EVIDENCE OUTLINE

RELEVANCE

§1: AN INTRODUCTION TO RELEVANCE

§1.1: Relevance as the Presupposition of Admissibility

A. **G/R:** in the law of evidence, truth matters.

B. **Rule 402:** all relevant evidence is admissible, except as otherwise provided…Evidence which is not relevant is not admissible.

1. Thus, if the evidence lacks probative value it should be excluded.

II. **§1.2: The Meaning of Relevancy and the Counterweights**

A. **G/R:** there are two components to relevant evidence: materiality and probative value.

1. Materiality: concerns the fit between the evidence and the case. It looks to the relation between the propositions that the evidence is offered to prove and the issues in the case.

a. *Immateriality:* if the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial.

b. *Issue*: what is "in issue" that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in light of the rules of pleading and controlled by the *substantive law*.

i. In addition to evidence that bears directly on the issues, leeway is allowed even on direct examination for proof of facts that merely fill in the background of the narrative and give it interest, color, and lifelikeness.

ii. Moreover, parties may question the credibility of the witnesses and, within limits, produce evidence assailing and supporting their credibility.

2. Probative Value: is the tendency of evidence to establish the proposition that it is offered to prove.

a. **Rule 401:** relevant evidence means evidence having the 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.

b. There are two ways to think about whether an item of evidence has probative value:

i. One can ask: does learning of this evidence make it either more or less likely the disputed fact is true?

ii. A second approach considers the probability of the evidence given the hypothesis.

c. Probative evidence often is said to have "logical relevance", while evidence lacking in substantial probative value may be condemned as speculative or remote.

i. *Speculativeness:* usually arises with regard to dubious projections into the future or questionable surmises about what might have happened had the facts been different.

ii. *Remoteness:* relates not to the passage of time alone, but to the undermining of reasonable inferences due to the likelihood of supervening factors.

B. **G/R:** An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make the proposition appear more probable than not.

1. It is enough if the item of evidence could reasonably show that a fact is slightly more probable than it would appear without the evidence.

C. **G/R:** Evidence that is Irrelevant for Want of Probative Value: the distinction between "direct" and "circumstantial" evidence offers the starting point for answering the question of what sort of evidence is irrelevant for want of probative value.

1. *Direct Evidence:* is evidence which, if believed, resolves a matter in issue.

a. Direct evidence from a qualified witness offered to help establish a provable fact can never be irrelevant.

2. *Circumstantial Evidence:* may also be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion.

a. Circumstantial evidence can offered to help prove a material fact, yet be so unrevealing as to be irrelevant to that fact.

b. To say circumstantial evidence is irrelevant in the sense that lacks probative value is to say the knowing the evidence does not justify *any* reasonable inference as to the fact in question.

D. **G/R:** relevant evidence is evidence that in some degree advances the inquiry. It is material and probative. As such, it is admissible, at least prima facie.

1. *Caveat:* relevance does not ensure admissibility. There remains the question under Rule 403 of whether its value is worth what it costs.

E. **Rule 403:** a great deal of evidence is excluded on the ground that its costs outweigh the benefits. Rule 403 categorizes most of these costs. Rule 403 codifies the common law power of judges to exclude relevant evidence 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. *Danger of Prejudice:* in this context, prejudice does simply mean damage to the opponents cause—for that can be a sign of probative value, not prejudice. Neither does it necessarily mean appeal to emotion. Prejudice can arise, however,

from facts that arouse the jury's hostility or sympathy for one side without regard to the probative value of the evidence.
2. Whether or not "emotional" reactions are work, relevant evidence can confuse, or worse, mislead a trier of fact who is not properly equipped to judge the probative worth of the evidence.
3. Certain proof and the answering evidence that it provokes might unduly distract the jury from the main issues.
4. The evidence offered and the counterproof could consume an inordinate amount of time.

F. **G/R:** trial judges are given much leeway/discretion in weighing probative value against probable dangers because weighing the pertinent costs and benefits at trial is no trivial task.

§1.3: Evidence Admissible for One Purpose, Inadmissible for Another: "Limited Admissibility."

A. **G/R:** an item of evidence may be logically relevant is several aspects, leading to distinct inferences or bearing upon different issues. For one of these purposes it may be admissible but for another inadmissible.

1. In this common situation, subject to limitations, the normal practice under the Federal Rules of Evidence is to admit the evidence. The opponent's legitimate interest is protected by a request at the time of the offer for an instruction to the jury that it is to consider the evidence for only the allowable purpose.

a. Realistically, the instruction may not always be effective, but admission of the evidence with the limiting instruction is normally the best reconciliation of the competing interests.

b. However, where the danger of the jury's misuse of the evidence for inadmissible purposes is acute, and its value for the legitimate purpose is slight or the point for which it is admissible can readily be proved by other evidence, the judges' power to exclude the evidence altogether is clear in case law and under Rule 403.

B. **G/R:** similarly, evidence is frequently admissible as against one party, but not as against the other. In that event, the practice is to admit the evidence with an instruction, if requested, that the jurors are not to consider it only as to the party against whom it is properly admissible.

THE HEARSAY RULE AND ITS EXCEPTIONS

§2: <u>THE HEARSAY RULE</u>

§2.1: The Reasons for the Rule Against Hearsay; Exceptions to the Rule

A. **G/R:** <u>Factors of Testimony:</u> the factors upon which the value of testimony depends are perception, memory, narration, and sincerity of the witness.

1. *Perception*: did the witness perceive what is described and perceive it accurately?
2. *Memory:* has the witness retained an accurate impression of the perception?
3. *Narration:* does the witness' language convey that impression accurately?
4. *Sincerity:* is the witness, with varying degrees of intention, testifying falsely?

B. **G/R:** in order to encourage witnesses to put forth their best efforts and to expose inaccuracies that might be present with any of the factors of testimony, the legal system evolved three conditions under which witnesses are ordinarily required to testify:

1. *Oath*;
    a. The out of court declarant, in the hearsay context, commonly speaks or writes without the solemnity of the oath administered to witnesses in a court of law.
    b. The oath is important in two respects:
        i. It may induce a feeling of special obligation to speak the truth, and
        ii. It may also impress upon the witness the danger of criminal punishment for perjury, to which the judicial oath is a prerequisite condition.
2. *Personal Presence at Trial*; and
    a. When a witness is giving information, in the hearsay context (out of court) there exists the lack of opportunity to observe the out of court declarant's demeanor, with the light this may shed on his credibility.
    b. Personal presence eliminates the danger that the witness reporting the out of court statement may do so inaccurately.
3. C*ross-Examination*: the lack of any opportunity for the adversary to cross examine the absent declarant whose out of court statement is reported as the main justification for the exclusion of hearsay.

C. **G/R:** in the hearsay situation, two witnesses are involved:

1. The first complies with all three of the ideal conditions for giving testimony but merely reports what the second witness said.
2. The second witness is the out of court declarant whose statement was not given in compliance with the ideal conditions but contains critical information.

D. **G/R:** <u>Hearsay that is Admitted:</u> hearsay by its inherent nature is not unworthy of any reliance in a judicial proceeding. The contrary is proved by the fact that courts are constantly admitting hearsay evidence under the numbers exceptions to the hearsay rule.

1. Hearsay evidence exhibits a wide range of reliability, some mere third hand rumors to sworn affidavits of credible observers and ranging from the highest to the lowest levels of trustworthiness.
2. Board support exists for a general policy of requiring testimony be given by witnesses *in open court, under oath, and subject to cross-examination*, which is the objective of the rule against hearsay.

§2.2: A Hearsay Definition

A. **Rule 801: (a)** a "Statement" is defined as (1) an oral or written assertion; or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. **(b)** "Hearsay" is defined as a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.

1. This definition is affirmative: it says than out of court assertion, offered to prove the truth of the matter asserted is hearsay.
    a. This means that out of court conduct is *not* hearsay if it:
    i. is not an assertion; or
    ii. even if it is assertive, is not offered to prove the truth of the matter asserted.

B. **G/R:** Another Definition: another formulation of hearsay measures the out of court statement against the policy underlying the hearsay rule and classifies as hearsay statements whose evidentiary value depends upon the credibility of the declarant without the assurances of oath, presence, or cross-examination.

1. Thus, when conduct or statements are not assertive or when they are assertive but are not used to prove the truth of the matter asserted, the statement should generally not be treated as hearsay because it does not fit the literal definition and because under these circumstances the danger of insincerity is usually reduced significantly.

C. **G/R:** Not in Presence of Party Against Whom Offered: a statement can still be hearsay and inadmissible if not made in the presence of the party against whom they are offered.

1. The presence or absence of the party against whom an out of court statement is offered has significance in only a few situations; e.g., when a statement is spoken in the party's presence is relied upon to establish notice, or when failure to deny a statement is a basis for claiming that the party adopted the statement.

§2.3: Distinction Between Hearsay Rule and Rule Requiring Firsthand Knowledge

A. **G/R:** Rule Requiring Firsthand Knowledge: witnesses are qualified to testify to facts susceptible of observation only if it appears that they had a reasonable opportunity to observe the facts.

B. **G/R:** Distinction between Rule of Hearsay and Firsthand Knowledge: the distinction between the rules is one of the form of the testimony, whether the witness purports to give the facts directly upon his own credit or whether the witness purports to give an account of what another has said and this offered to establish the truth of the other's report.

§2.4: Instances of the Application of the Hearsay Rule

A. Generally: evidence of the following oral statements have been excluded as hearsay:

1. on the issue of whether deceased had transferred his insurance to his new automobile, testimony that he said he had made the transfer;
2. to prove that veniremen had read newspaper articles, testimony of deputy sheriff that attorney said that another had read the articles;
3. to prove that driver was driving with consent of insured owner, testimony that owner said after the accident that the driver had his permission;
4. in rebuttal of defense of entrapment, criminal reputation of defendant to show predisposition;
5. to show defendant's control of premises where marijuana was found, testimony of a police officer that neighbors said person of same name occupied the premises; and
6. statements of child to social workers describing sexual abuse.

B. Generally: evidence of the following written statements was excluded as being hearsay:

1. written estimates of damages or cost of repairs made by an estimator who did not appear as witness;
2. written appraisal of stole trailer by appraiser who did not testify;
3. invoices from third parties as independent evidence of the making of repairs;
4. the written statement of an absent witness to an accident;
5. newspaper accounts as proof of the acts reported;
6. statements in a will that testator's second wife had agreed to devise property to his children as proof of the agreement;
7. medical report by a physician who did not testify to prove that plaintiff had sustained injuries in a subsequent accident;
8. manufacturer's advertising claims as proof of products reliability.

§2.5: Some Out-of-Court Utterances that are Not Hearsay

A. **G/R:** the hearsay rule forbids evidence of out of court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the truth of the facts asserted, it is not hearsay.

B. **G/R:** Verbal Acts: [verbal acts of independent legal significance]: when a suit is brought for breach of written contract, the writing offered as evidence of the contract is not hearsay. Similarly, proof of oral utterances by the parties in a contract suit constituting the offer and acceptance which brought the contract into being are not evidence of assertions offered as testimonially but rather verbal conduct to which the law *attaches legal duties and liabilities.*

1. Other obvious instances of the utterance by the defendant of words relied on as constituting a slander or deceit for which damages are sought.

C. **G/R:** Verbal Parts of Acts: the legal significance of acts taken alone and isolated from surrounding circumstances may be unclear. Explanatory words, which accompany and give character to the transaction, are not hearsay when under the *substantive law* the

pertinent inquiry is directed only to objective manifestations rather than to the actual intent or other state of mind of the actor.

1. The "verbal parts of acts" concept has been tightly limited to words that constitute operative legal conduct and renders the doctrine adjunct to the verbal acts doctrine.

D. **G/R:** Utterances and Writings Offered to show Effect on Hearer or Reader: [Circumstantial Evidence of State of Mind]: a statement that D made a statement to X is not subject to attack as hearsay when its purpose is to establish the *state of mind* thereby induced in X, such as having knowledge or receiving notice or motive, or to show the information which X had as bearing on the reasonableness, good faith, or voluntariness of subsequent conduct, or on the anxiety produced.

1. The same rationale applies in self-defense cases to proof by the defendant of communicated threats by the person killed or assaulted. If offered to show the defendant's reasonable apprehension of danger, the statement is not offered for a hearsay purpose because its value does not depend on its truth.
2. In these situations, the out of court statement will usually have an impermissible hearsay aspect as well as a permissible non-hearsay aspect.
    a. Unless the need for the evidence for the proper purpose is substantially outweighed by the danger of improper use, the appropriate result is to admit the evidence with a limiting instruction.

E. **G/R:** Prior Inconsistent and Consistent Statements Used to Affect Credibility: a common technique to impeach the credibility of a witness is to show that on a prior occasion the person made a statement inconsistent with his testimony on the stand. the theory of impeachment does not depend upon the prior statement being true and the present one false. Instead, the mere fact that the witness stated the facts differently on separate occasions is sufficient to impair credibility.

1. Thus, the prior statement is not offered for its truth and is not hearsay.
2. It is important to note that as a consequence of the theory of admissibility, statements offered under this theory may not be used for their truth and do not constitute substantive evidence.
    a. *Rehabilitation:* once a witnesses' testimony has been impeached, prior inconsistent statements may be offered under some circumstances in rehabilitation, and when offered for this limited purpose, they are also non-hearsay.

F. **G/R:** Indirect Versions of Hearsay Statements, Group Statements: if the purpose of the testimony is to use an out of court statement to prove the truth of the facts stated, the hearsay objection cannot be eliminated by eliciting the content of the statement in an indirect form.

1. Thus, when offered as proof of the facts asserted, testimony regarding "information received" by the witness and the result of investigations made by other person are properly classified as hearsay.

2. Statements of collective or group; decisions presented by the testimony of one of the group should be treated similarly except where expert opinions are involved.

G. **G/R:** Reputation: reputation is a composite description of what the people in a community have said and are saying about a matter. A witness who testifies as to reputation testifies to a generalized version of a series of out of court statements.

1. Whether reputation is hearsay depends on the same tests applied to evidence of other out of court statements and sometimes may not be hearsay at all.
2. Proof of reputation in the community offered as evidence that some person there had knowledge of the reputed facts is not hearsay.
3. Evidence of reputation is hearsay when offered to prove the truth of the fact reputed and hence depends for its value on the veracity of the collective assertions. It should be excluded when it fits within no exception.
    a. However several exceptions have to the hearsay rule have been recognized for reputation as to character and other certain issues.

H. **G/R:** Prior Statements of Witnesses Offered for the Truth; Admissions of Party Opponents: some prior statements of witnesses offered for their truth and admissions by party opponents are excluded from the hearsay rule by the FRE under theories separate from the definition of hearsay.

§2.6: Conduct as Hearsay and Implied Assertions

A. **G/R:** Nonverbal Conduct: in some situations nonverbal conduct may be just as assertive as words (ex: pointing out a criminal defendant in a line-up). Clear instances of non-verbal conduct of a person intended by the person as an assertion, which satisfy the definition of hearsay in Rule 801, receive the same treatment as oral or written assertions.

B. **G/R:** Nonassertive Nonverbal Conduct: **Rule 801**, and numerous decisions, treat nonverbal conduct as non-hearsay unless an intent to assert is shown.

1. Ex: captain got in ship with family and sailed after inspecting it (non-assertive nonverbal conduct tending to show the ship was safe); raising an umbrella because it is raining; moving forward when the light turns green, etc…
2. Nonassertive nonverbal conduct is not hearsay because it involves no intent to communicate the fact sought to be proved, and purpose deception is much less likely in the absence of the intent to communicate.

C. **G/R:** Silence as Hearsay: one aspect of the conduct as hearsay problem is presented by cases where a failure to speak or act is offered to support an inference that conditions were such as would evoke silence or inaction in a reasonable person. These cases usually fall into two classes:

1. Evidence of the absence of complaints from other customers as disproof of claimed defects of goods or food or form other persons who would have been affected, as disproof of a claimed injurious event or condition; and

2. Evidence from members of a family that a particular member never mentioned an event or claim to or disposition of property, to prove nonoccurrence or nonexistence.
3. **g/r:** the evidence is not hearsay under the definition in Rule 801 because it is not intended as an assertion.

D. **G/R:** Implied Assertions: [Out of court assertions offered not prove the truth of the matter asserted]: an out of court assertion is not hearsay if offered as proof of something other than the matter asserted.

1. The theory is that questions of sincerity are generally reduced when assertive conduct is offered as a basis for inferring something other than the matter asserted.

E. **G/R:** Knowledge: testimony offered to establish declarations evidencing knowledge, notice or awareness of some fact are generally not hearsay because no problem of veracity is involved and does not depend upon the content of the statement.

1. Ex: person thought to be dead states "I am a alive." It would not have mattered if the person said I am dead, because the act of speaking is evidence that the person was alive and the content of the speech does not matter.
2. *Caveat:* when the existence of knowledge is used as the basis for a further inference, the hearsay rule may be violated.

a. Statements of memory or belief are not generally allowed as proof of the happening of the event remembered or believed, since allowing the evidence would destroy the hearsay rule.

§2.7: The Requirement of Knowledge from Observation

A. **G/R:** Rule of Firsthand knowledge: the declarant must have had an opportunity to observe the fact declared. If the witness's testimony on its face purports to be a description of observed facts, but the testimony rests on statements of others, the objection is that the witness lacks firsthand knowledge.

1. A person who has no knowledge of a fact except what another has told him does not satisfy the requirement of firsthand knowledge from observation.

§2.8: Nature and Effect

A. **G/R:** Admissions of a Party-Opponent: (a) *Admissions:* are the words or acts of a party or party's representative that are offers as evidence by the opposing party. (b) They may be *express admissions*, which are statements of the opposing party or an agent whose words may be fairly used against the party; or (c) *admissions by conduct.*

1. **G/R:** admissions are admissible and do not violate the hearsay rule because they are a product of the adversarial system, sharing on a lower level the characteristics of admissions in pleadings or stipulations.

a. Under this theory, admissions need not satisfy the traditional requirement for hearsay exceptions that they possess circumstantial guarantees of trustworthiness. Rather, admissions are outside the

framework of hearsay exceptions, classed as non-hearsay, and excluded from the hearsay rule.

B. **Rule 801(d)(2):** Admission by a Party Opponent: excludes admission from the hearsay rule, and defines an admission as a statement offered against a party that is:

(A) the party's own statement, in either an individual or 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 agency or employment, made during the existence of the relationship, or

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

C. **G/R:** admissions are received as substantive evidence of the facts admitted and not merely to contradict the party.

D. **G/R:** Evidentiary Admissions: when the term admission is used without any qualifying adjective, the customary meaning is an evidentiary admission; that is, words in oral or written form or conduct of a party or a representative offered in evidence against the party.

1. Evidentiary admissions are to be distinguished from judicial admissions (judicial notice), which is not evidence at all.

§3: EXCEPTIONS TO THE HEARSAY RULE: GENERALLY

§3.1: The Hearsay Exceptions Where Declarant is Unavailable; Admission of Hearsay as a Consequence of Wrongful Procurement of Unavailability

A. **Generally**: the courts recognize numerous exceptions to the hearsay rule where circumstantial guarantees of trustworthiness justify departure from the general rule excluding hearsay. The exceptions are divided into two groups:

1. Availability or Unavailability of Declarant is Not a Relevant Factor: the theory of this group of exceptions is that the out of court statement is as reliable or more reliable than would be testimony in person so that producing the declarant would involve pointless delay and inconvenience.

2. Unavailability is a Requirement of the Exception: the theory of this group of exceptions is that while live testimony would be preferable, the out of court statement will be accepted if the declarant is unavailable.

a. The critical factor is actually the unavailability of the witness' testimony.

B. **Rule 804(a):** provides a list of the five generally recognized *unavailability* situations:

B(1). **Rule 804(a)(1):** Exercise of Privilege: the successful exercise of a privilege not to testify renders the witness unavailable with the scope of the privilege.

B(2). **Rule 804(a)(2):** Refusal to Testify: if a witness simply refuses to testify, despite all the appropriate judicial pressures, he is practically and legally unavailable.

B(3). **Rule 804(a)(3):** Claimed Lack of Memory: a claim of lack of memory made by the witness on the stand can satisfy the unavailability requirement. If the claim is genuine, the testimony is simply unavailable by any realistic standard.

1. Under the Federal Rule, the witness may testify regarding a lack of memory and is subject to cross-examination. If the claim is determined to be false, the witness is subject to contempt proceedings, though perhaps less effectively than in cases of simple refusal.

2. If the forgetfulness is only partial, the appropriate solution would appear to be to resort to present testimony to the extent of recollection, supplemented with the hearsay testimony to the extent required.

B(4). **Rule 804(a)(4):** Death; Physical or Mental Illness: death was the form which unavailability assumed with most of the relevant exceptions. Physical ability to attend the trail or testify is also a recognized ground. Mental incapacity, including failure of faculties due to disease, senility, or accident is also recognized as a basis of unavailability.

1. Where the disability is not permanent, unavailability should be determined by the judge (granting a continuance is sometimes the appropriate relief), with due regard for the prospects of recovery, the importance of the testimony, and the interest of prompt administration of justice.

B(5). **Rule 804(a)(5):** Absence: absence of the declarant from the hearing, standing alone, does *not* establish unavailability. Under the federal rule, the proponent of a hearsay statement must in addition show an inability to procure declarant's attendance:

1. by process; or
    a. The relevant process is subpoena, or in appropriate situations, writ of habeas corpus. If a witness is beyond the reach of process, obviously process cannot procure attendance.
    b. Substantial differences exist between criminal and civil cases for the reach of process.
    c. If the witness cannot be found, process obviously cannot be effective. The proponent of the hearsay statement must, however, establish that the witness cannot be found through a substantial good faith effort.
2. by other reasonable means.
    a. In addition to inability to procure attendance by process, the Confrontation Clause requires the prosecution, before introducing a hearsay statement of the type where unavailability is required, also to

show that declarant's attendance cannot be procured through good faith efforts by other means; here the standard is one of *diligence.*

**When absence is relied upon as grounds of unavailability, the Federal Rule imposes a further requirement that inability to take the deposition of the missing witness also be shown.

C. **G/R:** Admission of Hearsay as a Consequence of Wrongful Procurement of Unavailability: the final sentence of Rule 804(a) states that a witness is not legally unavailable if the justification for that unavailability "is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying."

1. The language of the Rule requires a specific purpose to render the witness unavailable; but does not require wrongful conduct.

2. **Rule 804(b)(5):** admits hearsay against a party, who directly or through others, engages in purposeful wrongful conduct that procures a witness' unavailability.

a. This Rule is unique among hearsay exceptions in admitting evidence without a guarantee of trustworthiness, based on a theory that the opponent's purpose wrongful action forfeits any objection.

D. **G/R:** Depositions: unavailability may appear as a requirement at two different stages in connection with depositions:

1. the right to take a deposition may be subject to certain conditions of which the most common is unavailability to testify at the trial; or

2. the right to use a deposition at the trial in place of the personal appearance of the deponent is usually conditioned upon availability.

*The matter is largely governed by statute or rule.

E. **G/R:** Children: receiving testimony from children, particularly in sexual abuse cases, often presents questions of unavailability:

1. In some jurisdictions, a finding of incompetence will make the witness unavailable;

2. Other courts have found unavailability based upon the inability of the child to remember events;

3. Often, a finding of unavailability is justified upon a determination that testifying will cause emotional trauma to the child and that child is therefore unavailable.

§3.2: Dying Declarations: Requirements that Declarant Must have been Conscious of Impending Death and that Declarant Must be Unavailable

A. **Rule 804(b)(2):** Statement under Belief of Impending Death: in a prosecution for homicide or in a civil action 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.

B. **G/R:** Dying Declarations and Limitations: the popular reverence for deathbed statements flows from two important limitations upon the dying declaration exception as developed at common law:

1. the declarant must have conscious that death was near and certain when making the statement;

a. The declarant must have lost all hope of recovery;

b. A belief in a probability of impending death would arguably make most people strongly disposed to tell the truth and hence guarantee the needed special reliability.

c. The description of the declarant's mental state in **Rule 804(b)(2)** is less emphatic than the common law cases, merely saying "while believing that declarant's death was imminent."

d. This mental state is a question of fact to be determined by the court.

2. the declarant must be dead when the evidence is offered;

a. The Federal Rules do not require that the declarant must be dead, only unavailable, which of course includes death.

**The critical issue throughout is the declarant's belief in the nearness of death at the time of the statement, not the actual swiftness with which death ensues after the statement or the immediacy of the statement after injury.

§3.3: Dying Declarations: Limitation to the Use in Criminal Homicide Cases and Subject Matter Restrictions

A. **G/R:** the dying declaration exception is limited to prosecutions for homicide and civil actions or proceedings. Under the Federal Rule, dying declarations are inadmissible in criminal cases other than homicides.

1. Not only must the charge be homicide, but the defendant in the present trial must have been charged with the death of the declarant.

2. Another limitation regarding the subject matter is that declarations are only admissible insofar as they related to the circumstances of the killing and to the events more or less nearly preceding it in time and leading up to it.

a. Federal Rule 804(b)(2) requires only that the statement be one concerning the cause or circumstances of what the declarant believed to be impending death.

i. Statements identifying the attacker are clearly admissible under this terminology and those describing prior threats by, or fights and arguments with, such person also meet the requirement.

B. **G/R:** dying declarations are admissible on behalf of the accused as well as for the prosecution; that is, dying declarations can be received on behalf of the defendant as well as the prosecution.

§3.4: Dying Declarations; Application of Other Evidentiary Rules: Personal Knowledge; Opinion; Rules about Writings

A. **G/R:** Personal Knowledge: if the declarant did not have adequate opportunity to observe the facts recounted, the declaration will be rejected for lack of firsthand knowledge.

1. When there is room for doubt as to whether the statement is based on knowledge, the question is for the jury. Expressions of suspicion or conjecture are to be excluded however.

B. **G/R:** Opinion: the traditional opinion rule, designed as a regulation of the manner of question of witnesses in court, is entirely inappropriate as a restriction upon out of court declarations.

C. **G/R:** Best Evidence Rule: often the dying victim will make one or more oral statements about facts of the crime and, in addition, may make a written statement, or the person hearing the statement may write it down and have the declarant sign it.

1. The issue then becomes when must the writing be produced or its absence be explained.

a. Any separate oral statement is clearly provable without producing the later writing; but the terms of a written dying statement cannot be proved as such without producing or accounting for the writing.

D. **G/R:** Instructions: a question often arises as to the weight to be given to a dying declaration; as a result, the practice has grown up in some jurisdictions of requiring or permitting the judge to instruct the jury that these declarations are to be received with caution or that they are not to be regarded as having the same weight as sworn testimony.

§3.5: Preliminary Questions of Fact Arising on Objections

A. **G/R:** the great body of evidence law consists of rules that operate to exclude relevant evidence (like the hearsay rule).

1. Most of these technical exclusionary rules and their exceptions are conditioned upon the existence of certain facts; that is, foundational or preliminary facts falling under **Rule 104.**

2. Issues of fact are usually left to the jury; however, there are strong reasons for not letting the jury decide preliminary questions of fact upon which hinges the *application* of a rule of evidence.

B. **G/R:** Foundational Facts Conditioning the Application of Technical Exclusionary Rules: the generally accepted view, the trial judge finally decides the questions of fact conditioning the admissibility of evidence objected to under exclusionary rules such as the hearsay doctrine.

1. **Rule 104(a):** incorporates this view.

2. The same practice extends to the determination of preliminary facts conditioning the application of the rules as to witness' competency and privileges.

3. On all these preliminary questions, the judge on request will hold a hearing at which each side may produce evidence.

C. **G/R:** Foundational Facts Conditioning the Logical Relevance of the Evidence: in situations where the logical relevancy—the fundamental probative value—of the evidence depends on the existence of a preliminary fact then these conditional relevancy questions will be considered by the jury. Conditional relevancy questions under Rule 104(b) are well within the jurors' competence.

1. **Rule 104(b)**: when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding to the fulfillment of the condition.
2. Federal Rule 602 expressly applies this procedure to the preliminary issue of a lay witness' personal knowledge, and Rule 901(a) extends the procedure to the foundational issue of the authenticity of exhibits.

D. **G/R:** Confessions: are subject to their own special rules, which are treated elsewhere.

E. **G/R:** Dying Declarations: in cases involving dying declarations some courts give the jury a role in deciding the preliminary question whether declarant had the settled, hopeless expectation of death required for that hearsay exception.

§3.6: Res Gestae and the Hearsay Rule

A. Generally: historically, *res gestae* served as an exception in and of itself to the hearsay rule. *Res gestae* is generally not used anymore, but it did describe the admissibility of four statements that today come within four exceptions to the hearsay rule:

1. statements of present sense impressions;
2. excited utterances;
3. statements of present bodily condition; and
4. statements of present mental states and emotions.

B. Policy: two main policies or motives are discernable in the recognition of *res gestae* as a password for admission of otherwise inadmissible evidence:

1. the desire to permit each witness to tell his story in a natural way by reciting all that happened at the time of the narrated incident, including those details that give it life and color; and
2. the recognition of spontaneity as the source of special trustworthiness.

§3.7: Spontaneous Statements as Nonhearsay: Circumstantial Proof of a Fact in Issue.

A. Generally: the various types of spontaneous statements are often treated as hearsay by the courts; and thus, to be admissible, they must come within an exception to the general rule excluding hearsay.

1. Hearsay is generally defined as assertive statements offered to prove what is asserted; however, many spontaneous statements are in fact not assertive statements or, if assertive, are not offered to prove the truth of the assertion.

B. **G/R:** if the statement offered in evidence is not classified as hearsay, then no further consideration of the exceptions to the hearsay rule are required. If however, it is considered hearsay, then the following exceptions may become pertinent to admissibility.

§3.8: Self-Serving Aspects of Spontaneous Statements

A. **G/R:** the hearsay rule excludes all hearsay statements *unless* they within in some exception. Thus, no specific rule is necessary to exclude self-serving out of court statements if not within a hearsay exception.

1. If a statement with a self-serving aspect falls within an exception to the hearsay rule, the judgment underlying the exception that the assurances of trustworthiness outweigh the dangers in hearsay should be taken, as controlling, and the declaration should be admitted despite its self-serving aspects.
2. Although historically some courts excluded self-serving statements; the Federal Rules make no special provision for self-serving statements.
    a. What is clear, however, is that since spontaneity is the principal, and often the only, guarantee of trustworthiness for the exceptions in this chapter, its absence should result in the exclusion of the statement.
3. Under the Federal Rules, judgments about credibility should be left to the jury rather being preempted by judicial determination; therefore, although it possible for the judge to use the Rule 403 balance in considering the prejudicial effect of self-serving statements they are better left for the jury.

§3.9: Unexcited Statements of Present Sense Impressions

A. **G/R:** there is an exception to the hearsay rule for statements concerning non-exciting events that the declarant was observing while making the declaration.

1. Although these statements lack whatever assurance of reliability is produced by the effect of an exciting event, other factors offer safeguards:
    a. Since the report concerns observation being made at the time of the statement, possible errors caused by a defect of the declarant's memory are absent;
    b. A requirement that the statement be made contemporaneously with the observation means that little or no time is available for calculated misstatement;
    c. The statement will usually have been made to third person (the witness who subsequently testifies to it), who was also present at the time and scene of the observation.
    d. Thus, in most cases, the witness will have observed the situation and thus can provide a check on the accuracy of the declarant's statement and furnish corroboration.
        i. Moreover, since the declarant will often be available for cross-examination his credibility will be subject to substantial verification before the trier of fact.

B. **Rule 803(1):** provides a hearsay exception, without regard to the availability of the declarant, for a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

1. Like all hearsay exceptions and exclusions other than admissions, present sense impressions and excited utterances require that the declarant have first hand knowledge, which can sometimes be provided entirely by the statement.

C. Difference Between Present Sense Impressions and Excited Utterances: these two exceptions differ in a number of important respects:

1. no exciting event or condition is required for present sense impressions;
2. while excited utterances *relating to* the startling event or condition are admissible, present sense impressions are limited to *describing or explaining* the event or condition perceived;
3. although the time within which an excited utterance may be made is measured by the duration of the stress caused by the exciting event, the present sense impression statement may be made only while the declarant was actually *perceiving* the event, or *immediately thereafter*.

i. Thus, the appropriate inquiry with present sense impressions is whether sufficient time elapsed to have permitted reflective thought.

D. **G/R:** Corroboration: there is no requirement for third-party corroboration with the present sense impression exception.

§3.10: Excited Utterances

A. **G/R:** Excited Utterance: an exception to the hearsay rule for statements made under the influence of a startling event is now universally recognized. There are two basic requirements for this exception:

1. There must be an occurrence or some event sufficiently startling to render inoperative the normal reflective thought process of the observer; and

a. The sufficiency of the event or occurrence as an exciting event is usually easily resolved;

i. Physical violence, though often present, is not required.
ii. Automobile accidents, pain, or an injury, an attack by a dog, a fight seeing a photograph in a newspaper, and wide range of other events may qualify.

2. the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought.

a. Under generally prevailing practice, the statement itself is considered sufficient proof of the exciting event, and therefore the statement is admissible despite absence of other proof that an exciting event occurred.
b. Initially, it is necessary that the declarant be affected by the exciting event. The declarant need not actually be involved in the event; an excited utterance by a bystander is admissible.
c. *Temporal Element:* the most important of the many factors entering into this determination is the temporal element—if the statement occurs while

the exciting event is in progress the courts have little difficulty finding that the excitement prompted the statement.

i. But as the time between the event and the statement increases, courts become more reluctant to find the statement an excited utterance.

*These two elements, which define the essence of the exception, together with a third requirement that the statement "relate to" the event, determine admissibility.

**The rationale for this exception leis in the special reliability that is furnished when excitement suspends the declarant's powers of reflection and fabrication.

B. **G/R:** Temporal Element: where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process.

1. Testimony that the declarant still appeared "nervous" or distraught" and there was a reasonable basis for continuing emotional upset will suffice.
2. The nature of the exciting event and the declarant's concern with it are obviously relevant.

C. **G/R:** Factors Indicating Exclusion: evidence that the statement was made in response to an inquiry or was self-serving is an indication that the statement was the result of reflective thought. Where the time interval permitted such thought, those factors might swing the balance in favor of exclusion.

1. Proof that the declarant performed tasks requiring relatively careful thought between the event and the statement provides strong evidence that the effect of the exciting event had subsided.

D. **G/R:** Trial courts have substantial discretion in determining whether the declarant was still under the influence of an exciting event at the time the statement was offered.

E. **Rule 803(2):** the rule *requires* a connection between the event and the content of the statement, but it defines that connection broadly as "relating to" the event.

1. This terminology is intended to extend beyond merely a description or an explanation of the event.
2. The Rule has the advantage of simplicity while at the same time preserving the trustworthiness gained by requiring a relationship between the exciting event or condition and the resulting statement.
3. It also permits clarification of the difference in theory between excited utterances and statements of present sense impressions.

F. **G/R:** Firsthand Knowledge: the witness is required to have firsthand knowledge of the exciting event.

1. Direct proof of observation is not necessary; if the circumstances appear consistent with opportunity by the declarant, the requirement is met.
2. If there is doubt, the question should be for the jury.

G. **G/R:** Competency: other aspects (opposed to firsthand knowledge) competency are *not* applied. Thus, an excited utterance is admissible despite the fact that the declarant was a child and would have been incompetent as a witness for that reason, or the declarant was incompetent by virtue of mental illness.

§3.11: Excited Utterances and Other Hearsay Exceptions in Sexual Abuse Cases

A. Generally: rape cases and other sexual offenses, particularly those involving minors, raise difficult hearsay issues.

B. **G/R:** in modern practice, particularly where children are the victims of sexual offenses, many courts have liberally interpreted the allowable period of time between the exciting event and the child's description of it.

C. **Uniform Rule 807:** the rule exempts form the ban of the hearsay rule the audio-visually recorded statement of a child victim or witness describing an act of sexual abuse or physical violence if the court finds:

1. the minor will suffer severe emotional or psychological stress if required to testify in open court;
2. the time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and
3. other enumerated requires are followed regarding the conduct of the recording process.

§4: EXCEPTIONS TO THE HEARSAY RULE: ADMISSIONS

§4.1: Nature and Effect

A. Generally: the familiar phrase, "Anything that you say can be used a against you" is a convenient starting point for admissions as evidence.

1. *Definition:* admissions are words or acts of a party or party's representative that are offered as evidence by the opposing party.
    a. *Express Admissions:* are statements of the opposing party or an agent whose words may fairly be used against the party;
    b. *Admissions by Conduct:* are implied statements by the opposing party's actions.
2. *Policy:* the justification for the admissibility of admissions is that they are the product of the adversary system, sharing on a lower level the characteristics of admissions in pleadings and stipulations.
    a. Under this view, admissions need not satisfy the traditional requirement for hearsay exceptions that they possess circumstantial guarantees of trustworthiness.
    b. Rather, admissions are outside the framework of hearsay exceptions, classed as nonhearsay, and excluded from the hearsay rule.

B. **Rule 801(d)(2):** Statements which are not Hearsay: Rule 801(d)(2), which excludes admissions from the hearsay rule, defines an admission as a statement offered against a party that is:

(A) the party's own statement, in either an in either an individual or 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 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.

C. **G/R:** admissions of a party are received as substantive evidence of the facts admitted and not merely to contradict the party.

1. As a result, no foundation by first examining the party, as required for impeachment with a prior inconsistent statement, is mandated for admissions.

D. **G/R:** Evidentiary Admissions: when the term admission is used without any qualifying adjective, the customary meaning is an evidentiary admission, that is, words in oral or written form or conduct of a party or a representative offered in evidence against the party.

1. Evidentiary admissions should be distinguished from judicial admissions, which are not evidence at all.

D. **G/R:** Admissions: are simply words or actions, inconsistent with the party's position at trial, relevant to the substantive issues in the case, and offered against the party.

1. While generally received in evidence because of their typically significant probative value, admissions may be *excluded* if their probative value is substantially outweighed by the prejudicial impact.

E. **G/R:** Admissions and Declarations of Interest: a declarations against interest is a separate exception to the hearsay rule and should not be confused with admissions.

1. Declarations of interest must have been made against the declarant's interest when made.

a. Although most admissions are against interest when made, no such requirement is applied to admissions.

b. In addition, admissions must be statements of a party to the suit, and they must be offered against the party opponent; whereas, declarations of interest do not have that requirement.

§4.2: Testimonial Qualifications: Mental Competency; Personal Knowledge

A. **G/R:** Mental Capacity in some instances, the mental capacity of a declarant making an admission must be considered.

1. Statements by badly injured persons, possibly under sedation are an example.
2. However, the issue of mental capacity is usually one of weight, and not admissibility under the Federal Rules.

B. **G/R:** Rule of Firsthand Knowledge: the requirement that a witness speak from firsthand knowledge is applicable to hearsay declarations generally and on rare occasions is applied to admissions.

1. The traditional view, however, is that firsthand knowledge is *NOT* required for admissions. This view is accepted by the majority of courts and the Federal Rules of Evidence.

§4.3: Admissions in Opinion Form; Conclusions of Law

A. **G/R:** Opinions: the opinion rule, like the rule of firsthand knowledge, does not exclude the admission of a party.

1. The rule limiting lay opinions, which is designed to promote the concreteness off answers on the stand, is grotesquely misapplied to out-of-court statements such as admissions where the declarant's statements are made without thought of the form of courtroom testimony.
2. The prevailing view is that admissions in the form of opinions are competent.

§4.4: Admissions in Pleadings; Pleas of Guilty

A. **G/R:** Pleadings: the final pleadings upon which the case is tried state the contentions of each party as to the facts, and by admitting or denying the opponent's pleading, they define the factual issues that are to be proved.

1. Pleadings are generally used as judicial and not evidentiary admissions, and they are conclusive until withdrawn or amended.
2. The pleadings, subject to some qualifications, are generally usable against the pleader.
3. These same principles apply to the sue in a subsequent trial of counsel's oral in court statements representing the factual contentions of the party, even including assertions made during opening statements.

B. **G/R:** pleadings shown to be prepared or filed by counsel employed by the party are prima facie regarded as authorized by the client and are entitled to be received as admissions.

1. The party opposing admission may offer evidence that the pleading was filed upon incorrect information and without his actual knowledge, but, except in extraordinary circumstances, such a showing goes only to the weight and not to the admissibility of the pleading.

C. **G/R:** Exception to the Pleading Rule: an important exception to the use of pleadings as admissions arises in situations where the use of written pleadings is uncertainty as to whether the evidence as it actually unfolds at trial will prove the case described in the pleadings.

1. Thus, when the pleader uses alternative, or hypothetical forms of statements of claims and defenses, regardless of their consistency; it is readily appreciated that pleadings of this nature are directed primarily at giving notice and lack the essential character of an admission.

2. Hence, the decisions with seeming unanimity, deny alternative pleadings the status of judicial admissions, and generally disallow them as evidentiary admissions.

D. **G/R:** Guilty Pleas: generally, a plea of guilty to a criminal charge is admitted as an admission in a related civil action.

E. **G/R:** Withdraw of Guilty Pleas: when a plea of guilty to a criminal charge is withdrawn by the accused and he is subsequently tried on the charge, the Federal Rules exclude such withdraw as an admission in both civil and criminal cases [**Rule 410**].

§4.5: Testimony by the Party as an Admission

A. **G/R:** Testimony as an Admission: while testifying on pretrial examination or at trial, a party may admit some fact that is adverse, and sometimes fatal, to a cause of action or defense. If the party's admission stands un-impeached, and un-contradicted at the end of trial, it is conclusive against the party.

B. **G/R:** Contradicting Admissions: some courts [there are three views, but this approach is most preferable in policy and in accord with the jury trial] take the view that a party's testimony in making a detrimental admission, is like the testimony of any other witness called by the party, and the party is free to elicit contradictory testimony from the same witness or to call other witnesses to contradict the statement.

1. Obviously, the problem of persuasion may be a difficult one when the party seeks to explain or contradict his own words, and equally obviously, the trial judge would often be justified in ruling on a motion for directed verdict that reasonable minds could only believe the party's disserving statement.

§4.6: Representative Admissions; Coconspirator Statements

A. **G/R:** Representative Admissions: when a party to the suit has expressly authorized another person to speak, it is an obvious and accepted extension of the admission rule to admit against the party the statements of such persons.

B. **G/R:** Agent's Statements: the admissibility of the agent's statement as admissions of the principle are measured by precisely the same tests as the principle's substantive responsibility for the conduct of the agent; that is, the words of the agent will be received as admissions of the principle if they are spoken within the scope of the authority of the agent to speak for the employer.

1. *Speaking Agents:* this formula makes plain that the statements of an agent employed to give information (the speaking agent) can be received as the employer's admissions, and the authority to act (only) does not carry with it automatically the authority to make statements to others describing the duties performed [ex: authority of chauffeur to drive car].
2. **g/r:** even before the adoption of the federal rules, the predominant view was to admit a statement by an agent if it concerned a matter within the scope of the declarant's employment and was made before that relationship was terminated.

C. **Rule 801(d)(2)(C)-(D):** admits statements offered against a party "by a person authorized by the party to make a statement concerning the subject" and "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."

D. **G/R:** Matters of Proof: the party offering the evidence of the alleged agent's admission must first prove that the declarant is an agency of the adverse party and the scope of that agency.

1. This may done directly by testimony of the asserted agent, or by anyone who knows, or by circumstantial evidence.
2. The Federal Rules permit evidence of the purported agent's past declarations asserting the agency to be used by the trial judge in deciding the agency issue but states explicitly that standing alone they are insufficient to establish it.

E. **G/R:** Preliminary Question of Fact: if the preliminary question of fact of the declarant's agency is disputed, the question is one to be decided by the court under Rule 104(a).

F. **G/R:** In-House Admissions: the Federal Rules allow in house admissions [admission statements by an agent not made to an outsider but to another agent or the principle, e.g., business reports, accident reports, and the like] to be admissible as an admission.

1. This applies both to statements by an agents authorized to speak and by those agents only authorized to act for the principle.

G. **G/R:** Attorneys: if an attorney is employed to manage the party's conduct of a lawsuit, the attorney has *prima facie* authority to make relevant judicial admissions by pleadings, by oral or written stipulations, or by formal opening statement, which unless allowed to be withdrawn are conclusive in the case.

1. In other words, the attorney's extra-judicial statement is admissible against the client as a mere evidentiary admission made by an agent.

2. The cases generally measure the authority of the attorney to make out of court admissions by the same tests of express or implied authority as would be applied to other agents, and when they meet these tests, admit them as evidentiary admissions.

F. **G/R:** Partners: a partner is the agent of the partnership for the conduct of the firm's business; accordingly, when the existence and scope of the partnership have been proved, the statement of a partner made in the conduct of the business of the firm is receivable as the admission of the partnership.

G. **G/R:** Coconspirator: conspiracies to commit a crime or an unlawful or tortious act are analogous to partnerships.

1. **Rule 802(d)(2)(E):** treats as an admission, "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

a. *In Furtherance:* the "in furtherance requirement" calls for exclusion of statements possessing evidentiary value solve as admissions.

i. Under this requirement, statements that merely recount prior events in the conspiracy are not admissible, but the line of admissibility is not always clear since historically statements that advance the goals of the conspiracy are admissible.

b. *During the Course:* the requirement that the statement be made during the course of the conspiracy calls for exclusion of admissions and confessions made after the termination of the conspiracy, which generally is held to occur with the achievement or failure of its primary objectives.

2. **g/r:** preliminary questions of fact with regard to declarations of coconspirators are governed by Rule 104(a) and must be established by a preponderance of the evidence.

i. *Bootstrapping Rule:* the putative (supposed) coconspirator statement itself can be considered by the trial court in determining whether a conspiracy exits and its scope.

H. **G/R:** Statements of Government Agents in Criminal Cases: in a criminal prosecution, statements by the agent of an accused may generally be admitted against the accused, but statements by agents of the government are often held inadmissible against the government.

§4.7: Declarations by "Privies in Estate," Joint Tenants, Predecessors in Interest, Joint Obligors, and Principals Against Surety.

A. **G/R:** the Federal Rules have omitted any provision for admitting declarations—of a privity or identity of interest between the declarant and a party, such as joint tenants—because most meritorious statements will qualify as declarations against interest, vicarious admissions of agents, or some other hearsay exception more soundly grounded than on the privity concept.

§4.8: Admissions by Conduct: (a) Adoptive Admissions

A. **G/R:** Adoptive Admissions: one may expressly adopt another's statement and that is an explicit admission like any other.

1. Adoptive admissions apply to evidence of other conduct of a party manifesting circumstantially the party's assent to the truth of the statement made by another.

B. **Rule 801(d)(2)(B):** adoptive admissions are governed by Rule 801(d)(2)(B) which provides that a statement is not hearsay if offered against a party and is a statement of which the party has manifested an adoption or belief in its truth.

1. To constitute an adoptive admission, reliance must be affirmatively established.
2. The primary factual issues arising with regard to whether a statement was adopted are to be decided as questions of *conditional relevancy* under Rule 104(b).

§4.9: Admissions by Conduct: (b) Silence

A. **G/R:** Silence as Admission: when a statement made in the presence of a party containing assertions of facts which if untrue, the party would under all circumstances naturally be expected to deny, failure to speak has traditionally been received as an admission.

1. Since it is failure to deny which is significant, an equivocal or evasive response may similarly be used against the party on either theory, but if the total response adds up to a clear-cut denial, this theory of implied admission is inapplicable.

B. **G/R:** Factors to Consider: courts have often suggested that admissions by silence should be received with caution, especially in criminal cases. Several characteristics of the evidence should be noted:

1. its nature and circumstance sunder which it arises often amount to an open invitation to manufacture evidence;
2. ambiguity of interference is often present;
3. *Miranda's* constitutional limitations apply to the use of this type of evidence in a criminal case, but only if the suspect is interrogated by the police while in custody; and
4. the statement is highly damaging and of a nature likely to draw attention away from the basic inquiry of whether acquiescence did in fact occur.

C. **G/R:** Safeguards Against Misuse: the Supreme Court has not found any absolute federal constitutional the use of admissions by silence other than those imposed in some circumstances by *Miranda*. Nevertheless, courts have evolved a variety of safeguards against misuse:

1. the statement must have been heard by the party claimed to acquiesced;
2. it must have been understood by the party;
3. the subject matter must have been within the party's personal knowledge;
4. physical or emotional impediments to responding must not be present;

5. the personal makeup of the speaker (e.g. young child or the person's relationship to the party or event) may be such as to make in unreasonable to expect denial; and
6. most important, the statement itself must be such as would, if untrue, call for a denial under the circumstances.
**This list is not exclusive, and the essential inquiry is: *whether a reasonable person under the circumstances would have denied the statement, with answers not lending themselves to readily mechanical formulations.*

D. **G/R:** Police Presence: beyond the constitutional issues that can be raised, the fact that the police are present when an accusatory statement is made may constitute a critical circumstance that eliminates the naturalness of a response.

