the witness is hostile. The opposing party will almost always be deemed hostile; so will a witness who is shown to be biased against the calling side.

7) Cross examination
   a) Leading questions: Leading questions are permitted during cross-examination.
      i) Exception: When the witness is biased in favor of the cross-examiner.
   b) Scope: Cross is limited to the matters testified to on the direct examination and issues of credibility of the witness. The TC may, at its discretion, permit inquiry into additional matters as in on direct examination (Turns into this person's witness). Depends on the orderly presentation of the case or the convenience of the witness.

8) Argumentative and misleading questions: these questions will be stricken
   a) Argumentative: A question which tries to get the witness to agree with the counsel's interpretation of the evidence. It is more common on cross than on direct, and usually has an element of badgering the witness.
   b) Misleading: A question that assumes as true a fact that is either not in evidence or is in dispute. It usually has a "trick" aspect.

B) **Rule 612. Writing Used to Refresh Memory**
1) Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—
   a) (1) while testifying, or
   b) (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
2) an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

3) General rule: If the witness's memory on the subject is hazy, any item (picture, document, weapon) may be shown to the witness to refresh his recollection. This is the technique of present recollection refreshed.

   a) Not evidence: The item shown to the witness is not evidence at all: it is merely a stimulus to produce evidence in the form of testimony.

b) Abuse: If the item shown to the witness is a document, and the trial judge concludes that the witness is really reading the document on the stand instead of testifying from his now refreshed recollection, he may order the testimony stricken.
c) Cross-examination: The cross examiner may examine the document or the other item shown to the witness, and use any part of the document during cross examination. The cross examiner may also introduce into evidence any parts of the document that relate to the witness's testimony.
d) Documents seen before trial: If the document has been consulted by the witness before he took the stand, the trial court has discretion to have the document shown to the other side if "necessary in the interests of justice."

C) **Impeachment generally**

1) Rule 607. Who May Impeach
   a) The credibility of a witness may be attacked by **any party**, including the party calling the witness.

2) The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them.
   a) Cannot do it if the primary purpose is to get in the impeaching evidence.

3) Five main methods of Impeachment
   a) Evidence showing the character or conduct of the witness raises doubt as to their truthfulness (Past bad acts, crime, or reputation): 404(a)(3), 608, 609.
   b) Prior inconsistent statement: Implies that the witness lied or erred in his/her testimony. 613, see also 801(d)(1)(A) and 806.
   c) Bias, interest or corruption of the witness. 408 and 411 only mention bias but it is not explained in any rule.
   d) Evidence of defects in the ability of the witness to observe, remember, or recount
   e) Impeachment by contradicting the witness (by cross-examination, or independent extrinsic evidence, or by a substantively admissible statement).

These rules generally governed by rules 401-403 and 611(a)

4) Effect of impeachment: The show the witness lied or erred on a specific statement, or to establish a pattern for a separate statement.

D) **Impeachment by contradiction: The "Collateral issue" rule**
1) Showing of the contradiction allowed: A witness may be impeached by presenting another witness who contradicts the first witness on the same point.
2) **Collateral issue rule**: The right to put on a second witness to impeach the first is limited by the collateral issue rule. Certain types of testimony by the second witness are deemed to be of such collateral interest to the case that they will not be allowed if their sole purpose is to contradict:
   a) Disallowed: W2 may not testify as to: (1) prior bad acts by W1 that did not lead to conviction; (2) Prior inconsistent statements made by W1 that do not relate to a

material fact in the case; or (3) things said by W1 in his testimony which according to W2 are not true, unless these facts are material to the case.

b) Allowed: Testimony by W2 as to the following subjects: (1) prior criminal convictions by W1; (2) W1's bad character for truthfulness; (3) W1's bias; or (4) W1's sensory or mental defect that prevents W1 from observing, remembering or narrating events correctly.

c) Fed rules: There is no express collateral issue rule. The judge can apply the policy behind the rule by using the rule 403 balancing test.

3) State v. Oswald: This is an example of impeachment by contradiction

a) The alibi witness says the D was there for every day for a two-month period including July 14. Prosecution wants to introduce evidence through another witness saying that the D was not there for a couple of the days (not specifically July 14). Prosecution can establish this through cross.

b) Cannot put on another witness to establish the impeaching testimony

i) Cannot use extrinsic evidence to impeach a witness if the testimony is on a collateral matter.

c) Rule is like 608(b), which prohibits extrinsic evidence of prior bad acts.

i) But authority comes from 403 and 611(a): waste of time or harassment of the witness (Policy is that it is unfair and unproductive).

E) **Impeachment by bias**

1) Generally allowed: All courts allow proof that the witness is biased. The witness may be shown to be biased in favor of a party (W and P are friends or relatives), or biased against a party (W and D were once involved in litigation). W's interest in the outcome may also be shown as a form of bias (If W is an expert, that fact that he is being paid a fee for his testimony is generally allowed as showing that he has an interest in having the case decided in favor of the party retaining him).