E. **G/R:** Conditional Relevancy: most preliminary questions of admissibility in connection with admissions by acquiescence fall within the category of conditional relevancy under Rule 104(b).

F. **G/R:** Failure to Reply to Letter or Other Written Communication: if a written statement is given to a party and read in the presence of others, the party's failure to deny its assertions may be received as an admission, when under the circumstances, it would be natural for the person to deny them if he did not acquiesce.

1. If a party receives a letter containing several statements, which he would naturally deny if untrue, and states a position as to some of the statements but fails to comment on others, this failure will usually be received as evidence of an admission as to those admitted.
2. The failure to reply to a letter containing statements, which it would be natural under all the circumstances for the addressee to deny if he believed them untrue, is receivable as evidence of an admission by silence. Two factors tend to show that a denial would be naturally forthcoming:
    a. where the letter was written as part of a mutual correspondence between the parties; and
    b. where the proof shows that the parties were engaged in some business, transaction, or relationship, which would make it improbable, that an untrue statement or communication about the transaction or relationship would be ignored (e.g. a billing statement).

§4.10: Admissions by Conduct: (c) Flight and Similar Acts

A. **G/R:** Flight: many acts of the defendant after a crime seeking escape are received as admissions by conduct, constituting circumstantial evidence of conscious guilt and hence of the fact of guild itself.

1. In this class are:
    a. flight from the scene;
    b. from one's usual haunts; or
    c. from the jurisdiction of a crime;
    d. assuming false name;

e. changing appearance;
f. resisting arrest;
g. attempting to bribe arresting officers;
h. forfeiture of bond by failure to appear or departure from the trial while it is proceeding;
i. escapes or attempted escapes from confinement; and
j. suicide attempts by the accused.

B. **G/R:** Probative Value of Flight: the probative value of flight as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn:

1. from the defendant's behavior to flight;
2. from flight to consciousness of guilt;
3. from flight to consciousness of guilt concerning the crime charged; and
4. from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

§4.11: Admissions by Conduct: (d) Failure to Call Witnesses or Produce Evidence; Refusal to Submit to Physical Examination

A. **G/R:** Failure to Call Witnesses: when it would be natural under the circumstances for a party to call a particular witnesses, or to take the stand as a witness in *a civil case*, or to produce documents in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference.

1. An analogy may be drawn if the party unreasonably declines to submit, upon request, to a physical examination or refuses to furnish handwriting exemplars.

§4.12: Admissions by Conduct: (e) Misconduct Constituting Obstruction of Justice

A. **G/R:** Misconduct Constituting Obstruction of Justice: a wrongdoing by a party in connection with its case amounting to an obstruction of justice is commonly regarded as an admission by conduct.

1. The following are considered under this general category of admissions by conduct:
    a. a party's false statement about a matter in litigation, whether before the suit or on the stand;
    b. subordination of perjury;
    c. fabrication of documents;
    d. undue pressure by bribery;
    e. intimidation, or other means to influence a witness to testify favorably or to avoid testifying;
    f. destruction or concealment or relevant documents or objects;
    g. attempt to corrupt the jury; and
    h. hiding or transferring property in anticipation of judgment.

§5: EXCEPTIONS TO THE HEARSAY RULE: FORMER TESTIMONY

§5.1: Introduction

A. **G/R:** upon compliance with the requirements designed to guarantee an adequate opportunity for cross-examination and after a showing that the witness in unavailable, testimony given previously may be received in the pending case.

1. The prior testimony may have given during a deposition or at a trial. It may have been received in a separate case or in an earlier hearing of the present case.

2. Cross-examination, oath, the solemnity of the occasion, and the accuracy of modern methods of recording testimony all combine to give former testimony a high degree of reliability.

B. **Rule 804(b)(1):** upon a showing of unavailability, excepts from the hearsay rule:

(1) testimony given as a witness at another hearing of the same or a different proceeding; or

(2) in a deposition taken in compliance with the law in the course of the same or another proceeding;

(3) if the party against whom the testimony is now offered, or,

(a) in a civil action or proceeding, a predecessor in interest,

(4) had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

C. **G/R:** when the former testimony is offered for some nonhearsay purpose—to show the commission of an act of perjury, to show that the testimony against the accused furnished the motive for retaliation against the witness, to refresh recollection, or to impeach a witness at the present trial by proving the earlier testimony was inconsistent—the restrictions of the hearsay exception do not apply.

1. Likewise, if offered for a hearsay purpose, but under some other exception, e.g., as an admission of a party-opponent or past recollection recorded, only the requires of the other exception must be satisfied.

§5.2: The Requirement of Oath and Opportunity for Cross-Examination; Confrontation and Unavailability

A. **G/R:** Oath: to be admitted under this hearsay exception, former testimony must have been given under the sanction of oath or affirmation.

B. **G/R:** Cross-Examination: the party against whom the former testimony is now offered, or perhaps a party in like interest, must have had a reasonable opportunity to cross-examine.

1. Actual cross-examination is not required if the opportunity was afforded and waived.

2. The exception is judged upon the availability of the opportunity to cross-examine and not on the use of the opportunity.

a. This is demonstrated in cases holding that the opportunity to cross-examine at a preliminary hearing in a criminal case provides sufficient opportunity even though few litigants, for a number of reasons, fully exercise that opportunity.

3. The opportunity to cross-examine is not construed literally; rather, the party must have the opportunity to develop the testimony through questioning.

C. **G/R:** Right to Counsel: if a right to counsel exists when the former testimony is offered, a denial of counsel when the testimony was taken renders it inadmissible.

D. **G/R:** Unavailability: if evidence is offered under the former testimony exception to the hearsay rule, it is offered as substitute for testimony given in person in open court, and the strong policy favoring personal presence requires that unavailability of the witness be shown before the substitute is acceptable.

§5.3: Identity of Parties; "Predecessor in Interest"

A. **G/R:** Identity of Parties: is often spoken as a requirement for the admission of former testimony (but it is just a convenient generalization as opposed to a requirement). It is used to indicate a situation where the underlying requirement of adequacy of the present opponent's opportunity for cross-examination would usually be satisfied.

B. **G/R:** under Rule 804(b)(1) it is unclear how the requirement that "the party against whom the testimony is now offered, or in a civil action or preceding a *predecessor in interest*, hand an opportunity and similar motive" to examine the witness should be interpreted.

1. In criminal cases when testimony is offered against a criminal defendant, the defendant must have been a party to the former proceeding.

a. The Rule, as enacted, eliminates doubts under the Confrontation Clause, which would have allowed examination by substitute.

2. In non-criminal cases, the legislative history indicates that there must be a "formal relationship between the parties."

C. **G/R:** Predecessor in Interest: courts in construing the "predecessor in interest" language have taken several approaches that appear consistent with the ambiguous congressional intent:

1. *Community of Interest Analysis:* this approach requires some connection—some shared interest, albeit far less than a formal relationship—that helps to insure adequacy of cross-examination.

2. The second approach requires courts to insure fairness directly by seriously considering whether the prior cross-examination can be fairly held against the later party.

3. These suggested interpretations accomplish all that is known for certain from the legislative history—an interpretation of the term predecessor in interest that makes it fair to hold the present party responsible for the actions of another.

§5.4: Identity of Issues; Motive to Cross-Examine

A. **G/R:** Identity of the Issues: while occasional stated as a requirement that the issue in the two suits be the same, the policy underlying the exception does not require that all the issues (any more than all the parties) in the two proceedings must be the same.

1. At most, the issue on which the testimony was offered in the first suit must be the same as the issue upon which it is offered in the second.

2. Additional issues or differences with regard to issues upon which the former testimony is not offered, are of no consequence.

3. Moreover, insistence upon precise identity of the issues, which might have some appropriateness if the question were one of res judicata or estoppel by judgment, is out of place with respect to the form testimony where the question is not of binding anyone but merely of salvaging the testimony of an unavailable witness.

4. Thus, the standard is to require a *substantial identity of the issues.*

a. The requirement has become, not a mechanical one of identity or even substantial identity of the issues, but rather that the issues in the first proceeding, and hence the purpose for which the testimony was offered, must have been such as to produce an adequate motive for testing on cross examination the credibility of the testimony.

5. Neither the form of the proceeding, the theory of the case, nor the nature of the relief sought need to be the same between the proceedings.

B. **G/R:** in criminal cases, one important pattern involves introducing testimony from the preliminary hearing at trail, analogously, in a civil case, testimony from a discovery deposition is admitted.

1. In another frequently encountered situation, testimony is given against the accused in an earlier criminal trial is offered against the same accused in a civil case to which the criminal defendant is a party. Prior testimony is generally admitted in these situations.

2. Cases examining the admissibility of prior grand jury testimony of a witness against the government reach mixed results.

a. The typical fact pattern involves a witness who testified before the grand jury giving testimony that is some aspect exculpates the defendant and is unavailable at trial, usually because the witness asserted the Fifth Amendment privilege against self-incrimination.

b. In *United States v. Salerno* the Supreme Court rejected the view that adversarial fairness required admission of such testimony obtained by the government under a grant of immunity regardless of whether the similar motive test of Rule 804(b)(1) is satisfied.

C. **G/R:** courts do not require that the party at the earlier proceeding actually have conducted a full cross-examination of the witness. The cases hold that judgments to limit or waive cross-examination at that earlier proceeding based on tactics or strategy, even

though these judgments were apparently appropriate when made, do not undermine admissibility.

1. Instead, courts look to the operative issue in the prior proceeding, and if basically similar and if the opportunity to cross-examine was available, the prior testimony is admitted.

§5.5: Character of the Tribunal and of the Proceedings in Which the Former Testimony was Taken

A. **G/R:** if the accepted requirements of an oath, adequate opportunity to cross-examine on substantially similar issues, and present unavailability of the witness are satisfied, then the character of the tribunal and the form of the proceedings are immaterial, and the former testimony should be received.

B. **G/R:** Lack of Subject Matter Jurisdiction: some court have held that, if the court in the former proceeding lacked jurisdiction of the subject matter, the former testimony is inadmissible.

1. But others have concluded that the fact that the court may ultimately be held to lack power to grant the relief sought does not deprive it of power to compel attendance and administer oaths, and accordingly the former testimony was admissible.

§5.6: Objections the Their Determination

A. **G/R:** an issue arises of whether objections to the former testimony, or parts thereof, which could have been asserted when it was given, may be made for the first time when offered for the present trial.

1. Objections, which go merely to the form of the testimony—as on the ground of leading questions, unresponsiveness, or opinion—must be made at the original hearing when errors can be corrected.

2. On the hand, objections that go to the relevancy or the competency of the evidence may be asserted for the first time when the former testimony is offered at trial.

B. **G/R:** whether the former testimony meets the requirements of the hearsay exception is a preliminary question of fact decided by the court when admissibility depends upon a question of fact, like unavailability.

§5.7: Methods and Scope of Proof

A. **G/R:** Rule of Completeness: when only a portion of the former testimony of a witness is introduced by the proponent, the result may be a distorted and inaccurate impression. Under the rule of completeness, the adversary is entitled to introduce such other parts as fairness requires and to have them introduced at that time rather than waiting until the presentation of his own case.

B. **Rule 106:** when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness be considered contemporaneously with it.

C. **G/R:** Methods of Proof: four methods of proof can used to admit prior testimony:

1. any firsthand observer of the giving of the former testimony may testify to what was said from *unaided memory*;
2. a firsthand observer may testify regarding the former testimony by using a memorandum, such as counsel's or the stenographer's notes or transcript to *refresh the present memory* of the witness;
3. a witness who has made written notes or memorandum of the testimony at the time of the former trial, or while the facts were fresh in his or her recollection, and who will testify that he knows that they are correct, may use the notes or memorandum of *past recollection recorded*;
4. In most states, the official stenographer's transcribed notes of the testimony are admitted when properly authenticated as evidence of the fact and purport of the former testimony, either by statute or under the hearsay exception for *official written statements*.

§5.8: The Effect of the Introduction of Part of a Writing or Conversation

A. **Generally:** two competing considerations come into play when a party offers in evidence only a portion of a writing, oral statement, or conversation:

1. the danger of admitting only the portion, wresting that part of the expression out of its context; and
2. the opposing danger of requiring that the whole be offered, thereby wasting time and attention by cluttering the trial record with passages which have no bearing on the present controversy.

B. **G/R:** Rule of Completeness: under the common law rule of completeness, the prevailing practice permits the proponent to prove only such part as he desires. At common law, the opponent cannot force the proponent to broaden the scope of his questioning of the witness.

1. However, when the proponent turns the witness over to the opponent for questioning the witness, the opponent then can elicit the other parts relevant to the same topic.
2. Although the federal rules do not codify this aspect of the rule of completeness, the opponent can still invoke this doctrine in modern federal practice.
3. **Rule 106** does not come into play unless the other passage is so closely related to the part the proponent offers that presenting only that part to the jury would mislead the jury.

§6: EXCEPTIONS TO THE HEARSAY RULE DECLARATIONS AGAINST INTEREST

§6.1: General Requirements; Distinction Between Declarations Against Interest and Admissions

A. **G/R:** Requirements: traditionally two main requirements have been imposed on the statement against interest exception:

1. either the declaration must state facts that are against the pecuniary or proprietary interest of the declarant or the making of the declaration itself must create evidence that would harm such interests;
   a. Under the theory that people generally do not lightly make statements that are damaging to their interests, this requirement provides the safeguard of special trustworthiness justifying most exceptions to the hearsay rule.
2. the declarant must be unavailable at the time of trial.

B. **G/R:** Firsthand Knowledge: as with hearsay exceptions generally, the declarant must have firsthand knowledge.

C. **G/R:** Distinction from Admissions: the declaration against interest, and the admission exceptions are distinct. The admissions of party opponents may be introduced without satisfying any of the requirements for declarations against interest:

1. while frequently admissions are against when made, they need not be and may, in fact, have self-serving at that time;
2. the party making the admission need not be, and seldom is, unavailable;
3. the party making the admission need not have had any personal knowledge of the fact admitted.

**Accordingly, when the opponent offers a statement of a party, it should be submitted as, and tested by, the requirements for a parties admissions and not hose for declarations against interest.

D. **Rule 804(b)(3):** admits statements of unavailable declarants as follows:

(1) A statement;
(2) which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest; or
(3) so far tended to subject the declarant to civil or criminal liability; or
(4) to render invalid a claim by the declarant against another;
(5) that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.
(6) 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.

§6.2: Declarations Against Pecuniary or Proprietary Interest; Declarations Affecting Claim or Liability for Damages

A. **G/R:** the traditional field for this exception has been that of declarations against propriety or pecuniary interest.

1. Common instances of declarations against proprietary interests are:
    a. acknowledgements that the declarant does not own certain land or personal property, or has conveyed or transferred it; or
b. a statement by one in possession that he or she holds an interest less than complete ownership.
2. The clearest example of a declaration against pecuniary interest is an acknowledgement that the declarant is indebted.

B. **G/R:** Rule 804(b)(3) is broadly drawn to include statements against pecuniary or proprietary interest in general, and more specifically those tending to subject the declarant to civil liability, without being limited to tort or contract, and those tending to invalidate a claim by the declarant against another.

§6.3: Penal Interest; Interest of Prestige or Self Esteem

A. **Rule 804(b)(3)**: Declarations of Penal Interest: reverses the common law rule prohibiting declarations against penal interest, and the exception allows such statements to be admissible.

1. The situation principally examined is whether a confession or other statement by a third person offered by the defense to *exculpate* the accused should be admissible.
2. However, because of the possibility of untrustworthiness of declarations against penal interest, the federal rules provide an additional requirement that *corroborating circumstances that clearly indicate the trustworthiness of the statement* must also support the evidence.
3. Under Rule 804(b)(3), statements against penal interest by third parties inculpating both the defendant and the declarant may also be offered by the prosecution to *inculpate the accused*.

B. **G/R:** Declarations Against Social Interest: the Federal Rules did not adopt an exception to the hearsay rule, under Rule 804(b)(3) [as proposed by the Supreme Court] to include statements against social interests.

1. In other words, statements tending to make the declarant an object of hatred, ridicule or disgrace are not admissible under the exception.

§6.4: Determining What is Against Interest; Confrontation Problems

A. **G/R:** The Time Aspect: the theory underlying the hearsay exception for declarations against interest is that people do not make statements that are harmful to their interests without substantial reason to believe that the statements are true.

1. Reason indicates that the harm must exist at the time the statement is made; otherwise, it can exert no influence on declarant to speak accurately and truthfully.
    a. That the statement later proves to be damaging, or for that matter, beneficial, is without significance.
2. **g/r:** the motivation and statement must be contemporaneous.

B. **G/R:** The Nature of the Statement: under Rule 804(b)(3), the statement must be such that "a reasonable person in the declarant's position would not have made the statement unless believing it to be true," in view of the statement's adversity to the declarant's interest.

1. The interests involved are the declarant's pecuniary, proprietary, or penal interest.
2. With regard to statements against penal interest, the statement need not be a confession, but it must involve substantial exposure to criminal liability.

C. **G/R:** Collateral Statements and Williamson: the Supreme Court, in *Williamson v. US*, by focusing on the definition of a statement, as used in the rule, concluded that that the principle behind the rule pointed to a narrow reading of the term—"a single declaration or remark" rather than a "report or narrative"—because only as to the more narrow meaning does the rationale hold that not particularly honest people make self incriminatory statements only if they believe them to be true.

1. Thus, the result is that only the *specific parts* of the narrative that inculpate qualify. The determination of whether a statement in this narrow sense is self-incriminatory requires examination of context.
2. *Williamson* noted that under the new test statements against interest by third parties can continue to be admitted against the defendant where the statement does not mention the defendant directly but either logical inferences or the operation of law makes it incriminating to the defendant.
    a. Also, statements mentioning a defendant may also be admissible if a reasonable person in the declarant's position would realize that being linked to others implicated the declarant in another crime.
3. Applying *Williamson*, the federal courts have most frequently admitted third party statements that inculpate a defendant where two general conditions are met:
    a. the statement was made to a private person and does not seek to curry the favor of law enforcement authorities; and
    b. it does not shift blame.

D. **G/R:** The Factual Setting: whether a statement was against interest can only be determined by viewing it in context and will often require a delicate examination of the circumstances under which it was made.

1. That determination may depend on outside facts that existed at the time the statement was made that were reasonably known by the declarant but may not be disclosed in the statement.
2. The setting in which the statement is made is of particular importance where statements against penal interest are offered to inculpate the accused [being in police custody for example].
    a. A relationship of trust and confidence could militate against awareness that making the statement might be against the declarant's interest.

E. **G/R:** Corroboration: both the proper role for, and definition of, corroboration for statements against interest is confused.

1. Rule 804(b)(3) makes third party statements that exculpate the defendant admissible only if corroborating circumstances clearly indicate the trustworthiness of the statement.

a. Federal courts have disagreed on whether the corroboration requirement applies to the veracity of the in-court witness testifying that the statement was made in addition to the clearly required showing that the statement itself is trustworthy.

b. Corroboration of the trustworthiness of an out of court declaration should generally focus on the circumstances of the making of the statement and the motivation of the declarant.

c. Significantly, the rule does require that the statements themselves be independently proved to be accurate; rather it requires that only the corroboration circumstances indicate trustworthiness.

i. Such as, the declarant being in the vicinity of the crime, and had any motivation to commit it.

2. Although not in the rule, many federal courts have likewise imposed a corroboration requirement for third party statements that inculpate the defendant, which will probably disappear after *Williamson*.

F. **G/R:** Motive: actual state of mind of the declarant: the usual standard, as in Rule 804(b)(3), that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

1. Difficulties of proof, probabilities, and the unavailability of the declarant all favor the accepted standard. However, statements of a declarant disclosing his ostensible actual mental state should certainly be received if ahs should control in an appropriate case.

2. If it appears that the declarant had some motive, whether of self-interest or otherwise, which likely to lead to a misrepresentation of facts, the statement should be excluded.

§6.5: Unavailability of the Declarant

A. **G/R:** Unavailability: the Federal Rule and the vast majority of the state require unavailability.

§7: EXCEPTIONS TO THE HEARSAY RULE: STATE OF MIND

§7.1: Statements of Physical or Mental Condition: (b) Statements of Present Mental or Emotional State to Show a State of Mind or Emotion in Issue

A. **G/R:** the substantive law often makes legal rights and liabilities hinge upon the existence of a particular state of mind or feeling.

1. Thus, such matters as the intent to kill, or the intent to have a certain paper take effect as a deed or will, or the maintenance or transfer of the affections of a spouse may come to issue in litigation.

2. When this is so, the emotional or mental state of a person becomes an ultimate object of inquiry.

3. While a state of mind may be proved by a person's actions, the statements of the person are often a primary source of evidence.

a. In many instances, statements used for this purpose are not assertive of the declarant's present state of mind and therefore are not hearsay.

B. **G/R:** as with statements of bodily condition, the special assurance of reliability for statements of present state of mind rests upon their spontaneity and resulting probable sincerity.

1. The guarantee of reliability is assured principally by the requirement that the statements must relate to a condition of the mind or emotion existing at the time of the statement.

a. In addition, some formulations of the exception require that the statement must have been made under circumstances indicating apparent sincerity, although **Rule 803** imposes no such condition.

C. **G/R:** the unavailability of the declarant is not required.

D. **G/R:** although the statement must describe a state of mind or feeling existing at the time of the statement, the evidentiary effect of the statement is broadened by the notion of the continuity in time of states of mind.

1. The duration of states of mind or emotion varies with the particular attitudes or feelings at issue and with the cause, and the court may require some reasonable indication that in light of all the circumstances, including the proximity in time, the state of mind was the same at the material time.

2. Whether the state of mind continues is a decision for the trial judge.

E. **G/R:** declarations of the state of mind, often include assertions other than state of mind. The normal practice in these situations is to admit the statement and direct the jury to consider it only as proof of the state of mind and to disregard it as evidence of other issues.

F. **Rule 803(3):** covers statements of the declarant's then existing state of mind, emotion, sensation (such as intent, plan, motive design, mental feeling). The general rule is consistent with the hearsay exception developed at common law.

G. **G/R:** <u>Insanity:</u> a main source of proof of mental competency or incompetency is the conduct of the person in question, showing normal and abnormal response to the circumstances of his environment.

1. By this test, every act of the subject's life, within reasonable limits of time would be relevant to the inquiry.

2. Whether the conduct is verbal or nonverbal, assertive or nonassertive, is inconsequential.

3. It is offered as a response to environment, not to prove anything that may be asserted, and is accordingly not hearsay.

§7.2: Statements of Physical or Mental Condition: (c) Statements of Intention Offered to Show Subsequent Acts of Declarant

A. **G/R:** statements of mental state are generally admissible to prove the declarant's state of mind when that state of mind is at issue. But the probative value of the state of mind may go beyond the state of mind itself.

B. **G/R:** Hillmon Doctrine: [*Mutual Life Insurance Co. v. Hillmon*]: statements of state of mind are recognized as admissible to prove subsequent conduct.

1. Thus, out of court statements that tend to prove a plan, design, or intention of the declarant may be received, subject to the usual limitations as to remoteness in time and perhaps apparent sincerity common to all statements of mental state, to prove the plan, design, or intention of the declarant was carried out by the declarant.
2. **Rule 803(3):** does not explicitly address the question of admitting intent for the purpose of proving the doing of the intended act, the Advisory Committee stated that it was to continue.
a. Statements for this purpose are currently and routinely admitted.
b. *But see:* the House Committee notes state that the *Hillmon Doctrine* should be limited so as to render statements of intent by the declarant admissible only to prove his future conduct, not the future conduct of another person.

C. **G/R:** Unavailability: is not required under the federal rule to admit statements of mental state.

D. **G/R:** the danger of unreliability is greatly increased when the action sought to be proved is not one that the declarant could have performed alone, but rather that required the cooperation of another person.

1. The issue is made even more difficult when the cooperative actions between the declarant and another are themselves at issue.
2. The result of these dangers is the statement is used as proof of the other's person's intent and as proof that this intent was achieved. The additional dangers have however prompted the courts to impose additional restrictions or requirements; these include:
a. instructing the jury to consider the evidence only to prove the conduct of the declarant;
b. requiring independent evidence to establish the defendant's conduct;
c. permitting the declaration to be used only to explain the declarant's intent; and
d. limiting the use of such statements to cases where the declarant is dead or unavailable and to situations where both the statement of intent is shown to be serious and the vent is realistically likely to be achieved.

§7.3: Statements of Physical or Mental Condition: (d) Statements of State of Mind to Show Memory or Belief as Proof of Previous Happenings

A. **G/R:** forward looking statements: under the *Hillmon doctrine*, statements of intent to perform an act are admissible as proof that the act was in fact done.

1. By contrast, a statement by the declarant that he or she had in fact done that would be excluded under this exception to the hearsay rule.
2. *Forward Looking Statements:* forward looking statements of intention are admitted while backward looking statements of memory or belief are excluded [subject to the will exception in Rule 803(3)] because the former do not present the classic hearsay dangers of memory and narration.
a. The weakness inherent in forward looking statements—the uncertainty that the intention will be carried out—may lead to exclusion, but this is under the relevancy doctrine rather than the hearsay analysis.
3. **Rule 803(3):** explicitly allows the introduction of a statement of memory or belief to prove the fact remembered or believed if it relates to the exclusion, revocation, identification, or terms of the declarant's will.

§8: EXCEPTIONS TO THE HEARSAY RULE: STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

§8.1: Statements of Physical or Mental Condition: (a) Statements of Bodily Feelings, Symptoms, and Condition

A. **Rule 803(3):** defines a hearsay exception, without regard to the unavailability of the declarant, for a "statement of the declarant's then existing…physical condition (such as …pain and bodily health).

B. **G/R:** statements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule.

1. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement.

C. **G/R:** declarations of present bodily condition do not have to be made to a physician in order to satisfy the present exception. Any person hearing the statement may testify to it.

1. *Caveat:* The exception is, however, limited to descriptions of present condition and therefore excludes description of past pain or symptoms, as well as accounts of the events furnishing the cause of the condition.

§8.2: Statements of Bodily Feelings, Symptoms, and Condition: (a) Statements made to Physicians Consulted for Treatment

A. **Rule 803(4):** provides a hearsay exception, regardless of the availability of the declarant for "statements made for purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

B. **G/R:** statements of a presently existing bodily condition made by a patient to a doctor consulted for treatment have almost universally been admitted as evidence of the facts stated, and even courts that otherwise limited the admissibility of declarations of body conditions have admitted statements made under these conditions.

1. The reliability of these statements is assured by the likelihood that the patient believes that the effectiveness of the treatment depends on the accuracy of the information provided to the doctor, which may be termed a "selfish treatment motivation."

2. Many courts have extended this exception to include statements made by a patient to a physician concerning *past* symptoms because of the strong assurance of reliability.

C. **G/R:** Causation: a major issue involving the scope of the exception is the treatment of statements made to a physician concerning the cause or the external source of the condition to be treated.

1. Moreover, a physician who views cause as related to diagnosis and treatment might reasonably be expected to communicate this to the patient and perhaps take other steps to assure reliable response.

2. However, the result is different when the statements as to causation enter into the realm of fault.

a. Generally neither the patient, nor physician, is likely to regard them as related to diagnosis or treatment. In such cases the statements lack any assurance of reliability based on the declarant's interest in proper treatment and should properly be *excluded*.

D. **G/R:** under Rule 803(4) the statement need not have been made to a physician; one made to a hospital attendant, ambulance driver, or member of the family may qualify if intended by the patient to secure treatment.

1. Psychologists and social workers have been included within this exception.

2. Nor does the Rule require that the statement concern the declarant's condition, and statements by others, most often close family members, may be received if the relationship or the circumstances give appropriate assurances.

E. **G/R:** Test for Admissibility: the test for admissibility is whether the subject matter of the statements is reasonably pertinent to diagnosis or treatment—an objective standard.

1. Descriptions of cause are similarly allowed in if they are medically pertinent; but statements of fault are unlikely to qualify under Rule 803(4).

§8.3: Statements of Bodily Feelings, Symptoms, and Condition: (b) Statements Made to Physicians Consulted Only to Testify

A. **Rule 803(4):** has abandoned the restrictions on admissibility between doctors consulted for treatment and doctors consulted only to testify.

1. The Advisory Committee concluded that permitting statements to be admitted, as a basis for a medical expert's opinion but not for their truth was likely to be a distinction lost on juries and rejected the limitation.

a. The general reliance upon "subjective facts" by the medical profession and the ability of its members to evaluate the accuracy of statements made to them is considered sufficient protection against contrived symptoms.

B. **G/R:** Test for Admissibility: Rule 803(4) eliminates any difference in the admissibility of statements made to testifying, as contrasted with treating, physicians.

1. Here, as with statements made fore treatment, the test for admissibility is whether the statement is medically pertinent to the diagnosis.

§9: EXCEPTIONS TO THE HEARSAY RULE: PRIOR IDENTIFICATION

§9.1: Prior Statements of Witnesses as Substantive Evidence

A. **G/R:** the traditional view has been that a prior statement, even one made by the witness, is hearsay if offered to prove the matters asserted therein.

1. *Caveat:* this categorization has not precluded using prior statements for other purposes, e.g., (a) to impeach the witness by showing a self-contradiction if the statement is inconsistent with his testimony; or (b) to support credibility when the statement is consistent with the testimony and logically helps to rehabilitate.

2. But the prior statement has traditionally been admissible as substantive evidence to prove the matter asserted therein only when falling within an established exception to the hearsay rule, such as 801(d).

B. **G/R:** the advisory committee has taken an intermediate approach to prior statements as substantive evidence, neither admitting nor rejecting prior statements *in toto* where the declarant testifies and is subject to cross-examination concerning the statement; but exempting from classification as hearsay certain prior statements thought by circumstances to be generally free of the danger of abuse.

C. **Rule 801(d)(1):** exempts from classification as hearsay prior statements thought to be free from abuse, those statements are:

(A) inconsistent statements given under oath subject to the penalty of perjury at trail, hearing, or other proceeding, or in a deposition;

(B) consistent statements offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; and

(C) statements of identification.

C(1). **Rule 801(d)(1)(A):** Prior Inconsistent Statements: a prior inconsistent statement wherein the witness has told one story earlier and another at trial has invited searching examination of credibility through cross-examination and re-examination.

1. The reasons for the change, whether forgetfulness, carelessness, pity, terror, or greed may be explored by the adversary in the presence of the trier of fact, under oath, casting light on which is the true story and which is the false story.

a. Evidence of a prior inconsistent statement, when declarant is on the stand to explain it if he can, has the major safeguards of examined testimony.

2. Where a witness no longer remembers an event, a prior statement describing that event should *not* be considered inconsistent.

3. The result of the Rule is to confine substantive use of prior inconsistent statements virtually to those made in the course of judicial proceedings, including grand jury testimony, although allowing use for impeachment without these limitations. This is because of the language in the rule "given under oath subject to penalty of perjury at trial…"

C(2). **Rule 801(d)(1)(B):** Prior Consistent Statements: while prior consistent statements are hearsay under the traditional view, and inadmissible as substantive evidence, they have nevertheless been allowed a limited admissibility for the purpose of supporting the credibility of a witness, particularly to show that a witness whose testimony has allegedly been influenced told the same story before.

1. The Rule goes further and exempts from the hearsay rule prior consistent statements that are offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

2. The Supreme Court has concluded that the rule imposes a timing requirement and admits only those statements made before the charged recent fabrication or improper influence or motive [*Tome v. U.S.*].

C(3). **Rule 801(d)(1)(C):** Statements of Identification: when A testifies that on a prior occasion B pointed to the accused and said "that's the man who robbed me" the testimony is clearly hearsay.

1. If however B, present in court, testifies to the prior identification, and is available for cross-examination, the case falls under the exception.

2. Justification for the Rule is found in the unsatisfactory nature of courtroom identification and by the constitutional safeguards that regulate out-of-court identifications arranged by the police.

3. Evidence of such pretrial identification is usually permitted even when the witness cannot make an in-court identification.

D. **G/R:** Requirement of Cross-Examination: all the foregoing exceptions under Rule 801(d)(1) requires the declarant testify at trial or hearing and subject to cross examination concerning the statement.

1. The Supreme Court has held that the requirements of both the Confrontation Clause and the hearsay rule are satisfied as long as the witness takes the stand and responds willingly to questions [*U.S. v. Owens*].

a. Judicial restrictions on cross-examination and claim of privilege would threaten meaningful cross-examination, but lack of memory does not.

§10: EXCEPTIONS TO THE HEARSAY RULE: RECORDS OF PAST RECOLLECTION

§10.1: History and Theory of the Exception

A. **G/R:** as the rule permitting the introduction of past recollection recorded developed, it had four requirements:

1. the witness must have had firsthand knowledge of the event;
2. the written statement must be an original memorandum made at or near the time of the event while the witness had a clear and accurate memory of it;
3. the witness must lack a present recollection of the event; and
4. the witness must vouch for the accuracy of the written memorandum.

B. **Rule 803(5):** Records of Past Recollection: with no formal requirement for unavailability of the declarant, the Rule provides "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.

§10.2: Firsthand Knowledge

A. **G/R:** the usual requirement of firsthand knowledge that applies to witnesses and hearsay declarants is also enforced with in regard to past recollection recorded.

1. Thus, were an inventory was offered and the witness produced to lay the necessary foundation testified that it had been made only partly from his own inspection and partly from information provided by an assistant, the inventory was inadmissible.

§10.3: Record Made While the Witness' Memory was Clear

A. **G/R:** the exception as generally stated requires that there be a written formulation of the memory. Rule 803(5) uses the somewhat broader terms "memorandum or record" which for example, a videotape or audio recording would satisfy.

1. Moreover, the original must be produced or accounted for as is generally required when the contents of documents sought to be proved.

2. However, the record need not have been prepared by the witness personally if the witness read and adopted it.

B. **G/R:** Time: the record must have been prepared or recognized as correct at a time close enough to the event to ensure accuracy.

1. The formula in the Rule is "when the matter was fresh in the witness' memory."

a. The cases vary as to the length of time lapse allowable, and while the period of the time between the event and the making of the memo or record is a critically important factor, a mechanical approach, looking only to the length of time that has passed rather than focusing on the indications that the memory remains fresh, should not be employed.

§10.4: Impairment of Recollection

A. **G/R:** the traditional formulation of the rule required that the witness who made or recognized it as correct testify that he lacks any present memory of the event; however, the standard used by the Rule is that the witness lack sufficient present recollection to enable the witness to testify fully and accurately.

1. The standard of the federal rules has gained increasing judicial adherence because it balances two competing concerns:

a. clouded by the passage of time, present recollection is often less accurate than a statement made at a time when recollection was fresh and clear;

b. However complete abandonment of the requirement that the witness must have some memory impairment would likely encourage the use of statements carefully prepared for litigation.

§10.5: Proving the Accuracy of the Record; Multi-Party Situations

A. **G/R:** Proving Accuracy: as a final assurance of reliability, either the person who prepared the writing or one who read it a time close to the event must testify to its accuracy.

1. This may be accomplished by a statement that the person presently remembers recording the fact correctly or remembers recognizing the writing as accurate at an earlier time.

a. Also, if present memory is inadequate, the requirement may be met by testimony that the declarant knows it is correct because of a habit or practice to record such matters accurately or to check them for accuracy.

b. Thus, under the Rule, the witness' must acknowledge at trial the accuracy of the statement.

B. **G/R:** Multiparty Situations: when the verifying witness did not prepare the report but merely examined it and found it accurate, the matter involves a cooperative report, but the substantive requirements of the exception can be met by the testimony of the person who read and verified the report.

§10.6: Refreshing Recollection

A. **G/R:** Refreshing Recollection: most courts adhere to the view that any memo or other object may be used as stimulus to present memory without restriction as to authorship, guarantee of correctness, or time making.

B. **Rule 612:** announces that if a witness uses a writing to refresh her memory before testifying, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross examine the witness about the writing, and to introduce into evidence the portions relating to the witness' testimony, although only if the court in discretion determines production is necessary in the interests of justice.

§11: EXCEPTIONS TO THE HEARSAY RULE: REGULARLY KEPT RECORDS

§11.1: Admissibility of Regularly Kept Records

A. **G/R:** Regularly kept records may be offered in evidence in may different situations, although in most the record is offered as evidence of the truth of its terms.

1. In such cases, the evidence is hearsay, and some exception to the hearsay rule must be used if the record is to be admitted.

2. Often no special exception is needed, however, as the record comes within the terms of another exception, such as, admission of a party opponent, to refresh the witnesses memory, or a record of past recollection recorded.

§11.2: The Regularly Kept Records Exception in General

A. **G/R:** the hearsay exception for regularly kept records is justified on grounds of trustworthiness and necessity that underlie other hearsay exceptions.

1. Reliability is furnished by the fact that regularly kept records typically have a high degree of accuracy.

2. The regularity and continuity of the records are calculated to train the record keeper in habits of precision; if of a financial nature, the records are periodically checked by balance-striking and audits; and in actual experience, the entire business of the nation and many other activities function in reliance upon records of this kind.

B. **G/R:** Common Law Elements: the common law exception had four elements:

1. the entries must be the original entries made in the routine of a business;
2. the entries must have been made upon the personal knowledge of the recorder or of someone reporting the information;
3. the entries must have been made at or near the time of the transaction recorded; and
4. the recorder and the informant must be shown to be unavailable.

**If these elements where met the business record was admissible to prove the facts recited in it.

C. **Rule 803(6):** provides a hearsay exception, without regard to the unavailability of the declarant:

--A memorandum, report, record, or data compilation in any form, of acts, events, conditions, opinions, or diagnosis, 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,

--*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.

§11.3: Types of Records; Opinions; Absence of Entry

A. **G/R:** Oral Records: the usual statement of the business records exception to the hearsay rule suggests that oral reports are not within it, even if the other requirements for admissibility are met.

B. **G/R:** Originality: in business practice, daily transactions, such as sales or services rendered, are customarily noted upon slips, memorandum books, or the like by the person most directly concerned.

1. Someone then collects these memoranda and from them makes entries into a permanent book, such as a journal or ledger.

2. In these cases, the entries in the permanent record sufficiently with the requirement of originality.

a. They would certainly be admissible if the slips or memoranda disappeared and should be admissible as the original permanent entry without proof as to the unavailability of tentative memoranda.

3. Of course the slips or memoranda would also be admissible if they should be offered, the Federal Rule does not require that the entry be original, but allows "any form."

C. **G/R:** Opinions: with regard to opinions in business records, two types of issues arise:

1. First, concerns lay opinions or conclusions, which are largely conclusory forms of expression.

a. The opinion rule should be restricted to governing the manner of presenting live testimony where a more specific and concrete answer can be secured if desired and should have little application to the admissibility of out of court statements, including business records.

2. The second, and more difficult issue regards expert opinions within business records.

a. Rule 803(6) specifically provides that an admissible regularly kept business record may include opinions.
b. Such opinions should be governed by the ordinary restrictions on expert qualifications and proper subjects for expert opinions.

D. **G/R:** Absence of Entries: [**Rule 803(7)**] sometimes the absence of an entry relating to a particular transaction is offered as proof that no such transaction took place.

1. Courts have generally admitted evidence for this purpose, and **Rule 803(7)** specifically provides for it.

§11.4: Made in the Routine of Business; Accident Reports; Reports made for Litigation; Indications of Lack of Trustworthiness

A. **Rule 803(6):** in Rule 803(6) the term business includes "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

1. Applying to a memorandum, report, record, or data compilation, in any form, this rule has broad scope.
2. See examples, p. 440, right hand column.

B. **G/R:** Records, such as diaries, if of a purely personal nature not involved in the declarant's business activities, do not fall within the rule, but if kept for business purposes are within the rule.

1. Memoranda of telephone conversations are treated similarly.
2. The breadth of the exception is also demonstrated by cases holding that the activity need not be legal for the record to qualify.
3. Some church records are covered by the business records exception, while those related to the family history of members are the subject of federal Rule **803(11).**

C. **G/R:** Non-Routine Records: non-routine records are records not made in the regular practice of the business, but are nevertheless made in the course of regularly conducted activities.

1. ***Palmer v. Hoffman****:* held that an accident report was not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls…Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. There primary use is for litigating.

D. **G/R:** Accident Reports: the most reasonable reading of *Palmer* is that it did not create a blanket rule of exclusion for accident reports or similar records kept by businesses.

1. Rather, it recognized a discretionary power in the trial court to exclude evidence which meets the letter of the exception, but which under the circumstances appears to lack the reliability business records are assumed ordinarily to have.
a. The existence of a motive and opportunity to falsify the record, especially in the absence of any countervailing factors, is of principle concern.
b. The Federal Rule incorporates this reading of *Palmer* by permitting admission of reports that otherwise comply with the requirements of the rule, *unless the source of the information or method or circumstances of preparation indicate lack of trustworthiness*.
2. When records are prepared in anticipation of litigation, they will often lack the requisite trustworthiness.

E. **G/R:** Police Reports: police reports and records can, of course, meet the requirements for the regularly kept records exception to the hearsay rule, but they also qualify under the hearsay rule for public records and reports.

1. **Rule 803(8)** contains certain restrictions upon the use of police reports in criminal cases, and the question has arisen whether those restrictions can be avoided by offering police reports under the regularly kept records exception, which imposes no such limitations—the answer is generally NO.

§11.5: Made at or Near the Time of the Transaction Recorded

A. **G/R:** a substantial factor in the reliability of any system of records is the promptness with which transactions are recorded.

1. The formula in Rule 803(6) is "at or near the time."
2. Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory.
3. In addition, failure to make a timely record may suggest non-regularity in the making of the statement and may indicate motivational problems related to records prepared for litigation.

§11.6: Personal Knowledge; All Participants in Regular Course of Business

A. **Rule 803(6):** Firsthand Knowledge: requires that the record be made by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity.

1. Assuming, as is reasonable, that knowledge means firsthand knowledge, then Rule 803(6) requires that the person who originally feeds the information into the process must have firsthand knowledge;

a. Also then, the person making the record must be in the regular course of business, Rule 803(6) using the term "kept" to describe records produced in the regular course of business.

B. **G/R:** Lutz Problems: If any person in the process is not acting in the regular course of the business, then an essential link in the trustworthiness chain fails, just as it does when the person feeding the information does not have firsthand knowledge.

1. ***Johnson v. Lutz:*** the court held inadmissible a police officer report insofar as it was not based upon his personal knowledge but on information supplied by a bystander.
a. Courts generally followed this analysis, and so does Rule 803(6).
b. **G/R:** Thus, if information going from the observation to final recording is to be received under this exception, all parts of the process must be conducted under a business duty.
i. One alternative is for someone within the organization to verify the accuracy of the information provided by the outsider.
2. **G/R:** multiple hearsay: when the matter recorded itself satisfies the conditions of some other hearsay exception, the requirement that the person initially acquiring the information must be acting the in the regular course of the business does not apply.

§11.8: Unavailability

A. **G/R:** Unavailability: Rule 803(6) does not require unavailability for the admission of regularly kept records for various reasons, and that requirement has almost entirely disappeared from American jurisdictions with respect to the exception.

§11.9: Proof; Who Must be Called to Establish Admissibility

A. **G/R:** any witness with the necessary knowledge about the particular record keeping could testify that the regular practice of the business was to make such records, that the record was made in the regular course of business upon the personal knowledge of the recorder or of someone reporting in the regular course of business, and that the entries were made at or near the time of the transaction.

1. Rule 803(6) states that the foundation may be laid by the custodian or other qualified witness.
2. Perhaps the most commonly used foundational witness is a person in authority in the record keeping department of the business.

§11.9: Special Situations: (a) Hospital Records

A. **G/R:** Admissibility: although some courts hesitated to extend the business records exception to hospital records, they are now admissible upon the same basis as other regularly kept records.

1. This result is appropriate, for the safeguards of trustworthiness of records of the modern hospital are at least a substantial as the guarantees of reliability of records of business establishments generally.

B. **G/R:** Personal History: under standard practice, a trained attendant at hospitals enters upon the record a "personal history" including an identification of the patient, an account of the present injury or illness, and the events and symptoms leading up to it.

1. These types of records involve two layers of hearsay (use of the hospital record for truth of the matters contained therein, and proof that the statement was made).
2. The primary issue is whether the specific entry involved was an entry made in the regular course of the hospital's business.
a. If the subject matter within activities that under hospital practice are regarded as relevant to the diagnosis, treatment, or other hospital business, it is within the regular course of the business.
b. If, on the other hand, the subject matter does not relate to those concerns, the making of the entry is not within the regular course of the hospitals business, and thus it is not admissible even for the limited purpose of proving that the statement was made.
3. Remember, the personal history statements contain multiple hearsay, so if they are being admitted for the truth of the matter asserted, they will have to fall within another exception, the common ones are:
a. statements for the purpose of diagnosis or treatment;
b. admission of a party opponent;
c. dying declarations,
d. declarations against interest; or
e. excited utterances.

C. **G/R:** Diagnostic Statements: professional standards for hospital records contemplate that entries will be made of diagnostic findings at various stages; these entries are clearly admissible in the regular course of the operations of the hospital. However, the problem, which they pose, is one of the admissibility of opinions.

1. In the hospital records area, the opinion is usually one of an expert would unquestionably be permitted to give it if personally testifying.
2. **Rule 803(6):** specifically includes opinions or diagnosis, thus usually admissible; however admissibility of all such entries is not assured:
a. First, where indications of lack of trustworthiness are shown, which may result from a lack of expert qualifications or form a lack of factual support, exclusion is warranted
i. Moreover, when the expert does not testify, the admission has to survive the Rule 403 balance.

D. **G/R:** Privilege: in most states, patients have been afforded a privilege against disclosure by physicians of information acquired in attending the patient and necessary for diagnosis and treatment.

1. Hospital records are generally privileged to the extent that they incorporate statements made by the patient to the physician and the physician's diagnostic findings;
2. for nurses and attendants, if the privilege statute would bar the direct testimony a nurse or attendant, it should bar use of their hearsay statement under this exception; if it would not, such statements in hospital records should not be privileged.

§11.10: Special Situations: (b) Computer Records

A. **G/R:** even though pens have often been replaced by computed records, the theory behind the reliability of regularly kept business records remains the same; thus, provided a proper foundation is laid, computer generated evidence is no less reliable than original entry books and should be admitted under the exception.

1. **Rule 803(6)** applies to a "data compilation, in any form" terminology intended to include records stored in computers. Courts and legislatures have judged the admissibility of such records by the hearsay exception for regularly kept records.
a. Generally, courts have dealt competently with the admissibility of such evidence by applying Rule 803(6) or its statutory counterparts.
b. The usual conditions for the exception are applicable.
c. In some, cases more of a foundation may have to be laid then with tradition business records.

§12: EXCEPTIONS TO THE HEARSAY RULE: PUBLIC RECORDS, REPORTS, AND CERTIFICATES

§12.1: The Exception for Public Records and Reports: (a) In General

A. **Generally:** the common law developed a rule for written records and reports for public officials under a duty to make them, made upon firsthand knowledge of the facts. These statements are admissible as evidence of the facts recited in them.

B. **Rule 803(8):** provides, without regard to the declarant's availability, a hearsay exception for the following:

--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.

B(1). Policy: the special trustworthiness of official written statements is found in the declarant's official duty and high probability that the duty to make an accurate report has been performed.

§12.2: The Exception for Public Records and Reports: (b) Activities of the Office; Matters Observed; Investigative Reports; Restrictions on Prosecutorial Use

A. **G/R:** Activities of Office: the first group includes the oldest and most straightforward type of public records, records of activities of the office itself; for example, the record of receipts and disbursements of the Treasury Department.

1. These types of records are highly reliable and routinely admitted.

B. **G/R:** Matters Observed Pursuant to Duty: the second group consists of matters observed and reported, both pursuant to duty imposed by law; for example, rainfall records of the National Weather Service.

C. **G/R:** Investigative Reports: [***Beech Aircraft Corp. v. Rainey***] the Supreme Court rejected a narrow interpretation of "factual findings" and held that "factually based opinions and conclusions" could be included within the exception.

1. Under this exception, a wide range of agency findings are admissible.
2. The Court noted that the primary protection against admission of unreliable evidence was the Rule's provision directing exclusion of all elements of a report—both factual and evaluative—if the court determines that they lack trustworthiness.
3. In making the determination of trustworthiness, the four factors to be examined include:
   a. the timeliness of the investigation;
   b. the skill or experience of the investigation;
   c. whether a formal hearing was held; and
   d. the bias of the investigator.
4. To be admissible, the record is not required to satisfy all four requirements, and if the record facially satisfies the requirements of the rule, the opponent has the burden to demonstrate lack of trustworthiness.
5. As the name indicates, these reports embody the results of investigation and accordingly are often not the product of the declarant's firsthand knowledge, required under most hearsay exceptions.
   a. Nevertheless, the nature and trustworthiness of the information relied upon, including its hearsay nature, is important in determining the admissibility of the report.

D. **G/R:** Restrictions on use by Prosecution in Criminal Cases: as enacted, clause (C) of Rule 803(8) prohibits the use of investigative reports as evidence against the accused in a criminal case. The limitation was included because of the almost certain collision with the confrontation rights which would result form using investigative reports against the accused.

1. Clause (B) of Rule 803(8) reads that "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*.
2. The language of clause (C) clearly allows a criminal defendant to use an investigative report, which falls under that provision.
3. Although clause (B) literally would exclude use of investigative reports by criminal defendants as well as the prosecution, the courts have construed the provision to permit the defendant to introduce police reports under clause (B).
4. The phrase "other law enforcement personnel" has been construed in its broadest form to include "any officer or employee of a governmental agency which ahs law enforcement responsibilities." [***U.S. v. Oates***].
a. EX: Custom Service Chemists, INS agents, border inspectors, *but not* building inspectors, medical examiners, or judges.
5. The limitations in clauses (B) and (C) cannot be avoided by resorting some other hearsay exception which is satisfied because Congress intended to exclude law enforcement and investigative reports against defendants in criminal cases whatever route around the hearsay rule was chosen [***U.S. v. Oates***].

§12.3: The Exception for Public Records and Reports: (c) Vital Statistics

A. **Rule 803(9):** the concerning the records of vital statistics (such as, a minister's return upon a marriage license, reports of physicians on death and birth certificates) is largely statutory, and states generally have enacted legislation on the subject. Federal Rule 803(9) covers records in any form of births, deaths, and marriages, if the report is made to a public officer pursuant to requirements of law.

1. As to routine matters, such as place and date of birth or death and "immediate" cause of death, such as drowning or gunshot wound, admissibility is seldom questioned.
2. However, entries in death certificates as to the "remote" cause of death, such as suicide, accident, or homicide usually are made on the basis of information obtained from other persons and predictably involve the questions that have been raised with regard to investigative reports generally, and courts have divided on admissibility.
a. When issues of this type are involved, Rule 803(8) is applicable.

§12.4: The Exception for Public Records and Reports: (d) Judgments in Previous Cases, Especially Criminal Convictions Offered in Subsequent Civil Cases.

A. **G/R:** Court Judgments: Since reports of official investigations are admissible under the official written statement exception, the judgment of a court, made after the full investigation of a trial, should likewise be admissible in subsequent litigation to prove the truth of those facts necessarily determined in the first action.

1. Guilty pleas and statements made in the course of litigation may constitute declarations against interest or admissions of party opponent and under those exceptions avoid the bar of the hearsay rule.

B. **G/R:** Civil Judgments in Subsequent Civil Actions: many courts exclude (for various reasons, p. 452) a prior civil judgment offered in a subsequent civil case when offered under the public records and reports exception.

C. **G/R:** Criminal Judgments in Subsequent Civil Actions: most courts admit a prior conviction of a serious criminal offense in a subsequent civil action.

1. Courts have moved to a rule of general admissibility of a prior criminal conviction in a civil action against the party who was previously the criminal defendant.

a. Often the exception is limited to convictions for serious offenses under the theory that convictions for misdemeanors do not represent sufficiently reliable determinations to justify dispensing with hearsay objections.

D. **Rule 803(22):** is generally consistent with these trends and has a number of significant features:

1. only criminal judgments of conviction are included; judgments in civil cases are not included, their effect being left to the law of res judicata or preclusion;

2. it covers only serious crimes, i.e., punishable by death or imprisonment for more than one year, thus eliminating the problems associated with convictions of lesser crimes;

3. the rule does not apply to judgments of acquittal;

4. when offered by the government in a criminal prosecution, judgments of conviction of persons other than the accused are admissible only for purposes of impeachment;

a. when the judgment of conviction is offered in a civil case, however, it is treated as are investigative reports generally, and there is no restriction as to the parties against whom the evidence is admissible.

5. judgments entered on pleas of nolo contendere are not included within the exception; and

6. the provision merely removes the hearsay bar from a qualifying judgment and does not purport to dictate the sue to be made of the judgment once admitted.

§12.5: The Exception for Official Certificates: (a) In General

A. **G/R:** for purposes of the law of evidence, a certificate is a written statement issued to an applicant by an official that recites certain matters of fact.

B. **Rule 803(12):** provides a hearsay exception for certificates of marriage and similar ceremonies performed by clergy, public officials, or others authorized to perform the

ceremony where the certificate is issued at the time of the act or within a reasonable time thereafter.

1. Certification is also provide for a large variety of matters by statutes, with corresponding provisions for admissibility in evidence.

§12.6: The Exception for Official Certificates: (b) Certified Copies or Summaries of Official Records; Absence of Record

A. **Generally:** Certified Copies: when a purported copy of a public record is presented in court accompanies by a certificate that the purported copy is correct, a two-layer hearsay problem is presented:

1. first, is the public record within the hearsay exception for that kind of record? and
2. is the certificate within the hearsay exception for official certificates?

B. **G/R:** the American common law rule remains that a custodian has, by virtue of the office, the implied duty and authority to certify the accuracy of a copy of a public record in the custodian's official possession.

1. The usual practices is to prove public records by a copy certified as correct by the custodian, and many statutes so provided.
2. **Rule 1005** allows proof of public records by copy, without producing or accounting for the original, and
3. **Rule 902(4):** provides for authentication by certificate.

C. **G/R:** Summaries: in the absence of a statute to the contrary, the usual view has been that the authority to certify copies of public records is construed literally as requiring a copy and does not include paraphrase or summaries.

D. **G/R:** Absence of Record: proof of non-occurrence may be made by the absence of an entry in a public record where such matters are recorded.

1. However, absence of the entry or record could at common law be proved only by testimony of the custodian.
2. **Rule 803(10)** modifies this limitation, and defines a hearsay exception for a certification in accordance with Rule 902 or for testimony that a diligent search failed to disclose a record, report, or entry used to prove the absence of the record, report, or statement or the non-occurrence or non-existence of a matter which should otherwise have recorded.
   a. This rule is phrased to include not only proving non-occurrence of an event of which a record would have been made, but also the non-filing of a document allowed or required by law to be filed.

§13: MULTIPLE HEARSAY

§13.1: Hearsay within Hearsay; Multiple Hearsay

A. **G/R:** on principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both confirm to the requirements of a hearsay exception.

B. **Rule 805:** under this rule, multiple levels of hearsay are admissible if "each part of the combined statement statements confirms with an exception to the hearsay rule provided in these rules."

§14: VARIOUS OTHER EXCEPTIONS TO THE HEARSAY RULE

§14.1: Learned Treatises, Industry Standards, and Commercial Publications

A. **G/R:** Learned Writings: when offered to prove the truth of matters asserted in them, learned writings, such as treatises, books, and articles regarding specialized areas of knowledge, are clearly hearsay.

1. **Rule 803(18):** provides: "To the extent called to the attention of an expert witness upon cross-examination or relied upon by expert witnesses in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence *but may not be received as exhibits*.

2. This rule is broadly worded as to subjects—history, medicine, or other science or art—and is sufficient to include standards and manuals published by government agencies and industry or professional organizations.

3. The rule requires that the reliability of the publication must be established, which demonstrates that it is viewed as trustworthy by professionals.

a. Authoritativeness can be established by the expert of either party or by judicial notice.

4. The Rule also requires that the publication must be called to the attention of an expert on cross-examination or relied upon by the expert in direct examination.

B. **Rule 803(17):** defines a hearsay exception for such publications, covering market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

1. *Requirements:* the list must be published in written form and circulated for use by others; it must be relied upon by the general public or by person in a particular occupation; and it must pertain to relatively straightforward objective facts.

§14.2: Reputation as to Character; Statements, Reputation, and Judgments as to Pedigree and Family History; Reputation Concerning Land Boundaries and General History

A. **G/R:** Reputation as to Character: evidence regarding pertinent traits of character are admitted both to prove conduct in conformity with those traits and to impeach the credibility of witnesses, and in modern evidence law, these traits may be proved by evidence of reputation or opinion [**Rules 404, 405, & 608**].

1. **Rule 803(21):** deals only with the hearsay aspect of the issue, recognizes an exception that admits reputation among associates or in the community when used to establish character.

B. **G/R:** Statements, Reputation, and Judgments as to Pedigree and Family History:

1. **Rule 804(b)(4):** requires the unavailability of the declarant and provides a hearsay exception for:

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even declarant had no means of acquiring personal knowledge of the matter stated; or
(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

2. **Rule 803(13):** provides a hearsay exception, regardless of the declarant's availability for statements concerning person or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

3. **Rule 803(19):** matters of family history traditionally have been provable by reputation in the family, and sometimes in the community; Rule 803(19) follows this tradition and covers:

a. Rule 803(19): "Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history."
b. The exception requires reputation among family members or members of the community to establish such facts and not simply assertions by individuals.

4. **Rule 803(23):** permits admission of judgments as "proof of matters of personal family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

C. **G/R:** Reputation Regarding Land Boundaries and General History: when the location of boundaries of land is at issue, reputation is admitted to prove that location.

1. **Rule 803(20):** allows for this evidence to be admitted, and does not require that the reputation be ancient or that the passage of time have rendered other evidence of boundaries unavailable.

§14.3: Recitals in Ancient Writings and Documents Affecting an Interest in Property

A. **G/R:** Ancient Documents Rule: one method of authenticating a writing is to show that it is at least 20-years old, is unsuspicious in appearance, and came from a place of custody natural for such a writing.

1. **Rule 803(16):** provides an exception to the hearsay rule for statements in a document in existence 20-years or more the authencity of which is established.

a. While the rule itself contains no limitation as to the kind of document that may qualify, as long as it is 20-years old or more and properly authenticated, several limitations are imposed that provide reliability and additional assurances of trustworthiness:

i. the general requirement of firsthand knowledge;

ii. by virtue of the authentication requirements, the document must not be suspicious in appearance, which also supports reliability.

B. **Rule 803(15):** Documents Affecting an Interest in Property: 803(15) covers statements contained in a document "purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

1. This exception imposes no requirement of age of the document, but it is limited to title documents, such as deeds, and statements relevant to the purpose of the document.

§14.4: The Residual Hearsay Exceptions

A. **Generally:** the residual hearsay exception is a catchall exception for statements having comparable circumstantial guarantees of trustworthiness.

1. The residual hearsay exception does not contemplate unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specified exceptions.

B. **Rule 807:** 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 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(1). **G/R:** Requirements of Rule 807: the rule contains five requirements, three of which impose substantial limitations on the admission of hearsay:

1. *Equivalent Circumstantial Guarantees of Trustworthiness:* in applying the residual exception, the most important issue is whether the statement offers equivalent circumstantial guarantees of trustworthiness to those found in the various other specific hearsay exceptions. There are 9 re-occurring factors that are particularly significant to the determination of admissibility:

a. whether the declarant had a motivation to speak truthfully or otherwise;

b. the spontaneity of the statement, including whether it was elicited by leading questions;

c. the time lapse between the event and statement;

d. whether the statement was under oath;

e. whether the declarant was subject to cross-examination at the time the statement was made;

f. the relationship between the declarant and the person to whom the statement was made;

g. whether the declarant has recanted or re-affirmed the statement;

h. whether the statement was recorded and particularly whether it was videotaped; and

i. whether the declarant's firsthand knowledge is clearly demonstrated.

j. One factor that *should not* be considered in evaluating the trustworthiness of the statement is the credibility of the person testifying to having heard it.

2. *Necessity:* a second factor given varying significance by the cases is the requirement that the statement must be "more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts."

a. Many courts interpret this as a general necessity requirement; however, it does not been that the hearsay must be essential.

b. Other courts view it as a requirement of diligence;

c. the requirement also has the effect of imposing a rough best evidence requirement on the exception in the sense that where live testimony of the declarant is available and the out of court statement is no superior, the exception cannot be used.

3. *Notice:* another substantial requirement of the rule is that notice be given sufficiently in advance of trial to enable the adverse party to prepare to meet the hearsay evidence.

a. While occasionally strict compliance with this requirement is enforced, courts generally have been willing to dispense with notice of the need for the hearsay arise shortly before or during the

trial, and possible injustice is avoided by the offer of a continuance or other circumstances.

4. *Other Requirements:* the remaining requirements, lettered (A) and (C) in the rules, have had no appreciable impact upon the application of the of the residual hearsay exception.

a. Provision (A), requiring that the statement be offered as evidence of a material fact, is a restatement of the general requirement that evidence be relevant;

b. Requirement (C), that the general purposes of the rules and the interests of justice will be served by admitting the evidence is, in effect, a restatement of Rule 102.

5. *Near Miss:* the rule states that it applies to "statements not specifically covered by" any of the specific exceptions.

a. Thus, failing to qualify under an enumerated exception does not disqualify admission under the residual hearsay exception.

6. Courts have employed the exception most extensively in admitting statements made by child witnesses, particularly in sexual abuse cases.

§15: CONSTITUTIONAL ISSUES AND THE HEARSAY RULE

§15.1: Constitutional Problems of Hearsay: Confrontation and Due Process

A. **Confrontation Clause:** The Constitutional issues related to admission of hearsay focus primarily on the Confrontation Clause of the 6th Amendment which applies to the States through the 14th Amendment.

1. The clause requires that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him.

2. In addition, nearly every state constitution has a similar provision.

3. **G/R:** the confrontation clause is applicable only to criminal prosecutions and may invoked only by the accused.

a. However, the values served by confrontation are so basic that elements of its requirements are occasionally extended as a matter of due process to persons other than the accused in a criminal case.

4. The Rule against hearsay and the constitutional right of confrontation have similar underpinnings—they both operate to preserve the ability of a party to confront adverse witnesses in open court. Both the confrontation clause and rule against hearsay have several exceptions.

B. **Generally:** the recent decisions of the Supreme Court with respect to confrontation clause indicates the Court has found that the clause recognizes the validity of the traditional hearsay rule and its exceptions; thus, the Court has indicated it intends to simplify and diminish the impact of the Confrontation Clause as an independent restrain on the admission of hearsay.

C. **G/R:** [***California v. Green***] in *Green*, the Court established one prong of the current Confrontation Clause analysis. The Court concluded that the clause did not limit the introduction of prior statements of witnesses actually produced at trial for *full* cross-examination.

D. **G/R:** [***United States v. Owens*]:** in *Owens*, the Court recognized that generally absent limitations by the trial court on cross-examination or the witness' invocation of a privilege, the opportunity to cross-examine would be found constitutionally adequate.

E. **G/R:** Two Prong Test for Admission of Hearsay under the Prior Testimony Exception: [***Ohio v. Roberts***]: in *Roberts*, the Court stated a two-part test for the admission of hearsay under the Confrontation Clause that appeared to be generally applicable [the test was later limited, *U.S. v. Inadi*]:

1. First, the prosecutor must either produce, or demonstrate the unavailability of the declarant whose statements it wishes to use against the defendant; and

2. Second, if the declarant is unavailable, the statement must have been made under circumstances providing sufficient indicia of reliability.

a. The *Roberts* Court further noted sufficient reliability to satisfy the Confrontation Clause can be inferred without more in a case where the evidence falls within *firmly rooted* hearsay exception.

b. In other cases, the evidence must be excluded at least absent a showing of particularized guarantees of trustworthiness.

F. **G/R:** Coconspirator Exception and Confrontation Clause: [***United States v. Inadi***]: in *Inadi*, the Court backed away from, or clarified, the apparent general requirement of unavailability announced in *Roberts*.

1. The Court concluded that the prosecutor need not produce or demonstrate the unavailability of a conspirator whose statement was used against the accused, and it limited the *Roberts* requirement to instances involving the use of the prior testimony exception, which has always required a showing of unavailability.

2. *Coconspirator Exception:* in the case of coconspirator's statements, the Court found such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court.

a. The Court also noted that the benefits of an unavailability rule for coconspirator declarant's would be slight and the burdens substantial, and concluded that the Confrontation Clause does *not* embody the rule.

G. **G/R:** Spontaneous Declarations and Statements Made While Receiving Medical Care Exceptions and the Confrontation Clause: [***White v. Illinois***]: the Court applied the same *Inadi* analysis to hearsay admitted under the spontaneous declarations and for statements made in the course of receiving medical care, finding the Confrontation Clause imposed no unavailability requirement.

H. **G/R:** the analysis of *Inadi* and *White* appear to mean that unavailability is *NOT* required under a hearsay exception based on a theory that the out of court statement is

superior to what is likely to be produced in court, i.e., all exceptions under Federal Rule 803.

1. *Inadi* and *White* leave undisturbed prior analysis of the impact of the Confrontation Clause on the showing of unavailability required for hearsay exceptions that mandate unavailability, such as former testimony.

a. Other decisions dictate a reasonably rigorous test under the Constitution for unavailability when hearsay is offered under one of these exceptions by the prosecution in a criminal case.

I. **G/R:** Firmly Rooted Hearsay Exceptions: [***Bourjaily v. United States***] in *Bourjaily*, the Court clarified the other prong of the *Roberts* test regarding the definition of "firmly rooted" hearsay exceptions that will automatically satisfy the "indicia of reliability" of reliability requirement.

1. The Court held that the coconspirator "exception" was firmly rooted enough in jurisprudence that a court need not independently inquire into the reliability of such statements.

2. The definition of firmly rooted, it concluded, rested on the exception's longevity and widespread acceptance, not on an individualized assessment of the exceptions' reliability.

J. **G/R:** Indicia of Reliability and Not Firmly Rooted Exceptions: [***Idaho v. Wright***]: the Court addressed how "indicia of reliability" is to be judged for exceptions that are not firmly rooted.

1. The residual hearsay exception is *not* a firmly rooted exception for Confrontation Clause purposes; accordingly, statements may be constitutionally admitted under the residual hearsay exception only if supported by a finding of "particularized guarantees of trustworthiness."

2. The Court ruled that the search for such guarantees was limited to the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of that belief and expressly rejected the use of corroborating evidence as to the hearsay statement to provide the guarantees of trustworthiness.

K. **G/R:** Analytical Framework for Confrontation Clause: there are four distinct scenarios that can arise under the Confrontation Clause and for the admissibly of hearsay:

1. *Firmly Rooted Hearsay Exceptions:* hearsay falling within a traditional or firmly rooted exception to the rule will be admissible under the Confrontation Clause.

2. *Unavailable Not Required:* [Rule 803 exceptions] where the exception does not require unavailability because of the theoretical superiority of the out of court statement, the Constitution does not require the declarant to be unavailable.

3. *Unavailability Required:* [Rule 804 exemptions] where unavailability is constitutionally required, the Confrontation Clause will in *some circumstances* require a more rigorous demonstration of unavailability by the by the prosecution than the hearsay rules require.

4. *Not Firmly Rooted Hearsay Exceptions:* [Rule 807]: where the hearsay is offered by the prosecution under a residual hearsay exception, *particularized guarantees of trustworthiness* must be shown, which is not identical to meeting the "equivalent circumstantial guarantees of trustworthiness" for the Federal Rule and the state counterparts.

a. In addition, the prosecution must establish the trustworthiness of the statement itself, rather than depending on its likely truth in light of corroborating circumstances.

b. Newly created statutory hearsay exceptions should also be subject to the test set forth in *Wright* until widespread acceptance and longevity render such exception firmly rooted.

L. **G/R:** Due Process Clause: [***Chambers v. Mississippi***] the Due Process Clause may require the admission of otherwise inadmissible hearsay if of sufficient reliability and importance.

1. The *Chambers* decision was limited to its facts presented and has not proven to be a significant catalyst of further developments.

A RETURN TO RELEVANCE

§16: PROBABILISTICE EVIDENCE

§16.1: Probabilities as Evidence: Identification Evidence Generally

A. **G/R:** Probability Evidence: courts are willing to rely on probabilities in assessing the force of statistical evidence; however, the courts are substantially more reluctant to admit probability calculations intended to show the identity of a wrongdoer, especially in criminal cases.

B. **G/R:** Probability Evidence and Identification: [***People v. Collins***]: in criminal cases where the prosecutor attempts to compute the probability of observing a conjunction of certain incriminating characteristics by assuming that each characteristic is statistically independent and that the probabilities of these presumably independent characteristics can be obtained by introspection, appellate courts hold that it is error to admit such testimony on the ground that the hypothesized values used in computing the probability of the join event are sheer speculation.

1. In addition, some opinions decry the use of the multiplication rule for the probabilities of independent events when there is reason to believe that the events are dependent.

C. **G/R:** Probabilistic Evidence and Identification of Characteristics: [like blood tests, fingerprints, and bite marks]: in these cases, there is some data for calculating the joint probability. While many forensic experts are content to describe the points of similarity between the incriminating traces of material taken from the defendant or his belongings and to leave it to the jury to decide how unlikely it would be to find all these similarities

by mere coincidence, from time to time, the experts testify to vanishingly small probabilities.

1. The appellate courts responses to estimates that have some empirical basis are more divided.
a. When statistical independence of characteristics is established, multiplication of individual probabilities is allowed.
b. In the exceptional case that finds error in admission of computations that the court considers well founded, the rationale seems to be that the jury would misconstrue the meaning of the probability or overemphasize the number, or that it would be too difficult to explain its true meaning.

§16.2: Probabilities as Evidence: Paternity Testing

A. **G/R:** Blood and Tissue Test: the majority of states now admit the results of blood and tissue typing tests not merely to exclude the alleged father as the biological father, but, when he is not excluded, to help prove that he is the father.

1. In most, if not all of these jurisdictions, an expert may go beyond reporting the positive test findings.

B. **G/R:** Probability of Paternity: in the absence of a statute explicitly authorizing expert testimony of the probability of paternity, admissibility should turn on whether probability testimony is sufficiently likely to aid the jury in properly assessing the probative value of the positive findings.
1. See p. 333 for what exactly is the probability of paternity.

§17: CHARACTER AND HABIT EVIDENCE

§17.1: Character: In General

A. **Generally:** evidence of the general character of a party or witness almost always has probative value, but in many situations, the probative value is slight and the potential for prejudice large.

1. The courts tend to pass on the admissibility of evidence of character and habit according to a number of rules with myriad exceptions that reflect the recurring patterns of such proof and its usefulness.

B. **G/R:** the rules categorically exclude most "character evidence"—evidence offered solely to prove a person acted in conformity with a trait of character on a given occasion.

1. Character evidence, which is not categorically excluded, is admissible, subject to the other rules of evidence, including the usual case-by-case balancing of probative value against possible prejudice.

C. **G/R:** Character in Issue and Circumstantial Evidence of Character:

1. *Character in Issue:* if the purpose for which the evidence of character is offered is itself is an issue in the case, then character evidence is crucial.

2. *Circumstantial Evidence of Character:* if the character evidence merely is introduced as circumstantial evidence of what a person did or thought, it is less critical.

D. **Rule 404(a):** provides, subject to enumerated exceptions, that "evidence of a persons character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.

E. **Rule 405(a):** allows opinion testimony as well as reputation testimony to prove character whenever any form of character evidence is appropriate.

§17.2: Character in Issue

A. **G/R:** Character in Issue: a person's character may be a material fact that under the substantive law determines rights and liabilities of the parties, in this instance, character is in issue.

1. Ex: defamation cases, employer was negligent in hiring, etc…
2. The phrase character in issue is sometimes misleading.
    a. A defendant in a criminal case generally can bring in evidence to show his good character and that he is not the type of person who would have committed the offense charged. When the defendant makes his character an issue in this manner, it merely means that the prosecution is allowed to bring forth certain kinds of rebuttal evidence of bad faith.

B. **G/R:** in view of the crucial role of character in this situation, the courts usually hold that it can be proved by evidence of specific acts. The Federal Rule follows this approach.

1. The hazards of prejudice, surprise, and time consumption implicit in this manner of proof are tolerable when character is itself in issue than when this evidence is offered as a mere indication that the defendant committed the acts that are subject of the suit.

§17.3: Character as Circumstantial Evidence: General Rule of Exclusion

A. **G/R:** Circumstantial Use of Character Evidence: evidence of character, in any form—reputation, opinion from observation, or specific acts—although it usually has some probative value, generally will not be received to prove that a person engaged in certain conduct or did so with a particular intent on a specific occasion, the so called circumstantial use of character evidence.

1. The reason is the familiar one of prejudice outweighing probative value.
2. Character evidence used for this purpose, while typically being of relatively slight value, usually is laden with dangerous baggage of prejudice, distraction, and time-consumption.

§17.4: Character for Care in Civil Cases

A. **G/R:** the rule against using character evidence solely to prove conduct on a particular occasion has long been applied in civil cases, notwithstanding suggestions that exclusion is not justified in this context.

1. The rule is invoked most uniformly when specific act evidence is proffered.
2. Most courts reject proof of an actor's character for care by means of reputation evidence or opinion testimony.

B. **G/R:** the prevailing pattern is to exclude all forms of character evidence in civil cases when the evidence is employed merely to support an inference that conduct on a particular occasion was consistent with a person's character.

§17.5: Bad Character as Evidence of Criminal Conduct: Other Crimes

A. **G/R:** Criminal Cases: in anything, the rule against using character evidence to prove conduct on a particular occasion applies even more strongly in criminal cases.

1. Unless, and until, the accused gives evidence of his good character, the prosecution may not introduce evidence of (or otherwise seek to establish) his bad character.
2. The evidence of bad character would not be irrelevant, but particularly in the setting of the jury trial, the dangers of prejudice, confusion and time consumption outweigh the probative value.

B. **G/R:** this broad prohibition includes the specific and frequently invoked rule that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is introduced for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that the committed the crime for which he is on trial.

C. **Rule 404(b):** provides "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

1. As the rule indicates, there are numerous uses to which evidence of criminal acts may be put, and those enumerated are neither mutually exclusive or collectively exhaustive.

D. **G/R:** the permissible purposes for use of criminal acts at trail by the prosecution include the following:

1. To complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings;
a. This rationale should be applied only when reference to the other crimes is essential to a coherent and intelligible description of the offense at bar.
2. To prove the existence of a larger plan, scheme, or conspiracy, of which the crime at trial is a part;

a. This will be relevant as showing motive, and hence the doing of the criminal act, the identity of the action, or his intention.
3. To prove other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused;
a. Much more is demanded than the mere repeated commission of crimes of the same class, such as repeated murders, robberies or rapes.
b. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.
4. To show, by similar acts or incidents, that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge.
a. In these types of cases, the similarities between the act charged and the extrinsic acts need not be as extensive and striking as required under #3, and the various acts need not be manifestations of an explicit, unifying plan, as required under #2.
5. To establish motive. The evidence of motive may be probative of the identity of the criminal or of malice or specific intent.
6. To establish opportunity, ins the sense of access to or presence at the scene of the crime or in the sense of possessing distinctive or usual skills or abilities employed in the commission of the crime charged;
7. To show, without considering motive, that the defendant acted with malice, deliberation, or the requisite specific intent;
8. To prove identity; although this is indisputably one of the ultimate purposes for which evidence of other criminal conduct will be received and frequently is included in the list of permissible purposes for other crimes evidence, it is rarely a distinct ground for admission.
a. Certainly, the need to prove identity should not be, in itself, a ticket to admission.
b. In addition, the courts tend to apply stricter standards when the desired inference pertains to identity as opposed to state of mind.
9. To show a passion or propensity for unusual or abnormal sexual relations.
a. **Rules 413 and 414** allow the broadest conceivable use of "similar" crimes in sexual assault and child molestation cases, making "evidence of the defendant's commission" of other such offenses admissible for its bearing on any matter to which it is relevant.
10. To impeach an accused who takes the witness stand by introducing past convictions.

D(1). **G/R:** a number of procedural and other substantive considerations also affect the admissibility of the other crimes evidence pursuant to these ten exceptions:
1. The fact that the defendant is guilty of another relevant crime need not be proved beyond a reasonable doubt.
a. The measure of proof varies from sufficient to support a finding by the jury to clear and convincing. If the standard is met, then the other crimes

evidence should be potentially admissible even if the defendant was acquitted of the other charge.
2. The connection between the evidence and the permissible purpose should be clear, and the issue on which the other crimes evidence is said to bear should be the subject of genuine controversy.
3. Even if one or more of the valid purposes for admitting other crimes evidence is properly invoked, there is still the need to balance its probative value against usual counterweights—Rule 403 balance.

§17.6: Good Character as Evidence of Lawful Conduct: Proof by the Accused and Rebuttal by the Government

A. **G/R:** Propensity Evidence: the prosecution is generally forbidden to initiate evidence of the bad character of a defendant merely to imply that, being a bad person, he is more likely to commit a crime.

1. This rule, in turn, is a corollary of the more general proscription on the use of character as circumstantial evidence of conduct.
2. ***Exception****:* when the defendant in a criminal case seeks to offer evidence of his good character to imply that he is unlikely to have committed a crime, the general rule against propensity evidence is not applied.
a. In both situations, the character evidence is relevant circumstantial evidence, but when the accused chooses to rely on it to exonerate himself, the problem of prejudice is different because the knowledge of the accused's character evidence may prejudice the jury in his favor.
b. Thus, the Federal Rules permit the defendant, but not the government, to open the door to character evidence.
i. Not all aspects of the accused's character are open to scrutiny under this exception; the prevailing view is that only pertinent traits—those involved in offense charged—are provable.
(A) One accused of theft might offer evidence of honesty, while someone accused of murder might offer evidence that he is peaceable, but not vice versa.

B. **Rule 405(a):** Opinion Testimony: provides, in part, that: 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.

1. This Rule allows expert opinion testimony about an accused's character traits, subject to the court's residual power to screen for prejudice, distraction, and time-consumption.
2. Nevertheless, it does not allow evidence of particular incidents.

C. **G/R:** Reputation Evidence: where reputation evidence is employed, it may be confined to reputation at approximately the time of the alleged offense.

1. Traditionally, only testimony as to the defendant's reputation in the community where the accused resided was allowed, but increasing

urbanization has prompted the acceptance of evidence as to reputation within other substantial groups of which the accused is a constantly interacting member, such as the locale where the defendant works.

D. **G/R:** Opening the Door: when the defendant does produce evidence of his good character as regards traits pertinent to the offense charged, whether by way of reputation or opinion testimony, the defendant simply opens the door to proof of certain character traits as circumstantial evidence of whether he committed the act charged with the requisite state of mind.

1. The defendant does not put his "character in issue" because although the defendant is relying on character witnesses to indicate that he is not predisposed to commit the type of crime in question, it does not transform his character into an operative fact upon which guilt or innocence may turn.

E. **G/R:** Rebuttal Testimony: once the defendant gives evidence of pertinent character traits to show that he is not guilty, his claim of possession of these traits—but only these traits—is open to rebuttal by cross-examination or direct testimony of prosecution witnesses.

1. The prosecution may cross-examine a witness who has testified to the accused's reputation to probe the witness' knowledge of the community opinion, not only generally, but specifically as to whether the witness has "heard" that the defendant ahs committed particular prior criminal acts that conflict with the reputation vouched for on direct examination.
2. Likewise, if a witness gives his opinion of defendant's character, then the prosecution can allude to pertinent bad acts by asking whether the witnesses knew of these matters in forming his opinion.

§17.7: Character in Civil Cases Where Crime is in Issue

A. **G/R:** Criminal Cases: in criminal cases the law relaxes its ban on evidence of character to show conduct to the extent of permitting the defendant to produce evidence of good character.

1. However, it is not unusual in civil litigation for one party to accuse another of conduct that amounts to a criminal offense.

B. **Rule 404:** bars evidence in a civil case to show how a person probably acted on a particular occasion.

§17.8: Character of Victim in Cases of Assault, Murder, and Rape

A. **G/R:** First Aggressor Exception: a well established exception to the rule forbidding character evidence to prove conduct applies to homicide and assault cases in which there is a dispute as to who was the first aggressor.

1. Under this exception, the accused can introduce evidence of the victim's character for turbulence and violence.

a. This evidence must be directed to the victim's reputation or opinion rather than specific acts.
2. In response, the prosecution may adduce evidence that the victim was a characteristically peaceful person.

B. **Rule 404(a)(2):** addresses "first aggressor" situations. It speaks to *pertinent* character traits of the victims of crimes generally and specifically to the trait of non-violence in homicide cases. It excludes form the usual rule of exclusion:

--Evidence of a pertinent trait of character of the victim of the crime offered by the accused, or by the prosecution to rebut the same, or evidence of the character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the defendant was the first aggressor.
1. The last clause of this Rule provides that whenever the accused claims self-defense and offers *any* type of evidence that the deceased in a murder case was the first aggressor, the government may reply with evidence of the peaceable character of the deceased.

C. **Rule 412:** Federal Rape Shield Law: Rule 412 applies only to prosecutions for sexual assault. In criminal cases, the Rule bars all reputation and opinion evidence of the victim's past sexual conduct, but permits evidence of specific incidents if certain conditions are met.

1. *Procedurally*: the proponent of the evidence ordinarily must give written notice before trial, and the court must conduct an *in camera* hearing before admitting the disfavored evidence.
2. *Substantively:* in criminal cases, Rule 412 distinguishes between evidence of past sexual behavior of the victim with the accused and sexual conduct involving other individuals.
a. If the evidence pertains to past conduct with an accused who claims consent, it may be admitted to prove or disprove consent.
b. But if the evidence pertains to acts of the victim with other individuals, the defendant may use it only to prove that someone else was the "source of semen or injury."
c. The Rule specifies that if the constitution mandates it, the defendant may introduce evidence of the victim's prior sexual conduct.
3. In civil cases, the Rule 412 is extended to all cases "involving alleged sexual misconduct."
1. This Rule surely reaches civil suits for sexual assaults that could be (or were) the subject of criminal actions, and it probably extends to civil rights claims for sexual harassment.

D. **Rule 412:** Civil Cases: the Federal Rape Shield law is weaker in the civil context than in criminal cases, where the rule excludes all evidence of the victim's sexual character—no matter how probative—that is not within the categorical exceptions.

1. **Rule 412(b)(2):** in contrast to the criminal provision, adopts a balancing test with the scales tilted against admission.

a. It forbids admission of any type of evidence for sexual disposition unless the "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."

§17.9: Evidence of Character to Impeach a Witness

A. **G/R:** the familiar practice of impeaching a witness by producing evidence of bad character for veracity amounts to using a character trait to prove that a witness is testifying falsely.

1. As such, it is a true exception to the policy against admitting evidence of a character trait solely to show action in conformity with that trait.

§17.10: Habit and Custom as Evidence of Conduct on a Particular Occasion

A. **G/R:** Habit: although courts frown on evidence of traits of character when introduced to prove how a person or organization acted on a given occasion, they are more receptive to evidence of personal habits or of the customary behavior of organizations.

1. To understand this difference, one must appreciate the distinction between habit and character.

a. *Character:* is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance, or peacefulness.

b. *Habit:* in the present context, is more specific. It denotes one's regular response to a repeated situation.

c. If we speak of a character of care, we think of the person's tendency to act prudently in all the varying situations of life—in business, at home, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of responding to a particular kind of situation with a specific type of conduct.

2. Evidence of habit have greater probative value than does evidence of general traits of character and the potential for prejudice is substantially less.

3. **g/r:** as a result, may jurisdictions accept the proposition that evidence of habit is admissible to show an act.

a. These courts only reject the evidence categorically if the putative habit is not sufficiently regular or uniform, or if the circumstances are not sufficiently similar to outweigh the dangers of distraction, prejudice, and time consumption.

b. The Federal Rule follows this pattern.

§18: SIMILAR HAPPENINGS AND TRANSACTIONS

§18.1: Other Claims, Suits, or Defenses of a Party

A. **G/R:** Depending on the circumstances, a party may be permitted to cast doubt on the merits of the claim at bar by demonstrating that an opponent has advanced similar claims

or defenses against others in previous litigation. The cases generally fall into three categories:

1. At one extreme, if the evidence reveals that a party has made previous, very similar claims, and that these claims were fraudulent, then almost universally the evidence will be admissible despite the dangers of distraction and time-consumption with regard to the quality of these other claims, and despite the general prohibition on using evidence of bad character solely to show conduct on a given occasion.

2. On the other extreme, if the evidence is merely that the plaintiff is a chronic litigant with respect to all sorts of claims, the courts consider the slight probative value overborne by the countervailing factors. This evidence is usually excluded.

3. The rest of the cases fall somewhere in the middle and require the judge to balance the probative value against prejudice. The evidence should only be admitted if there is a basis for concluding that the other claims were fabricated.

§18.2: Other Misrepresentations and Frauds

A. **G/R:** in cases alleging fraud or misrepresentation, proof that the defendant perpetrated similar deceptions frequently is received in evidence. This evidence is usually admitted on one of three theories:

1. The evidence of other frauds may help establish the element of knowledge—by suggesting that defendant knew that the alleged misrepresentation was false or by indicating that defendant's participation in an alleged fraudulent scheme was not innocent or accidental.

2. The evidence may be admissible with respect to the closely related element of intent to deceive.

3. If the uttering of the misrepresentations or the performance of fraudulent conduct is contested, then other misrepresentations or fraudulent acts that are evidently part of the same plan or scheme may be admissible to prove the conduct of the defendant.

§18.3: Other Contracts and Business Transactions

A. **G/R:** evidence concerning other contracts or business dealings may be relevant to prove the terms of a contract, the meaning of these terms, a business habit or custom, and occasionally the authority of an agent.

1. Evidence of other transactions between the same parties readily is received when relevant to show the meaning they probably attached to the terms of a contract.

2. Likewise, when the existence of the terms is in doubt, evidence of similar contracts between the same parties is accepted as a vehicle for showing of a parties' custom or continuing course of dealing between them, and as such, as evidence of the terms of the present bargain.

3. Also, when the authority of an agent is in question, other similar transactions that the agent has carried out on behalf of the principal is freely admitted.

4. Inasmuch as there is no general danger of unfair prejudice inherent in evidence of other business transactions, strict rules or limits on admissibility are inappropriate.

a. The courts should admit such evidence in all cases where the testimony as to the terms of the present bargain is conflicting and where the judge finds that the risk of wasted time and confusion of issues does not substantially outweigh the probative value of the evidence of the other transactions.

i. Many jurisdictions therefore leave evidence of other contracts or business dealings to the trial judge to evaluate on a case-by-case basis.

§18.4: Other Sales of Similar Property as Evidence

A. **G/R:** when the market value of property needs to be determined, the price actually paid in a competitive market for comparable items is an obvious place to look.

1. Indeed, when presented with the sometimes widely disparate estimates of professional appraisers, courts have remarked that the sales prices of comparable properties are the best evidence of value.

2. The testimony of witnesses with first-hand knowledge of other sales, or reliable price lists, market reports, or the like may be received to show the market price.

B. **G/R:** the less homogeneous the product, the more difficulty there is in measuring market value this way. Thus, cases involving land valuation, especially condemnation cases, frequently discuss the admissibility of evidence of other sales.

1. The dominant rule gives the judge discretion to admit evidence of other sales. The inquiry focuses on whether these sales have been sufficiently recent, and whether the other land is sufficiently nearby and alike as to character, situation, usability, and improvements, as to make it clear that the two tracts of land are comparable in value.

§18.5: Other Accidents and Injuries

A. **Generally:** the admissibility of evidence of other accidents and injuries is raised frequently in negligence and product liability cases.

1. Judges usually scrutinize this evidence carefully and require a non-propensity purpose and showing of sufficient similarity in the conditions giving rise to the various accidents is required before the evidence is admissible.

B. **G/R:** the various permissible purposes for admitting evidence of other accidents and injuries tend to blend together in that more than one is typically available; however, there are four valid purposes for admitting evidence of other accidents:

1. the evidence may admissible to prove the existence of a particular physical condition, situation, or defect.

a. Ex: the fact that several persons slipped and fell inn the same location in a store can help show the slippery substance was on the floor.

2. the evidence of other accidents or injuries may be admissible to help show that the defect or dangerous situation caused the injury;

a. Thus, instances in which the other patients placed on the same drug in therapy contracted the same previously rare disease is circumstantial evidence that the drug caused the disease in the plaintiff's case.

3. perhaps most commonly, evidence of other accidents or injuries may be used to show the risks that the defendant's conduct created; and

a. If the extent of the danger is material to the case, as it almost always is in personal injury cases, the fact the same conditions produced harm on other occasions is a natural and convincing way of showing the hazard.

4. the evidence of the other accidents commonly is received to prove that the defendant knew, or should have known, of the danger.

C. **G/R:** when the evidence of other accidents is introduced to show notice of the danger, subsequent accidents are not admissible under this rationale.

1. The proponent probably will want to show directly that the defendant had knowledge of the prior accidents, but the nature, frequency, or notoriety of the incidents may well reveal that the defendant knew of them or should have discovered the danger by due inspection.

2. Since all that is required is that the previous injury or injuries be such as to call defendant's attention to the dangerous situation that resulted in the litigated accident, the similarity in the circumstances of the accidents can be considerably less than that which is demanded when the same evidence is used for one of the other valid purposes.

D. **G/R:** the history of safety for exculpatory purposes is generally not admissible to the defendant. (e.g. that a 1000 persons went down a stairwell without falling). Many decisions lay down a general rule against proof of absence of other accidents.

1. A few recent decisions can be found applying a general rule of exclusion.

2. However, a large number of cases recognize that lack of other accidents may be admissible to show:

a. the absence of the defect or condition alleged;

b. the lack of causal relationship between the injury and the defect or condition charged;

c. the non-existence of an unduly dangerous situation; or

d. want of knowledge (or grounds to realize) danger.

§19: SIMILAR HAPPENINGS AND ADMISSIONS

§19.1: Admissions by Conduct: (g) Safety Measures After an Accident; Payment of Medical Expenses

A. **G/R:** Remedial Measures: [**Rule 407**] after an accident causing injury, the owner of the premises or the enterprise will often take remedial measures, such as repairing a defect or changing safety rules. These new safety measures, which might have prevented the injury, *are not* admissible to prove negligence as an implied acknowledgement by conduct that due care required that these measures should have been taken before the injury. There are two main reasons for this:

1. the predominant reason for excluding such evidence is the policy not to discourage safety measures; and
2. because the evidence is sometimes irrelevant.

B. **G/R:** Remedial Measures: Courts exclude evidence of various types of remedial measures taken after an injury when offered as admissions of negligence or fault, and in some jurisdictions, defects in a product or its design or a need for warning or instruction. These include:

1. repairs and alterations in construction;
2. installation of new safety devices, such as, lights gates, or guards;
3. changes in rules and regulations or the practice of business; and
4. the dismissal of an employee charged with causing the injury.
5. ***Caveat:*** however, when the remedial measures are taken by a third person, the policy ground for exclusion is absent, and the evidence, if otherwise admissible, is not excluded.

C. **G/R:** Exceptions to the Remedial Measures Exclusionary Rule: there have been substantial inroads upon the general rule of exclusion:

1. Evidence of subsequent repairs or changes has been admitted as evidence of the defendant's ownership or control of the premises or duty to repair;
2. as evidence of the possibility or feasibility of preventative measures;
3. as evidence to explain that the situation at the time of the accident was different when the jury has observed the scene at a later time;
4. as evidence of what was done later to show that the earlier condition as of the time of the accident was as plaintiff claims;
5. to impeach testimony of adversary's witnesses; and
6. as evidence that the faulty condition later remedied was the cause of the injury by showing that after the change the injurious effect disappeared. [**Rule 407**].

D. **Rule 407:** specifically requires that, when the evidence is offered for another purpose (such as the exceptions above) the purpose must be controverted.

1. If the other purpose is not controverted, the evidence is inadmissible.
2. That fact that the other purpose is controverted should not be taken as a guarantee of admissibility; the possibility of misuse of the evidence as an admission of fault still requires a balancing of probative value and need against potential prejudice under Rule 403.

a. The availability of other means of proof is an important factor in this balancing process.

E. **G/R:** Impeachment: the provision of the rule that permits evidence of remedial measures to be admitted for impeachment is of particular concern in that if applied expansively it could swallow up the rule.

1. At the same time, impeachment should be permitted in some situations, such as when the witness' testimony constitutes not simply a general denial of negligence, but a claim that is directly contradicted by the remedial conduct.

F. **G/R:** Recall Letters: the admissibility of recall letters has been approached in somewhat similar vein, as the first step of taking remedial steps. The courts have split on the question.

1. Those admitting the letters often take the view that the action should not be protected since it is not likely to be deterred because undertaken under regulatory command and not voluntarily.

G. **G/R:** Payment of Medical Expenses: [**Rule 409**]: similar considerations of doubtful relevancy and public policy underlie the general exclusion of evidence of payment or offers to pay medical expenses of on injured person.

1. Unlike compromise negotiations, where the discussion of issues is an essential part of the process and requires protection against disclosure, communications are unnecessary to the providing of care.
a. Accordingly they are unprotected.
2. **Caveat:** if the offer to pay is relevant to an issue other than liability for injury, exclusion is not required by this doctrine.

§19.2: Admissions by Conduct: (f) Offers to Compromise Disputed Claim in Civil Suits and Plea Negotiations in Criminal Cases

A. **G/R:** Offers to Compromise: [**Rule 408**]: general agreement exists that the offer of compromise (settlement offers) is not admissible on the issue of liability. Two grounds for the rule of inadmissibility are advanced:

1. lack of relevancy; that is, the relevancy of the offer will vary according to the circumstances of the case, with a very small offer of payment to settle a very large claim being must more readily construed as a desire for peace rather than an admission of weakness; however, relevancy would increase as the amount of the offer approaches the amount claimed; and
2. policy considerations; that is, the promotion of settlement of disputes, which would be discouraged if offers of compromise were admitted.

B. **G/R:** Actual Dispute Requirement: to invoke the exclusionary rule, an actual dispute must exist, preferably some negotiations, and at least an apparent difference of view between the parties as to the validity or amount of the claim.

1. An offer to pay an admitted claim is not privileged since there is no policy of encouraging compromises of undisputed claims, which should be paid in full.
2. If the validity of the claim and the amount due are undisputed, an offer to pay a lesser sum in settlement or to pay in installments would accordingly be admissible.

C. **G/R:** Items Excluded: the offer is excluded, as well as any suggestions or overtures of settlement.

1. *Statements of Fact:* the trend as to statements of fact has been to extend the protection to all statements made in compromise negotiations, and this result is accomplished by the second sentence in Rule 408 ("Evidence of conduct or statements made in compromise negotiations is likewise not admissible.").
2. **Rule 408:** is designed to exclude the offer of compromise only when it is tendered as an admission of weakness of the offering party's claim or defense, not when offered for another purpose.

D. **G/R:** Impeachment: the use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with dangers of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should *not* be permitted.

E. **G/R:** Evidence of a Present Party's Compromise with Third Persons: the prevailing view is that the compromise offer or payment made b the present defendant is privileged when offered as implied admission of liability.

F. **G/R:** Effect of Acceptance of Offer to Compromise: if an offer to compromise is accepted and a contract thus created, the party aggrieved may sue on the contract and obviously may prove the offer and acceptance.

1. Moreover, if after such a contract is made and the offering party repudiates it, the other may elect to sue on the original cause of action and here again the repudiating party may not claim privilege against the proof of compromise.
2. The shield of the privilege does not extend to the protection of those who repudiate the agreements, which the privilege is designed to encourage.

G. **G/R:** Compromise Evidence in Criminal Cases: the policy of protecting offers of compromise in civil cases does not extend to efforts to stifle criminal prosecution by "buying off" the prosecuting witness or victim.

1. ***Plea Bargains:*** On the other hand, the legitimacy of settling criminal cases by negotiations between prosecuting attorney and accused, whereby the latter pleads guilty in return for some leniency, has been generally recognized.

H. **Rule 410:** excludes from civil and criminal cases as evidence against the defendant who made a plea or participated in the plea discussions:

1. guilty pleas which were later withdrawn;
2. nolo contendere pleas;
3. statements made in the course of entering the plea under Rule 11 of Fed. R. Crim. P. or comparable state procedures; and
4. statements made in the course of plea discussions with a prosecuting attorney which did not result in a plea of guilty or which result in a plea was later withdrawn.
5. **Caveat:** the Rule allows such statements to be admitted for completeness in some instances and in prosecutions for perjury regarding such statements.

I. **G/R:** Rule 410 and Impeachment: while the Rule permits use of statements made as part of plea negotiations for certain limited purposes, impeachment of the defendant's subsequent testimony is not one of those permissible purposes.

1. **Caveat:** the impeachment is permissible if the plea agreement was drafted to waive the defendant's objection.
2. If the transaction on which the prosecution is based also gives rise to a civil cause of action, a compromise or offer of compromise to the civil claim should be privileged when offered at the criminal trial if no agreement to stifle the criminal prosecution was involved.

§20: CONFESSIONS

§20.1: Judicial Confessions, Guilty Pleas, and Admissions Made in Plea Bargaining

A. **G/R:** admissions under confession law can be broken down into three categories:

1. Judicial Confessions;
2. Guilty Pleas; and
3. Admissions made in connection with plea-bargaining.

A(1). **G/R:** Judicial Confessions: may consist of a defendant's testimony in a different (and perhaps civil) proceeding, in a prior hearing during the criminal prosecution then being tried, a stipulation, or pleadings in the litigation at bar or other litigation.