2) **Extrinsic evidence**: Bias may be shown by the use of extrinsic evidence. However, most courts require a foundation before extrinsic evidence may be used for this purpose: the examiner must ask the W about the alleged bias, and only if the W denies it may the extrinsic evidence (testimony by another person that the W is biased) be presented.

3) Bias is not defined in the fed rules but there was not intention to eliminate evidence on bias.

F) **Impeachment by prior bad acts**. Rule 608. Evidence of Character and Conduct of Witness

1) (a) **Opinion and reputation evidence of character**. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

2) (b) **Specific instances of conduct**. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime

as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

3) The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

4) In Rule 404(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.
   a) The inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive.

5) Common law
   a) Generally allowed: Most common law courts allowed the cross-examiner to bring out the fact that the witness has committed prior bad acts, even though these have not led to a criminal conviction.
   b) No extrinsic evidence: The prior bad acts must be introduced solely through the cross examination, not through extrinsic evidence.
   c) Good-faith basis: The prosecutor must have a good faith basis for believing that the witness really committed the act.

6) Fed rule: The fed rules basically follow the common law.
   a) **Probative of truthfulness**: Only bad acts that are probative of truthfulness may be asked about. Focus on whether the information has a bearing on the truthfulness or untruthfulness as stated in 608(b)(1). Ask whether the prior bad act is probative of truthfulness or untruthfulness.
      i) Sometimes distinguish between act itself and lying about the act: Lying about the act on an application is probative.

   b) **No extrinsic evidence**: Can only be shown on cross, not through extrinsic evidence.
      i) When asking the witness on cross and he says no, can you offer extrinsic evidence:
         - Do not have to take the first answer given
         - Process of testing or probing to get at the truthfulness.
         - Cross: Should have some chance to get over the denial.

   c) **Discretion of the court**: All questions about prior bad acts are in the discretion of the court. The extent to which the questioner has a good faith basis for believing W really committed the act will be one factor that the court normally considers.

7) Exception to extrinsic evidence

a) When the witness is a party to the action and the party has denied an act on direct examination; like the person testifies to an unblemished past. Here you can offer extrinsic evidence.
b) Psychiatric opinion: Found witness to be a pathological liar. May or may not be admitted. (See rule 702 on expert opinion and rules 401 and 403 for considerations)

G) **Evidence of prior convictions (Rule 609) Rule 609. Impeachment by Evidence of Conviction of Crime**

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

6) Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without

regard to the grade of the offense. Provable convictions are not limited to violations of federal law.

7) D has to testify before the evidence of prior convictions can be admissible. (This rule is for impeachment)

8) Common law rule: Two types of prior conviction may be used to impeach W's credibility
   a) Any felony conviction, and
   b) A misdemeanor conviction, but only if the crime involved dishonesty or a false statement.

9) Federal rule: The federal make it slightly harder to use a prior conviction to impeach a witness.
   a) **Crimen falsi (609(a)(2)**: If the crime involved dishonesty or false statement it may always be used to impeach W, regardless of whether it was a misdemeanor or a felony, and regardless of the degree of prejudice to W. The judge may not even exclude the evidence under 403.
      i) Examples: Perjury, false statement, criminal fraud, embezzlement, taking property by false pretenses, counterfeiting, forgery, filing false tax returns.
      ii) Other theft crimes: Most courts hold that theft crimes other than false pretenses and embezzlement are not crimen falsi; so shoplifting, robbery and receiving stolen goods don't work.
      iii) Look to the underlying facts: Most courts say that the court may treat a crime as crimen falsi if the D actually believed in a deceitful way, even if the crime is not defined so as to require deceit.

   b) **Felony**: If the crime was a felony not involving dishonesty or false statement, and the witness is the D in a criminal case, the crime may be used only if the court "determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused".
      i) Witness other than the accused: If the witness is not a criminal D (a prosecution W, or any witness in a civil case) the witness gets no special treatment against impeachment. Instead 403 balancing applies allowing the prior conviction to be excluded only if the person opposing its introduction shows that the convictions probative value is substantially outweighed by the danger of unfair prejudice".
      ii) What kind of criminal conviction outweigh prejudice:
         - Have to show that there is some value to truthfulness or untruthfulness.
         - Factors: The impeachment value of the prior crime, the remoteness in time, the similarity between the crimes, the importance of the D's testimony, the centrality of the credibility issue, subsequent history
         - Just note that a past criminal act can be highly prejudicial because the jury may take as a character propensity.

   c) **Other misdemeanors**: If the crime was a misdemeanor not involving dishonesty or false statement, it may not be used for impeachment at all.

d) **Old convictions**: If more than 10 years has elapsed from both the conviction and the prison term for that conviction, the convicio may not be used for impeachment unless the court determines that there are specific facts and circumstances that make the probative value of the conviction substantially outweigh its prejudicial effect. This makes it harder to get into evidence.

e) **In Limine motions**: The D may, before taking the stand, ask the TC to rule in Limine whether a particular conviction will be allowed to impeach him. If the ruling goes against the D, he can elect not to take the stand. But if he doesn't take the stand, the in limine ruling will not be reviewed on appeal in the fed courts.
   i) There could be a stipulation between the counsel as to which convictions get in.
   ii) Can the d appeal from a motion in limine when the D offers prior conviction on direct examination as opposed to waiting for the prosecutor to bring it up on cross in order to soften the blow: No, cannot bring it up himself and preserve the issue for appeal on ruling in motion in limine.

f) **Ineligible convictions**: certain types of convictions are excluded by special rules: If W was pardoned, based on a finding of innocence, the conviction may never be used. (If it was because of rehabilitation, it may only be used if W has been convicted of a subsequent felony) A Juvenile adjudication of D may not be used to impeach him.