1. Under the general rule governing admissions, these judicial confessions are admissible, subject of course to compliance with such requirements as any right to counsel the defendant may have had at the time.

A(2). **G/R:** Guilty Pleas: a defendant's guilty plea and statements made in connection with its offer to and acceptance by the trial court are admissible as admissions.

1. **Rule 410:** prohibits the use of withdrawn guilty pleas and also bars the use of statements made in the course of proceedings in which the pleas are submitted to and accepted by the trial court.
   a. This is apparently on the rationale that permitting use of the plea would frustrate the policy objectives supporting the right to withdraw that plea.

A(3). **G/R:** Admissions Made in Connection with Plea Bargaining: there is general agreement that admissions made in connection with plea negotiations that do not result in final pleas of guilty must be excluded in order to encourage the desirable or at least necessary process of plea bargaining.

1. **Rule 410:** provides for this and generally makes inadmissible statements made "in the course of plea discussions."

a. *Plea Discussions:* Rule 410 limits protection to statements made in connection with discussions with a prosecutor, on the rationale that discussions between law enforcement officers and defendants do not involve the sort of negotiations that should be encouraged by exclusion of admissions made during those negotiations.

i. Thus, generally no protection is afforded admissions made to law enforcement officers.

ii. Nevertheless, admissions made to a law enforcement officer will be protected if the evidence shows that the officer was acting as the apparently authorized agent of the prosecutor.

b. *In the Course* of Plea Discussions: whether a statement was made in the course of plea discussions is often addressed by using a two-part test:

i. first, did the defendant make the admission with an actual expectation that he was in the process of negotiating a plea bargain; and

ii. second, if so, was that expectation reasonable giving the totality of the circumstances.

2. These provisions protect only confessions made in the process of reaching a plea bargain.

a. If a bargain is reached and obligates the defendant to make certain statements, those statements are not protected.

3. Exception: the federal provisions permit use in perjury prosecutions of otherwise inadmissible pleas and statements related to pleas and plea negotiations.

4. Impeachment: the federal circuit courts have held that Rule 410 precludes the use of statements made in plea negotiations for impeachment purposes.

§21: INSURANCE AGAINST LIABILITY

§21.1: Insurance Against Liability

A. **G/R:** a large body of case law holds that evidence that a party is or is not insured against liability is not admission on the issue of negligence. This doctrine rests on two premises:

1. the belief that insurance coverage reveals little about the likelihood that one will act carelessly; and

2. the concern that the evidence would be prejudicial—that the mention of insurance invites higher awards than are justified, and conversely, that the sympathy that a jury might feel for a defendant who must pay out of his own pocket could interfere with its evaluation of the evidence under the appropriate standard of proof.
3. Exceptions: despite these concerns and the general rule that evidence of the fact of insurance is inadmissible to show negligence or reasonable care, such evidence is frequently received:
a. the evidence may be admitted for some other purpose, providing of course that its probative value on this other issue is not substantially outweighed by its prejudicial impact.
b. the exceptions are listed in Rule 411.

B. **Rule 411:** provides that "evidence that person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully…this rule *does not* require the exclusion of evidence of insurance against liability when offered for another purpose such as proof of agency, ownership or control, or bias or prejudice of a witness.

CROSS EXAMINATION; IMPEACHMENT; REHABILITATION

§22: FORM OF QUESTIONS ON DIRECT AND CROSS

§22.1: The Form of Questions: (a) Questions calling for a Free Narrative versus Specific Questions

A. Generally: the vast majority of objections at trial relate to the issue of the form of the question rather than substantive evidence doctrines such as hearsay.
1. Form objections can arise on either direct or cross-examination.

B. **Rule 611(a):** 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) to avoid needless consumption of time; and
(3) protect witnesses from harassment or undue embarrassment.

C. **G/R:** Specific and Narrative Questions: under the prevailing view, there is no general rule of law requiring or preferring either specific or narrative forms of questioning.
1. In some situations, either form of testimony may be more persuasive.
2. The guiding principle is that the trial judge has a discretion, not reviewable except for abuse, to control the form of examination, to the end that the facts are clearly and expeditiously presented.
a. As a practical matter, in civil cases many judges begin with the presumption that the lawyer may elicit the witness's testimony in narrative form.

b. The presumption will be rebutted, and the judge will insist on more specific questions, only if the witness's narrative becomes confused or the witness makes repeated references to inadmissible matters.

§22.2: The Form of Questions: (b) Leading Questions

A. **Rule 611(c):** objections to leading questions have been preserved by the modern common law, and Rule 611(c) which announces the general norm that "leading questions should not be used on the direct examination.

B. **G/R:** Leading Questions: a leading question is one that suggests to the witness the answer desired by the examiner.

1. A question may be leading because of its form, but often the mere form of a question does not indicate whether it is leading.

2. It is sometimes supposed that any question which can be answered "yes or no" is leading; however, the real issue is whether an ordinary witness would get the impression that the questioner desired one answer rather than another.

C. **G/R:** Permissible Leading Questions: the courts have developed different standards for direct and cross examination; however the general standard is that: upon objection, the judge ordinarily forbids leading questions on direct examination but usually permits them on cross examination.

1. The matter of allowability of leading questions is discretionary, and the judge's action will not be reviewed unless it is charged that it contributed to an unfair trial.

2. *Caveat:* in many situations, leading questions are permitted on direct examination; for instance, they may be used to bring out preliminary matters such as the witnesses name and occupation, or to elicit matters not substantially in dispute.

a. When a witness has been directed to the subject by non-leading questions without securing a complete account of what he is believed to know, his memory is said to be "exhausted" and in that event the judge will permit the examiner to ask questions which by their particularity may revive his memory but which can suggest the answer desired.

b. Likewise, many courts liberally allow specific, leading questions during the direct examination of experts.

c. In some jurisdictions there is a longstanding practice of permitting leading questions to a witness who, for impeachment purposes, is to testify to a previous witness's statement that is not inconsistent with the previous witness's testimony.

§22.3: The Form of Questions: (c) Argumentative, Misleading, and Indefinite Questions

A. **G/R:** Argumentative Questions: the examiner may not ask questions that merely invoke the witness's assent to the questioner's inferences from or interpretations of the facts proved or assumed.

1. The question is objective as argumentative if the cross-examiner challenges a witness about an inference from the testimony already in the record, rather than attempting to elicit new testimony.
    a. EX: Do you really expect the jury to believe that?
2. The trial judge has a wide range of discretion in enforcing the rule, particularly on cross-examination, where such questions are more frequent.

B. **G/R:** Misleading Questions: [or assuming facts not in evidence] another common vice is for the examiner to couch the question so that it assumes as true matters which the witness has not testified, and which are disputed between the parties.

1. The danger is two-fold:
    a. when the examiner puts the question to a friendly witness, the recitation of the assumed fact may be leading, suggesting the desired answer; and
b. whether the witness is friendly or hostile, the answer can be misleading.

C. **G/R:** Indefinite Questions: occasionally questions are considered objectionable because they are too broad or indefinite. Often this objection is in reality an objection to lack of relevancy.

1. Indefinite or ambiguous questions can be especially dangerous on cross-examination.

D. **Rule 611(a):** these types of objections are not specifically codified in the Federal Rules although they may be enforced pursuant to the trial judge's discretion under Rule 403 and 611(a).

§22.4: The Judge May Examine and Call Witnesses

A. **Rule 614(b):** the judge has powers to call and question witnesses under case law and Rule 614(b), the judge has the discretion to examine any witness to clarify testimony or to bring out needed facts which have not been elicited by the parties.

B. **G/R:** Commenting on the Evidence: in the federal courts, and the few states retaining the common law power of the judge to comment on the evidence, and in judge tried cases in all jurisdictions, the restrictions on judicial questions (i.e. leading) are relaxed.

1. Nevertheless, even then, the judge must avoid extreme exercises of the power to question, he must not assume the role of an advocate or prosecutor. If his questions are too partisan or extensive, he runs the risk that the appellate court will find that he has crossed the line between judging and advocacy.
2. The nature of the judge's questions in the most important consideration.

§23: CROSS-EXAMINATION AND SUBSEQUENT EXAMINATIONS

§23.1: The Right of Cross-Examination: Effect of Deprivation of Opportunity to Cross Examine

A. **G/R:** Constitutional Right of Cross-Examination: lawyers and judges have regarded the opportunity to cross-examine as an essential safeguard of the accuracy and completeness of testimony. They have insisted that the opportunity is not just a right, but a privilege.

1. The right is available at the taking of depositions as well as during the examination of witnesses at trial.
2. State constitutional provisions guaranteeing the accused the right of confrontation have been interpreted as codifying this right of cross examination.
3. The right of confrontation secured by the 6th Amendment of the federal constitution has likewise been construed as guaranteeing the right to cross-examine in criminal proceedings.
    a. Indeed, a majority of the Supreme Court appears to have embraced the notion that the right to cross-examination is the primary interest secured by the confrontation clause.
    b. Moreover, courts have granted the right a measure of constitutional protection in civil cases.

B. **G/R:** generally, the effect of the deprivation of the right to cross-examine results in having the direct testimony stricken from the record.

§23.2: Scope of Cross-Examination: Restriction to Matters Opened Up on Direct: The Various Rules

A. **Generally:** the practice varies widely in the different jurisdictions on the question of whether the cross examiner is confined to the subjects testified about in direct examination, and if so, to what extent. However, there is a good consensus over the proper scope of direct examination; for example:

1. All courts agree that the proper scope includes matters relevant to credibility;
2. Most jurisdictions accord the trial judge a measure of discretionary power over the scope of cross-examination on the merits.

B. **G/R:** Restrictive Rule: Limiting Cross Examination to the Scope of Direct: the federal rules adopt the majority rule of the states that cross-examination must be limited to the matters testified to on the direct examination. There are several variations of this rule, and the federal rules are interpreted as embracing the most liberal version; that is:

1. the cross-examination is limited to the matters opened on direct and to facts tending to explain, contradict, or discredit the direct testimony and in some instances facts tending to "rebut" any inference or deduction from the matters testified to on direct.

2. **Rule 611(b):** this interpretation of the federal rules is consistent with the provision of Rule 611(b) that the court may permit inquiry into addition matters as if on direct.
3. Legal Test: many federal judges apply the so-called "legal test." This test equates the subject matter of the direct with the essential elements of the cause of action, crime, or defense mentioned on direct.
a. At the end of the trial, the judge gives the jury substantive law instructions on the pertinent causes of action, crimes, and defenses.

§23.4: Cross-Examination to Impeach Not Limited to the Scope of Direct

A. **G/R:** Impeaching Credibility: [**Rule 611(b)**]: one of the main functions of cross-examination is to afford opportunity to elicit answers impeaching the witness's veracity, capacity to observe, impartially, and consistency.
1. Even in jurisdiction adopting the most restrictive practice, cross-examination to impeach is not limited to matters brought out in the direct examination.
2. On direct examination, a witness's propend ordinarily may not bolster the witness's credibility; during redirect—before there has been any attack on the witness's credibility—the proponent generally may not elicit testimony which is logically relevant only to the witness's believability.
3. Nevertheless, by the simple act of testifying the witness places her credibility in issue. For that reason, the witness's credibility is fair game on cross-examination.

§23.5: Cross-Examination About Witness's Inconsistent Past Writings: Must Examiner Show the Writing to the Witness Before Questioning About its Contents?

A. **Rule 613:** the Federal Rules abolish the rule of *Queen Caroline's Case* [stating that the cross-examiner cannot ask the witness about any written statements made by the witness, or ask whether the witness has ever written a letter of a given tenor, before first asking the witness about the letter or laying a foundation for the statement].
1. The Federal Rules permit cross-examination without a prior showing of the writing to the witness.
2. Rule 613 substitutes a requirement that the writing be shown or disclosed to opposing counsel on request as an assurance of the cross-examiner's good faith.

§23.6: The Standard of Relevancy as Applied on Cross-Examination: Trial Judge's Discretion

A. **G/R:** Functions of Cross Examination: the three main functions of cross examination are:
1. to attack the credibility of the direct testimony and other opposing witnesses;
2. to elicit additional facts on the historical merits related to those mentioned on direct; and
3. in states following the "wide open" rule (not the federal rules) to bring out additional facts which tend to elucidate any issue in the case.

B. **G/R:** as to cross-examination designed to serve the 2d or 3d function, the usual standard of relevancy governing testimony offered on direct examination applies to facts to be elicited on cross-examination.

C. **G/R:** Relevancy when Attacking the Witness's Credibility: when the examiner is performing the first function, that of attacking the credibility of the direct testimony, the cross examiner's purpose is radically different than in the other two functions.

a. Test of Relevancy: In the first function, the cross-examiner is not directly targeting the historical merits of the case; here, the test of relevancy is not whether the answer sought will shed light on any issue on the merits, but whether it aids the court or jury in appraising the witness's credibility and assessing the probative value of the direct testimony.

b. This is covered by **Rule 611(b)** authorizing cross-examination concerning matters "affecting the credibility of the witness."

§23.7: Redirect and Subsequent Examinations

A. **G/R:** one who calls a witness is normally required to elicit on the witness's first direct examination all that he wishes to prove by him. This norm of proving everything so far as feasible at the first opportunity is in the interest of fairness and expedition.

B. **G/R:** Redirect and Subsequent Examinations: the uniform practice is that the party's examination is typically limited to answering any new matter drawn out in the adversary's immediately preceding examination.

1. **Rule 611(a):** gives the judge discretion over the scope of redirect; however, reply to new matter drawn out on cross examination is the customary function of the redirect examination. Examination for this purpose is often deemed a matter of right, but even then its extent is subject to the judge's discretionary control.

2. The re-examiner often invokes the "rule of completeness" permitting proof of the remainder of the transaction, conversation, or writing when part has been proven by the adversary so far as the remainder relates to the same matter [this rule is not abrogated by Rule 106].

§24: IMPEACHMENT AND SUPPORT

§24.1: The Stages of Impeachment and the Modes of Attack

A. **G/R:** Credibility Rules: there are three groups of credibility rules:

1. the attempts by a witness's proponent to bolster the witness's credibility even before it has been impeached;

2. the various techniques which the opponent may employ to attack or impeach the witness's credibility; and

3. the methods which the witness's proponent may use to rehabilitate the witness's credibility after impeachment, in effect to undo the damage the done by impeachment.

B. **G/R:** Bolstering Evidence: the general norm under the federal rules is that the witness's proponent may not bolster the witness's credibility before any attempted impeachment.

1. Thus, as a general proposition bolstering evidence is inadmissible.

C. **G/R:** Impeachment: the federal rules liberally admit impeaching evidence. There are five main modes of attack upon a witness's credibility:

1. *Self-Contradiction:* proof that the witness on a previous occasion has made statements inconsistent with the present testimony.
2. *Partiality:* showing that the witness is partial on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest, whether legitimate or corrupt.
3. *Character:* an attack on the witness's character, but lack of religious belief is not available as a basis of attack on credibility [Rule 610].
4. *Witness Defect:* an attack showing a defect of the witness's capacity to observe, remember, or recount the matters testified about.
5. *Specific Contradiction:* proof by other witnesses that material facts are otherwise than as testified to by the witness under attack.

**Some of these attacks are not specifically or completely treated by the Federal Rules but are nevertheless authorized by Article IV of the Federal Rules, which contain specific provisions expressly regulation impeachment techniques such as proof by prior inconsistent statements, and proof of other facts logically relevant to witness credibility is governed by the general framework set out in Rule 401-403.

D. **G/R:** Process of Impeachment: the process of impeachment may proceed in two different stages:

1. *Intrinsic Impeachment:* the facts discrediting the witness or his testimony may be elicited from the witness himself on cross-examination.
   a. A good faith basis for the inquiry is required;
   b. Certain modes of attack are limited to this stage; the shorthand expression is that "you must take his answer."
   c. When the mode of attack is limited in this manner, the cross-examiner is sometimes said to be limited to "intrinsic impeachment."
2. *Extrinsic Impeachment:* in other situations, the facts discrediting the witness may be proved by extrinsic evidence; the assailant waits until the time for putting on his own case in rebuttal, and then proves by a second witness or documentary evidence, the facts discrediting the testimony of the witness attacked.

E. **G/R:** there is a cardinal rule of impeachment: never launch an attack implying the witness has lied deliberately, unless the attack is justifiable and essential to the case.

1. An assault which fails often produces in the jury's mind an indignant sympathy for the intended victim.

§24.2: Prior Inconsistent Statements: Rule Against Impeaching One's Own Witness

A. **Rule 607:** abolishes the common law voucher rule [which forbade a party from impeaching its own witness. The standard methods of impeachment are permitted under these Rules.

1. *Doctrine of Mere Subterfuge:* it has been widely held that a criminal prosecutor may not employ a prior inconsistent statement to impeach a witness as a mere subterfuge or for the primary purpose of placing before the jury substantive evidence with is otherwise inadmissible.

a. Application of the mere subterfuge or primary purpose doctrine focuses on the content of the witness's testimony as a whole.

i. If the witness's testimony is useful to establish any fact of consequence significant in the context of litigation, the witness may be impeached by means of a prior inconsistent statement as to any other matter testified to.

ii. In other words, the pivotal question is whether the party is calling a witness with the reasonable expectation that the witness will testify something helpful to the party's case aside from the prior inconsistent statement.

§24.3: Impeachment by Specific Contradiction

A. **G/R:** Specific Contradiction: may be explained by way of example: Witness #1 testifies on a certain day he was wearing a sweater and it was snowing and this testimony can be disproved by: (a) the witness admitting on direct that he was in error; (b) taking judicial notice that at the time and place it could not have been snowing; or most commonly (c) calling witness #2 to testify that the day was warm and Witness #1 was wearing a T-shirt (this is the sense in which contradiction is used).

1. *Value of Specific Contradiction:* specific contradiction tends to show Witness #1 has erred about or falsified certain facts, therefore is capable of lying or error.

B. **G/R:** Collateral Facts Doctrine: the trial judge in his discretion may permit the cross-examiner to test the power of a witness to remember, observe, and recount facts unrelated to the case to "explore" these capacities.

1. However, to allow a prolonged dispute about such extraneous material and collateral facts (such as the weather and what the witness was wearing) by allowing the attacker to call other witnesses to disprove them, is impractical.

a. Dangers of surprise, confusion of the jury's attention, and waste of time are apparent.

2. To combat these dangers, at common law, many courts enforced the restriction that a witness may not be impeached by producing extrinsic evidence of "collateral facts" contradicting the first witness's assertion about those facts.

a. *Collateral Facts:* a matter is collateral if the matter itself is irrelevant in the litigation to establish a fact of consequence, i.e., irrelevant for a purpose other than mere contradiction of prior witness's in court testimony.
b. When a the collateral fact sought to be contradicted is elicited on cross-examination, the restriction is often expressed by saying that the answer is conclusive or that the cross-examiner must "take the answer."
c. If the "collateral" fact happens to be drawn out on direct examination, the rule against extrinsic evidence to contradict still applies.

C. **G/R:** Article VI of the Federal Rules do not expressly mention specific contradiction as a permissible method of impeachment. However the Federal Courts continue to permit resort to this technique.

D. **United States v. Abel:** the Supreme Court's reasoning in *Abel* is apposite (appropriate). As in the case of specific contradiction, Article VI is silent on the bias impeachment technique.

1. However, the *Abel* Court noted that bias is certainly logically relevant to a witness's credibility; and consequently, even without more, **Rule 402** is sufficient statutory authorization for the continuation of the practice of bias impeachment.
a. Like bias, specific contradiction is relevant to impeach a prior witness's credibility.
2. The judge may exercise his discretion under **Rule 403** to limit specific contradiction impeachment; but when it is logically relevant, specific contradiction evidence is presumptively admissible under **Rule 402.**

§24.5: Contradiction: Collateral and Non-Collateral Matters; Good Faith Basis

A. **G/R:** Collateral Fact Rule: on cross-examination, every permissible type of impeachment has one of its purposes testing the witness's credibility.

1. The use of extrinsic evidence to contradict is more restricted due to considerations of confusion of the issues, misleading the jury, undue consumption of time, and unfair prejudice.
2. If a matter is considered collateral, the counsel may be limited to intrinsic impeachment; the witness's testimony on direct or cross examination stands—the cross examiner must take the witness's answer; and contradictory extrinsic evidence, evidence offered other than through the witness himself, is *not* permitted.
3. When the matter is not collateral, extrinsic evidence may be introduced disputing the witness's testimony on direct examination or cross.

B. **G/R:** The Procedural Significance of a Determination that the Rule Bars Extrinsic Evidence: the collateral fact rule does not limit cross-examination. During cross-examination the questioner may attempt to challenge virtually any aspect of the witness's direct testimony.

1. Subject to the trial judge's discretionary control under Rule 403, the cross-examiner can question about the witness's perceptual ability, memory, narrative ability or sincerity and all other facts relevant to the jury's assessment of the witness's credibility to the examiner's heart is content.
a. The courts sometime say when the collateral fact rule applies, the cross examiner must take the witness's answer, but this expression does not means that the cross examiner is obliged to accept the initial answer out of the witness's mouth.
b. In addition, the cross-examiner may apply further pressure by reminding the witness of the penalties of perjury or by confronting the witness with any contrary writing which the witness would be competent to authenticate.
2. The core prohibition of the collateral fact rule applies when the witness to be impeached has already left the stand and the former cross-examiner later calls a second witness or proffers an exhibit to impeach the earlier witness's credibility.
a. At common law, if the collateral fact rule applies at this juncture, the second witness's testimony is automatically inadmissible.

C. **G/R:** Impeachment Techniques Exempt From the Collateral Fact Rule: most impeachment techniques are exempt from the collateral fact rule. In some cases, the exemption arises from the very nature of the impeachment technique.

1. Moreover, other techniques are exempted because the impeaching facts are deemed highly probative on credibility; for example, proof of:
a. bias, interest, corruption or coercion;
b. alcohol or drug use;
c. deficient mental capacity;
d. want of physical capacity or lack of exercise of capacity to acquire personal knowledge; and
e. prior convictions are exempt.
2. These matters can posses such great probative worth on issues of the witness credibility that the courts tolerate the expenditure of additional time entailed in the subsequent presentation of extrinsic evidence.

D. **G/R:** Impeachment Techniques Subject to the Collateral Fact Rule: there are only three impeachment techniques subject to the collateral fact rule:

1. *Untruthful Acts:* proof the witness has committed an untruthful act which has not resulted in a conviction;
2. *Inconsistent Pretrial Statements:* proof that the witness has made an inconsistent pretrial statement; and
3. specific contradiction.

E. **G/R:** When is a Particular Topic Deemed Collateral:

1. *Untruthful Acts:* In the case of proof of the witness's untruthful acts which have not resulted in a conviction, the answer is simple: extrinsic evidence of such acts is always deemed collateral, with one exception.
a. If the witness initially denies the perpetrating the act, the cross-examiner may pressure the witness by reminding him of the penalties of perjury and perhaps confronting him with a writing;
b. On the other hand, if the witness denies the act, the cross-examiner must "take the answer" even when it would be relatively easy to expose the perjury.
c. Exception: the solitary exception to this general rule applies when the witness's testimony triggers the curative admissibility or "door opening" doctrine.

i. Extrinsic evidence concerning a collateral matter may be admitted under the doctrine of "door opening."

ii. Admission of evidence under this doctrine tends to occur where the government seeks to introduce evidence on rebuttal to contradict specific factual assertions raised during the accused's direct examination.

2. *Inconsistent Pretrial Statements and Specific Contradiction:* the determination of whether extrinsic impeachment evidence relates to a collateral matter is more complex when the former cross-examiner resorts to extrinsic evidence to prove a prior inconsistent statement or to specifically contradict the earlier witness's testimony.
a. Although extrinsic evidence of untruthful acts is almost always considered collateral, extrinsic evidence offered for these purposes is sometimes collateral and sometimes non-collateral.
b. Test: in these situations, there are two ways in which the extrinsic impeaching evidence can qualify as non-collateral:

i. the matter is non-collateral and extrinsic evidence is admissible if the matter is itself relevant to a fact or consequence of n the historical merits of the case.

(A) When a fact is logically relevant to the merits of the case as well as the witness's credibility, it is worth the additional court time entailed in hearing extrinsic evidence.

ii. the extrinsic evidence is non-collateral and again admissible when it relates to a so-called "linchpin" fact.

(A) Under this prong of the test, for purposes of impeachment a part of the witness's story may be attacked where as a matter of human experience, he could not be mistaken about that fact if the thrust of his testimony on the historical merits was true.

(B) A fact negating the assumption that the witness was in the right place at the right time to observe what he testified to is a "linchpin" fact.

F. **G/R:** Collateral Fact Rule and Federal Rules: the status of the collateral fact rule under the FRE is somewhat unclear.

1. **Rule 608(b):** expressly prohibits extrinsic evidence of a witness's untruthful acts, however, the FRE do not expressly codify the a collateral fact restriction.
2. However, many courts continue to refer to the doctrine, nonetheless, the trial judges discretion under Rule 402 and Rule 403 may allow more extrinsic evidence to be admissible.

§25: IMPEACHMENT

§25.1: Character: Conviction of a Crime

A. **Rule 609:** the types of convictions usable for impeachment are:

1. **Rule 609(a)(2):** crimes of dishonesty or false statement, regardless of the imposable punishment, may be used against any witness, including an accused.
2. Other misdemeanor-grade crimes (punishable by imprisonment less than a year) are *never usable*.
3. **Rule 609(a)(1):** against an accused who takes the stand, felony-grade crimes (punishable by death or more than a year) may be used, if the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant.
4. In civil cases or crimes against all criminal witnesses other than the accused, Rule 609(a)(1) crimes are usable unless under the normal Rule 403 standard the court determines the probative value of the conviction is substantially outweighed by its prejudicial effect.
5. **609(a)(2):** Crimes involving "dishonesty or false statement" regardless of the punishment or against whom used, do not require balancing of probative value against prejudice, they are *automatically admissible*.

a. *Definition:* Crimes of dishonesty or false statement mean crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or nay other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

i. Crimes involving solely the use of force, such as assault and battery, and crimes such as drunkenness and prostitution do not involve dishonesty or false statement while the crime of fraud does.

ii. The advisory committee expressed disapproval of the minority of cases which read Rule 609(a)(2) broadly as including theft offenses; and because of that the trend is to restrict "dishonesty or false statement" to a crime which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

B. **G/R:** convictions in any state or federal court are usable to impeach. The trend is to hold that a conviction is sufficiently final as soon as the guilty verdict is entered even if the sentence has not yet been imposed.

C. **G/R:** Pardons: a pardon does not prevent use of the conviction to impeach, under case law.

1. **Rule 609(c)(2):** a pardon bars the use of the conviction if the pardon or other equivalent procedure was based on a finding of innocence.

D. **G/R:** Appeals: the pendency of an appeal does not preclude the use of a conviction.

E. **Rule 609(b):** convictions are presumptively considered remote and inadmissible when more than 10-years has elapsed since the conviction.

F. **G/R:** Mechanics of using a Conviction of Impeachment: most jurisdictions permit proof of the conviction by either production of the record or a copy, or the oral statement of the convicted witness himself.

1. On cross-examination, the examiner need not lay a foundation for proof by copy or record; nor is he bound to take the answer if the witness denies the conviction, but may prove it by the record.
2. To minimize prejudice and distraction from the issues, most courts restrict the cross-examiner to elicited testimony about the basic facts reflected on the very face of the judgment: the name of the crime, the time and place of conviction, and sometimes the punishment.
    a. Further details, such as the victims name and aggravating circumstances may not be inquired into unless the specific circumstances in question independently admissible under another theory of logical relevance such as Rule 404(b) or 608(b).

G. **G/R:** Defendant Testimony: the most prejudicial impact of impeachment by conviction is when the criminal accused with a past criminal record takes the stand. Thus, **Rule 609** permits the introduction of the defendant's prior convictions in the discretion of the judge, who is to balance *in each instance* the possible prejudice against the probative value of the conviction as to credibility.

§25.2: Character: Impeachment by Proof of Opinion or Bad Reputation

A. **G/R:** Opinion and Bad Reputation: the federal rules permit attack on a witness's credibility by opinion and attack upon character by reputation. Indeed, the Federal Rules seem to authorize expert opinion on the subject.

1. The great majority of courts limit impeachment by character evidence to "reputation for truth and veracity."
2. Opinion, as well as reputation, pursuant to **Rule 608(a)** is likewise restricted; the rule mentions solely character for truthfulness or untruthfulness.

B. **G/R:** Reputation: [the temporal element]: under Rule 608(a), most courts:

1. permit the reputation witness to testify about the impeachee's present reputation as of the time of trial, if he knows it, and
b. to accept testimony about reputation as of any time before trial which the judge in his discretion find is not too remote.

C. **G/R:** Reputation: [place element]:as to the place of reputation, the traditional inquiry is as to the general reputation for veracity in the community where he lives.

1. Under Rule 608(a), however, because of urbanization, it is now generally agreed that proof may be made not only of the reputation of the witness where he lives, but also of his repute, as long as it is established, in any substantial group of people among whom he is well known, such as, the persons with whom he works, does business, or goes to school.

D. **G/R:** Requirement of Firsthand Knowledge: a lay person's opinion, under Rule 608(a), should rest on some firsthand knowledge pursuant to Rule 602 so that ht opinion can be based on rational perception and of aid t the jury as required by Rule 701.

§25.3: Attacking the Supporting Character Witness

A. **Rule 608(1):** permits the cross-examiner to impeach a witness by forcing the witness to admit that she had committed an untruthful act, even if the act has not resulted in a conviction.

B. **Rule 608(b)(2):** Under Rule 608(b)(2), and at common law, a character witness who has testified to his favorable opinion or the good reputation of another witness ("principal witness") for truth and veracity can be cross-examined about the principal witness's specific prior acts, if probative of untruthfulness.

1. Specific acts of conduct sufficiently probative of untruthfulness not having resulted in a conviction normally involve dishonesty or false statement.
2. Extrinsic evidence with respect to specific instances of the principle witness's conduct not resulting in conviction is inadmissible, the cross-examiner must take the witness's answer.
3. The character witness may be asked directly not only about the principle witness's specific acts probative of untruthfulness, but also about familiarity with the principle witness's convictions, arrests, and indictments.
4. Inquiry on cross examination of the character witness about principle witness's acts probative of untruthfulness not resulting in a conviction may be precluded if the court determines that the probative value of such cross examination is substantially outweighed by the danger of unfair prejudice.

§25.4: Defects of Capacity: Sensory or Mental

A. **G/R:** Sensory Deficiencies: any deficiency of the senses, such as deafness, or color blindness, which would substantially lessen the ability of the witness to perceive the facts which the witness purports to have observed, ought to be provable to attack the witnesses

credibility, either upon cross-examination or by producing other witnesses to prove the defect.

B. **G/R:** Mental Deficiencies: as to the mental qualities of intelligence and memory, a distinction must be made between attacks on competency and attacks on credibility, the subject of this section.

1. Sanity, in a general sense, is no longer a test of competency, and a so-called insane person is generally permitted to testify if he is able to report correctly the matters to which he testifies and understands the duty to speak the truth.
2. **Rule 601:** precludes the trial judge from treating insane persons as automatically incompetent to testify, although a prospective witness could conceivably be treated as incompetent if he did not have the capacity to recall, understand the duty to tell the truth, or acquire personal knowledge.
3. More commonly, however, the fact of a mental abnormality at either the time of observing the facts or testifying is provable to impeach, on cross or by extrinsic evidence, as under the federal rules, in the judge's discretion.

C. **G/R:** Psychiatric Testimony: most courts now hold that the admission of psychiatric testimony is in the judge's discretion, and more often than not the discretion is exercised in favor of excluding evidence of the witness's past psychiatric problems.

1. These courts hold that the discretion to order an examination or permit such testimony should be exercised only for compelling reasons in exceptional circumstances.
2. The Federal Courts have been disinclined to exercise their discretion to permit attacks by experts on mental capacity affecting credibility.

§26: MORE IMPEACHMENT

§26.1: Prior Inconsistent Statements: Degree of Inconsistency Required

A. **G/R:** the most widely used impeachment technique is proof that the witness made a pretrial statement inconsistent with her trial testimony. This certainly holds true in civil actions where pretrial depositions are commonplace.

B. **G/R:** Substantive Use of Prior Inconsistent Statements: when a witness testifies to facts material in the case, the opponent may have available proof that the witness previously made statements inconsistent with his present testimony.

1. Under the modern view of the hearsay rule, some or all such previous statements are exempt for the rule and admissible as substantive evidence, if the prior inconsistent statement was made under oath subject to the penalty of perjury at a trial, hearing, or deposition.
2. However, if no exemption or exception to the hearsay rule applies, these previous statements will often be inadmissible as evidence of what they assert.
3. Even though inadmissible hearsay as evidence of the facts asserted, they are nevertheless admissible for the limited purpose of impeaching the witness and may be admitted for that purpose, with a limiting instruction.

*This section only deals with situations when the evidence is inadmissible as substantive evidence.

C. **G/R:** Self-Contradiction: when prior inconsistent statements are to be admitted for impeachment purposes, the making of the previous statement may be drawn out in cross-examination of the witness himself, and under the FRE the making of the statement may also be brought out by another witness, without prior inquiry during the cross-examination of the witness who made it.

D. **G/R:** Degree of Inconsistency: to create a doubt about the witness's credibility, the degree of inconsistency between the witness's testimony and his previous statements is fairly liberal. Under the majority rule, any *material variance* between the testimony and the previous statement suffices.

1. The pretrial statement need only "bend in a different direction" than the trial testimony.

2. Accordingly, if the prior statement omits a material fact presently testified to, which it would have been natural mention in the statement, is sufficiently inconsistent.

3. A witness's earlier statement that he had no knowledge of the facts now testified to should be provable.

4. **Test:** the test is: could the jury reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a prior statement of this tenor.

5. The FRE do not specifically prescribe a test for inconsistency, but the more liberal standards should govern under the Rules.

a. Thus, if the previous statement is ambiguous and according to one meaning inconsistent with the testimony, it ought to be admitted for the jury's consideration.

b. Judge's have a fair amount of discretion in this area.

§26.2: Prior Inconsistent Statements: Opinion Form

A. **G/R:** Form of Impeachment Statement: the general rule, and majority view, is that there is a substantial inconsistency, the form of the impeaching statement, even if it is in opinion form, is immaterial.

1. **Rule 701**: lends support to this view by codifying a broad version of the opinion rule.

2. This is particularly true with experts. If a witness, such as an expert, testifies in terms of opinion, all courts permit impeachment by showing the witness's previous expression of an inconsistent opinion.

a. The same holds true with most other types of witness's also.

§26.3: Prior Inconsistent Statements: Extrinsic Evidence: Previous Statements as Substantive Evidence of the Facts Stated

A. **G/R:** Extrinsic Evidence of Prior Inconsistent Statements: extrinsic evidence, that is, the production of other witnesses, for impeachment by inconsistent statements, is restricted for reasons of economy of time.

1. The rule that one cannot contradict collateral matters applies.
2. Here, that rule means that to impeach, by extrinsic proof of prior inconsistent statements, the statements must have as their subject facts relevant to issues on the historical merits of the case.
3. Although the FRE do not codify a categorical prohibition on the use of extrinsic evidence to impeach on collateral matters, the judge may factor the same policy considerations into her Rule 403 analysis.

B. **Rule 801(d)(1):** if the prior inconsistent statement is admitted under the Rule 801 exemption, the particular inconsistent statement of a witness can be used as substantive evidence as well as for impeachment purposes.

§26.4: Prior Inconsistent Statements: Requirement of Preliminary Questions on Cross-Examination as Foundation for Proof by Extrinsic Evidence

A. **Rule 613:** under the federal rules, the only requirements for introducing a witness's prior inconsistent written or oral statements is that:

1. While questioning the witness concerning written statements, or the substance of the statements, they shall be shown or disclosed to opposing counsel upon his request; and
2. at some point in time—even after the introduction of extrinsic evidence—the witness is afforded a chance to deny or explain the inconsistent statement, and opposing counsel shall have the opportunity to question the witness about the statement.
    a. Even if the witness's opportunity to explain or deny later and the opposing counsel's opportunity to question later can be dispensed with in the judge's discretion in the "interests of justice."

B. **G/R:** Rule 613 adopts a liberal view, abolishing the rigid notion that witness must on cross-examination be shown an inconsistent statement or be advised of its contents before being questioned about its substance.

1. Rule 613 abandons the traditional requirement that the foundation questions be put to the witness on cross-examination before extrinsic evidence of the statement is introduced, i.e., before other witnesses testify to it or before an inconsistent writing is introduced.
2. Rule 613 indicates that the traditional insentience that the attention of the witness be directed to the statement on cross examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine the statement, with no specification of any particular time sequence.

§26.5: Prior Statements of Witnesses as Substantive Evidence

A. **G/R:** the traditional view has been that a prior statement, even one made by the witness, is hearsay if it is offered to prove the matters asserted therein. Of course, this categorization has not precluded using the prior statement for other purposes, such as:

1. to impeach the witness by showing self contradiction if the statement is inconsistent with his testimony; or
2. to support credibility when the when the statement is consistent with the testimony and logically helps to rehabilitate.

*But the prior inconsistent/consistent statement has traditionally been admissible as substantive evidence to prove the matter asserted therein only when falling within an established exception to the hearsay rule.

B. **Rule 801(d)(1):** the FRE have taken an intermediate position, neither admitting nor rejecting prior statements of witnesses *in toto* where the "declarant testifies and is subject to cross examination concerning the statement," but exempting from classification as hearsay certain prior statements thought by circumstances to be generally free of the danger of abuse.

1. Under Rule 801(d)(1), the exempt statements are:

(A) inconsistent statements given under oath and subject to the penalty of perjury at trial, hearing, or other proceeding, or in a deposition;

(B) consistent statements offered to rebut an express or implied charge against the declarant of recent fabrication or improper motive or influence; and

(C) statements of identification.

C. **Rule 801(d)(1)(A):** Prior Inconsistent Statements: the witness who has told one story earlier and another at trial has invited a searching examination of credibility through cross-examination and re-examination.

1. The reasons for the change, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the adversary in the presence of the trier of fact, under oath, casting light on which is the true story.
2. This evidence and testimony can be admitted as substantive evidence.
3. When statement is inconsistent (see above for test) it may be admitted as substantive evidence, however, where a witness no longer remembers an event, a prior statement describing that event *should not* be considered inconsistent.
4. **g/r:** the practical effect of Rule 801(d)(1) is to confine substantive sue of prior inconsistent statements virtually to those made in the course of judicial proceeding, including grand jury testimony, although allowing use for impeachment without these limitations.

D. **Rule 801(d)(1)(B):** Prior Consistent Statements: while prior consistent statements are hearsay by the traditional view and inadmissible as substantive evidence, they have nevertheless been allowed a limited admissibility for the purpose of supporting the credibility of a witness, particularly to show that a witness whose testimony has allegedly been influenced told the same story before being influenced.

1. Rule 801(d)(1)(B) goes further and exempts from the hearsay rule prior consistent statements that are offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.
2. ***Tome v. U.S.:*** the Supreme Court concluded that the rule imposes a timing requirement and admits only those statements made *before the charged recent fabrication or improper influence or motive.*
3. The most clearly accepted use of consistent statements for rehabilitation purposes is to clarify or rebut prior inconsistent statements that have been used to impeach the witness.

E. **Rule 801(d)(1)(C):** Statements of Identification: when A testifies that on a prior occasion B pointed to the accused and said that "is the man who robbed me" the statement is clearly hearsay.

1. If, however, B is present in court, testifies to the prior identification, and is available for cross-examination, the case fits within the present section.

F. **G/R:** Cross-Examination: with respect to each of the categories of prior statements discussed above, the Rule 801 requires that the declarant testify at trial or hearing and subject to cross examination concerning the statement.

1. If the witness takes the stand and responds to questions the requirements of both the hearsay rule and Confrontation Clause are satisfied [***U.S. v. Owens***].

§26.6: Impeachment of a Hearsay Declarant

A. **Generally:** when a hearsay statement is introduced, often the declarant does not testify. It is, however, ultimately the declarant's credibility that determines the value that should be accorded the statement.

B. **Rule 806:** when a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, *the credibility of the declarant may be attacked*, and if attacked *may be supported* by any evidence which would be admissible for those purposes if the declarant had testified as a witness.

--Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.
--If the party against whom the hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

C. **G/R:** the rule effectively treats the hearsay declarant as a witness for impeachment purposes. It covers both statements admitted under hearsay exceptions and admissions, but it does not apply to statements that are non-hearsay and not admitted for truth.

1. The declarant may be impeached by any of the standard methods of attacking credibility, including prior convictions, inconsistent statements, bias or interest, and character for untruthfulness.

2. Rule 806 eliminates the requirement, applicable to statements made by witnesses who testify in person, that an opportunity be afforded for them to explain or deny the inconsistency.

§26.7: Supporting the Witness:

A. **Credibility Analysis:** there are three stages in credibility analysis:
1. Bolstering before attempted impeachment;
2. Impeachment; and
3. Rehabilitation after attempted impeachment.

B. **G/R:** under an adversary system, the witness's proponent must be given an opportunity to meet impeachment, an attack on the witness's credibility, by evidence rehabilitating the witness.

C. **G/R:** Bolstering Evidence: under the FRE, and case law, absent an attack on credibility, no bolstering evidence is allowed.

1. Conversely, when there has been evidence of impeaching facts, the witness's proponent may present contradictory evidence disproving the alleged impeaching facts; such disproof is relevant and generally allowable.

D. **G/R:** Rehabilitation: the two most common techniques employed for rehabilitation are: (a) introduction of supportive evidence of good character of the witness attacked and (b) proof of the witness's consistent statements.

1. **Test:** the general test for admissibility of rehabilitative testimony is whether evidence of the witness's good character or consistent statements is logically relevant to explain the impeaching fact.

a. The rehabilitating facts must meet the impeachment with relative directness.

2. As a rule of thumb, the courts demand that the rehabilitation be a response in kind to the impeachment.

E. **G/R:** Proof of the Witness's Character Trait for Truthfulness: when may the party supporting the impeached witness offer evidence of the witness's good character for truth?

1. Certainly, attacks by evidence of bad reputation, bad opinion of character of truthfulness, conviction of a crime, or misconduct which has not resulted in a conviction, all open the door to character support.
2. The evidence of good character for truth is a logically relevant response in kind to these modes of impeachment.
3. A witness's corrupt conduct showing bias should also be regarded as an attack on veracity-character and thus warrant character support.
4. If the witness has been impeached by an inconsistent statement, perhaps the numerical majority of courts permit a showing of his good character for truthfulness.

a. However, if the adversary has merely introduced evidence denying the facts to which the witness testified, the greater majority of cases forbid a showing of the witness's good character for truthfulness.

5. An important consideration is whether the inconsistency or contradiction relates to a matter on which the witness could be innocently mistaken.

F. **G/R:** Proof of the Witness's Prior Consistent Statement: what kind of attack upon the witness opens the door to evidence of the witness's prior statements consistent with his present story on the stand?

1. When the attack takes the form of character impeachment by showing misconduct, convictions, or bad reputation, there is no justification for rehabilitation by consistent statements.

2. *Temporal Priority Doctrine:* at common law, if the attacker has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember, the prior consistent statement is deemed irrelevant to refute the charge unless the consistent statement was made *before* the source of bias, interest, influence, or incapacity originated.

3. ***U.S. v. Tome:*** the Supreme Court held that Rule 801(d)(1)(B), governing the admission of consistent statements as substantive evidence, incorporates the temporal priority doctrine.

4. There is a division of authority on the question of whether impeachment by inconsistent statements opens the door to support by proving consistent statements.

a. A few courts hold generally that the support is permissible.

b. At the opposite extreme, some courts, since the inconsistency remains despite the consistent statement, hold generally that it does not.

i. There are a few qualifications to this general rule that are consistent with the text of the FRE.

ii. Under the broader viewpoint, the common law temporal priority doctrine does not apply to consistent statements offered for the limited purpose of rehabilitation in federal practice, and the judge had discretion under Rules 401 and 403 to determine whether the particular circumstances justify admission of consistent statements to rehabilitate the witness.

X. **§26.8: Partiality; Bias**

A. **Generally:** case law recognizes the slanting effect on human testimony of the witness's emotions or feelings toward the parties or the witness's self-interest in the outcome of a case.

1. *Partiality:* or any acts, relationships, or motives reasonably likely to produce it, may be proved to impeach credibility.

2. Article VI of the FRE does not explicitly refer to attacking a witness by showing bias, interest, corruption, or coercion, it authorizes the use of that ground of impeachment.
3. The inclusion of Article VI in the FRE reflects that fact that witness's credibility is a fact of consequence under Rule 401; and Rule 402 states that evidence logically relevant to a fact of consequence is admissible unless there is a statutory basis for exclusion.
4. Thus, **Rule 402** is the only statutory authorization needed for the continued use of the bias impeachment technique in federal practice.
5. In criminal cases, the defendant has a qualified constitutional right to show the bias of government witnesses.
6. In any event, a good faith basis in fact for the inquiry is required.

B. **G/R:** Kinds and Sources of Partiality: the kinds and sources of partiality are too varied to be reviewed exhaustively, but a few of the most common kinds are:

1. *Favor:* or friendly feeling toward a party may be evidenced by a family or business relationship, employment by a party or the party's insurer; sexual relations, shared membership in an organization, or the witness's conduct or expressions evincing such feeling.
2. *Hostility:* toward a party may be evidenced by the fact that the witness has had a fight or quarrel with him, has a lawsuit pending against him, has contributed to the defense, or employed special counsel to aid in prosecuting the party.
3. *Self-Interest:* the witness's self-interest is manifest when he is himself a party or a surety on the debt sued upon. Similarly, it may be shown that he is being paid by a party to give evidence, even though payment in excess of regular witness fees may as in the case of an expert be entirely lawful.

a. Self-interest may also be shown in a criminal case when the witness testifies for the state and an indictment is pending against him, the witness has not been charged with a crime, has been promised leniency, has been granted immunity, is awaiting sentence, is being held in protective custody, or is an accomplice or co-indictee in the crime in trial.
b. Self interest in an extreme form may be manifest in the witness's *corrupt* activity, such as taking or offering a bribe to testify falsely, or making similar baseless charges on other occasions.

C. **G/R:** Foundational Question on Cross-Examination: at common law, a majority of the courts imposed the requirement of a foundational question as in the case of impeachment by prior inconsistent statements.

1. The FRE are silent on the subject. The discretion granted the judge in **Rule 611(a)** is adequate authority to follow the same pattern for partiality as that employed for prior inconsistent statements under Rule 613(b).

a. Given Rule 402, the judge could not announce the practice as categorical, invariable requirement, but she could require a foundation if the specific facts of the instant case warranted it.

D. **G/R:** Cross-Examination and Extrinsic Evidence: under the FRE, the trial judge has discretion under Rule 611(a) to allow extrinsic evidence in addition to cross-examination to determine partiality.

1. If the witness on cross-examination fully denies or does not fully admit the facts claimed to show bias, the attacker has the need and right to prove those facts by extrinsic evidence.
2. Facts showing bias are highly probative of credibility; therefore, they are NOT deemed "collateral." The cross-examiner is not required to take the witnesses answer, but may call other witness's to prove the facts.

§26.9: Beliefs Concerning Religion

A. **Generally:** today there is no basis for believing that that the lack of faith in God's avenging wrath is an indication of great than average untruthfulness. Without that basis, the evidence of atheism is irrelevant to the question of credibility.

B. **Rule 610:** evidence of beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that the by reason of their nature the witness' credibility is impaired or enhanced.

1. *Caveat:* this prohibition is not complete, in some instances, evidence of the witness's religion will be admissible on an alternative theory of logical relevance. For example, the advisory committee note to Rule 610 adds that disclosure of affiliation with a church, which is a party to the litigation, would be allowable under the rule since it could bear on the witness's bias.

§26.10: Exclusion and Separation of Witnesses

A. **G/R:** there are steps the judge can take to help insure credible testimony. Judicial exclusion and separation orders are illustrative.

1. If the witness hears the testimony of others before he takes the stand, it will be much easier for him to deliberately tailor his own testimony to that of the other witnesses.

B. **Rule 615:** treats the exclusion of witness's as a matter of right: "At the request of any party, the court shall order witnesses excluded."

1. The court is also empowered to order exclusion on its own motion.
2. A request to exclude witnesses is often referred to as "invoking the rule on witnesses."

C. **G/R:** Exceptions: not all witnesses may be excluded and separated, neither case law nor Rule 615 authorizes the exclusion of:

1. A party who is a natural person;
2. An officer or employee of a party which is not a natural person designated as its representative by its attorney which includes a government's investigative agent;

3. A person whose presence is shown by the party to be essential to the presentation of the cause; or

4. the victim of an offense an accused is charged with when the prosecution contemplates calling the victim as a witness during a subsequent sentence hearing.