10) Rule 403: Balancing in 609

a) There is a presumption that relevant evidence is admissible. The burden is on the party wanting to exclude the evidence to prove a substantial burden (This is the rule 403 language)
b) 609(a)(1): When offered against the accused the burden is on the party offering the evidence that the probative value outweighs the prejudice (Does not say substantially outweighs).
c) 609(b): The probative value has to **substantially** outweigh the prejudicial value.
d) 609(d): Prior's against other than the accused, and the admission is necessary for a fair determination of the issue of guilt or innocence (This is the highest standard)

H) **Problems with the witness's ability to recall, observe, or recount (Mental or sensory defect)**

1) Generally allowed: W may be impeached by showing that his capacity to observe, remember, or narrate events correctly has been impaired.
   a) W may be shown to have such poor eyesight that he could not have seen what he claims to have seen.

2) Alcohol and drugs:
   a) Use during event: W may be impeached by showing that he was drunk or high on drugs at the time of the events he claims to have witnessed.
   b) Addiction: Courts are split on whether W may be shown to be a habitual or addicted user of alcohol or drugs: Many courts will not allow this of there is no showing that W was drunk or high at the time of the events in question.

I) **Prior inconsistent statements. Rule 613. Prior Statements of Witnesses (The Hitchcock rule also applies to these)**
   1) (a) **Examining witness concerning prior statement**. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
   2) (b) **Extrinsic evidence of prior inconsistent statement of witness**. Extrinsic evidence of a prior inconsistent statement by a witness is **not admissible unless** the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

   3) The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

   4) General rule: W's credibility may generally be impeached by showing that he has made a prior inconsistent statement.

   5) Foundation: Before the W's prior inconsistent statement may be admitted to impeach him, a foundation must be laid
      a) Common law: the foundation requirement is rigid: W must be told of the substance of the alleged statement, the time, the place, and the person to whom it was made. He must then be given a chance to deny having made the statement, or to explain away the inconsistency. Only after all of this may the prior inconsistent statement be introduced into evidence.
      b) Fed Rule: Liberalizes the foundation requirement: W must still be given a chance to explain or deny the prior inconsistent statement, but this opportunity does not have to be given to him until after the statement has been proved. (By testimony from W2 that W1 made the prior inconsistent statement).
      c) Writing: if the prior inconsistent statement is written, the common law rule is that it must be shown to the witness before it is admitted. But under fed rules, the examiner may first get the witness to deny having made the statement, and then admit it into evidence.

   6) Extrinsic evidence: Special rules limit the questioner's ability to prove that the W made a prior inconsistent statement by extrinsic evidence (evidence other than the W admitting he did so through testimony of W2 or a copy of a written statement). Such extrinsic proof can only be made where two requirements are satisfied:
      a) Collateral: At common law extrinsic proof of the prior inconsistent statement is not allowed if the statement involved only "collateral" matters. Thus the statement must relate to a material issue in the case. Nothing in the fed rules bars extrinsic proof on a collateral matter though the trial judge could keep it out under a 403 balancing test.

b) Material: extrinsic evidence is allowed only if the inconsistency between the prior statement and the trial statement is material (The variation is great enough to cast doubts on the veracity of W's testimony).

J) Rule 610: Evidence of beliefs in religion is not admissible for the purpose of credibility (It is admissible for other things like bias).

K) Rule 615: Exclusion of the witness
1) Get later witnesses out of the court room while the earlier witnesses testify "invoking the rule"
2) This is mandatory if any party requests or discretionary if the judge wants.
3) Note the exceptions to the exclusions.

XII) Rehabilitation of an impeached witness

A) No Bolstering: May not offer evidence supporting his witness's credibility, unless that credibility has first been attacked by the other side. This is known as the rule against bolstering one's witness. (Example: on direct, W tells a story favorable to P. P's lawyer will not be permitted to bring out o direct the fact that prior to trial, W told the same story to the police: his credibility has not yet been attacked).
   1) Prior identification: However, the "no bolstering" rule does not apply where W has made a prior out-of-court- identification: Most courts allow this to be brought out as part of the direct examination of W.
   2) Prompt complaint: In rape cases most courts allow the victim to in effect bolster her won testimony by stating that she made a prompt complaint to the police immediately following the crime.

B) **Rehabilitation methods** (want now to show that the witness is truthful)
   1) 801(d)(1)(b): Prior consistent statement: It is not hearsay if qualifies for this exception.
   2) 608(a): Opinion and reputation testimony is admissible if the other side attacks first.
   3) Evidence that the impeaching evidence itself is false (phony prior conviction document)
   4) Rehabilitation by confession and avoidance; explain why the impeaching evidence does not show what it purports to show.

C) Rehabilitation: Apart from the exceptions to bolstering, W's credibility may be supported only to rehabilitate it : ie. Only to repair the damage done by the other side's attack on that credibility.
   1) Meet attack: The rehabilitation evidence must meet the attack. It must support W's credibility in the same respect as that in which the credibility has been attacked by the other side.
   2) Good character: If W's credibility is attacked by evidence tending to show that he is generally untruthful, the proponent may show that W has a good character for truthfulness. This type of evidence may be used to rebut evidence that: (1) W has a bad character for truthfulness, (2) that W2 has a bad opinion of W's truthfulness, (3) That W has been convicted of a crime, (4) that W has committed a prior bad act, and maybe (5) that W has been subjected to a slashing cross-examination by the opponent, implying or stating that W is a liar.
      a) Attack on present testimony: If the attack was only to show that the testimony in the present case is inaccurate, cannot make a general showing of truthfulness. Good character evidence will not be allowed to rebut evidence that (1) W is biased because he is related to the other party and (2) W has given erroneous testimony in this case because of mistake.
      b) 608(2): Admissible only after the character of the witness for truthfulness has been attacked: has to be a direct attack on truthfulness.
         i) Attacked: or otherwise provision: if the TC admits, it would be subject to de novo review because it is a question of law. The impeachment by contradiction has to be very strong to allow it under the "or otherwise" provision.

c) Prior inconsistent statement: If W is attacked by a showing that he made a prior inconsistent statement, courts are split: Most treat it as an implicit attack on general credibility and thus allow a showing of good general character.

3) Prior consistent statement: The fact that the W has made an out of court consistent statement with his trial testimony may be used only to rebut an express or implied charge that W's trial testimony is a recent fabrication or the product of improper influence.(801(d)(1)(B).
   a) Rehabilitation: 801(d)(1)(B): rehabilitation by prior consistent statement. These are admissible even if they are hearsay in nature. Allowed for the truth of the matter asserted as well as rehabilitation. It need not be under oath.
      i) Before it can come in, there has to be something that it is responding to.
      ii) Hearsay exemption: can go to the truth of the matter asserted.
      iii) Statement must have been made before the charge against the witness is made (before the damaging statement). If it is not made before than it is not admissible.
         - Wyoming: child abuse cases: Not admissible for the truth of the matter asserted but are admissible for rehabilitation if the statement is made after the damaging evidence.
   b) Attack on general character: If W is attacked by showing his prior bad acts, past criminal convictions, or a general bad reputation for veracity, his credibility may not be rehabilitated by showing that he made a prior consistent statement.
   c) Prior inconsistent statement: Showing of an inconsistent statement will not by itself entitle the proponent to show that the W also made a consistent statement. The proponent must demonstrate that the use of the inconsistent statement amounts to an express or implied claim that W has recently fabricated, or is lying because of improper influence.
   d) Before the motive arose: The proponent who wants to use the prior consistent statement must show that the prior statement was made before the alleged motive to fabricate or improper influence arose.

XIII) Privileges

A) **Rule 501. General Rule**

1) Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

2) The rule does not say anything substantively about what is privileged. It merely recognizes that there are privileges under the constitution and common law.
   a) The court is just to be guided by the common law; follow the case law that is established
   b) Allows the changing of privileges and creating new privileges.
   c) In civil action where the state law governs (Diversity cases) the rules of the state govern.
   d) For reference, look at the rules that the SC promulgated but were not enacted and the uniform rules of evidence.
   e) Mistakes that the SC made in trying to codify privileges
      i) The common law is better suited for privilege law.
      ii) Court rules narrowed some of the existing privilege law (eliminated Dr/patient and spousal)
      iii) Eliminated the state privilege law in diversity cases.

B) Tensions and justification for privileges

1) Tensions: Anytime the privilege is invoked, it blocks the TC's ability to ascertain the truth.
   a) Other evidence rules are in place to facilitate the ascertaining of the truth, not this one.

2) Justification for privilege
   a) Facilitate full and frank disclosure.
   b) The desire to protect certain relationships
   c) Protect privacy, morals, and social freedoms.
   d) Fairness to the client

C) **Attorney/Client privilege**

1) Generally: The client has the right not to disclose, and the right to prevent his attorney from disclosing, any confidential communication between the two of them relating to the professional relationship. The key elements are:

a) Client: the client can be a corp. as well
b) Belongs to the client: The privilege belongs to the client, not to the lawyer or any third persons. The lawyer may assert it, but only if he is acting on behalf of the client.
c) Professional relationship: Privilege only applies to communications made for the purpose of facilitating the rendition of professional legal services.
d) Confidential: The privilege only applies to communications which are intended to be confidential.