CONFIDENTIAL COMMUNICATIONS: PRIVILEGES

§27: THE SCOPE AND EFFECT OF EVIDENTIARY PRIVILEGES

§27.1: The Purposes of the Rules of Privilege: (a) Other Rules of Evidence Distinguished

A. **Generally:** the rules of privilege, of which the most familiar are the rule against protecting against self incrimination and those shielding confidentiality of communications between husband/wife, attorney/client, physician/patient, are not designed or intended to facilitate the fact-finding process, as are the other evidence rules.

B. **G/R:** the rules of privilege, a substantial number operate to protect communications made within the context of various professional relationships. The rationale traditionally advanced for theses privileges is that public policy requires the encouragement of the communications without which these relationships cannot be effective.

§27.2: The Purposes of the Rules of Privilege: (b) Certain Rules Distinguished

A. **G/R:** true rule of privilege may be enforced to prevent the introduction of evidence even though the privilege is that of a person who is not a party to the proceeding in which the privilege is involved.

1. True rules of privilege operate generally to prevent revelation of confidential matter within the context of a judicial proceeding.

2. Thus, the rules of privilege do not speak directly to the question of unauthorized revelations of confidential matter outside the judicial setting, and redress for such breaches of confidence must be sought in the law of torts or professional responsibility.

§27.3: Procedural Recognition of Rules of Privilege

A. **G/R:** Assertion of Privilege and Waiver: in one important procedural respect, rules of privilege are similar to other evidentiary rules; that is, neither the exclusionary rules or the rules of privilege are self executing, they must be asserted to be effective.

1. If the rules of privilege are not asserted promptly, they will be deemed to have been waived.

§27.3.1: Procedural Recognition of Rules of Privilege: (a) Who May Assert?

A. **G/R:** Asserting the Privilege: if the evidence is privileged, the right to object does not attach to the opposing party as it does with other rules of evidence, but instead it is vested

with the outside interest or relationship fostered by the particular privilege. Thus, the party testifying must assert the privilege. In some instances, other persons, or the judge, can assert the privilege.

B. **G/R:** Appeals: the right to complain on appeal is a more crucial test; if the court erroneously recognizes an asserted privilege and excludes proffered testimony on this ground, clearly the tendering party has been injured in his capacity as a litigant and may complain on appeal.

1. Most courts allow a party who has been compelled to disclose privileged information to also complain on appeal.

§27.3.2: Procedural Recognition of Rules of Privilege: (b) Where May Privilege be Asserted?—Rules of Privilege in Conflicts of Laws.

A. **G/R:** under traditional choice of law doctrine, all rules of evidence, including those of privilege, were viewed as procedural and thus appropriately supplied by the law of the forum.

1. Modern conflict of law analysis, by contrast, inclines toward resolution of choice of law questions through evaluation of the policy interests of the respective jurisdictions which have some connection with the transaction in litigation.

§27.4: Limitations on the Effectiveness of Privileges: (a) Risk of Eavesdropping and Interception of Letters

A. **G/R:** Interception: a privilege only operates to preclude testimony by parties to a confidential relationship; accordingly, most modern decisions do no more than hold that a privilege will not protect communications made under circumstances in which interception was reasonably anticipated.

B. **G/R:** Eavesdropping: because of the vastly enhanced technology of eavesdropping, many legislatures had drawn statutes and rules defining the privileges to include provisions entitling the holder to prevent anyone from disclosing a privileged communication.

§27.4.1: Limitations on the Effectiveness of Privileges: (b) Adverse Arguments and Inferences from Claims of Privilege

A. **G/R:** under familiar principles, an unfavorable inference or argument made by opposing counsel, or the judge, against a party for invoking a privilege cannot be made or drawn.

1. ***Griffin v. California:*** the Supreme Court held that allowing comment upon the failure of an accused to take the stand violated his privilege against self-incrimination by making its assertion costly.

2. It is evident in cases that survive a motion for a directed verdict or its equivalent, allowing comment upon the exercise of privilege or requiring

it to be claimed in the presence of the jury, tends to greatly diminish its value.

3. Thus, comment, whether by judge or counsel, or its equivalent of requiring the claim to be made in the presence of the jury, and the drawing of inferences from the claim, should not be allowed in cases in which the privilege is well established.

§27.4.2: Limitations of the Effectiveness of Privileges: (c) Constitutional Limitations on Privilege

A. **G/R:** Defendant's Confrontation Right: a question arises as to the viability of a claim of privilege when a criminal defendant asserts: (a) the need to introduce the privileged matter as exculpatory; or (b) a need to use the privileged matter to impeach testimony introduced by the state.

1. The case on law this subject is in somewhat disarray; however, one approach adopted by several courts is to require the defendant to make a showing that there is reasonable ground to believe that the failure to produce the evidence which has been found privileged will impair the defendant's right to confrontation.

§27.5: Sources of Privilege

A. **Generally:** the earliest sources of privilege were judicially created, the origin of both the husband/wife and attorney/client privilege being traceable to the common law; however, today the sources of privilege are largely governed by statute in the states and by common law in the federal courts under Rule 501.

§27.6: The Current Pattern of Privilege

A. **Generally:** the failure of Congress to enact specific rules of privilege for the federal courts effectively precluded any immediate prospect of substantial uniformity in this area.

§27.6.1: The Current Pattern of Privilege: (a) Privilege in the Federal Courts

A. **Rule 501:** Except as otherwise required by the Constitution of the United States or proved by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, state, or political subdivision thereof, shall *be governed by the principles of common law as they may interpreted in 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.*

B. **G/R:** Federal Question, Diversity, and Criminal Actions: under Rule 501, then, common law "as interpreted…in light of reason and experience" will determine the

privileges applicable in *federal question* and *criminal cases*; while privileges in diversity actions will derive from State law.

1. In federal question and criminal cases, it seems likely that the Rules promulgated by the Supreme Court will prove influential as indicators of reason and experience; however, it is also apparent that the intent of Rule 501 is not to limit the number and type of privileges recognized to those included in the proposed rule; namely:
a. required reports;
b. attorney-client;
c. husband-wife;
d. psychotherapist-patient;
e. clergyman-communicant;
f. political vote;
g. trade secrets;
h. secrets of the state and other official information; and
i. identify of informer.
2. In diversity actions, a federal court will probably not enforce a privilege which is not recognized by the applicable state law.
a. Federal Courts generally follow the *Klaxon v. Stentor* Rule and look to the state choice of law rules in determining what state's privilege should be applied.

**For the current practice in State Courts, if Selig goes over them, see pp. 122-124.

§28: THE CLIENT'S PRIVILEGE: COMMUNICATIONS BETWEEN CLIENT AND LAWYER

§28.1: Background and Policy of the Privilege: (b) Modern Applications

A. **G/R:** Corporate Privilege: [***Upjohn v. U.S.***]: the Supreme Court recognized that the attorney-client relationship applies to corporations; and hence, the attorney-client privilege applies to corporate clients.

1. *Subject Matter Test:* communications with a corporate client will only be protected if:
1. it is a communication for an express purpose of securing legal advice for the corporation;
2. it relates to the specific corporate duties of the communicating employee; and
3. it is treated as confidential within the corporation itself.
2. At the minimum, under *Upjohn*, the privilege should apply only to corporate employees who either have, or are expressly conferred, the power to assert the privilege.
3. An *Upjohn* extension of the corporate attorney-client privilege almost necessitates extension of the privilege in other organizational structures.

§28.2: The Professional Relationship

A. **G/R:** Professional Relationship: the privilege for communications of a client with his lawyer hinges upon the client's belief that he is consulting the lawyer in that capacity and his manifested intention to seek professional legal advice.

1. It is sufficient if he reasonably believes that the person consulted is a lawyer, though in fact he is not.
2. Communications in the course of preliminary discussion with a view to employing the lawyer are privileged though the employment is in the upshot and not accepted.
3. The burden of proof rests on the person asserting the privilege to show that the consultation was a professional one.
4. Payment or agreement to pay a fee, however, is not essential.
5. Exception: where one consults an attorney not as a lawyer but as a friend or business adviser, banker, or negotiator, or as an accountant, or where the communication is to the attorney acting as a mere "scrivener" or as an attesting witness on a will or deed, or as an executor or his agent, the consultation is not professional nor the statement privileged.

B. **G/R:** Informer Privilege: traditionally, the relationship sought to be fostered by the privilege has been that between the lawyer and a private client, but more recently the privilege has been held to apply to communications between an attorney representing the state.

1. There is a privilege against the identity of an informer for the state, unless the judge finds the such a disclosure is necessary in the interests of justice.

C. **G/R:** Communications to an attorney appointed by the court to serve the interest of a party are of course within the privilege.

§28.3: Subject Matter of the Privilege: (a) Communications

A. **G/R:** Communications from Lawyer to Client: the modern justification of the privilege, namely, that of encouraging full and frank disclosure of information by the client for the furtherance of administration of justice, might suggest that the privilege is only a one-way one, operating to protect communications of the client or his agents to the lawyer or his clerk, but not vice versa.

1. However, it is generally held that the privilege will protect at least those attorney to client communications which would have a tendency to reveal confidences of the client.
2. The better-reasoned cases, have extended the privilege to protect communication by the lawyer to the client.

B. **G/R:** Observations and Communicative Intent: most authority holds that observations by the lawyer which might be made by anyone, and which involve no communicative intent by the client, are not protected.

1. Conversely, testimony relating intentionally communicative acts of the client, as where he rolls up his sleeve to reveal a hidden scar or opens the drawer of his desk to display a revolver, would as clearly be precluded as statements recounting the same information.

C. **G/R:** Tangible Evidence: if the client delivers tangible evidence to the attorney, such as stolen property or confides facts that would allow the attorney to come into possession of such evidence, has resulted in conflicting decisions.

1. However, the best argument is that the privilege should not operate to bar the attorney's disclosure of circumstances of acquisition, since to preclude the attorney's testimony would offer the client a uniquely safe opportunity to divest himself of incriminating evidence without leaving an evidentiary trail.

D. **G/R:** Writings: a professional communication in writing, as a letter from client to lawyer for example, will of course be privileged. These written privileged communications are readily to be distinguished from preexisting documents or writings such as deeds, wills, and warehouse receipts, not in themselves constituting communications between client and lawyer.

1. As to preexisting communications, two notions come into play:
a. the client may make communications about the document by words or by acts, such as sending the document to the lawyer for perusal or handling it to him and calling attention to its terms; these communications, and knowledge of the terms and appearance of the documents which the lawyer gains thereby are privileged from disclosure by testimony in court;
b. if a document would be subject to an order for production if it were in the hands of the client, it will be equally subject to such an order if it is in the hands of the attorney.

§28.4: Subject Matter of the Privilege: (b) Fact of Employment and Identity of the Client

A. **G/R:** Fact of Employment and Identity of the Client: the traditional and still generally applicable rule denies the privilege for the fact of consultation or employment, including the component facts of identity of the client, such identifying facts about as his address and occupation, the identity of the lawyer, and the payment and amount of fees.

1. Similarly, factual communications by the lawyer to the client concerning logistical matters, such as trial dates, are not privileged.

§28.5: The Confidential Character of the Communications: Presence of Third Persons and Agents: Joint Consultations and Employments: Controversies between Client and Attorney

A. **G/R:** Presence of Third Persons: it is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he

could reasonably assume under the circumstances would be understood by the attorney as so intended.

1. A mere showing that the communication was from the client to the attorney does not suffice, but the circumstances indicating the intention of secrecy must appear.
2. Wherever matters communicated to an attorney are intended by the client to make public or revealed to third persons, obliviously the element of confidentiality is wanting.
a. Similarly, if the same statements have been made by the client to third persons on other occasions this is persuasive that like communications to the attorney were not intended to be confidential.

B. **G/R:** Joint Consultation: when two or more persons, each having an interest in some problem or situation, jointly consult an attorney, their confidential communications with the attorney, thought known to each other, will of course be privileged. in a controversy of either or both of the clients with the outside world, that is, with parties claiming adversely to both or either of those within the original circle.

1. If the joint persons sue each other, however, the privilege is inapplicable because the communications between themselves were not intended to be confidential.

C. **G/R:** Attorney-Client Disputes: the weight of authority seems to support the view that when client and attorney become embroiled in a controversy between themselves, as in action by the attorney for fees or by the client for malpractice, the seal is removed from the attorney's lips.

§28.6: The Client as Holder of the Privilege: Who May Assert, and Who Can Complain of its Denial on Appeal.

A. **G/R:** Assertion of Privilege: the attorney client privilege cannot be asserted by an adverse party as such, but only by the person whose interest the particular rule of privilege is intended to safeguard. Thus, the privilege is the client's and his alone.

B. **G/R:** When the Client Can Assert the Privilege: there are four scenarios which must be examined:

1. it is clear that the client may assert the privilege even though he is not a party to the cause wherein the privileged testimony is sought to be elicited;
2. if he is present at the hearing whether as a party, witness, or bystander he must assert the privilege personally or by attorney, or it will be waived;
3. in some jurisdictions, if he is not present at the taking of testimony, nor a party to the proceedings, the privilege may be called to the court's attention by anyone present, such as the attorney for the absent client, or a party in the cases, or the court of its won motion may protect the privilege; and
4. while if an asserted privilege is erroneously sustained, the aggrieved party may of course complain on appeal of the exclusion of the testimony,

the erroneous denial of the privilege can only be complained of by the client whose privilege has been infringed.
a. This opens the door to appellate review by the client if he is also a party and suffers an adverse judgment.
b. If he is not a party, the losing party in the cause, is without recourse because relevant competent testimony has come in and the privilege was not created for his benefit.

§28.7: Waiver

A. **G/R:** Waiver: since it is the client is the holder of the privilege, the power to waive it is his, and he alone, or his attorney or agent acting with his authority, or his representative may exercise the power to waive.

1. In the case of a corporation, the power to claim or waive the privilege generally rests with the corporate management, i.e. the board of directors.

B. **G/R:** Inadvertent Disclosure: most courts today do not adhere to the strict approach of waiver, and when an inadvertent disclosure occurs, consider such factors as:

1. the excusability of the error;
2. whether prompt attempt to remedy the error was made;
3. and whether preservation of the privilege will occasion unfairness to the opponent.

C. **G/R:** Actions Against the Attorney: the commencement of a malpractice action against the attorney by the client will constitute a waiver of the privilege by the client.

1. If a party interjects the "advise of counsel" as an essential element in the claim or defense, then that party waives the privilege as to all advice received concerning the same subject matter.
2. *Caveat:* the mere filing or defending a lawsuit does not waive the privilege.

D. **G/R:** Taking the Stand: the prevailing view is that the mere voluntarily taking the stand by the client as a witness in a suit to which he is party and testifying to facts which where subject of consultation with his counsel is no waiver of privilege for secrecy of the communications to his lawyer.

1. It is the communications which are privileged and not the facts.
2. If on direct examination, however, the client testifies to the privileged communications, in part, this is a waiver as to the remainder of the privileged consultation about the same subject.

§28.9: Effect of the Death of the Client

A. **G/R:** Death of the Client: the accepted theory is that the protection afforded by the privilege will in general survive the death of the client [***Swidler & Berlin v. US***].

1. Exceptions: the Court acknowledged the existence of exceptions to the privilege both in instances of where the communications are in furtherance

of a crime or fraud, and in cases involving the validity of interpretations of a will or other dispute by the parties claiming by succession from the testator at his death.

§28.10: Consultation in Furtherance of Crime or Fraud

A. **G/R:** Crime/Fraud Exception: advice given to aid a person in carrying out an illegal or fraudulent scheme is not a professional service, but rather participation in a conspiracy; accordingly, it is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a *future* intended crime or fraud.

B. **G/R:** Legitimate Defenses: Advice secured in aid of a legitimate defense by the client against a charge of *past crimes* or misconduct, even though he is guilty, stands on a different footing and such consultations are privileged.

C. **G/R:** Procedure and Standard for Determining the Crime/Fraud Exception: [***US v. Zolin***]: the Court resolved the issue of whether and when the court can examine documents in camera in aid of its application of the crime/fraud exception.

1. The Court held that the judge may inspect documents *in camera* when there is a factual basis adequate to support a good faith belief by a reasonable person that such inspection may reveal evidence to establish the claim that the crime fraud exception applies.
2. The determination of whether the crime/fraud *in fact applies* requires a prima facie case that the communication was in furtherance of crime or fraud, or in other words, that the one who seeks to avoid the privilege bring forward evidence from which the existence of an unlawful purpose could reasonably be found.
a. The court must determine that the communication itself was in furtherance of the crime or fraud, not merely that it has the potential of being relevant evidence of criminal or fraudulent activity.

§28.11: Protective Rules Relating to Materials Collected for Use of Counsel in Preparation for Trial

A. **G/R:** Attorney-Client Privilege and Pretrial Discovery: it is recognized that if the traditional privilege for attorney-client communications applies to a particular writing, which may be found in the lawyer's file, the privilege exempts it from pretrial discovery proceedings, such as orders for production of interrogatories about its contents or questions about it in depositions.

1. *Caveat:* if the writing has been in possession of the client or his agents and was there subject to discovery, it seems axiomatic that the client cannot secure any exemption fro the document by sending it to an attorney to be placed in his file.
2. The attorney client privilege will protect intra-corporate communications made for the purpose of securing legal advice if,

additionally, the communication relates to the communicating employee's assigned duties and is treated as confidential by the corporation.

B. **G/R:** Work Product Doctrine: during discovery, a claim of attorney-client privilege is likely to be accompanied by a claim that the material is protected under the FRCP as "work product" of the attorney or party.

1. There is a limited work product protection recognized in criminal cases also [see pp. 152-54, §97].
2. The civil work product doctrine came about from ***Hickman v. Taylor*** and was codified by **FRCP 26(b)(3).**
3. Under Rule 26(b)(3), a party may obtain discovery of documents and tangible things prepared in *anticipation of litigation* by an attorney or agent of the opposing party ONLY UPON A SHOWING OF:
a. substantial need; and
b. a showing that the party seeking discovery cannot, without undue hardship, obtain the substantial equivalent from other sources.
c. Moreover, even if the requisite showing of need is made, the court must protect against disclosure of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
4. This protection is much larger than the attorney-client privilege; however, information protected by the attorney-client privilege is never discoverable; whereas, information under the work product doctrine may be discoverable upon the requisite showing of need.
5. Work product protection applies only to matters covered in "anticipation of litigation" whereas the attorney-client privilege covers confidential communications to the lawyer seeking legal advice or services, whether or not litigation is expected.

§29: THE PHYSICIAN/PATIENT PRIVILEGE

§29.1: The Statement of the Rule and Its Purpose

A. **Generally:** the rationale traditionally asserted to justify suppression in litigation of material facts learned by a physician is the encouragement thereby given to the patient freely to disclose all matters which may aid in the diagnosis and treatment of the disease or injury.

1. Today, the rationale also tends to be from disclosing embarrassing or personal information of a litigant with little or no probative value.

B. **G/R:** Physician/Patient Privilege: despite arguments against the need for such a privilege a majority of states today recognize a physician/patient privilege legislatively; however, there is no such privilege in the federal courts.

C. **G/R:** Psychiatrist/Patient and Psychologist/Patient Privileges: over time there has been a strong trend toward recognition of two related but distinguishable privileges protecting,

respectively, communications between psychiatrist and patient and psychologist and patient.

1. The psychologist/patient privilege has always fallen within the older physician/patient exception because psychologists are trained medically.

2. The rationale for the psychotherapist privilege is that the psychiatrist has a special need to maintain confidentiality because his capacity to help patients is completely dependent upon their willingness and ability to talk freely.

D. ***Jaffee v. Redmond:*** the Supreme Court, as a matter of the federal common law of privileges (although it is also recognized legislatively in all 50-states), recognized a psychotherapist privilege.

1. The Court emphasized that the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

2. The Court also noted the appropriateness of the recognition of the privilege in federal courts in light of the fact that all fifty states had enacted the privilege into law in some form.

3. The holding extended the privilege not only to psychiatrists and psychologists but also to licensed social workers.

4. The Court also held the privilege was absolute and rejected a balancing approach applied by the Court of Appeals.

§29.2: Relation of Physician and Patient

A. **G/R:** Diagnosis or Treatment Requirement: the first requisite for the privilege is that the patient must have consulted the physician for treatment or diagnosis looking toward treatment.

1. If consulted for treatment it is immaterial by whom the doctor is employed.

a. Usually, however, when the doctor is employed by one other than the patient, treatment will not be the purpose and the privilege will not attach.

i. Thus, when a driver at the request of a public officer is subjected to a blood test for intoxication, or when a doctor is appointed by the court or the prosecutor to make a physical or mental examination, or is employer for this purpose by opposing counsel, or is selected by a life insurance company to make an examination of an applicant for a policy or even when the doctor is employed by plaintiff's own lawyers in a personal injury case to examine plaintiff solely to aid in preparation of trial, the information secured is not within the present privilege.

ii. But when the patient's doctor calls in a consultant physician to aid in diagnosis or treatment, the disclosures are privileged.

B. **G/R:** Illegal Behavior: if the patient's purpose in the consultation is an unlawful one, as to obtain narcotics in violation of law, or as, by some authority, a fugitive from justice

to have his appearance disguised by plastic surgery, the law withholds the shield of privilege.

C. **G/R:** Death: After the death of the patient the relation is ended and the object of the privilege can no longer be furthered. Accordingly, it seems the better view that facts discovered in an autopsy examination are not privileged.

§29.3: Subject Matter of the Privilege: Information Acquired in Attending the Patient and Necessary for Prescribing

A. **G/R:** Privileged Information: the majority of statutes extend the privilege to any information acquired in attending the patient.

1. Understandably, theses provisions have been held to protect not only information explicitly conveyed to the physician by the patient, but also data acquired by examination or testing.

2. Other statutes appear facially to be more restrictive and to limit the privilege by communications to the doctor from the patient; however, many of these have been construed broadly to encompass data acquired through testing.

B. **G/R:** Non-Privileged Information: while the information secured by the physician may be privileged, the fact that he has been consulted by the patient and has treated him, and the number and dates of visits, are not within the shelter of the privilege.

§29.4: The Confidential Character of the Disclosure: Presence of Third Persons and Members of Family: Information Revealed to Nurses and Attendants: Public Records

A. **G/R:** Disclosed in Confidence: like the attorney/client and marital provisions (even if their statutes facially omit the adjective "confidential") the statutes giving the patient's privilege for information gained in professional consultations also are usually required to be confidential communications.

B. **G/R:** Presence of Third Persons: the principle of confidentiality is supported by the decisions holding that if a casual third person is present with the acquiescence of the patient at the consultation, the disclosures made in his presence are not privileged, and thus the stranger, the doctor, and the patient may be required to divulge them in court.

1. Family Member Exception: if however the third person is present as a needed and customary participant in the consultation, the circle of confidence may be reasonably extended to include him and the privilege will be maintained.

a. Thus, the presence of one sustaining a close family relationship to the patient should not curtail the privilege.

b. *Nurses and Attendants:* the nurse present as the doctor's assistant during the consultation or examination, or the technician who makes tests or X-rays under the doctor's direction, will be looked on as the doctor's agent in whose keeping the information will remain privileged.

i. A more functionalistic view bases the decision upon whether the communication was functionally related to diagnosis and treatment.

C. **G/R:** Death Certificates: when the attending physician is required by law to make a certificate of death to the public authority, giving his opinion as to the cause, the certificate should be provable as a public record, despite the privilege.

1. The duty to make a public record overrides the duty of secrecy, and in view of the availability of the record to the public, the protection of the information from general knowledge, as contemplated by the privilege, cannot be attained.

2. According the privilege does not attach.

§29.5: Rule of Privilege, Not Incompetency: Privilege Belongs to Patient, Not to an Objecting Party as Such: Effect of the Patient's Death

A. **G/R:** as with all privileges generally, the rule which excludes disclosures to physicians is not a rule of incompetency of evidence serving the end of protecting the adverse party against unreliable or prejudicial testimony.

1. It is a rule of privilege protecting the extrinsic interest of the patient and designed to promote health, not truth.

B. **G/R:** Holder of Privilege: the patient is the holder of the privilege; consequently, he alone during his lifetime has the right to claim or to waive the privilege.

1. If he is in a position to claim the privilege and does not, it is waived and no one else may assert it.

2. If the patient is not present, is unaware of the situation, or for some other reason is unable to claim the privilege, it is generally held that the privilege may be asserted on his behalf by a guardian, personal representative, or the health care provider, the latter being frequently held to have an enforceable duty to invoke the privilege in the absence of waiver by the patient.

C. **G/R:** the adverse party as such has no interest to protect if he is not the patient and thus cannot object as of right.

D. **G/R:** Death: in order to facilitate full disclosure as well as to protect the privacy of the decedent, most courts hold that the privilege continues after death.

1. *Caveat:* in contests of the survivors in interest with third persons, e.g., actions to recover property claimed to belong to the deceased, actions for the death of the deceased, or actions upon life insurance policies, the personal representative, heir, or next of kin, may waive the privilege, and by the same token the adverse party cannot assert the privilege.

§29.6: What Constitutes a Waiver of the Privilege

A. **G/R:** Waiver: the physician patient statutes, are held to create merely a privilege for the benefit of the patient, which he may waive.

B. **G/R:** Contractual Waivers: generally it is agreed that a contractual stipulation waiving the privilege, such as frequently included in applications for life or health insurance, or the policies themselves, is valid and effectual.

C. **G/R:** Testator Waivers: the privilege is often anticipatorily waived when a testator procures an attending doctor to subscribe his will as an attesting witness. This action constitutes a waiver as to all facts affecting the validity of the will.

D. **G/R:** Disclosure: the physician patient privilege, like most other privileges, may also be waived in advance of trial by a disclosure of the privileged information either made or acquiesced in by the privilege holder.

E. **G/R:** Mental Condition in Issue at Trial: a patient by voluntarily placing his or her physical or mental condition in issue in a judicial proceeding waives the privilege with respect to information relative to that condition.

1. Failure to find a waiver from assertion of a claim or defense predicated upon a physical or mental condition has the awkward consequence of effectively frustrating discovery on a central issue of the case.

2. Thus, a crucial question becomes the types of issues which sufficiently implicate a party's physical or mental condition, and what actions by a party serve to raise these issues within the meaning of the modern statutes.

a. A claim for damages in a personal injury action is the paradigm example, and will clearly waive the privilege in all jurisdictions where such waiver by filing is possible at all.

b. Claims for damages for mental suffering have been treated similarly, but here there is some discernment lest the privilege be seen to evaporate upon the filing of a claim whatsoever.

E(1). **G/R:** Criminal Cases: in the criminal area, waiver under the modern statutes has been seen to flow from assertion of the defenses of insanity and diminished responsibility.

F. **G/R:** Testifying: does the patient's testifying waive the privilege?

1. *Direct:* if the patient on direct examination testifies to, or adduces other evidence of, the communications exchanged or the information furnished to the doctor consulted he would waive the privilege in respect to such consultations.

a. When, however, the patient in his direct testimony does not reveal any privileged matter respecting the consultation, but testifies only to his physical or mental condition existing at the time of such consultation then:

i. some courts consider it a waiver; and

ii. other courts hold testimony as to the condition without disclosure of the communications is not a waiver.

2. *Cross:* if the patient reveals privileged matter on cross-examination, without claiming the privilege, this is usually held not to be a waiver of the privilege enabling the adversary to make further inquiry of the doctors, on the ground that such revelations were not "voluntary."

G. **G/R:** Patient Calls Doctor: if the patient examines a physician as to matters disclosed in consultation, or course of treatment, this is a waiver and opens the door to the opponent to examine him about any other matters disclosed.

H. **G/R:** Death: although the privilege continues after death of the patient, it may then be waived by the personal representative of the decedent.

1. Where the personal representative is engaged in litigation over the decedent's estate with other persons claiming through the decedent, or where heirs at law are in opposition to one another, any of the parties may waive the privilege.

EVIDENCE OUTLINE 2

§1: AN INTRODUCTION TO RELEVANCE

§1.1: RELEVANCE and INFERENCE

I. Overview

A. **Relevancy Analytical Framework:** the first question to always ask is: Is the evidence admissible?

1. **Rule 401:** does the evidence have any tendency to make the existence of any fact that is of consequence to the determination of the action *more probable* or *less probable* that it would be without the evidence?
    a. If no, the evidence is inadmissible.
    b. If yes, go to #2.
2. **Rule 403:** Is the evidence's probative value *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?
    a. If yes, the evidence is inadmissible.
    b. If no, consider all of the other exclusionary rules of evidence:
        i. Character evidence;
        ii. Hearsay;
        iii. Best evidence rule.

B. **Federal Relevancy Rules:**

1. **Rule 402:** all relevant evidence is admissible, *except* as otherwise provided by the Constitution, these rules, or Act of Congress.
    a. Irrelevant evidence is not admissible.
2. **Rule 401:** relevant evidence is evidence having the tendency to make the existence of any fact that is *of consequence* more probable or less probable than it would be without the evidence.
3. **Rule 403:** although relevant, evidence may be excluded if it falls within one of the six "dangers":
    a. Danger of misleading the jury or court:
        i. unfair prejudice;
        ii. confusion of the issues;
        iii. misleading the jury;
    b. Danger of wasting time:
        i. undue delay;
        ii. waste of time; and
        iii. needless presentation of cumulative evidence.

C. **Rule 401:** Requirements: for evidence to be relevant it must be:

1. *Material*: the evidence must be offered to prove a matter " in issue" in the case.

a. A matter is in "issue" when it is within the range of the litigated controversy and is determined mainly by the pleadings, and controlled by the *substantive law*.

i. EX: fault in a worker's compensation case is irrelevant because the substantive law only requires that person be hurt at work, whether or not he was at fault.

2. *Probative Value:* the tendency of the evidence to establish the proposition it is offered to prove.

a. The question is does learning of the evidence make it either more or less likely the disputed fact is true.

b. The evidence must have logical relevance to the underlying facts and not be:

a. *speculative:* what might have happened if the facts were different; and

b. *remote:* if a piece of evidence is too far removed in time and space it may be to remote (although pertinent) to be relevant because of it undermines the reasonable inferences due to supervening factors.

b. *Irrelevant Evidence for want of Probative value:* the distinction between direct and circumstantial evidence offers a starting point for determining what kind of evidence is irrelevant for want of probative value:

i. *direct evidence:* is evidence which if believed, resolves a matter in issue. Direct evidence form a qualified witness offered to help establish a provable fact can never be irrelevant.

ii. *circumstantial evidence:* requires additional reasoning reach the desired conclusion.

(A) if the circumstantial evidence is so unrevealing to prove a material fact, it is irrelevant.

(B) circumstantial evidence that lacks probative value means that knowing the evidence does not justify any reasonable inference as to the fact in question.

D. **Rule 403:** <u>The 403 Balance:</u> relevance does not ensure admissibility, it the costs of the evidence outweigh do not outweigh its benefits the evidence may be excluded.

1. *Danger of Prejudice:* [unfair prejudice, confusion of the issues, misleading the jury]: prejudice in this sense means arousing the jury's hostility or sympathy for one side without regard to the probative value of the evidence. It does not mean:

a. damage to the opponents cause; nor

b. simply appeal to emotion.

2. *Waste of Time*: [undue delay, waste of time, needless presentation of cumulative evidence]: if a fact can be proved with two witness, as opposed to ten, the other eight witnesses or exhibits to prove the fact are irrelevant.

*The Trial judge has a lot of discretion in weighing the probative value against probable dangers.

E. **Rule 105:** Limited Admissibility: an item of evidence may be logically relevant and admissible for one purpose and inadmissible for another purpose.

1. In this common situation, the normal practice under the FRE is to admit the evidence and protect the opponent's interest by offering a limiting instruction to the jury.

F. **G/R:** Distinction between Relevancy and Sufficiency of the Evidence: the test of relevancy which is applied by the trial judge in determining whether a particular item of evidence is different from and less stringent than the standard used at a later stage in deciding whether all the evidence of the party on an issue is sufficient to go to the jury.

1. In other words, if all the evidence is not sufficient, the judge will enter a directed verdict.

G. **G/R:** Distinction between Relevancy and Weight of the Evidence: the weight of the evidence is the importance that the trier of fact attaches to the evidence as opposed to its admissibility.

§1.2: PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT

A. **G/R:** the prosecution is entitled to prove is case by evidence of its own choice, or more exactly, a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it.

1. Thus, the defendant's stipulation to a fact does not make it irrelevant.
2. The reason for this rule is to permit a party to present to the jury a picture of the events relied upon; to substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fiar and legitimate weight.
*[*Old Chief v. U.S.*].

B. **G/R:** Under Rule 403, when a court weighs the probative value of the evidence against its prejudicial effect, it must give the evidence that amount of probative value it would have if the evidence is believed, not the extent to which the court finds believable [*Ballou v. Henri Studios*].

§2: THE HEARSAY RULE

§2.1: Rationale and Meaning: Definitions

I. Overview

A. **Rules 801; 802; 803; 804.**

B. **Analytical Framework:** there are four main questions to ask when determining if a statement is hearsay:

1. Is the statement one made by a declarant outside of the trial or hearing and offered in evidence to prove the truth of the matter asserted [**Rule 801(c)**].
    a. If no, it is admissible unless some other rule prohibits its use;

b. If yes, the statement is *hearsay*; go to #2.

2. Is there a non-hearsay *purpose* for the testimony?

a. If yes, it may be permitted for its *non-hearsay purpose*, but not to prove the truth of the matter asserted, unless an exception or exclusion applies;

i. Also consider whether its probative value is substantially outweighed by unfair prejudice [**Rule 403**]; or

ii. whether some other rule would bar its use.

b. If NO, does a hearsay <u>exclusion</u> apply?

i. *Prior Statement by a Witness*: is the statement a prior statement by the testifying witness who is no subject to cross examination concerning the statement [**Rule 801(d)(1)**];

ii. *Admission by a Party Opponent:* is the statement being offered against a party the party's own statement, in either an individual or representative capacity [**Rule 801(d)(2)**].

c. If NO, does a hearsay <u>exception</u> apply: (first ask whether the declarant is available or unavailable).

i. **Rule 803:** *Declarant's Unavailability Immaterial:*

(A) present sense impression;
(B) excited utterance;
(C) then existing mental, emotional or physical condition;
(D) statements for purposes of medical diagnosis or treatment;
(E) recorded recollection;
(F) Absence of entry in regularly kept records or reports;
(G) Public records or reports;
(H) Records of Vital Statistics;
(I) Residual Hearsay Exceptions;

ii. **Rule 804:** *Declarant Must be Unavailable:*

(A) Former Testimony;
(B) Statement under belief of Impending Death;
(C) Statement against interest;
(D) statement of personal or family history;
(E) Residual hearsay Exceptions.

C. **G/R:** <u>4-Hearsay Infirmities:</u> the factors upon which the value of testimony depend are:

1. *Perception:* did the witness perceive what is described and perceive it accurately?
2. *Memory:* has the witness retained an accurate impression of the perception?
3. *Narration:* does the witness's language convey that impression accurately?
4. *Sincerity:* is the witness, with varying degrees of intention, testifying falsely?

D. **G/R:** <u>3-Conditions to Ensure Accurate Testimony:</u> in order to encourage witnesses to put forth their best efforts and to expose inaccuracies that might be present with any of the factors of testimony, the legal system has three conditions under which witnesses are ordinarily required to testify:

1. Oath;

2. Presence at trial; and
3. Cross-Examination.
**With hearsay statements none of these safeguards are present; hence, receiving hearsay evidence could result in unfairness and injustice.

II. The Rule Against Hearsay

A. **Analytical Framework:** the first question to ask is:

1. Is the evidences a ***statement*** for purposes of the hearsay rule (i.e. is it an oral or written statement or conduct) *intended* to be a substitute for words?
    a. If NO, it is admissible—non-assertive conduct is not hearsay.
    b. If YES, go to #2.
2. *Is the statement offered to prove the truth of the matter asserted?* Approach this question by asking about the relevancy of the statement: is the statement relevant for any purpose that does not require accepting the truth of the matter asserted?
    a. If NO, and the statement is offered for a purpose other than proving its truth, it is *not* hearsay and admissible unless the danger that the jury will use it for its truth substantially outweighs its value for non-trust purposes.
    b. If YES, go to #3
3. Is the statement a *prior inconsistent statement* given by the declarant under oath?
    a. If YES, it is admissible as non-hearsay;
    b. If NO, go to #4,
4. Is the statement one of *identification* of a person made after perceiving him?
    a. If YES, admissible as non-hearsay;
    b. If NO, go to #5,
5. Was the statement made or adopted by a party to the action?
    a. If YES, admissible as non-hearsay;
    b. If No, go #6.
6. If none of the exemptions apply then the statement is hearsay and not admissible.

B. **Rule 801(c):** Definition: hearsay is a statement, other than one made by the declarant while testifying at trail or hearing, offered in evidence to prove the truth of the matter asserted (this is an assertion centered definition).

1. Statement*:* [**Rule 801(a)**]: a hearsay statement may consist of any of the following:
    a. *oral statements*: a witness offers testimony about statements made either by the witness or someone else outside of court;
    b. *writings:* a witness offers any document written or prepared by someone else; or
    c. *assertive conduct:* a witness offers testimony as to how the witness or someone else acted outside of court, where the conduct was intended by the actor to substitute for words.
2. Declarant: is the person who made the statement.

C. **Rule 802:** hearsay is not admissible *except* as provided by the FRE or by other Acts of Congress.

D. **G/R:** Elements of Hearsay: there are three essential elements to classify a statement as hearsay:

1. An assertion (or conduct that translates into an assertion);
2. *Made or Done* by someone other than the *testifying witness* on the stand (the out of court declarant); and
3. Offered into to evidence to prove the truth of the matter asserted.

E. **G/R:** Conduct as Hearsay: conduct and nonverbal conduct can be hearsay under Rule 801(a).

1. *Nonverbal conduct:* in some situations nonverbal conduct may be just as assertive as words and they receive the same treatment as oral or written assertions.
    a. EX: pointing out a criminal defendant in a line-up.

II. Out of Court Utterances that are Not Hearsay

A. **G/R:** the rule against hearsay forbids evidence of out of court assertions to prove the facts asserted in them. If the statement is is not an assertion or is not offered to prove the truth of the facts asserted, it is not hearsay.

B. **G/R:** Nonverbal Nonassertive Conduct: nonverbal, nonassertive conduct, is not hearsay under Rule 801(a) unless an intent to assert was shown:

1. EX: captain got in ship with family and sailed after inspecting it (non-assertive nonverbal conduct tending to show the ship was safe); raising an umbrella because it was raining; moving forward when the light turns green.
2. Nonassertive nonverbal conduct is not hearsay because it involves no intent to communicate the fact sought to be proved.

C. **G/R:** Silence as Hearsay: evidence of silence is not hearsay under Rule 801 because it is not intended as an assertion.

1. EX: evidence of the absence of complaints from other customers in a restaurant as disproof of claimed defects in the food.
*[*Silver v. NY Central RR*].

D. **G/R:** Implied Assertions: [out of court assertions offered not to prove the truth of the matter asserted]: an out of court assertion is not hearsay if offered as proof of something other than the matter asserted.

E. **G/R:** Knowledge: testimony offered to establish declarations evidencing knowledge, notice, or awareness are generally not hearsay because no problem of veracity is involved and does not depend upon the content of the statement.

1. EX: person thought to be dead says "I'm alive" It would not have mattered if the person said "I'm dead" because the act of speaking is evidence that the person was alive and the content of the speech does not matter.
*[*Estate of Murdock*].

F. **G/R:** Verbal Acts of Independent Legal Significance: where the issue is simply what words were spoken—the words themselves being at issue—evidence as to what was said is admissible because the words are offered as *legally operative facts* in the litigation (rather than to prove the truth of what was said) and therefore are not hearsay.

1. EX: (a) when a suit is brought for breach of contract, the writing offered as evidence of the contract is no hearsay; (b) in an oral contract, the words "offer" "acceptance" or "consideration" can be admitted because the law attaches legal duties and liabilities to the words; (c) slander and defamation cases; (d) gift, sale, or bailment cases (I hereby *give* (rather than lend) you my watch).
*[*Ries Biologicals, Inc* v. *Bank of Santa Fe*].

G. **G/R:** Circumstantial Evidence of State of Mind: statements that circumstantially or indirectly reveal the declarant's state of mind are *not* hearsay under the Federal Rules.

1. EX: statement by Megan that "LaMar is the hottest man alive" while inadmissible to prove the truth of the matter asserted, it is admissible to prove her state of mind (i.e. that she likes him.).
2. EX: statement by Megan, when her sanity is in issue, that "I am the Chief Justice of the US Supreme Court." This is not hearsay if offered as circumstantial evidence to prove her insanity.

H. **G/R:** Words and Writings offered to Effect on Hearer or Reader: [circumstantial evidence of state of knowledge]: evidence of a statement made to a person, or within his hearing, may be offered to show his state of mind in the sense that he had *notice, knowledge, motive, good faith, duress, probable cause, acted reasonably* or that he ahd acquired *information* that had a bearing on his subsequent conduct.

1. In these cases, the statement is not subject to attack as hearsay because the words are offered simply to show their **effect** on the hearer or reader or the circumstantially significant state of the hearer's *knowledge* rather than to prove the truth of the matter asserted.

a. EX: Knowledge of Hearer: evidence of complaints to defendant that its parking lot pavement was slippery when wet is admissible on the issue of D's notice or knowledge of the danger [*Vinyard v. Vinyard Funeral Homes*].

b. EX: Effect on Hearer: evidence of threats made to D by terrorists who forced D to carry ammunition as a defense to possession of prohibited firearm ammunition [*Subramanian v. Public Prosecutor*].

c. EX: Potential Knowledge of Hearer: in medical malpractice action, evidence of other hospital records admitted to show negligence in hiring a doctor, admissible and not hearsay because not offered to prove negligence but to show information existed.

d. EX: Knowledge of Speaker: word's revealing declarant's possession of circumstantially significant knowledge of unique facts (facts the could be known only to a person who had observed an object, gun, or place, interior of child abusers house) are admissible [*US v. Muscato*].

I. **G/R:** Nonhuman Evidence: [Machines and Animals]: testimony of a witness as to "statements" made by nonhuman declarants does not violate the rule against hearsay.

1. EX: testimony of bloodhounds following a Defendant; witness testifies that the radar gun "said" D was going 90 mph; the parking meter "said" D's time had expired; the computer printout "said" D's balance was 30-dollars.
2. The law permits so-called nonhuman evidence because machines and animals, unlike humans, lack a conscious motivation to tell falsehoods, and because working machines can be explained by humans witnesses who are then subject to cross.

*[*Buck v. State; City of Webster Groves v. Quick*].

III. Hearsay Exemptions: **Rule 801(d)**

A. **Rule 801(d):** exempts certain statements for the Hearsay Rule.

(1) Prior Statements: a statement is not hearsay if the *declarant testifies* at trial or hearing and is subject to *cross examination* concerning the statement, and the statement is:

(A) inconsistent with the declarant's testimony (i.e. impeachment);
(B) consistent with the declarant's testimony (i.e. rehabilitation);
(C) one of identification of a person made after perceiving the person.

(2) Admission by Party Opponent: a statement is not hearsay if the statement is offered against a party and is:

(A) the party's own statement;
(B) a statement the party adopted;
(C) a statement by a person authorized by the party to make a statement concerning the subject;
(D) a statement by the party's agent concerning a matter within the *scope of agency*;
(E) a statement of a coconspirator of a party during the furtherance of a conspiracy.

B. **G/R:** Prior Inconsistent Statement: [**Rule 801(d)(1)(A)**]: if the prior inconsistent statement is not hearsay if it was:

1. made under oath; and
2. in a proceeding (prior trial, preliminary hearing, deposition, and grand jury testimony).

*Thus, in federal practice, such statements can be used for impeachment purposes and substantive evidence.

C. **G/R:** Prior Consistent Statement: [**Rule 801(d)(1)(B)**]: whether under oath or not, a prior consistent statement, when offered to rebut an express or implied charge of *recent*

fabrication or *improper influence* or *motive* on the party of the witness is not hearsay and can be used as substantive evidence.

D. **G/R:** Witness's Prior Statement Identifying a Person: [**Rule 801(d)(1)(C)**]: a prior identification is not hearsay, such as an identification in a line-up.

E. **G/R:** Admissions by a Party Opponent: [**Rule 801(d)(2)**]: an admission by a party opponent is admissible as substantive evidence.

§2.2: EXCEPTIONS TO THE HEARSAY RULE

I. Overview

A. **Generally:** the FRE recognize numerous exceptions to the hearsay rule where circumstantial guarantees of trustworthiness justify departure from the general rule excluding hearsay. The exceptions are divided into two groups:

1. Availability or Unavailability of the declarant is Immaterial: the theory of this group of exceptions is that the out of court statement is as reliable or more reliable than would be testimony in person so that producing the declarant would involve pointless delay and inconvenience [governed mostly by **Rule 803**].
2. Unavailability Required: the theory of this group of exceptions is that while live testimony would be preferable, the out of court statement will be accepted if the declarant is unavailable.
    a. The critical factor is the unavailability of the witness's testimony.
    b. Governed mostly by **Rule 804.**

B. **Rule 804(a)**: provides a list of the five generally recognized *unavailability* situations:

(1) Exercise of Privilege: the successful exercise of privilege not to testify renders the witness unavailable within the scope of the privilege.
(2) Refusal to Testify: if a witness simply refuses to testify, despite all the appropriate judicial pressures, he is practically and legally unavailable.
(3) Claimed Lack of Memory: a claim of lack of memory made by the witness on the stand can satisfy the unavailability requirement. If the claim is genuine, the testimony is simply unavailable by any realistic standard.
(4) Death, Physical, or Mental Illness: death is obvious, physical ability to attend the trial or testify is also a recognized ground. Mental incapacity, including failure of faculties due to disease, senility, or accident is also recognized as a basis of unavailability.
(5) Absence: the absence of the declarant from the hearing, does *not* standing alone establish unavailability. Under the federal rule, the proponent of the hearsay statement must show an inability to procure declarant's attendance:
    a. Process; or
    i. the relevant process is subpoena and if the witness is beyond the reach of process, his attendance cannot be procured.

ii. if the witness cannot be found, then obviously process is in effective, however, the proponent of the hearsay statement must establish that the witness cannot be found through a *good faith effort*.
b. other reasonable means.
i. In addition to inability to procure attendance by process, the Confrontation Clause requires the prosecution, before introducing a hearsay statement of the type where unavailability is required, sol to show that declarant's attendance cannot be procured through any good faith efforts by other means, the standard is *diligence*.

II. **Dying Declarations**

A. **Rule 804(b)(2):** Statement of Belief of Impending Death: in a prosecution for **homicide** or in a **civil action** proceeding, a statement made by a declarant while believing the declarant's death was **imminent**, concerning the **cause** or **circumstances** of what the declarant believed to be impending death.

B. **G/R:** Requirements for Admissibility: there are 4-requirements for this exception to admissible:

1. the declarant must unavailable;
    a. death is sufficient to satisfy this requirement, but it is not required as long the declarant is otherwise unavailable for trial [**Rule 804(a)**].
2. the action must be a *civil action generally* or a criminal *homicide* case (no other criminal cases are permitted) and the defendant must have been charged with the declarant's death;
3. *Sense of Impending Death:* the declaration must have been made by the victim while believing that his death was *imminent.*
    a. In other words, the declarant must have been conscious that death was near and certain when making the statement, that is, the declarant must have lost all sense of recovery.
    *[*Soles v. State*].
4. *Facts Related to the Cause of Death*: the declaration must be:
    a. as to *facts*; and
    b. related to the *cause* or *circumstance* of what the declarant victim believed to be his impending death.
    i. statements identifying the attacker are clearly admissible under this terminology and those describing prior fights, threats, or arguments with such a person also meet this requirement.

C. **G/R:** Requirement of Firsthand Knowledge: if the declarant did not have an adequate opportunity to observe the facts recounted, the declaration will be rejected for lack of firsthand knowledge.

D. **G/R:** Preliminary Question of Fact: **[Rule 104(a)**] dying declarations, and their admissibility, are preliminary questions of fact for the court (and they can be inferred by circumstantial evidence).

E. **G/R:** dying declarations are admissible on behalf of the accused (defendant) as well as the prosecution.

II. **Spontaneous and Contemporaneous Exclamations**

A. **Rule 803(1):** Present Sense Impression: a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

A(1). Requirements for Admissibility:

1. There is no requirement that the declarant be unavailable and no requirement that the statement be corroborated.
2. *Time Uttered:* this exception requires the declaration be made **while** the observer was engaged in the conduct or perceiving the event, or **immediately thereafter.**
    a. Thus, it is possible that the exception could apply where a witness makes a report of an accident or crime very shortly after its commission.

B. **Rule 803(2):** Excited Utterance: a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

B(1) Requirements for Admissibility:

1. *Startling Event:* there must be an occurrence that startling enough **shock** and **excite** the observer.
    a. The occurrence of the event can be shown by the declaration itself if the surrounding facts and circumstances impart a reasonable measure of **corroboration**.
2. *Excitement:* the statement must be made while the observer is *under the stress* (startling enough to render inoperative the normal reflective though process) of the nervous shock and excitement; it must be spontaneous, with no time for deliberation or calculated misstatement.
    a. *Time:* courts usually limit admissibility to statements made soon after the event because of the requirement that the declarant still be under the stress of the excitement caused by the event; that is, before the declarant has time to contrive and misrepresent.
    *[*Truck Ins. Exchange v. Michling*].
3. *Statement Related to Event:* the spontaneous exclamation must pertain to the exciting event.

C. **Analytical Framework:** there are 3-questions to ask:

1. Does the statement relate to or describe an event or condition?
    a. If NO, inadmissible unless another exception applies;
    b. If YES, go to #2.

2. Was the statement made while the declarant was perceiving the event or condition, or immediately thereafter?

a. If YES, then admissible under **Rule 803(1)**;

b. If NO, go to #3.

3. Does the statement relate to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition?

a. If YES, then admissible under **Rule 803(2)**.

b. If NO, then it is inadmissible.

D. **G/R:** Requirement of Firsthand Knowledge: for excited utterances and present impressions, although the declarant need not have been a participant in the perceived event, it is clear that the declarant must speak from personal knowledge, i.e., the declarant's own sensory perceptions [*Booth v. State*; *State v. Jones*].

E. **G/R:** Bootstrapping: is some instances, proof of the startling event may be made by the hearsay statement itself.

III. **ADMISSIONS**

A. **Generally:** admissions are governed by **Rule 801(d)** and are exemptions to the hearsay rule; hence, they are not hearsay at all and may be received as substantive evidence of the facts admitted and not merely to contradict a party. As a result, no foundation by first examining the party is required.

1. *Definition:* an admission is an extra-judicial statement or conduct by a ***party*** to the present litigation (not a nonparty witness) that is inconsistent with a position that the party presently takes.

a. It does not have to be an admission "against interest"; it may be even partially self-serving.

b. The only requirement is that it turns out to be *contrary* to the party's *present position*.

2. *Rationale:* an admission is not treated as a hearsay statement because it is good for the adversarial system (i.e. anything you say can be used against you) and a party normally should not make a statement unless it is true.

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

(A) the party's own statement;

(B) a statement the party adopted;

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

(D) a statement by the party's agent concerning a matter within the *scope of agency*;

(E) a statement of a coconspirator of a party during the furtherance of a conspiracy.

C. **G/R:** Requirement of Firsthand Knowledge: firsthand knowledge is not required for admissions [**Rule 602**].

C(1). **G/R:** Best Evidence Rule: does not apply to admissions [**Rule 1007**].

D. **G/R:** Opinions: the opinion rule does not exclude an admission of a party.

C. **Rule 801(d)(2)(A):** The Party's Own Statement: a party's own statement is a classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity--the statement need only be relevant to the representative affairs [*Mahlandt v. Wild Canid Survival and Research Center*].

C(1). Testimony as an Admission: while testifying on pretrial examination or at trial, a party may admit some fact that is adverse, and sometimes fatal, to a cause of action or defense. If the party's admission stands un-impeached, and un-contradicted at the end of trial, it is conclusive against the party.

C(2). Representative Admissions: when a party to the suit has expressly authorized another person to speak, it is an obvious and accepted extension of the admission rule to admit against he party of the statements of such persons.

D. **Rule 801(d)(2)(B):** Adoptive Admissions: one may expressly adopt another's statement and that is an explicit admission like any other.

1. Adoptive admissions apply to evidence of other conduct of a party manifesting circumstantially the party's assent to the truth of the statement made by another.
2. To constitute an adoptive admission, *reliance* must be affirmatively established.
*[*Reed v. McCord*].

D(1). Admissions by Silence: when a statement made in the presence of a party containing assertions of facts which if untrue, the party would under all circumstances naturally be expected to deny, failure to speak has traditionally been received as an admission [*State v. Carlson*].

D(2). Other Adoptive Admissions by Conduct: other actions have been held as implied adoptions by conduct:

1. *Flight:* many of the acts of the defendant after a crime seeking to escape are received as admissions by conduct, constituting circumstantial evidence of conscious guilt and hence of the fact of guilt itself.
2. *Failure to Call a Witness:* when it would be natural under the circumstances for a party to call a particular witness, or to take the stand as a witness in a *civil case*, or to produce documents in his possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference.

3. *Obstructing Justice:* a wrongdoing by a party in connection with its case amounting to an obstruction of justice is commonly regarded as admission by conduct.

E. **Rule 801(d)(2)(C)-(D):** Vicarious Admissions: admits statements offered against a party "by a person authorized by the party to make a statement concerning the subject" and 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 [*Mahlandt*].

E(1). Agent's Statements: the admissibility of an agent's statement as an admission of the principle will depend on whether the words are spoken within the scope of authority of the agent to speak for the employer. The following elements usually have to be satisfied:

1. *Independent Proof of Agency and Authority:* the party must prove the independently from the hearsay statement the existence of the agent-principle relationship and the scope of the agency;
2. *Current Matters:* the facts admitted must relate to current matters; and
3. *Statements must be within the scope of Agency:* any statement made by an agent who has authority (express or implied) to speak on behalf of the principle, regarding the subject of the statement, is admissible against the principle.
    a. Under the FRE, if an unauthorized statement by an employee without authority to speak is made, it still may be admissible as admission if the statement was made by the agent "concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

*[*Sabel v. Mead Johnson & Co.*].

E(2). Attorneys: if an attorney is employed to manage the party's conduct of a lawsuit, the attorney has *prima facie* authority to make relevant judicial admissions by pleadings, by oral or written stipulations, or by formal opening statements, which unless allowed to be withdrawn are conclusive in the case. Thus, judicial admissions by an attorney with authority can become evidentiary admission.

1. *Pleadings:* the final pleadings upon which the case is tried state the contentions of the party as to the facts and by admitting or denying the opponent's pleading, they define actual issues that are to be proved.
    a. Admissions in a current pleadings in the case, if not withdrawn by amendment, are *conclusive* as to the pleader; they cannot be controverted.
2. *Guilty Pleas:* generally a guilty plea to a criminal charge is admitted as an admission in a related civil action.
3. *Withdraw of Guilty Pleas:* when a plea of guilty is withdrawn by the accused and he is subsequently tried on the charge, the FRE exclude such a withdrawal as an admission in both civil and criminal cases [**Rule 410**].

F. **Rule 802(d)(2)(E):** Coconspirator Admissions: the Rule treats as an admission a statement by a coconspirator of a party *during the course* and *in furtherance* of the conspiracy.

1. During the Course: the requirement that a statement be made during the course of a conspiracy calls for exclusion of admissions and confessions made after the

termination of the conspiracy, which generally is held to occur with the achievement or failure of its primary objectives.

2. In Furtherance: this requirement calls for the exclusion of statements possessing evidentiary value solely as admissions. Under this requirement, statements that merely recount prior events in the conspiracy are not admissible, but the line is not always clear and historically statements that advance the goals of the conspiracy are admissible.

a. The requirement is satisfied when a coconspirator's statement is part of the information flow between coconspirators intended to held each perform his role.

*[*U.S. v. Doerr*].

3. Bootstrapping Rule: in considering whether an out of court statement is admissible under the conspiracy exclusion, the court (under Rule 104(a) determinations) may sue the statement itself in determining whether a conspiracy exists.

IV. **FORMER TESTIMONY**

A. **Rule 804(b)(1):** Former Testimony: upon a showing of unavailability, the Rule excepts from the hearsay rule:

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

B. **G/R:** Definition: former testimony refers to transcripts of testimony given by a witness at some former deposition, hearing, or trial, in the same or another case.

C. Requirements for Admissibility: there are three main requirements for admissibility:

1. **Sufficient Identity of the Parties:** a witness's recorded testimony form some other trial, deposition, or proceeding, is admissible only if the party against whom it is now being offered:

a. was a ***party*** to the earlier proceeding (or a predecessor in interest if a civil action);

i. *Predecessor in Interest:* in civil cases, a predecessor in interest indicates that there must be a "formal relationship between the parties" which either means (a) there was a community of interest between the parties; or (b) whether the former cross-examination can be fairly held against the party.

ii. **Remember:** in criminal cases, the defendant must have been a *party* to the from proceeding (this eliminates doubts about Confrontation Clause problems).

b. had an opportunity to *examine* the witness at that time; AND
c. has a ***similar motive*** to develop the witness's testimony (by direct or cross) which he now has.
i. *Similar Motive:* the fact that the parties were the same does not necessarily satisfy the similar motive requirement of the Rule.

2. **Identity of the Issues:** the issues in both trials do not have to be identical but they must at least be *substantially the same*; they must relate to the same general subject matter so as to assure the same scope of the cross-examination.
a. Neither the form of the proceeding, the theory of the case, nor the nature of the relief sought need to be the same between the proceedings.

3. **Declarant Unavailable:** for the former testimony to be admissible, it must be shown that the witness who gave the testimony in the earlier trial or proceeding is unavailable to testify as a witness in the present trail [**Rule 804(a)**].

V. **Declarations Against Interest**

A. **Rule 804(b)(3):** Statement Against Interest: admits statements of *unavailable declarants* as follows:
1. A statement;
2. which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interests; or
3. so far tended to subject declarant to criminal liability; or
4. to render invalid a claim by the declarant against another;
5. that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

B. **G/R:** Requirements for Admissibility: there are 5-requirements for admissibility:
1. *Unavailability:* the declarant must be unavailable [**Rule 804(a)**];
2. *Firsthand Knowledge:* the declarant must have firsthand knowledge of the facts [**Rule 602**];
a. Courts generally refuse to allow statements based only on the declarant's opinions or estimates as to the facts.
3. ***AGAINST INTEREST:*** the facts, to the declarant's knowledge, must be to the declarant's immediate prejudice at the time of the declaration and the prejudice must be substantial.
a. *Declarations against pecuniary or proprietary interest:* a statement against interest falls within the exception if it is against the declarant's pecuniary (***financial***) or proprietary interest (***property***) interest. The prejudice must be immediate and substantial.
i. EX: acknowledgement that the declarant does not own certain land or personal property or he has conveyed or transferred it; evidence of indebtedness.

b. *Declaration Imputing Civil Liability on Self:* a statement is against interest if it would tend to subject the declarant to ***civil*** liability to another person.

c. *Invalidating Own Claim:* a statement is against interest if it would render invalid the declarant's claim against another.
i. EX: admission of contributory negligence.
d. *Statement Against Penal Interest:* see below.

4. *Prejudice Known or Apparent:* the declarant must have ***known***, or have been chargeable with knowledge, that the facts stated where so far contrary to her interest that a "reasonable person" in the declarant's position would not have made the statement unless believing them to be true.
5. *Absence of Motive to Falsify:* there must have been nothing to indicate that declarant had some motive to falsify, i.e. the actual state of mind of the declarant.

B(1). **G/R:** Statements against Penal Interest: reverses the common law rule and ***admits*** declarations that expose the defendant to criminal liability.

1. The situation principally examined is whether a confession or other statement by a third person offered by the defense to exculpate the accused to should be admissible.
2. Because of the untrustworthiness of declarations against penal interest (police coercion and pressure) the federal rules provide an additional requirement that ***corroborating circumstances*** *clear indicate that trustworthiness of the statement* must also support the evidence.
3. Statements against penal interest by third parties inculpating both the defendant and the declarant may also be offered by the prosecution to ***inculpate*** the accused.

B(2) **G/R:** Constitutional Limitation: a state *cannot*, by applying its "penal interest" limitation, exclude as hearsay evidence the fact that a third person has confessed to the crime with which an accused is charged because it would deprive the defendant of a fair trial (e.g. adequately present a defense) [***Chambers v. Mississippi***].

B(3). **G/R:** Collateral Statements: the Supreme Court (by focusing on the definition of a "statement") concluded that the principal behind the Rule pointed to a narrow reading of the term "single declaration or remark" rather than a "report or narrative"—because only as to the more narrow meaning does the rationale hold that not particularly honest people make self incriminatory statements if they believe them to be true.

1. Thus, the result is that only ***specific parts*** of the narrative that inculpate qualify. This is based on the circumstances and context.
2. Under *Williamson*, the lower courts have more frequently admitted third party statements that inculpate a defendant where two general conditions are met:
    a. the statement was made to a private person and does not seek to curry the favor of law enforcement; and
    b. it does not shift blame.

*[***US v. Williamson***].

C. **G/R:** Distinction between 804(b)(3) and Admissions in 802(d): there are six difference between declarations of interest and admissions against a party opponent:

1. Declarant unavailability:
    a. 804(b)(3): required;
    b. 802(d): not required.
2. Must the statement have been made by a party?
    a. 804(b)(3): yes;
    b. 802(d): no.
3. Must the declarant have personal knowledge of the facts:
    a. 804(b)(3): yes;
    b. 802(d): no.
4. Must the statement have been against interest:
    a. 804(b)(3): yes (pecuniary, proprietary, or penal);
    b. 802(d): no requirement that it be against the declarant's interest.
5. Who can the evidence be offered against:
    a. 804(b)(3): declarations against interest can be offered against anyone;
    b. 802(d): admissions have to offered against the adverse party
6. Effect of other Exclusionary Rules:
    a. 804(b)(3): knowledge of the hearer is required,
    b. 802(d): knowledge of the hearer is not required and the opinion rule, best evidence rule treat admissions more favorably.
7. In addition, with declarations against interest a party can bootstrap (prove the hearsay statement by the hearsay statement *except* in statements against penal interest which require corroboration) and with 802(d)(2)(C)-(E) a party cannot bootstrap (there must evidence in addition to the hearsay statement in those circumstances).

VI. **STATE OF MIND**

A. **Rule 803(3):** Then Existing Mental, Emotional, or Physical Condition: A statement of the declarant's *then existing* **state of mind**, **emotion**, **sensation**, or **physical condition** (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but *not including* a statement of *memory or belief* to prove the fact remembered or believed *unless* it relates to the execution, revocation, identification, or terms of declarant's will.

A(1). Requirements for Admissibility: [unavailability is *not* a requirement]:

1. *Trustworthiness:* such declarations must have some degree of spontaneity [*Brett v. Adkins*];
2. *Necessity:* the statement should be the best evidence of the declarant's state of mind [*Brett v. Adkins*];
2. *Time:* the statement must be one of the declarant's *then existing* state of mind [*Shepard v. U.S.*];
3. the statement **cannot** be one of *memory or belief* to prove the fact remembered or believed [*Shepard v. U.S.*].
    a. Exception: unless it relates to the declarant's will.

*The declaration can cover the declarant's state of mind (intent, plan, motive), emotion (love, hate, fear, mental feeling), sensation (pain); and physical condition (bodily health).

B. **G/R:** Statements of Present Mental or Emotional State to Show a State of Mind or Emotion *In Issue:* whenever a person's state of mind at a particular time is itself an issue that person's declarations as to his state of mind **at the time in question** are admissible provided they are made under circumstances indicating sincerity.

1. EX: a persons state of mind is at issue in the litigation when such matters arise as:

a. intent to kill; intent to have a certain paper take effect as a deed or will; the maintenance of a transfer of the affections of a spouse.

2. Declarations as to the state of mind often include assertions other than the state of mind.

a. The normal practice is these situations is to admit the statement with a limiting instruction.
*[*Adkins v. Brett*].

C. **G/R:** Statements of Intent Offered to Show Subsequent Acts of Declarant: statements of mental state are generally admissible to prove the declarant's state of mind when that state of mind is at issue; however, the probative value of the statement of mind may go beyond the state of mind itself.

1. Thus, a person's out of court declarations of state of mind may be admissible not only as proof of the person's state of mind at the time the statements were made, *but also* to show the **probability** that he committed some subsequent act pursuant to that declared state of mind.

a. EX: letters written by A stating that A was planning to go to Colorado were admissible as proof that X had in fact gone there [*Mutual Life Ins. v. Hillmon*].

C(1). **Hillmon Doctrine:** statements of state of mind are recognized as admissible to prove subsequent conduct.

1. Thus, the out of court statements that tend to prove a plan, design, or intention of the declarant may be received to prove the plan, design, or intention of the declarant was carried out by the declarant.

a. Subject to the usual limitations as to remoteness in time and perhaps apparent sincerity common to all statements of mental state.

2. *Caveat:* Conduct of Third Persons: out of court statements made by a declarant as to his state of mind cannot be used to implicate or reflect upon the probable conduct of a third person [*Shepard v. U.S.*; *U.S. v. Pheaster*; House Committee Notes].

a. EX: A's statement that he and B are planning to commit a crime is by itself insufficient to prove that B was involved and is inadmissible hearsay as to B.

D. **G/R:** Statements of state of Mind to Show Memory or Belief as Proof of Previous Happenings: under the *Hillmon* doctrine, statements of intent to perform an act are admissible as proof that the act was in fact done.

1. By contrast, a statement by the declarant that he had in fact done that would be excluded under this exception to the hearsay rule.
2. **Forward Looking Statements***:* forward looking statements of intention are admitted while *backward looking statements* of memory or belief are excluded [subject to the will exception] because the forward looking statements do no present the hearsay dangers of memory and narration.

VII. **MEDICAL DIAGNOSIS OR TREATMENT**

A. **Rule 803(4):** Statements for Purposes of Medical Diagnosis or Treatment: statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the **cause** or external source thereof insofar as *reasonably pertinent* to diagnosis or treatment.

*__Note:__ analyzing this section will probably come after a Rule 803(3) analysis because if it is a statement of the declarant's then existing physical condition (such as pain and bodily health) it can be admitted, whether made to a doctor or not.

1. However, this exception can be used to get in *past conditions* or *symptoms* (if made to doctor) which would be excluded under Rule 803(3), and the **cause** of the condition.

A(1). Requirements for Admissibility: [the unavailability of the declarant is not required]:

1. *Purpose:* the statement must be made for purposes of medical diagnosis or treatment;
    a. It has to be from the patient to the health care provider.
    b. The statement need not be made to a physician, one made to a hospital attendant, ambulance driver, or member of the family may qualify if intended to secure treatment.
    i. Psychologists and social workers have been included within this exception.
2. *Content:* the statement must describe medical history, *past or present* symptoms.
    a. Exception: statements of fault are unlikely to qualify because they are not related to diagnosis or treatment.
    i. EX: Megan ran me over while negligently driving her Toyota. (Megan ran me over would be admissible but the negligent reference would not).
3. *Cause:* the statement can include the general cause of the symptoms or pain;
4. **Test for Admissibility:** the test for admissibility is whether the subject matter of the statements is reasonably pertinent to diagnosis or treatment—an objective standard.

B. **G/R:** Rule 803(4) has abandoned the restrictions on admissibility between doctors consulted for treatment and doctors consulted only to testify (thus statements made to expert witnesses are treated the same as general physicians).

VIII. **PRIOR IDENTIFICATION**

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

A(1). Requirements for Admissibility: [this is exemption, so the declarant does not need to be unavailable]:

1. *Cross-Examination:* the declarant must testify at trial and be subject to cross-examination, the requirement of cross examination is satisfied if the declarant is placed on the stand, under oath, and responds willingly to questions [*U.S. v. Owens*].
    a. Judicial restrictions on cross examination and claim of privilege may threaten *meaningful* cross examination, but lack of memory does not.
2. *Statement:* is one of identification after perceiving a person.

B. **G/R:** Statements of Identification: when A testifies that on a prior occasion B pointed to the defendant and said "that's the man who sodomized me" the testimony is clearly hearsay.

1. If, however, B is present in court and testifies to the prior identification and is available for cross examination, the case falls under the exception.
2. Justification for the Rule is found in the unsatisfactory nature of the courtroom identification and by the constitutional safeguards that regulate out of court identifications arranged by police.
3. Evidence of such pretrial identification is usually permitted even when the witness cannot make an in-court identification.

IX. **PAST RECOLLECTION RECORDED**

A. **Rule 803(5):** Recorded Recollection: a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been *made or adopted* by the witness when the matter was *fresh* in the witness's 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.

*__Note:__ do not confuse this Rule with **Rule 612**: recollection refreshed.

A(1). Requirements for Admissibility: [the declarant does not have to be unavailable]

1. *Firsthand knowledge:* the usual requirement of firsthand knowledge applies.
2. *Prepared or Adopted:* the record was prepared or adopted by the witness;

a. The rule uses "record or memorandum" which has been held to encompass a video tape or audio recording.

b. The best evidence rule applies, hence, the original must be produced or accounted for as is generally required when the contents of documents are sought to be proved.

c. However, the record need not have been personally prepared by the witness if he read the record, knew then that the record was correct, and adopted it.

3. *Clear Memory:* the record **correctly** reflects what was remembered when it was made;

a. The record must have been prepared or recognized as correct at a time close enough to the event ensure accuracy—when the matter was "fresh" in the witness's memory.

4. *Impairment of Recollection:* the witness's must have an **insufficient** recollection to testify fully and accurately about the matter; and

5. *Authentic:* the record is the **authentic** memorandum which has not been tampered with.

1. Thus, the party offering the record must prove its accuracy. Either the person who prepared the writing or one who read it at a time close to the event may testify to its accuracy. The witness must acknowledge at trial the accuracy of the record.

*[*Baker v. State*].

B. **G/R:** Admissibility of Writing: the record is admissible as a past recollection recorded, however, it cannot be seen by the jury (except at the request of an adverse party).

a. **Rule 612:** requires that the adverse party be given an opportunity to inspect the record.

C. **G/R:** Multiparty Situations: when the verifying witness did not prepare the report but merely examined it and found it accurate, the matter involves a cooperative report, but the substantive requirements of the exception can be met by the testimony of the person who read and verified report, the record should be admissible.

D. **G/R:** Hearsay within Hearsay: where the witness did not adopt the statement written by another, the document is treated as hearsay within hearsay. The document will probably still be admissible, however, as a past recollection recorded of the writer (the written statement) of present sense impression (of the person who dictated the document).

1. EX: A is prosecuted for robbery, at trial B is called who testifies he saw the getaway car leave the scene and she told an officer exactly what the license plate number was, but she now has no recollection of the number. Then the officer is called and he produces the sheet with the number on it. B could then read the number on the sheet.

X. **BUSINESS RECORDS**

A. **Rule 803(6):** Records of Regularly Conducted Activity: a memorandum, report, record, or data compilation, in **any form**, of acts, events conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept **in the course of regularly conducted business activity**, and if it was the report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, *unless* the source of information or the method or circumstances or preparation indicate a 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.

A(1). Requirements for Admissibility: [unavailability is not required]:

*These elements are developed more fully below

1. *Regular Course of Business:* the record must be written in the course of a **regularly conducted business activity**. This requirement encompasses:
    a. the types of activities that may be "business" activities;
    b. the necessity of the entrant being under a duty to make entries; and
    c. the requirement that the records relate to the primary business.
2. *Form of Records:* the records being entered must be the permanent record of the business;
3. *Contents of Entry:* the rule of firsthand knowledge applies;
4. *Time:* the records must be made at or near the time of the transaction recorded; and
5. *Authentic:* the records must be authenticated.

B. **G/R:** Regular Course of Business: there are three elements to this requirement:

1. *Business Activity:* a business is defined broadly—any business, institution, association, profession, occupation, and calling of every kind.
2. *Regular Course:* the records must be prepared in the regular course of the business AND it must have been the business's regular practice to make the particular record or entry in question.
3. *Primary Business Activity:* the records in question must be of a type customarily maintained by the business as part of its primary activities.

B(1). Personal Records: records, such as diaries or records of telephone conversations, if of a purely personal nature not involved with the declarant's business activities do not fall within the rule (unless they are kept for business purposes).

B(2). Non-Routine Records: non-routine records are records not made in the regular practice of business, but are nevertheless made in the course of regularly conducted activities, such as:

1. *Accident Reports:* [**Palmer v. Hoffman**] *Palmer*, although the Supreme Court held that accident reports prepared in anticipation of litigation were not business records, did not create a blanket rule of exclusion for accident or similar records kept by businesses.

a. Rather, it recognized discretionary power in the trial judge to exclude evidence which meets the letter of the exception but which under the circumstances appears to lack trustworthiness and reliability.

b. Rule 803(6) incorporate this reading of *Palmer* by permitting admission of reports that otherwise comply with the requirements of the rule, *unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness.*

2. *Police Reports*: police reports are problematic, they can meet the requirements of Rule 803(6); the can satisfy the requirements of 803(8), and sometimes are still inadmissible because of multiple hearsay problems.

B(3). **G/R:** Hospital Records: are now admissible under Rule 803(6).

1. *Personal History:* in most hospital records there is an entry of the "personal history of the patient" including an identification of the patient, an account of the present injury or illness, and the events and symptoms leading up to it (and sometimes the cause).

a. These types of records involve two layers of hearsay (use of the hospital record for the truth of the matters therein, and proof that the statement was made).

i. If the subject matter is within activities under hospital practice are regarded as relevant to the diagnosis, treatment, or other hospital business, it is within the *regular course of business*.

*[*Williams v. Alexander*]

ii. If the personal history statement is to be admitted for the truth of the matter asserted they will have to fall within another exception, in addition to the business record exception because of the multiple hearsay; the common ones are:

(A) statements for the purpose of diagnosis or treatment;
(B) admission of a party opponent;
(C) dying declaration;
(D) declaration against interest; or
(E) excited utterance.

2. *Diagnostic Statements:* professional standards for hospital records contemplate that entries will be made of diagnostic findings at various stages; these entries are clearly admissible in the regular course of the operations of the hospital.

a. These statements are usually made in "opinion" form by experts, but they are still admissible under Rule 803(6), which specifically includes opinions or diagnosis.

3. *Privileges:* in most states, patients have been afforded a privilege against disclosure by physicians of information acquired in attending the patient and necessary for diagnosis and treatment. Thus, this could bar admission of the records.

C. **G/R:** Form of the Records: the Rule 803(6) states that a memorandum, record, report, or data compilation in *any form* is admissible.

1. Exception: oral reports are not within the definition, even if all the other requirements are met.
2. **Originality:** in business practice, the person most directly concerned customarily notes daily transactions, such as sales or services rendered, upon slips, memorandum books, or the like.
    a. Someone then collects these memorandums and from them makes an entry into a *permanent book*, such as a journal or ledger.
    b. In these cases, the entries in the permanent record meet the requirement of originality.
3. **Opinions:** Rule 803(6) specifically provides that an admissible regularly kept business record may include opinions (even expert opinions).
    a. *Caveat:* expert opinions are governed by the ordinary restrictions on experts.
4. Computer Records: Rule 803(6) applies to data compilations in any form, terminology intended to include records stored in computers; however, in some cases more of a foundation will have to be laid (such as demonstrating it cannot be tampered with) [*Hahnemann Univ. Hospital v. Dudnick*].

D. **G/R:** Content of Record: the rule of firsthand knowledge applies, and thus Rule 803(6) requires that the entry must consist of matters that were either:
1. within the person knowledge of the entrant; or
2. transmitted to the entrant by someone with a business duty to report such matters to the entrant and had firsthand knowledge of the facts.

D(1). **G/R:** Lutz Problems: [**Johnson v. Lutz**]: if any person in the process is not acting in the regular course of business, then an essential link in the trustworthiness chain fails.
1. In *Lutz* the court held inadmissible a police officer report insofar as it was not based on his personal knowledge, but on information supplied by a bystander.
2. **g/r:** thus, if information going form the observation to final recording is to be received under this exception, all parts of the process must be conducted under a business duty.
3. **Multiple Hearsay:** when the matter recorded itself satisfies the conditions of some other hearsay exception, the requirement that the person initially acquiring the information must be acting in the regular course of business does not apply [**Rule 805**].

E. **G/R:** Temporal Element: a substantial factor in the reliability of any system of records is the promptness with which transactions are recorded; the formula of Rule 803(6) is "at or near the time."
1. **Test:** whether an entry made subsequent to the transaction has been within a sufficient time to render it within the exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy or lapse of memory.

F. **G/R:** Authentic: the record must be authenticated, thus any witness with the necessary knowledge about the particular record keeping could testify that the regular practice of

the business was to make such records, that the record was made in the regular course of business upon the personal knowledge of the recorder or of someone reporting in the regular course of business, and that the entries were made at or near the time of the transaction.

1. Rule 803(b) states that the foundation must be laid by the **custodian** or other *qualified witness* (such as a person of authority in the record keeping department of the business).

G. **Rule 803(7):** Absence of Entry in Records Kept in Accordance with the Provisions of paragraph (6): Evidence that a matter is no included in the memorandum, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the non-occurrence or non-existence of the matter….

1. Sometimes the absence of an entry relating to a particular transaction is offered as proof that no such transaction took place and court generally admit evidence for this purpose under Rule 803(7).

XI. **PUBLIC RECORDS**

A. **Rule 803(8):** provides, without regard to the declarant's availability, a hearsay exception for the following:

--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.

*__Note: Rules 803(9), (10), (12), (14),__ and **(22)** also deal with public records.

B. **G/R:** Activities of Office: [Rule 803(8)(A)]: this group includes the oldest and most straightforward type of public records, records of activities from the office itself.

1. EX: Records of receipts and disbursements of the Treasury Department.

*These types of records are highly reliable and routinely admitted.

C. **G/R:** Matters Observed Pursuant to Duty: [Rule 803(8)(B)] this group consists of matters observed and reported, both pursuant to duty imposed by law.

1. EX: rainfall records of the National Weather Service.

D. **G/R:** Investigative Reports in Civil Cases: [Ruel 803(8)(C)]: the Supreme Court rejected an narrow interpretation of "factual findings" and that "factually based opinions and conclusions" could be included within the exception.

1. Under this exception, a wide ranger of agency findings are *admissible*.
2. The primary protection against admission of unreliable evidence is the Rule's provision direct exclusion of all element of a report—both factual and evaluative—if the determines they lack trustworthiness.
    a. In making a determination of trustworthiness, a court must consider four factors:
    i. the timeliness of the investigation;
    ii. the skill or experience of the investigator;
    iii. whether a formal hearing was held; and
    iv. bias of the investigator.
    b. To be admissible, the record is not required to satisfy all four requirements, and if the record facially satisfies the requirements of the Rule, the opponent has the burden to demonstrate lack of trustworthiness.

*[***Beech Aircraft v. Rainey***].

E. **G/R:** Restrictions on Use by Prosecution in Criminal Cases: [Rule 803(8)(B)-(C)]: as enacted, clause (C) of Rule 803(8) prohibits the use of investigative reports as evidence against the accused in a criminal case (to eliminate confrontation clause problems).

1. Clause (B) of Rule 803(8) reads that 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*.
2. Although clause (B) would literally exclude use of investigative reports by criminal defendants as well as the prosecution, the courts have construed the provision to permit the defendant to introduce police reports under clause (B).
3. The phrase "other law enforcement personnel" has been construed in its broadest form to include *any officer or employee of a government agency which has law enforcement responsibilities.*
    a. EX: custom service chemists, INS agents, boarder inspectors, *but not* building inspectors, medical examiners, or judges.
    *[***U.S. v. Oates***].
4. The limitations in clauses (B) and (C) cannot be avoided by resorting to some other hearsay exception [such as business records] which is satisfied because Congress intended to exclude law enforcement and investigative reports against defendants in criminal cases whatever route around the hearsay rule was chosen [***U.S. v. Oates***].

F. **Rule 803(10):** Absence of Record: proof of a non-occurrence may be made by the absence of an entry in a public record where such matters are recorded.

1. The Rule provides a hearsay exception for a certification in accordance with Rule 902 or for testimony that a diligent search failed to disclose a record, report, or entry used to prove the absence of the record, report, or statement or the non-occurrence (non-existence) of a matter that should otherwise have been recorded.

G. **Rule 803(9):** Records of Vital Statistics: Federal Rule 803(9) covers records in any form of births, deaths, and marriages, if the report is made to a public officer pursuant to requirements of law.

1. As to routine matters, such as place and date of birth or death and "immediate" cause of death, such as drowning or gunshot wound, admissibility is seldom questioned.
2. However, entries in death certificates as to the "remote" cause of death, such as suicide, accident, or homicide usually are made on the basis of information obtained from other persons and predictably involve the questions that have been raised with regard to investigative reports generally, and courts have divided on admissibility.
    a. When issues of this type are involved, Rule 803(8) is applicable.

H. **Rule 803(12):** Marriage, Baptismal, and Similar Certificates: the Rule provides a hearsay exception for certificates of marriage and similar ceremonies performed by clergy, public officials, or others authorized to perform the ceremony where the certificate is issued at the time of the act or within a reasonable time thereafter.

1. Certificates: for purposes of the law of evidence, a certificate is a written statement issued to an applicant by an official that recites certain matters of fact.

H(1). Certified Copies: when a purported copy of a public record is presented in court accompanies by a certificate that the purported copy is correct, a two-layer hearsay problem is presented:

1. first, is the public record within the hearsay exception for that kind of record? and
2. is the certificate within the hearsay exception for official certificates?

H(2). **G/R:** the American common law rule remains that a custodian has, by virtue of the office, the implied duty and authority to certify the accuracy of a copy of a public record in the custodian's official possession.

1. The usual practices is to prove public records by a copy certified as correct by the custodian, and many statutes so provided.
2. **Rule 1005** allows proof of public records by copy, without producing or accounting for the original, and
3. **Rule 902(4):** provides for authentication by certificate.

XII. **JUDGMENT OF PREVIOUS CONVICTION**

A. **G/R:** Court Judgments: Since reports of official investigations are admissible under the official written statement exception, the judgment of a court, made after the full investigation of a trial, should likewise be admissible in subsequent litigation to prove the truth of those facts necessarily determined in the first action.

1. Guilty pleas and statements made in the course of litigation may constitute declarations against interest or admissions of party opponent and under those exceptions avoid the bar of the hearsay rule.

B. **G/R:** Civil Judgments in Subsequent Civil Actions: many courts exclude a prior civil judgment offered in a subsequent civil case when offered under the public records and reports exception.

C. **G/R:** Criminal Judgments in Subsequent Civil Actions: most courts admit a prior conviction of a serious criminal offense in a subsequent civil action.

1. Courts have moved to a rule of general admissibility of a prior criminal conviction in a civil action against the party who was previously the criminal defendant.

a. Often the exception is limited to convictions for serious offenses under the theory that convictions for misdemeanors do not represent sufficiently reliable determinations to justify dispensing with hearsay objections.

D. **Rule 803(22):** Judgment of Previous Conviction: is generally consistent with these trends and has a number of significant features:

1. only **criminal judgments of conviction** are included;

a. judgments in civil cases are not included, their effect being left to the law of res judicata or preclusion;

2. it covers only serious crimes, i.e., punishable by death or imprisonment for more than one year [**felonies**], thus eliminating the problems associated with convictions of lesser crimes;

3. the rule *does not* apply to judgments of acquittal;

4. when offered by the government in a criminal prosecution, judgments of conviction of persons other than the accused are admissible only for purposes of impeachment;

a. when the judgment of conviction is offered in a civil case, however, it is treated as are investigative reports generally, and there is no restriction as to the parties against whom the evidence is admissible.

5. judgments entered on pleas of nolo contendere are *not* included within the exception; and

6. the provision merely removes the hearsay bar from a qualifying judgment and does not purport to dictate the use to be made of the judgment once admitted.

XII. **MICELLANEOUS EXCEPTIONS**

A. **G/R:** Learned Writings: when offered to prove the truth of matters asserted in them, learned writings, such as treatises, books, and articles regarding specialized areas of knowledge, are clearly hearsay.

1. **Rule 803(18):** provides: "To the extent called to the attention of an expert witness upon cross-examination or relied upon by expert witnesses in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence *but may not be received as exhibits*.

2. This rule is broadly worded as to subjects—history, medicine, or other science or art—and is sufficient to include standards and manuals published by government agencies and industry or professional organizations.
3. The rule requires that the reliability of the publication must be established, which demonstrates that it is viewed as trustworthy by professionals.

a. Authoritativeness can be established by the expert of either party or by judicial notice.

4. The Rule also requires that the publication must be called to the attention of an expert on cross-examination or relied upon by the expert in direct examination.

B. **Rule 803(17):** Market Reports, Commercial Publications: defines a hearsay exception for such publications, covering market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

1. *Requirements:* the list must be published in written form and circulated for use by others; it must be relied upon by the general public or by person in a particular occupation; and it must pertain to relatively straightforward objective facts.

C. **G/R:** Reputation as to Character: evidence regarding pertinent traits of character are admitted both to prove conduct in conformity with those traits and to impeach the credibility of witnesses, and in modern evidence law, these traits may be proved by evidence of reputation or opinion [**Rules 404, 405, & 608**].

1. **Rule 803(21):** deals only with the hearsay aspect of the issue, recognizes an exception that admits reputation among associates or in the community when used to establish character.

D. **G/R:** Statements, Reputation, and Judgments as to Pedigree and Family History:

1. **Rule 804(b)(4):** requires the unavailability of the declarant and provides a hearsay exception for:

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

2. **Rule 803(13):** provides a hearsay exception, regardless of the declarant's availability for statements concerning person or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
3. **Rule 803(19):** matters of family history traditionally have been provable by reputation in the family, and sometimes in the community; Rule 803(19) follows this tradition and covers:

a. Rule 803(19): "Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history."

b. The exception requires reputation among family members or members of the community to establish such facts and not simply assertions by individuals.

4. **Rule 803(23):** permits admission of judgments as "proof of matters of personal family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

E. **G/R:** Ancient Documents Rule: one method of authenticating a writing is to show that it is at least 20-years old, is unsuspicious in appearance, and came from a place of custody natural for such a writing.

1. **Rule 803(16):** provides an exception to the hearsay rule for statements in a document in existence 20-years or more the authenticity of which is established.

a. While the rule itself contains no limitation as to the kind of document that may qualify, as long as it is 20-years old or more and properly authenticated, several limitations are imposed that provide reliability and additional assurances of trustworthiness:

i. the general requirement of firsthand knowledge;

ii. by virtue of the authentication requirements, the document must not be suspicious in appearance, which also supports reliability.

B. **Rule 803(15):** Documents Affecting an Interest in Property: 803(15) covers statements contained in a document "purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

1. This exception imposes no requirement of age of the document, but it is limited to title documents, such as deeds, and statements relevant to the purpose of the document.

§2.3: THE FUTURE OF HEARSAY

I. RESIDUAL HEARSAY EXCEPTION

A. **Generally:** the residual hearsay exception is a catchall exception for statements having comparable circumstantial guarantees of trustworthiness.

1. The residual hearsay exception does not contemplate unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations, which demonstrate a trustworthiness within the spirit of the specified exceptions.

B. **Rule 807:** 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 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(1). **G/R:** Requirements of Rule 807: the rule contains five requirements, three of which impose substantial limitations on the admission of hearsay:

1. *Equivalent Circumstantial Guarantees of Trustworthiness:* in applying the residual exception, the most important issue is whether the statement offers equivalent circumstantial guarantees of trustworthiness to those found in the various other specific hearsay exceptions. There are 9 re-occurring factors that are particularly significant to the determination of admissibility:

a. whether the declarant had a motivation to speak truthfully or otherwise;
b. the spontaneity of the statement, including whether it was elicited by leading questions;
c. the time lapse between the event and statement;
d. whether the statement was under oath;
e. whether the declarant was subject to cross-examination at the time the statement was made;
f. the relationship between the declarant and the person to whom the statement was made;
g. whether the declarant has recanted or re-affirmed the statement;
h. whether the statement was recorded and particularly whether it was videotaped; and
i. whether the declarant's firsthand knowledge is clearly demonstrated.
j. One factor that *should not* be considered in evaluating the trustworthiness of the statement is the credibility of the person testifying to having heard it.

2. *Necessity:* a second factor given varying significance by the cases is the requirement that the statement must be "more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts."

a. Many courts interpret this as a general necessity requirement; however, it does not been that the hearsay must be essential.
b. Other courts view it as a requirement of diligence;

c. the requirement also has the effect of imposing a rough best evidence requirement on the exception in the sense that where live testimony of the declarant is available and the out of court statement is no superior, the exception cannot be used.

3. *Notice:* another substantial requirement of the rule is that notice be given sufficiently in advance of trial to enable the adverse party to prepare to meet the hearsay evidence.

a. While occasionally strict compliance with this requirement is enforced, courts generally have been willing to dispense with notice of the need for the hearsay arise shortly before or during the trial, and possible injustice is avoided by the offer of a continuance or other circumstances.

4. *Other Requirements:* the remaining requirements, lettered (A) and (C) in the rules, have had no appreciable impact upon the application of the of the residual hearsay exception.

a. Provision (A), requiring that the statement be offered as evidence of a material fact, is a restatement of the general requirement that evidence be relevant;

b. Requirement (C), that the general purposes of the rules and the interests of justice will be served by admitting the evidence is, in effect, a restatement of Rule 102.

5. *Near Miss:* the rule states that it applies to "statements not specifically covered by" any of the specific exceptions.

a. Thus, failing to qualify under an enumerated exception does not disqualify admission under the residual hearsay exception.

6. Courts have employed the exception most extensively in admitting statements made by child witnesses, particularly in sexual abuse cases.

II. **CONSTITUTIONAL ISSUES**

A. **Confrontation Clause:** The Constitutional issues related to admission of hearsay focus primarily on the Confrontation Clause of the 6th Amendment which applies to the States through the 14th Amendment.

1. The clause requires that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him."

2. In addition, nearly every state constitution has a similar provision.

3. **G/R:** the confrontation clause is applicable only to criminal prosecutions and may invoked only by the accused.

a. However, the values served by confrontation are so basic that elements of its requirements are occasionally extended as a matter of due process to persons other than the accused in a criminal case.

4. The Rule against hearsay and the constitutional right of confrontation have similar underpinnings—they both operate to preserve the ability of a party to confront adverse witnesses in open court. Both the confrontation clause and rule against hearsay have several exceptions.

B. **Generally:** the recent decisions of the Supreme Court with respect to confrontation clause indicates the Court has found that the clause recognizes the validity of the traditional hearsay rule and its exceptions; thus, the Court has indicated it intends to simplify and diminish the impact of the Confrontation Clause as an independent restrain on the admission of hearsay.

C. **G/R:** [***California v. Green***] in *Green*, the Court established one prong of the current Confrontation Clause analysis. The Court concluded that the clause did not limit the introduction of prior statements of witnesses actually produced at trial for *full* cross-examination.

D. **G/R:** [***United States v. Owens*]:** in *Owens*, the Court recognized that generally absent limitations by the trial court on cross-examination or the witness' invocation of a privilege, the opportunity to cross-examine would be found constitutionally adequate.

E. **G/R:** Two Prong Test for Admission of Hearsay under the Prior Testimony Exception: [***Ohio v. Roberts***]: in *Roberts*, the Court stated a two-part test for the admission of hearsay under the Confrontation Clause that appeared to be generally applicable [the test was later limited, *U.S. v. Inadi*]:

1. First, the prosecutor must either produce, or demonstrate the unavailability of the declarant whose statements it wishes to use against the defendant; and
2. Second, if the declarant is unavailable, the statement must have been made under circumstances providing sufficient indicia of reliability.
    a. The *Roberts* Court further noted sufficient reliability to satisfy the Confrontation Clause can be inferred without more in a case where the evidence falls within *firmly rooted* hearsay exception.
    b. In other cases, the evidence must be excluded at least absent a showing of particularized guarantees of trustworthiness.

F. **G/R:** Coconspirator Exception and Confrontation Clause: [***United States v. Inadi***]: in *Inadi*, the Court backed away from, or clarified, the apparent general requirement of unavailability announced in *Roberts*.

1. The Court concluded that the prosecutor need not produce or demonstrate the unavailability of a conspirator whose statement was used against the accused, and it limited the *Roberts* requirement to instances involving the use of the prior testimony exception, which has always required a showing of unavailability.
2. *Coconspirator Exception:* in the case of coconspirator's statements, the Court found such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court.
    a. The Court also noted that the benefits of an unavailability rule for coconspirator declarant's would be slight and the burdens substantial, and concluded that the Confrontation Clause does *not* embody the rule.

G. **G/R:** Spontaneous Declarations and Statements Made While Receiving Medical Care Exceptions and the Confrontation Clause: [***White v. Illinois***]: the Court applied the same *Inadi* analysis to hearsay admitted under the spontaneous declarations and for statements

made in the course of receiving medical care, finding the Confrontation Clause imposed no unavailability requirement.

H. **G/R:** the analysis of *Inadi* and *White* appear to mean that unavailability is *NOT* required under a hearsay exception based on a theory that the out of court statement is superior to what is likely to be produced in court, i.e., all exceptions under Federal Rule 803.

1. *Inadi* and *White* leave undisturbed prior analysis of the impact of the Confrontation Clause on the showing of unavailability required for hearsay exceptions that mandate unavailability, such as former testimony.

a. Other decisions dictate a reasonably rigorous test under the Constitution for unavailability when hearsay is offered under one of these exceptions by the prosecution in a criminal case.

I. **G/R:** Firmly Rooted Hearsay Exceptions: [***Bourjaily v. United States***] in *Bourjaily*, the Court clarified the other prong of the *Roberts* test regarding the definition of "firmly rooted" hearsay exceptions that will automatically satisfy the "indicia of reliability" of reliability requirement.

1. The Court held that the coconspirator "exception" was firmly rooted enough in jurisprudence that a court need not independently inquire into the reliability of such statements.

2. The definition of firmly rooted, it concluded, rested on the exception's longevity and widespread acceptance, not on an individualized assessment of the exceptions' reliability.

J. **G/R:** Indicia of Reliability and Not Firmly Rooted Exceptions: [***Idaho v. Wright***]: the Court addressed how "indicia of reliability" is to be judged for exceptions that are not firmly rooted.

1. The residual hearsay exception is *not* a firmly rooted exception for Confrontation Clause purposes; accordingly, statements may be constitutionally admitted under the residual hearsay exception only if supported by a finding of "particularized guarantees of trustworthiness."

2. The Court ruled that the search for such guarantees was limited to the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of that belief and expressly rejected the use of corroborating evidence as to the hearsay statement to provide the guarantees of trustworthiness.

K. **G/R:** Analytical Framework for Confrontation Clause: there are four distinct scenarios that can arise under the Confrontation Clause and for the admissibly of hearsay:

1. *Firmly Rooted Hearsay Exceptions:* hearsay falling within a traditional or firmly rooted exception to the rule will be admissible under the Confrontation Clause.

2. *Unavailable Not Required:* [Rule 803 exceptions] where the exception does not require unavailability because of the theoretical superiority of the out of court statement, the Constitution does not require the declarant to be unavailable.

3. *Unavailability Required:* [Rule 804 exemptions] where unavailability is constitutionally required, the Confrontation Clause will in *some circumstances* require a more rigorous demonstration of unavailability by the by the prosecution than the hearsay rules require.
4. *Not Firmly Rooted Hearsay Exceptions:* [Rule 807]: where the hearsay is offered by the prosecution under a residual hearsay exception, *particularized guarantees of trustworthiness* must be shown, which is not identical to meeting the "equivalent circumstantial guarantees of trustworthiness" for the Federal Rule and the state counterparts.

a. In addition, the prosecution must establish the trustworthiness of the statement itself, rather than depending on its likely truth in light of corroborating circumstances.

b. Newly created statutory hearsay exceptions should also be subject to the test set forth in *Wright* until widespread acceptance and longevity render such exception firmly rooted.

L. **G/R:** Due Process Clause: [***Chambers v. Mississippi***] the Due Process Clause may require the admission of otherwise inadmissible hearsay if of sufficient reliability and importance.
1. The *Chambers* decision was limited to its facts presented and has not proven to be a significant catalyst of further developments.

§3: RETURN TO RELEVANCE

§3.1: Probabilistic Evidence

A. **G/R:** Probabilistic Evidence: courts are willing to rely on probabilities in assessing the force of statistical evidence; however, the courts are substantially more reluctant to admit probability calculations intended to show the identity of a wrongdoer, especially in criminal cases.

B. **G/R:** Probability Evidence and Identification: in criminal cases, where the prosecutor attempts to compute the probability of observing a conjunction of certain incriminating characteristics by assuming that each characteristic is statistically independent and that the probabilities of these presumably independent characteristics can be obtained by introspection, appellate courts hold that it is error to admit such testimony on the grounds that the hypothesized values used in computing the probability of the joint event are sheer speculation [*People v. Collins*].

C. **G/R:** Probabilistic Evidence and Identification of Characteristics: [like blood tests, fingerprints, and bite-marks] in these cases, there is some data for calculating the joint probability; hence, forensic experts can testify on the similarities between the data and accused and allow the jury to decide.

1. The admission of statistical or mathematical evidence substantiated by expert witnesses, when relevant to prove the ultimate issue in the case, usually does not violate the due process rights of a defendant.

*[*Kramer v. Young*].