2) Professional relationship: Only applies in the context of a professional lawyer-client relationship
   a) The relationship can exist even though the lawyer does not get paid a fee.
   b) Non-legal advice: If the lawyer is not giving legal advise (business, friendly, or political advice) the privilege does not apply.
   c) Reasonable belief: So long as the client reasonably believes that the person he is talking to is a lawyer, the privilige applies.
3) Confidential communications: Only confidential communications are protected
   a) Client-to-lawyer: Disclosures from the client to the lawyer are protected
      i) Lawyer's observations: If the lawyer makes an observation that third parties could also have made, this will not be a confidential communication.
   b) Lawyer to client statements: Privilege also applies to these statements.
   c) Presence of a third person: The presence of a third person when the communication takes place. Or its later disclosure to a third person, may indicate that the communication was never intended to be confidential. If so, it will be deemed to be waived.

4) Attorney/Client and waiver
   a) The communication is confidential if it is intended to be confidential even if it is overheard (This is a subjective test). If a third party somehow learns of the communication, it may be found to have been waived (Older view: if anyone overhears the communication, privilege is waived)
      i) Most courts now hold that the communication is protected even if it is intercepted, as long as the interception was not reasonable to be anticipated. But if the party should have reasonably anticipated the interception, it will not be protected.
   b) Once the information is disclosed, waiver occurs and there is nothing that can be done to get the privilege back.
      i) Once the client discloses any meaningful part of the confidential information, it is no longer privileged.
   c) Intentional waiver does not have to occur.
   d) What if you tell you spouse about the communication: There is a split of authority, depends on the scope of the spousal privilege in the particular jurisdiction

5) Attorney client privilege and organizations.
   a) The Federal court uses the **subject matter approach**, no matter who is making the communication. (Upjohn v. U.S.)

i) If the subject relates to the representation, it is protected under the attny/client privilege.
ii) The attorney must be able to gather information and that may not be only from duly authorized constituents but other people like employees. This facilitates open and frank communication.
iii) The court rejected the control group theory because it was not broad enough.

b) **Control group test**: The privilege only applies to the senior management because this is the only group that possesses an identity analogous to the corporation as a whole (so they are the client).
c) Not all states follow the federal subject matter approach (This is the federal common law of privilege).
d) The law in Wyoming is not clear, and many states have modified the Upjohn rule or use the control group test.
e) Only those constituents in the organization with authority can waive the privilege. There may be times where the lawyer has to get consent from both.

6) Waiver: Rule 511
a) A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

D) **Dr./patient privilege**
1) The psychotherapist/patient privilege is widely accepted.
2) The Dr./patient privilege is not as widely accepted (10 states do not have)
a) Wyoming: Does apply the Dr/patient privilege in criminal cases.

3) Exception
a) The patient-litigant who puts his medical condition in issue is deemed to have effectively waived the privilege. Cannot sue someone and accuse them of causing an injury to you and then not allow the other party to get information from the Dr. who treated you for the injuries (This rule also applies to psychotherapists).

4) All statutes that cover general physician-patient confidences also cover psychotherapist-patient confidences. General elements:
a) A confidential communication
b) Made to a physician
c) If made for the purpose of obtaining treatment, or diagnosis looking toward treatment.

E) **Marital privilege**

1) Two privileges:
   a) Adverse testimony or (spousal immunity): Gives a spouse complete protection from adverse testimony by the other spouse.
   b) Confidential communication: this privilege is narrower: It protects only against the disclosure of confidential communications made by one spouse to the other during the marriage.

2) Distinctions: Practical differences between the two privileges
   a) Before marriage, or after the marriage ends: The adverse testimony privilege applies only if the parties are still married at the time of the trial, but applies to statements made before the marriage took place. The confidential communications privilege covers only statements made during the marriage, but applies even if the parties are no longer married by the time of the trial.
   b) Civil v. Criminal: The adverse testimony privilege is usually only allowed in criminal cases, but the confidential privilege is usually available in civil as well.
   c) Acts: The adverse privilege prevents the non-party spouse from testifying even as to acts committed by the spouse, but the confidential privilege does not since it only covers communications.

3) Adverse testimony privilege: Policy: would cause damage to the marriage force an unwilling spouse to testify to the relationship.
   a) Who holds the adverse testimony privilege
      i) Federal: The privilege belongs only to the testifying spouse, not to the party spouse. Thus the D in a criminal trial cannot block hi spouse from testifying; only the testifying spouse may assert or waive the right.
      ii) States: A slight majority give the privilege to the party (The criminal D). The rest follow the fed approach.
   b) Criminal v. Civil: Most jurisdictions (including the fed courts) grant the adverse testimony privilege only in criminal cases.
   c) Only applies to matters that occurred during the marriage, not before. The policy to preserve the marriage still applies, but do want people to get married in order to assert the privilege.
      i) Some jurisdiction still protect matters prior to marriage.
      ii) If the parties do get married after the act in question, the court will do an evidentiary inquiry into what was the purpose of getting married, it does not apply to a sham marriage. (Illegal aliens)
      iii) There are line drawing problems when the people are separated at the time of the trial.

4) Confidential communications privilege
   a) Federal: Fed courts apply this privilege on the basis of federal common law, since there is no federal rule granting it.
   b) Who holds: In most states, either spouse may assert the privilege.
   c) Communication required: Only communications are privileged. An act that is not intended to covey information is not covered. (But in some states if the act is done in

front of the spouse, only because the person trusts the spouse, the privilege should apply.)

d) Marital status: The parties must be married at the time of the communication. If so, the privilege applies even if the parties have gotten a divorce by the time of the trial.
e) Exceptions:
   i) Crime against other spouse: Prosecution for crimes committed by one spouse against the other, or against the children of either,
   ii) Suit between spouses (divorce suit)
   iii) Facilitating crime: for the purpose of planning or committing a crime.

F) **News person privilege (farber case)**

1) There is no first amendment privilege for the press to refuse to reveal information to the courts. (Plurality opinion in Branzburg v. Hayes)
2) Because of this rule, states enacted press shield statutes: These prevent journalists from being compelled to testify about confidential sources. All of the statutes at least protect the journalists from having to disclose the identity of the informant, some protect from forced disclosure of his notes and records of information learned from the source.

3) There is a constitutional requirement for criminal D's to be able to defend themselves. (Want the witnesses statement to the newspaper to attack the person's credibility).

   i) When the journalists privilege conflicts with a criminal defendant's Sixth Amendment right to compulsory process or confrontation, the journalist's privilege will probably give way. (In re Farber)

b) This policy and the policy behind the press shield statute are directly conflicting.
c) Constitutional rights override the press-shield.

G) **Other privileges**

1) Priest/penitent: Rule 506
2) Political vote: Rule 507
3) Trade secrets: Rule 508
4) Secrets of state and other official information: Rule 509
5) Identity of informer: Rule 510
6) Privilege against self-incrimination: Fifth amendment of the constitution

XIV) Competency

A) **Children and infants**
1) Rule 601; every person is competent unless otherwise stated by the rules.
   a) The TC has discretion to determine if the witness is competent
   b) Let the jury decide about credibility
   c) Let the other side impeach the witness and let the jury decide the weight.
2) Rules 602 and 603: These require that any witness have personal knowledge and be able to declare an oath to testify truthfully
   a) The child still has to have personal knowledge (includes the ability to observe) and the ability to take an oath.
3) The judge could also disallow the testimony as unfairly prejudicial under rule 403. Also could use rules 401 and 402 (both relevancy) to exclude.
4) 4 Factor test in Wyoming
   a) Child has to be able to understand the obligation to speak the truth on the stand.
   b) What was the mental capacity at the time of the occurrence.
   c) Is memory sufficient
   d) The capacity to express in words the occurrence
   e) The ability to answer simple questions about the occurrence.

B) **Hypnosis**: Where the witness's recall has been refreshed through hypnosis (3 approaches)
1) Does not raise a question of competency, but only a question of credibility for the jury (Wyoming position but this is not the majority rule)
2) Other jurisdictions require that safeguards be complied with before the testimony is admissible (eg. a video tape of the session)
3) Other say it is per se inadmissible; facts remembered before the hypnosis are OK as long as they were documented.
4) Criminal D's right to testify (Rock v. Arkansas)
   a) It is unconstitutional to have a per se rule of inadmissibility when the witness is the D in the case. The D has the right to testify in his own defense.
   b) Does not mean that post hypnotic recall has to be admissible, there just cannot be a per se rule of inadmissibility (Weigh the facts).
   c) This ruling only applies to Ds, not to other witnesses.

XV) Best evidence rule

A) **Rule 1001. Definitions: For purposes of this article the following definitions are applicable:**
1) (1) **Writings and recordings**. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
2) (2) **Photographs**. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.
3) (3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".
4) (4) **Duplicate**. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

5) Original: In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout

B) **Rule 1002. Requirement of Original**
1) 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.

2) There is no general rule that the best evidence must be produced to prove a fact or issue; only to prove a writing.
   a) Meyers v. US: Not trying to establish the contents of the transcript but what he said.
   b) If all that is trying to be proved is that the writing exists, was executed, or was delivered, the rule does not apply.

3) Three main components:
   a) Original document: The original must be produced rather than using a copy or oral testimony about the document.
   b) Prove terms: The rule only applies where what to be proved is the terms of the writing

c) Excuse: The rule does not apply if the original is unavailable because it has been destroyed, is in the possession of a third party, or cannot be conveniently obtained, and the unavailability is not due to the serious fault of the proponent.

4) Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. Examples where events can be proved without documentary evidence:
   a) Payment may be proved without producing the written receipt which was given.
   b) Earnings may be proved without producing books of account in which they are entered.
   c) Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

5) The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. The rule will seldom apply to ordinary photographs. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable.
   a) On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber.

6) Originals of X-rays: Rule 703, supra, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

C) **Rule 1003. Admissibility of Duplicates**

1) 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.

2) Unlike the common law, the federal rules allow a duplicate in lieu of the original unless the opponent raises a genuine question about authenticity or it would be unfair in the circumstances to allow the duplicate.