§3.2: Character Evidence

A. **Analytical Framework:** there are several questions that must be answered in determining if character evidence is admissible:

1. Does the evidence relate to character, other crimes, wrongs, acts or habits [**Rule 404**]? If yes, move on, if not, character is not a consideration.
2. Is the character specifically at issue in the case?
    a. If YES, it is admissible and may show specific acts [**Rule 405(b)**];
    b. If NO, go to #3.
3. Is it evidence of the habit of a person or of the routine practice of an organization?
    a. If YES, admissible;
    b. If NO, go to #4.
4. Consider other possible permissible uses of character related to evidence:
    1. *Character of the accused*: is it evidence of a pertinent trait of the character of the accused offered by the accused (opening the door, then the prosecutor can rebut the same).
    a. If YES, it is admissible but only through reputation or opinion testimony (specific acts may only be inquired to on cross) [**Rule 405(a)**].
    b. IF NO, is it evidence of a trait of character of the accused offered by the prosecution?
        i. If YES, it is inadmissible, unless Rule 404(a)(2) applies.
        ii. If NO, consider other permissible uses of character evidence.
    2. *Character of the Victim:* is it evidence of a pertinent trait of the character of the alleged victim offered by the defendant (or prosecution to rebut) [**Rule 404(a)(2)**]:
    a. If NO, consider other uses of character evidence;
    b. If YES, does the civil or criminal matter involve a sex offense?
        i. If NO, admissible in criminal cases and probably civil also;
        ii. If YES, must analyze **Rule 412** and see if the evidence is admissible.
    3. *Character of Witness:* go to impeachment analysis (i.e. prior bad acts and **Rules 608** and **609**].
    4. *Other Crimes, Wrongs, or Acts:* is it evidence of other crimes, wrongs, or acts offered to prove the character of the person in order to show action in conformity therewith [**Rule 404(b)**]:
    a. If NO, is it evidence of specific acts to show KIPPOMIA (knowledge, intent, plan, preparation, opportunity, motive, intent, absence of mistake):
        i. If YES, admissible if reasonable jury could find the existence of the extrinsic offense [**Rule 104(b)**] and survives **Rule 403** balance.

ii. If NO, is it evidence of similar crimes, wrongs or acts offered in a case involving sexual assault?

(A) If NO, inadmissible;

(B) If YES, **Rule 413-415** analysis.

B. **Generally:** character evidence is evidence of a general human trait, such as honesty, veracity, violence, cowardice, or carefulness. It is sometimes called "propensity" evidence.

C. **Rule 404(a):** Character Evidence Generally: evidence of a person's character or trait of character is *not admissible* for the purposes of proving action in conformity therewith.

1. Although the language of Rule 404(a) applies only to criminal cases; when the central issue involved in the civil case is of a criminal nature, the defendant may invoke the exceptions in Rule 404(a) [see below] [*Perrin v. Anderson*].

D. **Rule 404(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.

1. Thus, in a criminal case ("accused") the prosecution generally cannot introduce evidence to show that the accused was is a bad person or that he has a propensity to commit the crime he is charged with.

a. A "pattern" of bad conduct is not, in and of itself, permissible either [*U.S. v. Beasely*].

b. EX: evidence D previously committed liquor law violation is not admissible to show that he violated such laws on this occasion.

D(1). **Rule 404(b):** *Exemptions:* [these are not exceptions to the general rule against admissibility, but exemptions, or permissible purposes of the use of character evidence] evidence of other crimes, wrongs, or acts, **may be** [subject to Rule 403 balance] admissible for other purposes [KIPPOMIA] such as proof of:

1. **Knowledge, Intent, or Motive:** *State of Mind:* evidence of prior crimes by the accused is admissible to show the accused's knowledge, intent, motive, scienter, etc…

a. Intent: where evidence of prior crimes is admissible bearing on intent, the present crime charged must require specific intent.

i. EX: to show the D acted with the requisite malice (homicide), deliberation, or specific intent (larceny).

b. Motive: the evidence of motive may be probative of the identity of the criminal or specific intent, however, when evidence is admitted to reflect on motive, the D must be given an opportunity to deny his commission of past crimes, or show he had no motive.

2. **Plan:** evidence of the prior criminal acts by the accused is admissible to prove the existence of a larger continuing plan, scheme, or conspiracy of which the present crime at trial is a part.

a. EX: D was charged with trafficking drugs. Evidence was offered that D had on 3 other occasions trafficked drugs by the same means (balloon up

the ass) and from the same place for money. This tends to show intention and knowledge.

3. **Preparation:** evidence of prior crimes by the accused is admissible to show the accused's preparation to commit the crime charged.

a. EX: evidence of stealing a car is admissible to show the D's preparation of facilitate the crime of robbery.

4. **Opportunity:** evidence of prior crimes by the accused is admissible to show the accused's opportunity to commit the charged crime.

a. EX: D charged with stealing from safe, evidence can be offered to show that he stole the combination.

5. **Identity:** evidence of prior crimes by the accused is admissible to establish identity. Thus, evidence that the defendant committed a previous crime is admissible if the *modus operandi* in both crimes are similar and unusual enough to indicate the same person perpetrated both.

a. The crimes must be so nearly identical in method as to earmark them as the handiwork, or signature of the defendant. Much more is demanded than the mere repeated commission of crimes of the same class, such as repeated robberies, murders, or rapes.

i. EX: D is a serial killer, and every person he killed he painted a smiley face on their belly with their own blood.

b. [*U.S. v. Carrillo*].

6. **Absence of Mistake:** evidence of prior crimes may also be admitted to show absence of mistake or accident in the commission of the present act (i.e. the D's assertion that it all was a innocent mistake).

7. Other methods of getting character evidence in addition to these exemptions:

a. to impeach the accused;

b. Rules 413-415 in sexual assault cases.

*__Note:__ this list is not exhaustive, and all character evidence is subject to the Rule 403 balance.

**Standard of Proof: the proponent is entitled to get to the jury on the issue of whether the defendant committed other crimes once it introduces enough evidence to *permit a reasonable jury to decide in its favor* (it does not have introduce enough evidence to convince the judge that the defendant was guilt of the other crimes) [*Huddleston v. US*]. *[*US v. Cunningham*].

E. **Rule 405(b):** Character in Issue: in cases (civil or criminal) 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.

1. Thus, when a person's character is a material fact that under the substantive law determines the rights and liabilities of the parties, his character is in issue, and it can be proved by specific acts.

a. EX: defamation cases (i.e. if D called P a crook, and D raises the defense of truth, P's character is in issue and evidence can be offered by either side); negligent entrustment; negligent hiring, entrapment.

2. Any of the three types of character evidence are admissible when a person's character is in issue (i.e. opinion, reputation in the community, and specific acts).

*This is another exemption from the general rule and not a specific exception listed in Rule 404(a).

F. **Rule 404(a)(1)-(3):** Exceptions to the General Rule of Inadmissibility of Character Evidence:

F(1). Character of the Accused (Criminal Cases): [**Rule 404(a)(1)**]: the prosecution is generally forbidden from initiating the admission of evidence of the bad character of the defendant merely to imply that, being a bad person, he is more likely to commit a crime. Thus, if the accused never offers evidence of good character, the prosecution ordinarily cannot inquire into such matters at all.

1. *Exception:* as a matter of fairness, the accused in a criminal prosecution may always introduce evidence of his good character to show the improbability that he committed the crime of which he was charged.
    a. Thus, when the defendant in a criminal case seeks to offer evidence of his good character to imply that he is unlikely to have committed a crime, the general rule against propensity evidence is *not* applied.
    b. This is referred to as "opening the door" and the Federal Rules only permit the defendant to open the door to his character.
    c. *Pertinent Traits:* if the defendant does open the door, he can only prove **pertinent traits** (relevant to the charges) to the crime charged.
        i. EX: one accused of theft might offer evidence of honesty, or one accused of murder might offer evidence of peacefulness; but not vice versa.
2. **Rule 405(a):** when the defendant opens the door to his character, it may be proved by:
    a. *Opinion testimony*, including expert opinions; or
    b. *Reputation testimony:* testimony as to the defendants reputation in the community where the defendant resides or his reputation within other substantial groups (such as work) were the defendant is an interacting member.
    c. BUT NOT by evidence of specific conduct.
3. *Rebuttal Testimony:* was the defendant opens the door and gives evidence as to his pertinent character traits that he is not guilty; his claim of possession of these traits—but only these traits—is open to rebuttal by cross examination or direct testimony of the prosecution's witnesses.
    1. *Scope of Cross:* the prosecution may cross-examine a witness who has testified to the accused's reputation to prove the witness's knowledge of the community opinion, not only generally, but specifically as to whether the witness **"has heard"** that the defendant has committed particular criminal acts that conflict with the reputation vouched for on direct.
    a. Likewise, if a witness gives his opinion of the defendant's character, then the prosecution can allude to pertinent bad acts by asking whether the witness knew of these matters in forming his opinion.

**[*Michelson v. US*].

***Note:** Rule 404 does not permit evidence of either party's character to be admissible to reflect on whether a party acted or did not act in a certain way on a particular occasion.

F(2). Character of the Victim (Criminal Cases): [**Rule 404(a)(2)**]: in certain cases, evidence of a pertinent character trait of the victim may be admissible show action by the victim in conformity therewith.

1.*First Aggressor Exception*: a well established exception to the rule forbidding character evidence to prove conduct applies to homicide and assault cases in which there is a dispute about who is the first aggressor.

a. Under this exception, the accused can introduce evidence of the victim's character for turbulence and violence.

i. This evidence must be directed at the victim's reputation or opinion's rather than specific facts.

b. The prosecution in rebuttal can adduce evidence that the victim was peaceful.

2. See rape cases below.

F(3). Credibility of the Witness: **[Rule 404(a)(3)]:** character evidence can be admissible to reflect on a witness's credibility or lack thereof.

1. Any witness can be impeached by a showing of either:

a. Poor reputation for truth and veracity [Rule 608]; or

b. Prior felony conviction [Rule 609].

*A party who has been impeached may also enter evidence to rehabilitate the witness [Rule 608(b)].

G. **G/R:** Evidence of Victim's Character in Criminal Rape Cases: [Rule 404(a)(2) and **Rule 412**]: Rule 412 is the federal "rape shield" law and applies only in prosecutions for sexual assault. In criminal cases, the Rule bars all reputation and opinion evidence about the victim's past sexual conduct, but permits evidence of specific incidents if certain conditions are met.

1. *Procedurally:* the proponent of the evidence must give written notice before trial and the court must conduct an in camera hearing before admitting the disfavored evidence.

2. *Substantively:* in criminal cases, Rule 412 distinguished between evidence of past sexual behavior of the victim with the accused and sexual conduct involving other individuals.

a. If the evidence pertains to past conduct **with an accused** who claims consent, it may be admitted to prove or disprove consent.

b. But if the evidence pertains to acts of the victim **with other individuals**, the defendant may *only* use it to prove someone else was the source of semen or injury [in all other instances it cannot be used].

G(1). **G/R:** Evidence of Victim's Character in Civil Sexual Assault Cases: [Rule 404(a)(2) and **Rule 412**]: the Federal Rape Shield law is weaker in civil cases than in

criminal cases, where the rule excludes all evidence of the victim's sexual character—no matter how probative—that is not within the categorical exceptions.

1. **Rule 412(b)(2):** in contrast to the criminal provision, subsection (b)(2) adopts a balancing test with the scales tilted against admission.

a. It forbids admission of any type of evidence for sexual disposition, *unless* the probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.

H. **G/R:** Sex Crimes Exception to Use of Character Evidence: [**Rules 413-415**]: Rules 413-415 create a special exception to the rule against character evidence for sex crimes cases.

1. **Rule 413:** Sexual Assault: when a criminal defendant is accused of sexual assault, the prosecution may introduce evidence that the defendant committed other such crimes to show his propensity to commit sexual assault.
2. **Rule 414:** Child Molestation: creates a comparable rule for cases in which a criminal defendant is charged with child molestation.
3. **Rule 415:** Evidence Concerning Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation: provides for the admissibility of evidence of other offenses in civil cases involving sexual assaults or child molestation.

*These rules are still subject to the **Rule 403** balance.

**These rules specifically allow for testimony about prior acts of the defendant (as opposed to only opinion and reputation testimony). Additionally, the other crimes need not be evidenced by a prior conviction; if a victim comes forward for the first time after a defendant has been accused of raping another women, her testimony will be admissible under the Rules.

§3.3: Habit Evidence

A. **Rule 406:** Habit; Routine Practice: evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of an eyewitness, 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.

A(1). Requirements for Admissibility:

1. the acts claimed to be a "habit" must be *specific and routine* (performed without deliberation); and
2. *continuous*.

B. **Generally:** courts are more receptive to evidence of personal habits or the customary practice of business organizations than they are with general character evidence.

1. Distinction: the courts distinguish between habit and character:

a. *Habit:* one's regular response to a repeated situation;

b. *Character:* a generalized description of a person's disposition, such as honesty, temperance, or peacefulness.

2. Evidence of habit have greater probative value than does evidence of general traits of character and the potential for prejudice is far less; as a result, many

jurisdictions accept the proposition that **evidence of habit is admissible to show an act**.

3. If something as a general proposition is inadmissible as character evidence, it may still admissible as evidence of habit:

a. EX: Megan is a derelict (inadmissible as character evidence); Megan goes to 3d Street Bar everyday a 6PM (admissible as habit).

*Rule 406 does not state what kind of evidence is admissible to prove habit (i.e. opinion, reputation, specific acts) but it seems all three could be used.

C. **G/R:** evidence of human habit or the routine practice of an organization is admissible to prove that on a given occasion a particular act was done in accordance with the habit or routine.

1. With organizations, proof of an established business routine is admissible as habit (e.g. letter mailing, sales receipts, safety rules, etc…).

§3.3: Similar Happenings

A. **G/R:** Similar Happenings: proof of similar happenings, such as similar acts or injuries in the past, are not governed by a specific Rule. In these situations, the evidence sought to be offered usually falls somewhere between character evidence under Rule 404 and habit evidence under 406. Thus, the judge will usually, on a case by case basis, determine admissibility under **Rules 401, 402,** and **403**.

B. **G/R:** Other Accidents and Injuries: the admissibility of other accidents and injuries is raised frequently in negligence and product liability cases.

1. The court usually require for admissibility:

a. a non-propensity purpose; and

b. a showing of sufficient similarity in the conditions giving rise to the various accidents .

2. There are generally four valid purposes for admitting evidence of other accidents and injuries:

a. to prove the existence of a particular physical condition, situation, or defect;

i. EX: the fact that several people slipped and fell on the same portion of a sidewalk to show a defect in that sidewalk [*Simon v. Kennebunkport*].

b. to help show that the defect or dangerous situation caused the injury;

i. EX: instances in which other patients are placed on the same drug in therapy contracted the same previously rare disease is circumstantial evidence that the drug caused the disease in P's case.

c. to show the risks that the defendant's or plaintiff's conduct created (this is the most common exception);

i. EX: the fact that a mechanic heated cans of refrigerant regularly (moving toward habit) against the warning labels to show that there was not a defect in a particular can and the injury was caused by the dangerous risk created by the P [*Halloran v. Va. Chemicals*].

d. to prove the defendant knew, or should have known of the danger.

C. **G/R:** Absence of Similar Happenings: the absence of similar happenings for exculpatory purposes may be admissible to show:

1. the absence of the defect or condition alleged;
2. lack of causal relationship between the injury and the defect or condition charged;
3. the non-existence of an unduly dangerous situation; or
4. want of knowledge or grounds to realize danger.
5. EX: P falls go doing D's stairs, claims they were negligently built. D offers evidence that 1000 people when down the stairs without falling.

D. Other Possible Similar Happenings: there are many examples of similar happenings that are sought to be admitted in court, the most common being:

1. Other claims, suits, or defenses of a party in litigation;
2. Other misrepresentations and frauds by the defendant;
3. other contracts and business transactions by the parities;
4. other sales of similar property as evidence (of market value).

§3.4: Subsequent Precautions

A. **Analytical Framework:** there are two questions to ask:

1. Does the evidence relate to measures *taken after* an injury or harm allegedly caused by an event that, if taken previously, would have made the injury or harm less likely to occur [**Rule 407**].
    a. If NO, then it is admissible.
    b. If YES, go to #2.
2. Is the evidence being offered for another purpose, such as proving **ownership, control, or feasibility of precautionary measures**, if these are controverted, or for impeachment?
    a. If YES, then admissible.
    b. If NO, the evidence is inadmissible to prove negligence, culpable conduct, a defect in the product or design of the product, or a need for a warning instruction.

B. **Rule 407:** Subsequent Remedial Measures: evidence that, following an injury to the plaintiff, the defendant made repairs or took other remedial measures is generally held *not admissible* to prove negligence or other culpable conduct in connection with the event.

1. There are two main reasons for this rule:
    a. the policy not to discourage safety measures; and
    b. the evidence is sometimes irrelevant.
2. Some of the common types of remedial measures excluded are:
    a. repairs and alterations in construction;
    b. installation of new safety devices;
    c. changes in rules and regulations or practice of business; and
    d. the dismissal of an employee charged with causing the injury.

3. ***Caveat:*** when the remedial measures are taken by a third person, the policy reasons for the exclusion is absent, and the evidence is not excluded.

C. **G/R:** Exceptions to the Remedial Measures Exclusionary Rule: [**Rule 407**]: for any of these exceptions to apply and the evidence is offered for one of the following purposes, the purpose must **controverted** (in dispute or denied by the D). Evidence of subsequent repairs, if controverted, may be admitted for the following purposes:

1. as evidence of defendant's *ownership or control* of the premises or *duty to repair*;
2. as evidence of the possibility or *feasibility of preventive measures*;
    a. "Feasibility" in the context of Rule 407 not only means "physically possible" but also "economically viable." [*Tuer v. McDonald*].
3. as evidence to explain that the situation at the time of the accident was different when the jury has observed the scene at a different time;
4. as evidence of what was done later to show that the earlier condition as of the time of the accident was as plaintiff claims;
5. to impeach testimony of adversaries witness; and
6. as evidence that the faulty condition later remedied was the cause of the injury by showing that after the injurious effect disappeared.

To be admitted for any these purposes, the exception still has to survive the **Rule 403 balance.

§3.5: Payment of Medical Expenses

A. **Rule 409:** Payment of Medical Expenses and Similar Expenses: evidence furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is *not* admissible to prove liability for the injury.

1. Similar policy reasons and considerations of doubtful relevancy underlie this Rule as in Rule 407.
2. *Caveat:* if the offer to pay is relevant to an issue other than liability for injury, exclusion is not required by this Rule.

§3.6: Offers to Compromise

A. **Rule 408:** Compromise and Offers to Compromise: evidence that the defendant has paid or offered to pay in a settlement of a ***disputed claim*** against him (or that the plaintiff has offered to accept a certain sum) is *not admissible* to fix liability as between the parties.

1. *Disputed Claim Requirement:* to invoke the exclusionary rule, an actual dispute must exist, preferably some negotiations, and some difference of view between the parties as to the validity or amount of the claim.
2. The policy behind the Rule is that:
    a. offers to compromise are irrelevant to liability; and
    b. promotion of settlements and discussions.

*[*Davidson v. Prince*].

B. **G/R:** Items Excluded: the offer is excluded, as well as any suggestions or overtures of settlement.

1. *Statements of Fact and Conduct:* the federal rules exclude all statements of fact and any conduct made in the course of negotiating a compromise.

B(1). Items NOT Excluded: settlement offers and statements made in connection with offers are admissible if sufficiently probative on *some issue other than liability.*

1. EX: evidence a witness settled before trial with one of the parties may indicate bias, hence, the comprise may be offered to show possible bias.

C. **G/R:** Impeachment: the use of statements made in compromise negotiations to impeach the testimony of a party is generally *not* permitted [*Davidson v. Prince* holds otherwise].

D. **G/R:** Effect of Acceptance of Offer to Compromise: if an offer to compromise is accepted and a contract is thus formed, and a party subsequently repudiates it, the aggrieved party may sue on the contract and obviously may prove offer and acceptance.

E. **G/R:** Plea Bargains in Criminal Cases: the legitimacy of settling criminal cases by negotiations between the prosecuting attorney and accused, whereby the latter pleads guilty in exchange for leniency, has generally been recognized [*see* Rule 410, below].

F. **Rule 410:** Inadmissibility of Pleas, Plea Discussions, and Related Statements: excludes form civil and criminal cases evidence against the defendant who made the pleas or participated **in the course** of plea discussions **with a prosecutor** (not law enforcement officers):

1. guilty pleas that were later withdrawn;
2. nolo contendere pleas;
3. statements made in the course of entering the plea under Fed. R. Crim. Pro. 11; and
4. statements made in the course of plea discussions with a prosecuting attorney which did not result in a plea of guilty or which pleas was later withdrawn.
5. **Caveat:** the Rule allows such statements to be admitted for completeness and in some instances for prosecutions for perjury regarding such statements.
    1. While the Rule permits use of statements made as part of plea negotiations for certain limited purposes, **impeachment** of the defendant's subsequent testimony is not one of them.

*__NOTE:__ the Supreme Court has held that this Rule can be waived [*U.S. v. Mezzanatto*].

*__Also Note:__ the statement is only excluded if it was made "__in the course"__ of plea discussions, the courts use a two part test for determining if a statement was made in the course of plea negotiations:

1. did the defendant make the admission with an actual expectation that he was in the process of negotiating a plea bargain; and
2. if so, was that expectation reasonable given the totality of the circumstances.

*__Note Also:__ once the guilty plea is entered it constitutes an admission and can be used in subsequent actions under **Rule 609** to attack the witness's credibility.

§3.7: Insurance Against Liability

A. **Rule 411:** Liability Insurance: evidence that a person was or was not insured against liability is *not admissible* upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another person, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

1. *Policy:* the policy for the Rule is that:
    a. evidence of liability insurance is irrelevant to fault; and
    b. it is highly prejudicial (the jury may increase or decrease the verdict taking into consideration insurance).

B. **G/R:** Exceptions to the Rule: there are situations where evidence that the defendant carried liability insurance are admissible; however, in each of these situations the evidence of the insurance is admitted for some reason other than *to prove the defendant liable*:

1. *proof of ownership*: terms of insurance may be held admissible if there is a dispute as to ownership or *control* of the vehicle involved in an accident;
2. *proof of agency*: terms of insurance may be held admissible if there is a dispute as to agency or employment of the person covered by the policy;
3. *proof of bias:* the existence of insurance coverage may also be brought out on cross examination of a witness for possible bias;
4. *prejudice of a witness:* insurance is frequently mentioned on voir dire examination of jurors to determine if any may be prejudiced by reason of relationship or previous dealing with an insurance carrier.

§4: CROSS-EXAMINATION, IMPEACHMENT, AND REHABILITATION

§4.1: Form of the Question on Direct and Cross-Examination

A. **Rule 611(a):** the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence as to

(1) make the interrogation and presentation effective for the ascertainment of the truth;
(2) to avoid needless consumption of time; and
(3) protect the witness's from harassment or undue embarrassment.

B. **G/R:** Leading Questions: a leading question is one that suggests to the witness the answer desired by the examiner. The general standard for leading questions is that: upon objection, the judge ordinarily forbids leading questions on direct examination but usually permits them on cross examination.

1. **Rule 611(c):** preserves the common law objections to leading questions and states that leading questions ordinarily should not be used on direct examination.

C. **G/R:** Argumentative, Misleading, and Indefinite Questions: [**Rules 611(a); 403**] objections as to argumentative, misleading, or indefinite questions are not specifically provided for in the FRE; however, they are enforced pursuant to the judges discretion under Rule 611(a) and Rule 403.

1. *Argumentative Questions:* examiner challenges a witness about an inference from the testimony already in the record.
2. *Misleading:* examiner assumes facts not in evidence and assumes as true matter which the witness has not testified, and which are disputed between the parties.
3. *Indefinite:* examiner asks a question which is too broad, or irrelevant.

D. **Rule 614(b):** the judge may call and examine witnesses under case law and Rule 614(b) to clarify testimony or bring out needed facts which have not been elicited by the parties. This power is used sparingly.

1. In federal court, a judge also has the power to comment on the evidence, but he must be careful not to assume the role of advocate or prosecutor.

§4.2: The Right to, and Scope of, Cross Examination

A. **G/R:** Constitutional Right to Cross-Examination: the right of confrontation secured by the 6th Amendment guarantees the right to cross-examination in criminal proceedings. This right has been extended, in effect, to civil cases.

B. **G/R:** Denial of Cross-Examination: generally the effect the depravation of the right to cross-examination results in having the direct testimony stricken from the record.

C. **G/R:** Scope of Cross-Examination: [**Rule 611(b)**]: the federal rules limit the scope of cross examination to matters testified on direct examination. The federal courts have interpreted this provision liberally, thus, the standard is:

1. the cross-examination is limited to matters "opened" on direct and facts tending to explain, contradict, or discredit the direct testimony and in some instances facts tending to rebut any inference or deduction from the matters testified on direct.

C(1). **G/R:** Impeaching Credibility: [**Rule 611(b)**] the scope of cross examination "should be limited to … matters affecting the credibility of witnesses." This clause in the Rule means that cross examination to impeach is **not** limited to matters brought out on direct examination.

1. By the simple act of testifying, the witness places her credibility in issue. For that reason, the witness's credibility is fair game on cross examination.
    a. **Test for Relevancy when Attacking Credibility:** because the examiner is not attacking the historic merits of the case when attacking a witness's credibility, the standard of relevancy changes; hence, the test for relevancy is whether the examination aids the trier of fact in appraising the witness's credibility and assessing the probative value of the direct testimony.

D. **G/R:** Rule of Completeness: where a witness on direct, has testified to *part* of an event or conversation, or has introduced party of a writing or document, it is proper on cross-examination to inquire into any *other* party thereof necessary to make understandable the part already introduced.

§4.3: Redirect and Subsequent Examinations

A. **G/R:** one who calls a witness is normally required to elicit on the witness's first direct examination all that he wishes to prove by him. This norm of proving everything so far as feasible at the first opportunity is in the interest of fairness and expedition.

B. **G/R:** Redirect and Subsequent Examinations: the general rule is that the party's examination is typically limited to answering any new matter drawn out in the adversary's immediately preceding examination.

1. **Rule 611(a)** gives the judge discretion over the scope of redirect; however, to reply to new matter drawn out on cross-examination is the customary function of the redirect examination.
2. The re-examiner of invokes the "rule of completeness" permitting proof of the remainder of the transaction, conversation, or writing when part has been proven by the adversary so far as the remainder relates to the same matter.

§4.4: Impeachment

I. Overview: Stages of Impeachment and Modes of Attack

A. **G/R:** Credibility Rules: there are three groups of credibility rules:

1. attempts by a witness's proponent to bolster the witness's credibility even before it has been impeached;
2. the various techniques which the opponent may employ to attack or impeach the witness's credibility; and
3. the methods which the witness's proponent can use to rehabilitate the witness's credibility after it has been impeached (see §4.5).

B. **G/R:** Bolstering Evidence: the general norm under the federal rules is that the witness's proponent may **not** bolster the witness's credibility before any attempted impeachment and bolstering evidence is generally held inadmissible.

C. **G/R:** Impeachment: the federal rules liberally admit impeaching evidence. There are five main modes of attack upon a witness's credibility:

1. *Self-Contradiction by Prior Inconsistent Statements:* proof that the witness on a previous occasion has made statements inconsistent with the present testimony.
2. *Character of the Witness:* an attack on the witness's character through evidence of prior bad acts and convictions.
3. *Specific Contradiction:* proof by other witness's that material facts otherwise testified to by the witness's are inconsistent.

4. *Partiality and Bias:* showing the witness is bias on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest, whether legitimate or corrupt.
5. *Witness Defect:* an attack showing a defect of the witness's capacity to observe, remember, or recount matters testified about.

D. **G/R:** Process of Impeachment: the process of impeachment may proceed in two different stages:

1. *Intrinsic Impeachment:* the facts discrediting the witness or his testimony may be elicited from the witness himself on cross examination through a good faith basis of inquiry.
    a. In some instances, the examiner will be required to "take the witness's answer."
2. *Extrinsic Impeachment:* in other instances, the facts discrediting the witness may be proved by extrinsic evidence; the assailant waits until the time for putting on his own case in rebuttal, and then proves by a second witness or documentary evidence, the facts discrediting the testimony of the witness attacked.

II. Impeachment by Prior Inconsistent Statement

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

1. This rule abolishes the common law rule which forbade a party from impeaching his own witness and permits it.

A(1). **G/R:** Doctrine of Mere Subterfuge: a criminal prosecutor may not employ a prior inconsistent statement to impeach a witness as a mere subterfuge or for the primary purpose of placing before the jury substantive evidence otherwise inadmissible [*U.S. v. Hogan*].

B. **G/R:** the most widely used impeachment technique is proof that the witness made a pretrial statement inconsistent with her trial testimony, this certainly holds true in civil cases where depositions are commonplace.

C. **G/R:** Substantive Use of Prior Inconsistent Statements: when a witness testifies to facts material in the case, the opponent may have available proof that the witness previously made statements inconsistent with his present testimony.

1. Under the modern rule of hearsay, some or all such previous statements are exempt from the rule and admissible as substantive evidence, if the prior inconsistent statement was made under oath subject to the penalty of perjury at trial, hearing, or deposition [**Rule 801(d)(1)(A)**].
2. However, if no exemption or exception to the hearsay rule applies, these previous statements will often be inadmissible for the truth of the matter asserted therein; however, the may be **admissible for the limited purpose of impeaching the witness**, with a limiting instruction.

*This section only deals with those situations.

D. **G/R:** Inconsistency: before a witness's prior statement can be admitted, it must in fact be ***inconsistent*** with the witness's prior testimony at trial.

1. Degree of Inconsistency Required: under the majority rule, an *material variance* between the testimony and the previous statement suffices as an inconsistent statement.

a. **Test:** could a reasonable jury find that a witness who believed the truth of the facts testified to would have been unlikely to make a prior statement of this tenor.

E. **G/R:** Form of Impeachment Statement: the majority rule is that if there is a substantial inconsistency or material variance, the form the impeaching statement is immaterial, even if in opinion form.

F. **G/R:** Extrinsic Evidence of a Prior Inconsistent Statement: impeachment by prior inconsistent statement is limited to intrinsic impeachment on credibility issues; hence, extrinsic evidence (calling another witness) for impeachment by inconsistent statements is restricted for reasons of time and judicial economy.

1. The rule that one cannot contradict collateral matters applies (i.e. examiner must take the witness's answer).

2. Thus, to impeach by extrinsic proof of prior inconsistent statements, the statements must have as their subject facts relevant to the historical merits of the case.

G. **G/R:** Foundational Requirements for Proof by Extrinsic Evidence: [**Rule 613**] the only requirements for introducing a witness's prior inconsistent statement (oral or written) is that:

1. the statements shall be shown to opposing counsel upon request; and

2. at some point—even after the introduction of the extrinsic evidence—the witness is afforded a chance to deny or explain the inconsistent statement, and opposing counsel shall have the opportunity to question the witness about it.

a. This requirement can be dispensed with "in the interests of justice."

H. **G/R:** Impeaching a Hearsay Declarant: [**Rule 806**]: when a hearsay statement is introduced, often the declarant does not testify, however, the declarant's credibility determines the value that should be accorded the statement.

1. When a hearsay statement, or a statement defined in Rule 802(d)(2)(C)-(E) has been admitted in evidence, **the credibility of the declarant may be attacked**, and if attacked *may be supported* by any evidence [rehabilitation] would be admissible for those purposes if the declarant had testified as a witness.

a. Evidence of a prior inconsistent statement by the declarant is not subject to the requirement that the declarant be afforded an opportunity to deny or explain.

2. The Rule effectively treats the hearsay declarant as a witness for impeachment purposes.

a. The declarant may be impeached by any of the other means of impeachment also.

III. Impeaching the Character of a Witness

A. **Generally:** a witness, party or non-party, who takes the stand puts his character for truth and veracity in issue; therefore, they may be impeached by evidence that their character is such that they may lie under oath. There are three main ways of impeaching a witness's character:

1. Prior convictions;
2. Prior bad acts; and
3. Proof of bad reputation for truthfulness.

B. **Rule 609:** Impeachment by Evidence of Conviction of Crime: the types of convictions usable for impeachment are:

1. **Rule 609(a)(2)**: Crimes of Dishonesty or False Statement: crimes involving "dishonesty or false statement" regardless of the punishment or against whom used, are ***per se admissible,*** and do not require a Rule 403 balancing (i.e. the judge cannot exclude if he thinks it is too prejudicial).

a. *Definition:* crimes of dishonesty or false statement mean such crimes as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

i. Crimes involving solely the use of force, such as assault and battery, and crimes such as drunkenness and prostitution do not involve dishonesty and false statement while the crime of fraud does.

ii. The advisory committee admonished courts who read the term too broadly to include crimes of theft, which are not covered anymore [*U.S. v. Brackeen*]. .

*[*U.S. v. Wong*].

2. **Rule 609(a)(1):** Felonies: felony grade crimes (punishable by death or more than a year) may be admitted, if the court determines that the probative values of the conviction outweighs its prejudicial effect to the defendant (Rule 403 balance). In other words, these are admitted within the direction of the judge.

a. The court will usually consider five-factors in determining whether to exclude a prior conviction under Rule 609(a)(1):

i. the impeachment value of the prior crime;

ii. the point in time of the conviction and the witness's subsequent history;

iii. the similarity between the past crime and the crime charged;

(A) if the past conviction is similar to the crime charged, it is highly prejudicial and should be excluded under the balancing test [*US. v. Sanders*].

iv. the importance of the defendant's testimony; and

v. the centrality of the credibility issue.

*[*US v. Sloman*].

3. **Rule 609(a)(1):** Misdemeanors: if the crime is a misdemeanor (punishable by less than a year), and does not involve a false statement or dishonesty, the convict is ***per se inadmissible,*** and the judge is required to exclude it.

B(1). Defendant Testimony: the most prejudicial impact of impeachment by conviction is when the criminal accused with a past criminal record takes the stand, thus, Rule 609, permits the introduction of the defendant's prior convictions in the discretion of the judge, who is to balance ***in each instance*** the possible prejudice against the probative value of the testimony.

B(2). **Rule 609(b):** Time Limit: convictions are considered presumptively remote and inadmissible when more than 10-years has elapsed since the conviction.

B(2). **G/R:** convictions in any state or federal court may be used to impeach the witness. The trend is to hold that a conviction is sufficiently final as soon as the guilty verdict is entered even if the sentence has not yet been imposed.

B(3). **G/R:** Appeals: the pendency of an appeal does not preclude use of the conviction [**Rule 609(e)**].

B(4). **G/R:** Pardons: a pardon bars the use of the conviction ***if*** the pardon was based on a finding of innocence or based on a finding of rehabilitation and the person has not been convicted of another felony [**Rule 609(c)**].

C. **Rule 608(b):** Specific Instances of Conduct [Prior Bad Acts]: various acts that are not crimes may nonetheless reflect on a witness's veracity (e.g. whether a witness has defrauded others, cheats, lies, etc…). Rule 608(b) allows cross-examination on these prior bad acts if it is clearly probative of veracity and does not involve an unreasonable risk of prejudice, confusion of the issues, or waste of time [Rule 403 balance].

1. These acts may be proved only by intrinsic impeachment methods; extrinsic impeachment is **not permitted**, hence, the examiner will be bound by the witness's answers.

D. **Rule 608(a):** Opinion and Reputation Evidence of Character: the federal rules permit *any* witness to be impeached by showing she has a poor reputation in the community for truthfulness, and this can be done by opinion testimony as well.

1. Reputation: there are three requirements courts impose on reputation testimony:

a. *Temporal Element:* courts permit the reputation witness to testify about the person seeking to be impeached present reputation as of the time of trial, if he knows it, and any other reputation before trial if the judge finds that it is not too remote;

b. *Place Element:* as to the place of reputation the traditional inquiry is as to the general reputation for veracity in the community where he lives or in any substantial group of people among whom he is well known, such as, the persons with whom he works or goes to school.

c. *Firsthand Knowledge:* a lay person's opinion as to the person being impeached reputation should rest on some firsthand knowledge pursuant to Rule 602, so that the opinion can be based on rational perception and of aid to the jury as required by Rule 701.

2. Opinion: the Rules allow the subject witness's credibility to be attacked by lay opinion, however, the opinion must be based on the witness's firsthand knowledge of the subject witness.

a. *Expert Opinion:* some cases allow expert opinions on the subject of character reputation, usually be a psychiatrist, that certain kinds of people are more prone to be untruthful (e.g. alcoholics, drug users, or mental illness).

*[*U.S. v. Lindstrom*].

IV. Impeachment by Specific Contradiction

A. **Generally:** specific contradiction is impeachment by use of extrinsic evidence.

1. EX: Witness #1 testifies that on a certain day he wearing a sweater and it was snowing. His testimony can be contradicted by:

a. the witness admitting on direct that he was in error;

b. by taking judicial notice that at the time and place it could not have been snowing; or

c. most commonly by calling witness #2 to testify that the day was warm and Witness #1 was wearing a T-shirt.

2. The value of specific contradiction is that it tends to show that Witness #1 has erred about or falsified certain facts, and therefore is capable of lying or error.

B. **G/R:** Collateral Facts Doctrine: the trial judge in his discretion may limit the use of extrinsic evidence of issues that are collateral to the historical merits under Rule 403.

1. *Collateral Facts:* a matter is collateral if the matter itself is irrelevant in the litigation to establish fact of consequence, i.e., irrelevant for a purpose other than mere contradiction of a prior witness's in court testimony.

a. When a collateral fact is sought to be contradicted is elicited on cross-examination, the examiner must take the witness's answer (i.e. cannot introduce extrinsic evidence to disprove the fact asserted).

*[*State v. Oswalt*].

C. **G/R:** Specific Contradiction: the federal rules do not explicitly address specific contradiction (similarly bias is not mentioned); however, federal courts continue to use this impeachment technique.

1. The judge may exercise his discretion under **Rule 403** to limit specific contradiction impeachment under the collateral fact doctrine; however, when it is logically relevant, specific contraction evidence is presumptively admissible under **Rule 402.**

a. Thus, when the matter is deemed collateral, the examiner is limited to intrinsic impeachment; and

i. This does not mean the examiner must take the witness's first answer, he can probe the witness's recollection, rephrase question, and only at the end of the examination must he take the answers elicited.
b. when the matter is not collateral, the examiner may use extrinsic impeachment methods.

D. **G/R:** Impeachment Techniques Subject to the Collateral Fact Rule: most impeachment techniques are exempt from the collateral fact doctrine; however, three methods are clearly subject to the doctrine, as applied by federal courts:

1. *Prior Bad Acts:* proof the witness has committed an untruthful act which has not resulted in a conviction;
   a. in the case of prior bad act which has not resulted in a conviction, extrinsic evidence is **always** deemed collateral, with one exception:
   i. exception: when the witness "opens the door" to the specific act on direct.
2. *Inconsistent Pretrial Statements:* proof that the witness made inconsistent statement before trial; and
3. *Specific Contradiction*.
   a. With specific contradiction and prior inconsistent statements, when a matter is collateral is more complex and sometimes matters are deemed collateral and sometimes non-collateral:
   i. **Test:** there are two ways in which extrinsic impeaching evidence can be deemed non-collateral:
      (A) the matter is non-collateral and extrinsic evidence is admissible if the matter is relevant to a fact or consequence of the historical merits of the case; or
      (B) when the matter relates to a linchpin fact (a fact negating the assumption that the witness was in the right place at the right time to observe what he testified to).

V. Impeachment by Bias or Partiality

A. **G/R:** Bias: a witness's credibility may be attacked and impeached by showing that the witness was biased, hostile, or has some interest in the outcome of the litigation.

1. "Bias" is a term used to describe the relationship between the a party and witness which might leas the witness to slant, unconsciously or otherwise, his testimony if favor of the party.
2. Although not specifically recognized by the Federal Rules, the Supreme Court has held it is a permissible method of impeachment under **Rule 402** because it is logically relevant to a fact of consequence and is admissible unless there is an basis for exclusion.
*[*U.S. v. Abel*].

B. **G/R:** Kinds and Sources of Bias: the most common types of bias are:

1. *Favor:* or friendly feelings toward a party, which may be evidenced by a family or business relationship, employment by the party, sexual relationships, shared

membership in an organization, or the witness's conduct and expressions evidencing such a feeling.

2. *Hostility:* toward a party may be evidenced by the fact the witness has had a fight or quarrel with him, has a lawsuit pending against him, has contributed to the defense, or employed special counsel to aid in prosecuting the party.

3. *Self-Interest:* the witness's self interest is manifest when he is himself a party or a surety on a debt sued upon, similarly it may be shown that he is being paid by a party to give evidence, even though payment in excess of regular witness fees may as in the case of an expert be entirely lawful.

a. It may also be evidence in a criminal case when the witness testifies for the state and indictment is pending against him and has been promised leniency.

b. Self interest in a extreme form may be manifest in the witness's corrupt activity, such taking or offering bribes to testify falsely.

C. **G/R:** Proving Bias: the bias or adverse interest of a witness can be proved by cross-examination or introducing extrinsic evidence.

1. The Federal Rules are silent on how bias is proved, however, **Rule 611(a)** gives the judge the discretion to allow extrinsic evidence to prove bias.

2. *Foundation:* most court require that before a witness can be impeached by extrinsic evidence of bias, the cross-examiner must first ask about the facts that indicate such bias, hostility or adverse interest. Then if the witness denies bias or adverse interest, extrinsic evidence may be permitted in the judge's discretion.

VI. Impeachment by Showing Defect in the Witness

A. **G/R:** Sensory Deficiencies: any deficiency of the senses, such as deafness or colorblindness, which would substantially less the ability of the witness to perceive facts which the witness purports to have observed, ought to be provable to attack the witness's credibility, either upon cross examination or by producing other witness's to prove the defect.

B. **G/R:** Mental Deficiencies: as to the mental qualities of intelligence and memory, a distinction must be made between attacks on competency and attacks on credibility.

1. Sanity, in a general sense, is not longer a test of competency, and an insane person is generally permitted to testify if he is able to report correctly the matters to which he testifies and understands the duty to speak the truth.

2. **Rule 601** precludes the trial judge from treating insane persons automatically incompetent to testify although a prospective witness could be treated as incompetent if he did not have the capacity to remember, recall, or understand the duty to tell the truth.

3. To impeach the credibility of the witness, however, is generally in the trial judge's discretion.

a. Federal courts generally exclude evidence of the witness's past psychiatric testimony, and only allowing it in to impeach credibility in exceptional circumstances.

§4.5: Rehabilitation

A. **G/R:** Rehabilitation: the two most common types of rehabilitation are: (a) introduction of supportive evidence of good character of the witness attacked and (b) proof the witness's consistent statements.

1. **Test:** the general test for admissibility of rehabilitative evidence is whether the evidence of the witness's good character or consistent statements is logically relevant to explain the impeaching fact.

a. The rehabilitating facts must meet the impeachment with relative directness.

2. The courts demand that the rehabilitation be **a response in kind to the impeachment**.

a. If the rehabilitative evidence does not meet the attack it should be excluded as irrelevant under Rule 403.

B. **G/R:** Rehabilitating a Prior Inconsistent Statement: there are several ways to rehabilitate a prior inconsistent statement:

1. *Witness Explanation:* if the witness has made a prior inconsistent statement, he will be given an opportunity to explain the reasons for the statement. The party impeaching by prior inconsistent statement *must* make sure the witness is given an opportunity to "explain or deny' the statement (i.e. the impeaching party cannot decide to keep the statement a secret until the witness is unavailable and then introduce it [**Rule 613(b)**].

2. *Evidence of Character for Truthfulness:* perhaps a small majority of courts allow permit a showing of the witness character for truthfulness after he has been impeached by prior inconsistent statements.

a. Caveat: however, if the adversary has merely introduced evidence denying the fact to which the witness testified, the greater majority of courts forbid a showing of the witness's good character for truthfulness.

3. *Evidence of Prior Consistent Statements:* there is a division of authority on whether impeachment by inconsistent statements opens the door to support by consistent statements:

a. A majority of courts hold that since the inconsistency remains despite the consistent statement that it a prior consistent statement is inadmissible.

b. A small minority of courts hold generally that it is permissible.

**In federal courts, this is probably a determination under Rule 403.

C. **G/R:** Rehabilitating Character Impeachment: there are a few ways to rehabilitate an attack on the witness's character:

1. **Note:** when the attack takes the form of character impeachment by showing misconduct, convictions, or bad reputation, there is no justification for rehabilitation by prior consistent statements.

2. *Prior Bad Acts:* [Rule 608(b)] if the witness is impeached by showing a prior bad act which did not result in a conviction, the witness is always entitled to

explain the conduct, but extrinsic evidence is inadmissible to explain or justify such conduct.

3. *Prior Felony Conviction:* [Rule 609(a)]: if the witness was impeached by showing a prior conviction, he generally is not allowed more than a brief explanation, though even this is discretionary in trial judge under Rule 403.

4. *Impeachment by Reputation, Opinion of Witness's Character:* if the impeachment attack was by evidence of bad reputation, bad opinion of character for truthfulness, prior bad acts (some courts), or conviction (some courts) then the party may offer character support because evidence of good character for truth is a logically relevant response in kind to these modes of impeachment.

D. **G/R:** Rehabilitating Bias Impeachment: a witness's conduct showing bias is generally treated as an attack on veracity and character and thus warrant character support.

1. *Prior Consistent Statements:* when a witness has been impeached with evidence of bias or interest, prior consistent statements, are admissible to rehabilitate the witness only if they were made *prior to the time that the bias or interest arose*.

a. Temporal Priority Doctrine: at common law, if the attacker charged bias, interest, or corrupt influence, the prior inconsistent statement is deemed irrelevant to refute the charge unless the consistent statement was made **before** the source of bias, interest, or influence.

b. The Supreme Court held that Rule 801(d)(1)(B), governing the admission of prior consistent statements as substantive evidence, incorporates the temporal priority doctrine [*Tome v. US*].

c. In other words, a prior inconsistent statement to rehabilitate a witness charged with bias has a timing requirement and only admits prior consistent statements if those statements are made *before the charged recent fabrication or improper influence or motive.*

§4.6: Beliefs Concerning Religion

A. **Rule 610:** Religious Beliefs or Opinions: evidence of beliefs or opinions of a witness on matter of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.

1. *Caveat:* this prohibition is not absolute, in some instances, evidence of the witness's religion will be admissible on alternative theory of logical relevance:

a. EX: disclosure of affiliation with a church, which is a party to the litigation, would be allowable since it could bear on the witness's bias.

§4.7: Exclusion and Separation of Witnesses

A. **Generally:** there are steps a judge can take to help ensure credible testimony. Judicial exclusion and separation orders are illustrative.

1. If a witness hears the testimony of others before he takes the stand, it will be much easier for him to fabricate his own testimony to that of the other witnesses.

B. **Rule 615:** treats the exclusion of witnesses as a matter of right: "At the request of any party the court shall order witnesses excluded."

1. The court is also empowered to order exclusion on its own motion.
2. Not all witnesses can be excluded such a parties and experts generally.

§5: CONFIDENTIALITY AND CONFIDENTIAL COMMUNICATIONS

§5.1: Overview

A. **G/R:** Privilege: a privilege is a rule of law that, to protect confidential communications and a particular relationship or interest, either permits a witness to refrain from giving testimony he otherwise would be compelled to give, or permits someone, usually one of the parties, to prevent the witness from revealing certain information.

B. **Rule 501:** General Rule: [Privileges]: Except as otherwise required by the Constitution of the United States or proved by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, state, or political subdivision thereof, shall ***be governed by the principles of common law as they may interpreted in 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.*

B(1). **Generally:** [Deleted Rule 505]: federal courts, interpreting principles of common law in light of reason and experience, often look to the deleted Rule 505 as an indicator of whether a privilege which has not been recognized, should be recognized [*see Jaffee v. Redman*]. Hence, it is helpful, if there is unrecognized privilege on the examine, which is one of the following to use this as evidence of "reason and experience." The deleted privileges were:

1. required reports;
2. attorney-client;
3. husband-wife;
4. psychotherapist-patient;
5. clergyman-communicant;
6. political vote;
7. trade secrets;
8. secrets of the state and other official information; and
9. identity of a informer.

B(2). **G/R:** Federal Question and Diversity Actions: in federal question cases federal courts apply the federal common law of privileges as interpreted in light of reason and experience and may use the Rules promulgated by the Supreme Court (and rejected by Congress) as indicators.

1. *Diversity Actions:* a federal court will probably not enforce a privilege which is not recognized by the applicable state law.

a. Federal courts generally follow the *Klaxon v. Sentor* rule and look to the state choice of law rules in determining what state's privilege to apply.

C. **G/R:** Assertion of Privilege: a privilege must be asserted to be effective, if not asserted, it will be deemed to be waived.

1. The party testifying, the holder of the privilege, must assert the privilege for it to be effective.

2. *Caveat:* a privilege may also be asserted by a person authorized to do so on behalf of the holder.

a. EX: if the holder is legally incompetent her guardian may assert or waive the privilege.

D. **G/R:** Confidentiality: where a communication is claimed to be privileged, it must always be shown that it was made in confidence.