3) Examples: Photocopies, mimeograph copies, carbon copies, images scanned into a computer and then printed out, copies of an original video or audiotape made by re-

recording. But any copies produced manually, whether by typing or handwriting, are not duplicates and therefore may not be used if the original is available.

D) **Rule 1004. Admissibility of Other Evidence of Contents**

1) The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—
   a) (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
   b) (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
   c) (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
   d) (4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

2) Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactory explained, secondary evidence is admissible. This rule specifies the circumstances under which production of the original is excused.
   a) The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities.
   b) The fed rule about “no degrees” of secondary evidence is the minority rule as most state courts do recognize degrees of substantive evidence and hold that where there is a choice between a written copy and oral testimony, the written copy must be used.

3) Collateral writing exception (4): A document that only has a tangential connection (“not closely related to a controlling issue”) to the litigation need not be produced, even though its contents are being proved.

E) **Rule 1005. Public Records**

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

F) **Rule 1006. Summaries**

1) The contents of voluminous writings, recordings, or photographs which **cannot conveniently be examined in court** may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or

copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

2) Sponsoring witness: The summary must be sponsored by a witness (usually an expert) who testifies that he reviewed the underlying writings and the summary, and that the summary accurately reflects the underlying documents.
   a) The underlying originals need not be admitted since the purpose of the rule is to avoid this.

G) **Rule 1007. Testimony or Written Admission of Party**

1) Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

2) This rule limits the use of admissions to those made in the course of giving testimony or in writing. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible.

H) **Rule 1008. Functions of Court and Jury**

1) When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question **whether the condition has been fulfilled is ordinarily for the court** to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

2) Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, supra. Thus, the question whether the loss of the originals has been established, whether a particular item of evidence is an original, and whether the evidence relates to a collateral matter, is for the judge. (Most of the question involving the best evidence rule are resolved by the judge).
   a) When the authenticity of a copy is in question (As opposed to the authenticity of the original) The trier of fact determines if the contents are accurate.
      i) Question for the judge is to determine if there is sufficient evidence to support finding that it is an authentic copy. (104(b))

XVI) Authentication

A) **Generally:** All evidence must be authenticated before it is admitted. That is, it must be shown to be genuine. This means that the object must be established to be what the proponent claims it to be.
   1) Federal rules: Basic principle of authentication for all evidence: The proponent must come up with evidence "sufficient to support a finding that the matter in question is what the proponent claims."
   2) Judge's role: The judge does not have to decide whether the proffered item is what the proponent claims it to be (The jury does this). The judge does have to decide whether there is some evidence from which the jury could reasonably find that the item is what it is claimed to be.
      a) This is a 104(b) determination.

   3) Authentication is not needed if:
      a) The proponent has served on the opponent a written request for admission, and the opponent has granted this.
      b) Stipulation: the parties have jointly stipulated to the genuineness of a particular document or object.

B) **Rule 901. Requirement of Authentication or Identification**
   1) (a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
   2) (b) Illustrations.By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
      a) (1) **Testimony of witness with knowledge**. Testimony that a matter is what it is claimed to be.
      b) (2) **Nonexpert opinion on handwriting**. Nonexpert opinion as to the genuineness of handwriting, based upon **familiarity** not acquired for purposes of the litigation.
      c) (3) **Comparison by trier or expert witness**. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
      d) (4) **Distinctive characteristics and the like**. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. (Reply letter doctrine)
      e) (5) **Voice identification**. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
      f) (6) **Telephone conversations**. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to

business reasonably transacted over the telephone. (Other circumstances would be testimony that the person recognized the voice).

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

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

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

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

3) Authentication and identification represent a special aspect of relevancy. Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity."

a) This requirement of showing authenticity or identity fails in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

C) **Rule 902. Self-authentication**

1) Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

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

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

c) (3) **Foreign public documents**. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or

legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

d) (4) **Certified copies of public records**. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.
e) (5) **Official publications**. Books, pamphlets, or other publications purporting to be issued by public authority.
f) (6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.
g) (7) **Trade inscriptions and the like**. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
h) (8) **Acknowledged documents**. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
i) (9) **Commercial paper and related documents**. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
j) (10) **Presumptions under Acts of Congress**. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.
k) (11) **Certified domestic records of regularly conducted activity**. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—
    i) (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
    ii) (B) was kept in the course of the regularly conducted activity; and
    iii) (C) was made by the regularly conducted activity as a regular practice.

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

l) (12) **Certified foreign records of regularly conducted activity**. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—
   i) (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
   ii) (B) was kept in the course of the regularly conducted activity; and
   iii) (C) was made by the regularly conducted activity as a regular practice.

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

2) These are instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

D) **Rule 903. Subscribing Witness' Testimony Unnecessary**

1) The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

2) Rule 903 does not say what is required to authenticate an attested document; it only says the testimony of a subscribing witness is not required. The authentication requirements for an attested document, like any other, are found in Rules 901 and 902.

XVII)Opinion and experts

A) **Rule 701. Opinion Testimony by Lay Witnesses**

1) If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2) First hand knowledge: An ordinary (non-expert) witness must limit his testimony to facts which he has first hand knowledge.
   a) Distinguish from hearsay: If the W's statement on its face makes clear the W is merely repeating what someone else said, the objection is to hearsay. If W purports to be stating matters which he personally observed, but he is actually repeating statements by others, the objection is to lack of first hand knowledge.
   b) Experts: The rule requiring first hand knowledge does not apply to experts.

3) Fed approach to lay opinion: Lay opinions will be allowed if they have value to the fact finder. (Helpful to clear understanding of testimony or the determination of a fact in issue)
   a) Opinion on the "ultimate issue": Fed rules allow opinions on ultimate issues except where the mental state of a criminal D is concerned.
   b) Exceptions: A witness will not be permitted to express his opinion on a question of law, or an opinion on how the case should be decided.

B) **Rule 702. Testimony by Experts**

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

2) Requirements for allowing expert testimony:
   a) Qualifications: The expert must be qualified. He must have the knowledge or skill in a particular area that distinguishes him from an ordinary person.
      i) The proponent of the expert must lay the foundation as to the expert's qualifications.
      ii) After this is done, and before the witness begins testifying, the opponent can ask their own questions about the qualifications of the expert (Vior dire).
      iii) It is up to the judges discretion about whether the opponent can present their won evidence about whether the witness is qualified.

iv) It is solely a judge determination about whether an expert is qualified enough to hear the evidence: the judge has to have the responsibility under daubert to determine reliability.

b) Suitable subject matter: the expert's testimony must concern a topic that is so specialized that without the testimony, the jury would be less bale to reach an accurate conclusion. (Under the fed rule, the testimony must merely be helpful)

3) Foundation for the expert
   a) The proponent for the expert must lay foundation as to the experts qualifications
   b) After this is done, and before the witness begins testifying, the other party can ask their own questions of the expert
      i) It is at the judge's discretion about whether the opposing party can present their own evidence about whether the witness is qualified.
   c) Solely a judge determination about whether the witness is qualified as am expert. The judge has the responsibility under daubert to determine the reliability.

4) Basis for the experts opinion: The opinion may be based on any of several sources of information (1) The experts first hand knowledge, (2) the experts observations of prior witnesses and other evidence at the trial itself, (3) a hypothetical question asked by counsel to the expert
   a) Inadmissible evidence: The experts opinion may be based on evidence that would be otherwise inadmissible. Under 703, even inadmissible evidence may form the basis for the experts opinion if that evidence is of the type reasonably relied on be experts.
   b) Disclosure of the basis to the jury: Fed rules do not require that the expert state the facts or assumptions on which they base their opinion to the jury. 705 states that the expert need not make prior disclosure of the underlying facts or data, except that the court in a particular case may require him to do so, and in any event the cross-examiner may require the expert to state these underlying facts or data.

5) Hypothetical question: If the experts underlying facts and assumptions come from a hypothetical question, courts are liberal about the source of those facts and assumptions. Thus: (1) the assumptions need not be supported by evidence in the record at the time of the question, or even be admissible evidence at all, (2) the assumptions may be based on the opinions of others, if the expert I that situation would rely on such an opinion. But there must be some basis for the assumptions in the hypothetical—if the assumptions are too far fetched that no jury could possibly find them to be true, the hypo question will be stricken.

6) The court is called upon to reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community, or that otherwise would be only marginally helpful to the fact-finder. In civil cases the court is authorized and expected under revised Rule 26(c)(4) of the Federal Rules of Civil Procedure to impose in advance of trial appropriate restrictions on the use of expert testimony. In exercising this responsibility, the court should not only consider the potential

admissibility of the testimony under Rule 702 but also weigh the need and utility of the testimony against the time and expense involved.

7) **In Daubert** the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in **Kumho** clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. The admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the Daubert Court are (This is not an exhaustive list and others are listed in the comment)
   a) (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
   b) (2) whether the technique or theory has been subject to peer review and publication;
   c) (3) the known or potential rate of error of the technique or theory when applied;
   d) (4) the existence and maintenance of standards and controls; and
   e) (5) whether the technique or theory has been generally accepted in the scientific community.

   The Court in Kumho held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue."
8) A review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule. Daubert did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."

C) **Rule 703. Bases of Opinion Testimony by Experts**

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

2) Judicial function: Under Rule 703, the Trial Judge must determine the "reasonable reliance" question: whether the expert relies on information which, though inadmissible, is the information that other experts in the field reasonably rely on. If the expert takes into account inadmissible information that other experts in the field would not rely upon, the opinion is subject to exclusion under the Rule.

D) **Rule 704. Opinion on Ultimate Issue**

1) (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible **is not objectionable because it embraces an ultimate issue** to be decided by the trier of fact.
2) (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the **defendant did or did not have the mental state or condition constituting an element of the crime charged** or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

3) The so-called "ultimate issue" rule is specifically abolished by the instant rule.
   a) The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information.

E) **Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**

1) The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

F) **Rule 706. Court Appointed Experts**

1) (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
2) (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
3) (c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
4) (d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

5) Shopping for experts problem: the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.