E. **G/R:** Effect of Claiming a Privilege: an unfavorable inference or argument made by opposing counsel, or the judge, against a party for invoking a privilege cannot be made or drawn [*California v. Griffin*].

G. **G/R:** Waiver: there are several types of waiver of privileges that are generally applicable to all privileges:

1. *Failure to Object:* privileges are deemed waived if not raised by appropriate and timely objection when the testimony is fist offered.

2. *Consent:* a person entitled to claim a privilege can waive it by consent.

3. *Failure to Claim the Privilege:* where the holder has standing to opportunity to claim the privilege, or voluntarily discloses the privileged information, or contractually waives the privilege, it may not be asserted.

H. **G/R:** Eavesdroppers: a significant number of modern cases and statutes assert that so long as the holder of the privilege was not **negligent** (i.e. had no reasonable basis to believe the communication would be overheard) there is no waiver of the privilege and hence the eavesdropper is not permitted to testify.

1. *Interception:* a privilege only operates to preclude testimonies by parties to a confidential relationship; accordingly, most modern decisions do no more than hold that a privilege will not protect communications made under circumstances in which interception was reasonable anticipated.

I. **G/R:** Appeals: the prevailing view is that only the *holder* of the privilege—whose confidences have been violated—has a right to complain where disclosure of the confidential information matter was compelled erroneously or made without an opportunity to claim the privilege.

1. If a claim of privilege is by an person is erroneously sustained (i.e. excluding the evidence) the losing party may always base an appeal on that ground.

J. **G/R:** Constitutional Limitations on Privilege: in *criminal cases*, a claim of privilege may be denied if its exercise would deprive the accused right to confrontation of the witnesses or to a fair trial.

§5.2: Attorney-Client Privilege

A. **G/R:** Elements of the Attorney-Client Privilege: the privilege only applies if:

1. *Client:* the asserted holder of the privilege is or sought to become a client;
2. *Lawyer:* the person to whom the communication was made:
    a. is a member of the bar of a court or his subordinate, and
    b. in connection with this communication is acting as a lawyer.
3. *Communication:* the communication relates to a fact of which his attorney was informed:
    a. by his client;
    b. without the presence of strangers;
    c. for the purposes of securing primarily either:
    i. an opinion of law; or
    ii. legal services; or
    iii. assistance is some legal proceeding; and *not*
    iv. for the purposes of committing a crime or tort.
4. *Privileged Claimed:* the privilege has been:
    a. claimed; and
    b. not waived by the client.

*[*US v. Woodruff*].

A(1). **G/R:** Client: there must have been a client who directly or through a representative consulted the lawyer for the purpose of securing legal advice. The client may be a natural person, corporation, association, or public or private entity.

A(1.1). **G/R:** Corporate Clients: the Supreme Court has recognized that the attorney-client relationship applies to corporations; and hence, the attorney-client privilege applies to corporate clients.

1. *Subject Matter Test:* communications with a corporate client will only be protected if:
    a. it is a communication for an express purpose of securing legal advice for the corporation;
    b. it relates to specific corporate duties of the communicating employee; and
    c. it is treated as confidential within the corporation itself.
2. This privilege extends to any corporate officials or employees made to counseling attorney's as long as the officials or employees are *authorized* or *directed* by the corporation to make such communications.

*[*Upjohn v. US*].

A(2). **G/R:** Attorney: the second element is that the communication must have been to an attorney (i.e. member of the bar) or his subordinate (secretary, law clerk, etc…) for transmission to the lawyer.

A(3). **G/R:** Communication: the communication must have been to attorney in his legal capacity for the purposes of securing legal advice, opinions, or services. Thus, it would not attach to business or accounting advice, even if given by a lawyer.

1. The communication must have been from the client to the attorney.
2. However, the modern justification for the privilege, namely, encouraging *full and frank disclosure of information* by the client in furtherance of administration of justice, might suggest that the privilege is only one way, operating to protect communications from the client to the lawyer, but not vice versa.
    a. Nonetheless, it is generally held that the privilege will protect at least those attorney to client communications which would have a tendency to reveal confidences of the client.
3. *Observations and Communicative Intent:* most authority hold that observations by the lawyer which might be made by anyone, and which involve no communicative intent are not protected (i.e. observations of the client's mental or physical condition).
    a. Conversely, testimony relating to intentionally communicative acts of the client would be protected as recounting the same information that could be spoken (i.e. client rolls up sleeve to show scar or opens desk drawer to show revolver).
4. *Tangible Property:* if the client delivers tangible evidence to the attorney, such as stolen property or confides facts that would allow the attorney to come into possession of such items, most courts hold that the privilege should not operate to bar the attorney's disclosure of circumstances of acquisition, since to preclude the attorney's testimony would offer the client a way of to divest of evidence.
5. *Writings:* where a document is prepared by the client for *the purpose of giving an attorney* information that document will be privileged.
    1. *Pre-existing documents*: preexisting writings such as deeds, wills, books, or records are not privileged because they do not involve communications between the attorney and client. Two notions come into play:
    a. the client may make communications about the document by words or by acts, such as sending the document to the lawyer for perusal or handing it to him and calling attention to certain terms; these communications and knowledge of the terms that the lawyer thereby gains will be privileged;
    b. if a document would be subject to an order for production if it were in the ands of the client, it will be equally subject to such an order if it is in the hands of an attorney.
6. *Confidentiality:* the communication must have been outside the presence of strangers and have been of a type *reasonably expected* to be kept secret.

**If the client then claims the privilege in court, and these elements have been satisfied the privilege should attach.

B. **G/R:** Fact of Employment and Identity of Client: the general rule denies the privilege for the fact of consultation or employment, including the component facts of identity of the client, such as identifying facts about him such as address, occupation, the identity of the lawyer and the payment of fees.

1. Similarly, factual communications by the lawyer to the client concerning logistical matters, such as trial dates are not privileged.
*[*US v. Woodruff*].

C. **G/R:** Presence of Third Persons: whenever matters communicated to an attorney are intended to be made public or revealed to, or in the presence of, third persons, the obvious element of confidentiality is wanting and no privilege attaches.

D. **G/R:** Joint Consultation: when two or more persons, each having an interest in some problem or situation, jointly consult an attorney, their confidential communications with the attorney, though known to each other, will be privileged.

1. *Caveat:* if the joint clients sue each other, the privilege is inapplicable because the communications between themselves were not intended to be confidential.

E. **G/R:** Attorney-Client Disputes: when the client and attorney become embroiled in a controversy between themselves, as in action by the attorney for fees, or by the client for malpractice, the privilege cannot be asserted.

F. **G/R:** Waiver: since it is the client is the holder of the privilege, the power to waive it is his, and he alone, or his attorney or agent acting with his authority, or his representative may exercise the power to waive.

1. In the case of a corporation, the power to claim or waive the privilege generally rests with the corporate management, i.e. the board of directors.

G. **G/R:** Inadvertent Disclosure: most courts today do not adhere to the strict approach of waiver, and when an inadvertent disclosure occurs, consider such factors as:

1. the excusability of the error;
2. whether prompt attempt to remedy the error was made;
3. and whether preservation of the privilege will occasion unfairness to the opponent.

H. **G/R:** Taking the Stand: the prevailing view is that the mere voluntarily taking the stand by the client as a witness in a suit to which he is party and testifying to facts which where subject of consultation with his counsel is no waiver of privilege for secrecy of the communications to his lawyer.

1. It is the communications which are privileged and not the facts.
2. If on direct examination, however, the client testifies to the privileged communications, in part, this is a waiver as to the remainder of the privileged consultation about the same subject.

I. **G/R:** Death of the Client: the accepted theory is that the protection afforded by the privilege will in general survive the death of the client [***Swidler & Berlin v. US***].

1. Exceptions: the Court acknowledged the existence of exceptions to the privilege both in instances of where the communications are in furtherance of a crime or fraud, and in cases involving the validity of interpretations of a will or other dispute by the parties claiming by succession from the testator at his death.

J. **G/R: G/R:** Crime/Fraud Exception: advice given to aid a person in carrying out an illegal or fraudulent scheme is not a professional service, but rather participation in a conspiracy; accordingly, it is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a ***future*** **intended crime or fraud**. [*Clark v. State*].

J(1). **G/R:** Procedure and Standard for Determining the Crime/Fraud Exception: [***US v. Zolin***]: the Court resolved the issue of whether and when the court can examine documents in camera in aid of its application of the crime/fraud exception.

1. **Test:** the judge may inspect documents *in camera* when there is a factual basis adequate to support a good faith belief by a reasonable person that such inspection may reveal evidence to establish the claim that the crime fraud exception applies.
2. The determination of whether the crime/fraud *in fact applies* requires a prima facie case that the communication was in furtherance of crime or fraud, or in other words, that the one who seeks to avoid the privilege bring forward evidence from which the existence of an unlawful purpose could reasonably be found.
    a. The court must determine that the communication itself was in furtherance of the crime or fraud, not merely that it has the potential of being relevant evidence of criminal or fraudulent activity.

K. **G/R:** Legitimate Defenses: Advice secured in aid of a legitimate defense by the client against a charge of ***past crimes*** **or misconduct**, even though he is guilty, stands on a different footing and such consultations are privileged.

L. **G/R:** Attorney-Client Privilege and Pretrial Discovery: it is recognized that if the traditional privilege for attorney-client communications applies to a particular writing, which may be found in the lawyer's file, the privilege exempts it from pretrial discovery proceedings, such as orders for production of interrogatories about its contents or questions about it in depositions.

1. *Caveat:* if the writing has been in possession of the client or his agents and was there subject to discovery, it seems axiomatic that the client cannot secure any exemption fro the document by sending it to an attorney to be placed in his file.
2. The attorney client privilege will protect intra-corporate communications made for the purpose of securing legal advice if, additionally, the communication relates to the communicating employee's assigned duties and is treated as confidential by the corporation.

M. **G/R:** Work Product Doctrine: during discovery, a claim of attorney-client privilege is likely to be accompanied by a claim that the material is protected under the FRCP as "work product" of the attorney or party.

1. There is a limited work product protection recognized in criminal cases also.

2. The civil work product doctrine came about from ***Hickman v. Taylor*** and was codified by **FRCP 26(b)(3).**
3. Under **Rule 26(b)(3)**, a party may obtain discovery of documents and tangible things prepared in *anticipation of litigation* by an attorney or agent of the opposing party ONLY UPON A SHOWING OF:
    a. substantial need; and
    b. a showing that the party seeking discovery cannot, without undue hardship, obtain the substantial equivalent from other sources.
    c. Moreover, even if the requisite showing of need is made, the court must protect against disclosure of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
4. This protection is much larger than the attorney-client privilege; however, information protected by the attorney-client privilege is never discoverable; whereas, information under the work product doctrine may be discoverable upon the requisite showing of need.
5. Work product protection applies only to matters covered in "anticipation of litigation" whereas the attorney-client privilege covers confidential communications to the lawyer seeking legal advice or services, whether or not litigation is expected.

§5.3: Psychotherapist-Patient Privilege

I. Physician-Patient Privilege

A. **Generally:** the rationale asserted for justification of suppression in litigation of material facts learned by the a physician is the encouragement thereby given to the patient to freely to disclose all matters which may aid in the diagnosis or treatment of the disease or injury.

B. **G/R:** Physician-Patient Privilege: a majority of states today recognize a physician-patient privilege legislatively; however, **there is no such privilege in the federal courts.**

II. Psychotherapist-Patient Privilege

A. **Generally:** most American jurisdiction recognize a psychotherapist-patient privilege, on the rationale that full disclosure between the psychotherapist and patient is necessary for the treatment of mental and emotional illness.

B. **G/R:** Psychotherapist-Patient Privilege: the Supreme Court recognized a federal privilege for confidential communications between a therapist and her patient.
    1. The Supreme Court emphasized the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.
    2. The Court also noted the appropriateness of the recognition of the privilege in federal courts in light of the fact that all fifty states had enacted the privilege into law in some form.

3. The holding extended the privilege not only to psychiatrists and psychologists but also to licensed social workers.
4. The court held the privilege was absolute and rejected a balancing approach.
*[***Jaffee v. Redman***].

C. **G/R:** Element of Psychotherapist-Patient Privilege: the privilege applies in any case, civil or criminal, and it also applies if the patient is a non-party. The essential elements are:

1. *Confidential Communications;*
2. between *patient and psychotherapist* (or social worker);
3. for the purposes of *diagnosing* or *treating* his mental or emotional condition.

D. **G/R:** Mental Condition in Issue Exception: if a patient voluntarily places his physical or mental condition in issue in a judicial proceeding waives the privilege with respect to information relative to that condition.

1. Failure to find a waiver from assertion of a claim or defense predicated upon a physical or mental condition has the awkward consequence of effectively frustrating discovery on a central issue in the case.
*[The court in *Jaffee* did not adopt any exceptions, but this one will probably in federal courts as it has in state courts].

E. **G/R:** Danger to Third Persons Exception: several courts have held that where the patient confides an intent to harm a third person, the danger of violence may justify the psychotherapist in *warning the third person* of the threat.

1. Failure to warn may render the psychotherapist civilly liable for any harm inflicted by the patient.
*[*Menedez v. Superior Court*].

§5.4: Marital Privileges

I. Overview

A. **G/R:** Marital Privileges: there are TWO marital exclusionary rules:

1. *Anti-Spousal Privilege:* the rule prohibiting either spouse from testifying for against another; and
2. *Spousal Communications Privilege*: the rule prohibiting either spouse from revealing confidential communications from the other during marriage.
*These privileges are distinct and don't confuse them.

B. **G/R:** Marriage Requirement: in either situation, the interest protected is the marital relationship and therefore a **valid marriage must always be in existence.**

II. Anti-Spousal Privilege

A. **G/R:** Testimony *for* Spouse: the majority of states have rejected the common law rule [prohibiting a spouse (wife) from testifying because she was disqualified (incompetent)]

and ***permit*** either spouse to testify **for** the other, in either civil or criminal proceedings to which the other is a party.

B. **G/R:** Testimony *Against* Spouse [Spousal Immunity]: there is a distinction between civil and criminal cases:

1. **Civil Cases:** in most jurisdictions either spouse can be compelled to testify *against* the other in a civil case.
2. **Criminal Cases:** in federal court, in criminal cases, a spouse ***may*** testify against another spouse (except as to confidential communications, see below) *with or without* the consent of the other spouse.
    1. The federal courts view the privilege as belonging to the witness-spouse, and thus the witness-spouse can neither be compelled to testify nor foreclosed from testifying.
    a. In other words, the witness-spouse called by the prosecution as witness may claim the privilege or waive it, and the accused-defendant-spouse cannot invoke the privilege to prevent her from testifying.
    *[***Trammel v. U.S.***].

C. **G/R:** Duration: the privilege may only be asserted *during the marriage,* it terminates upon divorce or death, in which even either spouse can be compelled to testify against the other (even as to matters that occurred during marriage).

D. **G/R:** Sham Marriages: if the accused marries a witness in order to prevent her from testifying and the marriage is not valid (e.g. is fraud) the privilege will *not* be recognized.

E. **G/R:** Exceptions: the privilege will not be recognized in the following cases:

1. crimes against the person or property of the spouse;
2. crimes against their children;
3. certain statutory offenses (e.g. certain states have enacted statutory exceptions and federal law requires supporting children and no privilege for child abuse).

III. Spousal Communications Privilege

A. **G/R:** under **Rule 501** the federal courts have continued to recognize a marital communications privilege as effective by common law in civil and criminal cases.

1. Thus, either spouse can refuse to disclose, or *can prevent* another from disclosing, ***confidential communications*** made between the spouses during their marriage.
    a. The privilege only applies to *confidential communications* (i.e. some sort of expression from one spouse to the other intended to convey a message).
2. Confidential: confidential means that the communication must be outside the presence of third parties (including kids) *and* it must concern a matter the communicating spouse would probably desire to keep secret.

a. *Presumption:* a communication made between spouses is generally presumed to have been intended as confidential. The party objecting has the burden of showing that is was not intended to be privileged.

B. **G/R:** Time of Statements: the communications between the husband and wife before they were married, or after their divorce, are *not privileged*.

1. *Caveat:* about half of the courts, however, hold that the privilege survives the death of one of the spouses.

C. **G/R:** Disclosure to Third Persons: the privilege does not protect against the testimony of third persons who overheard (either accidentally or by eavesdropping) an oral communication between husband and wife, or who have secured possession or learned the contents of a letter from one spouse to another by interception, or through loss or mis-delivery by the custodian.

1. *Caveat:* most courts have held that the privilege will not be lost if the eavesdropping or the delivery or disclosure of the letter is due to the betrayal or connivance of the spouse to whom the message is directed.

D. **G/R:** Constitutional Limitations on Privilege: some courts hold that the marital communications privilege must give way where it would interfere with an accused's constitutional right to confront the witness against him in a criminal case.

E. **G/R:** Waiver: the confidential communications privilege belongs to *both spouses*; hence a failure by the holder to assert the privilege by objection, or a voluntary revelation by the holder of the communication, or of a material part, is a waiver.

1. The voluntary disclosure to a third party waives the privilege as to the disclosing spouse, however, the other spouse can still claim the privilege.

F. **G/R:** Exceptions: the privilege will not be recognized in the following cases:

1. crimes against the person or property of the spouse;
2. crimes against their children;
3. certain statutory offenses (e.g. certain states have enacted statutory exceptions and federal law requires supporting children and no privilege for child abuse).

G. **G/R:** Crime/Fraud Exception: in addition, the marital communications privilege does not apply where the communication is made to enable anyone to commit or plan to commit a crime or fraud.

§5.5: Miscellaneous Privileges

A. **G/R:** Clergymen-Penitent Privilege: the clergyman-penitent privilege is recognized by all fifty states, and was included in the proposed FRE 505, however, the federal courts have not adopted the privilege (to my knowledge) [however, if on the exam this brought up, use the same reasoning as the court did in *Jaffee* and say it should apply, i.e. all fifty states have adopted (reason and experience) and the proposed rule contained the privilege].

1. A person may refuse to disclose (and may prevent a clergyman from disclosing) any confidential communication that the person made to a member of the clergy who was acting in a professional capacity as spiritual advisor.

B. **G/R:** News Reporter's Privilege: the Supreme Court has specifically rejected such a privilege, but a number of states recognize it.

1. In states that recognize the privilege it applies to shield the reporter from having to disclose information obtained in gathering news and some only protect the newspersons sources of that information, subject to several exceptions. *[*Matter of Farber*].

C. **G/R:** Parent-Child Privilege: a very small minority of states recognize a limited privilege for communications between parent and child, however, this has been rejected by the federal courts [*In Re Grand Jury*].

D. **G/R:** Political Vote: except where the legality of such a vote is at issue, any witness has the privilege to refuse to disclose how he voted.

E. **G/R:** Trade Secrets: the owner of a trade secret may refuse to disclose it, unless non-disclosure would tend to conceal a fraud or work an injustice.

F. **G/R:** Accountant-Client: about a third of the states recognize a privilege for accountant and client, similar in scope to the attorney client privilege.

§6: COMPETENCY

A. **Generally:** the Competency rules address the threshold question of whether a prospective witness is qualified to give any testimony at all in the case.

1. There are no rules automatically excluding an insane person or a child of any specified age from testifying.

a. **Test:** whether the witness has enough intelligence to make it worthwhile to hear him at all and whether he recognizes the duty to tell the truth.

B. **Rule 601:** General Rule of Competency: Every person is competent to be a witness except as otherwise provided in these Rules [i.e. Rule 602 and Rule 603]. However…[in diversity cases] the competency of a witness shall be determined in accordance with state law.

B(1). **Rule 601**: Requirements: courts have not construed Rule 601 literally, but rather have taken the position that the rule has a more limited impact and merely creates a presumption of competency; at most, the Rule 601 requires:

1. *Physical and Mental Capacity:* the witness have the capacity to accurately perceive, record, and recollect impressions of fact;
2. *Personal Knowledge:* the witness did perceive, record, and recollect impressions of fact [**Rule 602**];

a. This requirement is conditional relevancy question under **Rule 104(b)**; thus, before a witness will be permitted to testify, the proponent need only introduce evidence sufficient to support a permissive inference of personal knowledge, i.e., that the witness had the capacity to and actually did observe, receive, and can now recollect and narrate impressions obtained through his senses, and the witness must declare by other or affirmation that he will testify truthfully.

3. *Oath or Affirmation:* the witness declare that he will tell the truth and understands the duty to tell the truth [**Rule 603]**; and

4. *Narration:* the witness possess the capacity to comprehend questions and express himself intelligibly.

C. **G/R:** Competency Test: a witness's competency to testify at most requires only a minimal ability to observe, recollect, and recount as well as an understanding of the duty to tell the truth.

1. **COMPETENCY TEST:** where a witness's capacity has been brought into question, the ultimate question is whether *a reasonable juror must believe that the witness is so lacking in the powers of perception, recollection, or narration that it is not worth the time to listen to the jurors*.

a. This test of competency requires only a minimum credibility.

b. The trend is to resolve doubts as to the witness's credibility in favor of permitting the jury to hear the testimony and evaluate the witness's credibility for itself.

i. Thus, proof of mental deficiency ordinarily has the effect of reducing the weight to be given to testimony rather than keeping the witness off the stand.

2. Caveat: under **Rule 403,** in an extreme case testimony of a witness passing the minimum credibility might be excluded on the basis of perceived trail dangers such as misleading or confusing the jurors or unfair prejudice.

a. **Test:** the testimony of witness whose mental capacity has been seriously impaired can be excluded on the ground that *no reasonable juror could possibly believe that the witness possess personal knowledge*, or understands the difference between the truth and a lie or fantasy.

D. **G/R:** Religious Beliefs: a lack of religious belief has ***no effect*** on a witness's competency [**Rule 603**].

E. **G/R:** Mental Incompetents: mental unsoundness does not per se disqualify a witness. It must be of such a degree that the person's ability to perceive, recall, and testify are so impaired that the witness's testimony is worthless.

G. **G/R:** Minors: a child of any age may be permitted to testify as long as the trial judge is satisfied that the child possesses the ability to *observe, recollect, and communicate*.

1. Children as young as three and four years old have been allowed to testify.

2. **Test:** four things must demonstrated in order for a child to testify:

a. understanding of the obligation to tell the truth;

b. mental capacity at the time of the occurrence;
c. sufficient memory to remember; and
d. capacity to speak in words about the occurrence and answer questions thereto.

*[*Hill v. Skinner; Larsen v. State*].

H. **G/R:** Conviction of a Crime: the conviction of a crime does not render a witness incompetent to testify (although it may be used as basis for an impeachment—Rule 609] and the conviction of a crime may affect the weight of a felon's testimony; but not the admissibility.

I. **G/R:** Personal Knowledge Requirement: **[Rule 602]** witnesses (other than experts) are not competent to testify unless they have personal knowledge of the facts they relate; such knowledge must be gained through the witness's senses (typically sight or hearing).

1. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony.
2. Personal knowledge is a question for the jury under Rule 104(b).

J. **G/R:** Husband and Wife: husband or wife are fully competent to testify against one another or for one another in *civil cases* or *criminal cases*.

1. **Privilege:** in federal criminal cases, the spouse who is called by the prosecution to testify as a witness may claim a marital privilege (but **only the spouse that is called may assert it**, see above *privileges*) [*Trammel v. U.S.*].

K. **G/R:** Judges: a judge is incompetent to testify in a case *which she is trying*, and there is an "automatic" objection to such testimony [**Rule 605**].

L. **G/R:** Juror as Witness: a juror sitting in the case is incompetent to testify as a witness in that case, if *ether party objects*. [**Rule 606(a)**].

M. **G/R:** Impeaching the Jury Verdict: a juror is incompetent to testify to impeach the jury's verdict, i.e., a juror may not testify in *post-verdict proceedings* for the purpose of *attacking* or *supporting* the jury verdict [at common law this was called the **Mansfield Rule** and has been adopted in **Rule 606(b).**

1. *Racial Prejudice and Drug Use:* the federal courts (and the Supreme Court) have held that the rule bars testimony about racist remarks during deliberations and juror's consumption of drug or alcohol use during deliberations [*Tanner v. U.S.*].
2. Extraneous Influence Exception: Rule 606(b) provides that jurors **may** testify to on the question of whether extraneous prejudicial information was improperly brought to bear upon any juror.
    a. *External/Internal Distinction:* the distinction is based on the nature of the allegation; matters which are internal (such as a juror's inability to hear or comprehend the trial or the physical or mental incompetence of witness) cannot be used to impeach a jury verdict; matters which are

extraneous or exert an extraneous influence on the jurors are admissible to impeach the verdict.
b. *Extraneous Influence:* federal courts have held the following to be an extraneous influence:
i. testimony of the jurors describing how they heard and read **prejudicial information not admitted into evidence**;
ii. juror testimony on influence by outsiders, such as a bailiff's comments on the defendant; or
iii. juror testimony revealing bribes offered to the jury; or
iv. a juror which has submitted application at the district attorney's office in a criminal case.
*[*Tanner v. US*].

N. **G/R:** Attorney's as Witnesses: an attorney under the federal rules is not per se incompetent to testify in trial, even one in which she is involved.

1. *NOTE:* this however is probably a violation of professional ethics under MRPC 3.7 and therefore should be avoided, or may be required by the judge to be avoided.

O. **G/R:** Dead Man's Statutes: many states have retained dead man statutes as an exception to the general rule that a witness is presumed competent. These statutes very greatly from jurisdiction to jurisdiction but generally provide that in a claim or demand against the decedent's estate, the party seeking to enforce such a claim is incompetent to testify as to a matter or fact occurring before the death of the decedent.

P. **G/R:** Hypnotically Induced Testimony: generally there are three positions the states have taken with respect to hypnotically induced testimony and its affect of the competency of witnesses:

1. *Minority Rule:* hypnotically induced testimony and recall goes to the weight and not the admissibility based on competency;
    a. Wyoming follows this position.
2. *Per Se Inadmissible:* many courts reject the admissibility of hypnotically induced testimony and recall *per se* allowing the witness to only testify to facts she ascertained before she was placed under hypnosis; and
3. *Admissible with Significant Procedural Safeguards:* some courts allow the testimony with several procedural protections that severely restrict the testimony's admissibility based on a balancing test.
*[*State Ex. Rel. Collins v. Superior Court*].

Q. **G/R:** Constitutional Limitations on Prohibiting Hypnotic Testimony: the 14th Amendment (due process clause), 5th Amendment (guarantee against compelled testimony) and the 6th Amendment (Compulsory Process Clause) render a **per se rule excluding all post-hypnosis of a *criminal defendant's*** right to testify on her own behalf unconstitutional.

1. Although the Supreme Court recognized that some post-hypnotic testimony may be reliable the holding the case was *limited to circumstances* involving:

a. a criminal defendant;
b. who is presenting her case; and
c. a per se rule excluding the defendant from testifying because she had undergone hypnosis.

2. The Court held that this rule only applies when a defendant is per se denied the right to testify; it does **not** render other hypnotic testimony inadmissible.
3. This rule only applies **to the defendant AND NOT to the defendant's witnesses;** hence, the case is very limited.
*[*Rock v. Arkansas*].

§7: WRITINGS

§7.1: THE BEST EVIDENCE RULE

A. **G/R:** Best Evidence Rule: in proving the terms of a writing, where the terms are material, the **original writing** must be produced *unless* it is shown to be unavailable for some reason.

B. **Analytical Framework:** there are _____ questions to be asked in considering the Best Evidence Rule:

1. Is the evidence being offered **to prove the content of a writing**, recording, or photograph [**Rule 1002**]?
2. If YES, then is the **original** being offered into evidence? [**Rule 1002**][Rule 1001(3) defines "original"]
   a. If YES, then it is admissible;
   b. If NO, go to #3.
3. *Unqualified Exemption:* are the contents of a **public records** being admitted?
   a. If YES, then admissible, *IF*
   i. can be proved by certified copy as correct in accordance with Rule 902; or
   ii. testified to be correct by a witness who has compared it with the original.
   *[**Rule 1005**]
   b. If NO, go to #4
4. *Qualified Exemption:* is a **duplicate** [see Rule 1001(4)] of the original being offered into evidence?
   a. If YES, then admissible *unless:*
   i. a genuine questions is raised as to the authenticity of the orginal; or
   ii. under the circumstances it would be unfair to admit the duplicate original instead of the original.
   *[**Rule 1003**].
   b. If NO, go to #5
5. *Other Exceptions:* do any of the other **exceptions** to the best evidence rule apply?
   a. original lost or not destroyed;
   b. original not obtainable;

c. original in possession of opponent; and
d. collateral matters (is the writing collateral to the issue in the case).
*[**Rule 1004**]

****Note:** this is the general hierarchy set up by the Federal Rules to prove the contents of a writing. Originals always have preference over other writings, public records get an unqualified exemption, duplicates get a qualified exemption, and all other secondary evidence is not recognized by degrees (i.e. a lost document should be accorded the same weight as an original that is not obtainable).

C. **Rule 1002:** Requirement of Original: *to prove the content* of a writing, recording, or photograph, the original writing, recording or photograph is required, ***except*** as otherwise provided [i.e. public documents, duplicates, and exceptions].

1. Original: an original of a writing or recording is the original *itself* or any counterpart intended to have the same effect by a person executing or issuing it.
    a. An original of a photograph includes the print or the negative;
    b. A printout of data stored in a computer or similar devise is considered an original.

1. Writing or Recording: consist of letters, words, or numbers, or their equivalent, set down by any form of data compilation [**Rule 1001(1)**].

2. Photograph: includes still photographs, X-Ray films, videotapes, and motion pictures.

D. **G/R:** Duplicate Originals: a duplicate original is admissible as the original *unless:*

1. the authenticity of the original is genuinely disputed; or

2. it would be unfair under the circumstances to admit the duplicate instead of the original.

3. ***Duplicate Original:*** a duplicate is a counterpart produced by the same impression as the original, or form the same matrix, or by means of photography, electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

E. **G/R:** Justifications for Non-production of the Original: the best evidence rule does not apply where it is impossible or impractical to produce the original writing in court because it is:

1. Lost or destroyed;
2. Unobtainable;
3. Too voluminous; or
4. in the opponents possession.

E(1). **Lost or Destroyed:** [**Rule 1004(1)**] where the original writing has been lost or destroyed the original is not required to be admissible *UNLESS* the proponent lost or destroyed them in **bad faith**.

1. Loss or destruction can be proved by circumstantial evidence of a contemporaneous search that was unable to locate the writing.

a. Factors such as the relative importance of the document and the lapse of time since it was last seen have been said to bear upon the extent of search required before loss or destruction may be inferred.
b. Reasonable diligence under the circumstances is that standard for the search.

2. **Bad Faith:** if the original document has been destroyed by the person who offers evidence of its contents, the evidence is *not* admissible—the intention to prevent the writing's use as evidence is the standard of bad faith.

E(2). **Unobtainable:** [**Rule 1004(2)**]: if the writing is in the possession of a third person out of the state of reach of the court's process (the trial court's subpoena power), a showing of this fact alone will suffice in the view of many courts to excuse the production of the writing.

1. *But Note:* some courts go further and require that before secondary evidence can be used the proponent must show either that he has made reasonable but unavailing efforts to secure the original from its possessor.

E(3). **Too Voluminous:** [**Rule 1006**]: where the originals are so voluminous that it would be impracticable to produce them in court the court may disregard the Rule and allow secondary evidence (usually the testimony of an expert who has reviewed the documents in their entirety) such as a summary, chart, or calculation, ***if*** the originals are available for inspection by the adverse party.

E(4). **Originals in Possession of Opponent:** [**Rule 1004(3)**]: the best evidence rule is inapplicable where the original writing is in control or possession of the adverse party and that party fails to produce it upon reasonable advance notice (a notice to produce filed before trial).

1. If the proponent really needs the document he may always serve a subpoena duces tecum or a motion for order to produce.
2. Exception: some courts hold that the adverse party is not required to produce when a criminal defendant is in possession of a document as to which she asserts her privilege against self-incrimination.

F. **G/R:** Limitations on the Best Evidence Rule: the best evidence is rule **is not applicable in the following circumstances:**

F(1). **Public Records: [Rule 1005**] provides that *certified copy* of a public document can be admitted instead of the original and *examined* copies authenticated by a witness who has compared it with the original are usually admissible.

1. This rule exists because public records and judicial records (contents of a judgment of a court or executive promulgation) are required by law to be retained by an official custodian in the public office and courts will not require the originals to be removed.

F(2). **Collateral Matters:** [**Rule 1004(4)**]: if the writing, recording, or photograph is not closely related to controlling issue, the best evidence rule does not apply.

1. Collateralness occurs frequently in litigation, and this exception is commonly invoked, it basically comes into play when a party is narrating his testimony and while doing so makes reference to some writing which is not at issue in the case.
2. **TEST:** three principle factors generally play a role in making a determination of collateralness:

a. the centrality of the writing to the principle issues of the litigation;
b. the complexity of the relevant features of the writing; and
c. the existence of a genuine dispute as to the *contents of the writing*.

F(3). **Admission by Party Opponent as to Contents:** [**Rule 1007**] the contents of a writing (photograph, recording, etc…) may be proved by the testimony or deposition of the party against whom it is offered or by that party's written admission **without** accounting for the non-production of the original.

G. **G/R:** Preliminary Question of Fact: each of the foregoing (Items "E" and "F") is a preliminary question of fact for the trial judge to decide alone.

1. When a question is raised as to:

a. whether the document or writing ever existed;
b. whether another writing produced at trail is the original; or
c. whether other evidence of contents correctly reflects the contents;
THEN
the question is for the trier of fact (jury) to determine.

***[Rule 1008].**

F. **G/R:** Order of Preference: most courts have adopted a rule of preference for a *copy* of the original writing, if available. Thus, if the proponent has a copy (or access thereto) that copy must be produced rather than oral testimony as to the contents.

G. **G/R:** Doctrine of Completeness: [**Rule 106**]: if a party seeks to introduce only **part** of a document or recorded statement (e.g. deposition), the other party may require the introduction at the same time of any other part which ought in fairness be considered contemporaneously with it.

§7.2: AUTHENTICATION

I. Overview

A. **G/R:** Authentication: [**Rule 901(a)**]: as with any other real evidence, before any writing (or secondary evidence of its content) may be received in evidence, it must be ***authenticated***—the proponent must offer a foundation of evidence sufficient to support a finding that the document is genuine and is what it purports to be.

1. Exceptions: authentication is not required where the genuineness of the document is *admitted* in the pleadings or by other evidence, or if the adverse party *fails to raise a timely objection* to the lack of foundation.

B. **G/R:** Preliminary Fact Determination: as will all real evidence (tangible evidence) the preliminary facts as to authenticity of a document are decided by the jury; that is, the authenticity of a writing or statement is not a question of the application of technical rule of evidence, it goes to the genuineness and conditional relevance, as the jury can readily understand. Thus, if a prima facie showing is made, the writing or statement comes in and the ultimate question of authenticity is left to the jury [**Rule 104(b)**].

1. The judge merely determines whether there is sufficient evidence for the jury to find that the document is what it purports to be—if the genuineness of the document is then disputed it a question for the jury.

II. Requirement of Authentication or Identification (i.e. Non-Self-Authenticating Documents)

A. **G/R:** Authentication by Direct Proof: the simplest form of direct testimony authenticating a writing as that of X, is the production of a witness who sears that he saw X sign the offered writing.

1. Other examples would be X, the signer, admitting authenticity.
2. It is generally held that business records may be authenticated by the testimony of one familiar with the books of concern, such as custodian or supervisor, who has not made the record, or sent if made, that the offered writing actually part of the business record. [This can still be done but I think the 2000 Amendments to the FRE (**Rule 902(11)**) makes this self authenticating if the requirements of the rule are satisfied??, that's the way I understand it].

B. **G/R:** Documents Requiring Direct Proof of Authenticity: in most cases, the proponent of a writing (letter, contract, deed) must produce evidence apart from the document itself to show that it is genuine and is what it purports to be. There is no limit on the kinds of evidence that may be used for this purpose, but the following are the most commonly encountered [**Rule 901(b)**].

C. **G/R:** Direct Proof of Authentication: the following allow direct proof for authentication

C(1). **Testimony of Subscribing/Attesting Witness:** testimony of a subscribing witness is not required under modern law (as it was at common law) [**Rule 903**]; however, if subscribing witnesses are available, it is one method that may be used to authenticate the document [**Rule 901(b)(1)**].

1. *Exception:* when the writing to be offered is one required by law to be attested, the subscribing witness must be produced, such as in the case of wills.

C(2). **Testimony of Other Witness:** [**Rule 901(b)(1)**]: the testimony of any witness who saw the execution of the document, or heard the parties acknowledge the document, may be used to authenticate the document—whether the witness subscribed the document or not.

C(3). **Opinion Testimony as to Handwriting Identification:** a writing may be authenticated by evidence of the genuineness of the handwriting maker:

1. Such evidence may be given any person [non-expert] familiar with the handwriting of the supposed writer ***except*** when the non-expert's familiarity is acquired in preparation for litigation [**Rule 901(b)(2)**];
2. by comparison by an expert [**Rule 901(b)(3)**]; or
3. by having the trier of fact compare it with some admittedly genuine document [**Rule 901(b)(3)**].

D. **G/R:** Circumstantial Evidence of Authentication: the following allow authentication by circumstantial proof when no direct evidence of authenticity of any type exists or can be found (authentication by circumstantial evidence is uniformly recognized as permissible:

D(1). **Authentication by Content:** [**Rule 901(4)**]: a writing may be authenticated by a showing that it contains information that is unlikely to have been known to anyone other than the person who is claimed to have written it, or that it is written in a manner unique to that person.

1. *Reply Letter Doctrine:* a writing may be authenticated by evidence that it was received in response to a communication sent to the claimed author; such as, where A mails a letter to B, and a reply is received in which reference is made to A's letter, this is sufficient evidence to authenticate the reply letter as actually having come from B.
2. *Style or Manner of Expression:* a writing may be authenticated by identification of the writer's style or manner of expression—e.g. the use of certain phrases, words, abbreviations, or idioms shown to have unique to the person claimed to written it [Rule 901(4) provides that "appearance, content, substance, internal patterns, or other distinctive characteristics" can be used to authenticate].

D(2). **Document Produced by Reliable System:** [**Rule 901(9)**] where documents or other data compilations have been produced by some automatic process or system (e.g. X-rays, computer printouts) testimony describing the process or system indicating its reliability is sufficient to authenticate.

D(3). **Ancient Documents:** [**Rule 901(8)**]: any document in any form (including data stored electronically) is presumed to be authentic if shown to be at least 20-years old and there is no suspicion as to its authenticity.

D(4). **Public Reports/Custody:** [**Rule 901(7)**]: if a writing purports to be an official report or record and is proved to have come from the proper public office where such official papers are kept, it is generally agreed that this authenticates the offered document as genuine.

D(5). **Telephone Conversations:** [**Rule 901(6)**]: telephone conversations can be authenticated by evidence that a call was made to a number *assigned by the telephone*

company to a particular person if the circumstances, *including self-identification*, show the person answering to the one that called. [Business phone calls are covered too].

D(6). **Voice Identification [Rule 901(5)]:** identification of voice can be authenticated whether heard firsthand or through mechanical devise (e.g. phone) by *opinion* based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker.

III. Self-Authenticating Documents

A. **G/R:** Self-Authenticating Documents: certain kinds of documents or records require **no independent proof** of authenticity. Their nature is such that merely producing the document establishes *prima facie* its own authentication.

1. The burden then shifts to the defendant to prove the documents are not what they purport to be.

B. **Rule 902:** Self-Authentication: extrinsic evidence of the following as a condition precedent to admissibility is not required:

(1) *Official Documents under Seal:* documents bearing the seal of any recognized government agency or department and the signature of an authorized signatory may be received into evidence without proof of authenticity.

(2) *Notarized Documents:* documents notarized as required by law (e.g. deeds, conveyances, mortgages, other instruments) need no independent proof of authenticity.

(4) *Certified Copies of Public Records:* a copy of any public record (including data compilations) may be received without further authentication if accompanied by a certificate showing that:

a. The original document is authorized by law to be recorded or filed and was filed; and

b. the copy is a correct copy of the original; and

c. the certificate is signed by the custodian of the public record and bears the seal of the office.

**Those are the main ones, the other self-authenticating documents are:

a. Foreign public documents;

b. Official publications;

c. Newspapers and Periodicals;

d. Trade Inscriptions,

e. Acknowledged documents;

f. commercial paper (incorporates UCC §3-307);

h. other Acts passed by Congress.

§8: OPINION, EXPERTISE, AND EXPERTS

§8.1: OPINION TESTIMONY BY LAY WITNESSES (i.e. Non-experts).

I. The Opinion Rule

A. **Generally:** at common law, opinion testimony was excluded unless it was based on personal firsthand knowledge. As developed, the courts began to distinguish between *opinion and fact,* allowing a lay witness to testify as to the latter but not the former; however, this distinction has basically proven unworkable, and trials courts now have broad **discretionary powers** under Rule 701 to admit opinion testimony as long as the requirements of the Rule are met.

B. **Rule 701:** Opinion Testimony by Lay Witnesses: conclusions and opinions by non-expert witnesses are inadmissible except when they are derived from the witness's personal observation of the facts in dispute and when, from the nature of those facts, no better evidence of them can be reasonably obtained. Thus, before a non-expert witness's opinion is admissible, the trail court must be satisfied [under **Rule 104(a)**] that:

1. The witness's opinion is **rationally based on the perception of the witness;** OR
    a. This means the witness's must have personal knowledge of the event in question [**Rule 602**]; i.e., the witness personally observed that about which he has an opinion.
2. The opinion is **helpful to a clear understanding** of his testimony or the determination of a fact in issue.
    a. This generally means that the subject matter of the witness's opinion is something about which normal persons commonly (regularly) form opinions; such as, speed, smell, sound, etc…and that the testimony if the form of opinion is the clearest, most understandable way of getting the information to the jury.
    i. EX: testifying that Megan appeared drunk and horny may be a clearer way of conveying her appearance to the jury than describing details about her speech, breath, and how she was hanging all over LaMar.
3. The opinion **must not be based** on scientific, technical, or other specialized knowledge within the scope of Rule 702.
    a. This restriction prohibits a party from putting in expert testimony under the guise of a "lay witness."

C. **G/R:** Lay Opinions: thus, under Rule 701 and 602, the witness must:

1. have personal knowledge of the matter forming the basis of testimony opinion;
2. the testimony must be based rationally on the witness's perception; and
3. *Test:* the principle test is whether the opinion is helpful to the jury.

D. **G/R:** State of Mind and Perception: under these statutory rules, many courts have become more receptive lay opinion and the courts tend to accept such opinions (even if about the state of mind of third parties) so long as the witness makes it clear that she is expressing an inference about the third party's apparent state of mind based on factors such as the third party's demeanor and behavior. Hence the most common examples of layperson testimony are:

1. *Matters of taste, smell, and appearance:* a nonexpert witness may state an opinion about matters of appearance, smell, or taste;

2. *Identity:* a witness's opinion about the identify of another is admissible; indeed, it is often the only way of conveying identification;
3. *Mental Condition:* the opinion of a nonexpert witness is often admissible on the issue of the mental state or sanity of an acquaintance.
4. *Physical Condition:* the witness can give an opinion in describing the apparent physical condition of another including the others apparent age, health, or pain.
    a. Words such as "nervous," "drunk," "sick," are admissible because a person's condition may be difficult to describe in any other way.
5. *Dimensions:* estimates of any measurement or dimension are usually admissible when they will assist the trier of fact in its determination.
6. *Handwriting:* the opinion of a lay witness is admissible to identify the handwriting as that of a certain person if the witness is shown to be sufficiently familiar with that person's handwriting [Rule 901(b)(2)];
7. *Collateral Matters:* courts generally have discretion to admit opinion evidence bearing on matters not directly in issue in order to save time.

E. **G/R:** Nonexpert Opinions that are Excluded: there are still many matters upon which the opinions of laypersons are inadmissible; namely, most have to do with statements which amount to no more than an expression of the witness's general belief as to how the case should be decided, as to the amount of damages, or as to legal conclusions (rather than factual observations). Hence nonexpert witnesses are generally excluded from expressing an opinion on:

1. *Standard of Care:* witnesses cannot express their opinions concerning negligence or fault; nor, are they permitted to testify whether the would have acted as the defendant did;
2. *Cause of Accident:* where an accident or occurrence is of a type such that expert specialized knowledge usually required to determine its cause, thus, nonexpert testimony is impermissible.
    a. exception: where the accident or occurrence is of a sort about which laypersons commonly form accurate opinions, a lay witness can properly give an opinion as to causation based on observation.
    *There is usually a fine lien between the rule and exception and is resolved by the trial judge in his discretion.
3. *Legal Relationships:* the existence, or lack thereof, of a legal relationship, such as a contract or agency relationship, is ultimately a question of law and a witness ordinarily cannot testify to it.

II. Ultimate Issue Doctrine [experts and non-expert testimony]

A. **G/R:** Common Law Rule: at common law, neither an expert nor a lay witness could render an opinion on the ultimate issue in the case on the rationale that this would invade the province of the jury; Rule 704, explicitly rejects this doctrine.

B. **Rule 704(a):** Opinion on Ultimate Issue: testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue.

1. On its face, Rule 704(a) is not limited to expert opinions.

a. Some courts hold that laypersons' opinions on ultimate facts are not precluded; however, such opinions may run afoul of other restrictions in particular instances, e.g., opinions as to how the case should be decided, legal conclusions, or amount of damages (see above). These opinions normally will not survive the **Rule 403 balance**.

b. *Remember:* the FRE **do not** permit opinion testimony on law (except foreign law).

2. **Rule 704(b) Exception:** [*Hinckley Amendment*]: when an accused's *mental state* or condition is in issue an expert witness (such as a psychiatrist) **may not** testify that the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense.

a. EX: an expert medical psychiatrist could answer the question "was the accused suffering from a mental disease or defect" *but not* "was the accused able to appreciate the nature and quality of his acts" (an element of insanity defense).

§8.2: EXPERT TESTIMONY

I. Overview

A. **Requirements for Admissibility:** an expert can ordinarily testify when the following four conditions are met:

1. *Specialized Knowledge Helpful to Factfinder:* and the subject must be one that is proper for expert inference; in other words, the opinions or inferences offered by the expert must depend upon the special knowledge, skill, or training he has and that skill and training is not within the ordinary experience of lay jurors, so that the testimony may help determine some issue **[Rule 702]**.
2. *Qualified:* the expert witness must be qualified as an expert **[Rule 702]**;
3. *Proper Bases for Opinion:* the validity of the expert's underlying theory or technique must be proven **[Rule 702, 703]**; and
4. *Underlying Data Revealed or Available:* the underlying data the expert relied upon must be available (not required to be stated) for cross-examination **[Rule 703, 705**]

II. Specialized Knowledge Helpful to Factfinder:

A. **Rule 702:** if scientific, technical, or other specialized knowledge will assist the trier of fact to:

1. *understand evidence*; or
2. *determine a fact in issue*;

an expert may testify on the subject matter (if all other requirements are also satisfied).

B. **G/R:** Admissibility Requirement: to warrant the use of expert testimony, the proponent must establish that traditionally the subject of the inference must be so

distinctively related to a science, profession, business, or occupations as to be beyond the knowledge of laypersons.

1. Court also admit expert opinion evidence concerning matters about which the jurors may have general knowledge if the expert opinion would still aid their *understanding* of the issue.
2. Rule 702, permits expert opinion even when the matter is within the juror's competence if specialized knowledge will be helpful ("will assist").

C. **G/R:** Untrained Layman Test: whether the situation is a proper one for the use of expert testimony is be determined on assisting the trier of fact.

1. **TEST:** whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having specialized understanding of the subject involved in the dispute.

III. Witness's Qualification as an Expert

A. **Rule 702:** …a witness qualified as an expert *by knowledge, skill, experience, training, or education*, may testify…

1. In other words, before a witness can testify as an expert and give opinions, the proponent must satisfy the trial judge that the witness possesses some specialized skill, knowledge, experience, training, or education that qualifies the person to render an opinion.

B. **G/R:** Knowledge and Experience: the witness must have sufficient skill or knowledge related to the pertinent field or calling that his inference will probably aid the trier in the search for the truth.

1. The knowledge may be derived from reading alone in fields (education);
2. from practice in other fields (experience); or
3. from both.

**The ultimate issue is not whether the expert is more qualified than other experts in the field; but rather, whether the expert is more competent to draw the inference than lay jurors and the judge. The practice is respect to expert qualifications is entrusted in the judge's discretion, reviewable only for abuse.

C. **G/R:** Qualifying Factors: among the factors usually considered when deciding whether a witness is qualified are:

1. education or training;
2. experience;
3. familiarity with authoritative references in the field; and
4. membership in professional associations.
5. *Any special experience or education* can qualify a person to give expert opinion:
    a. Cops can be qualified to give expert opinion on drug use or gambling techniques;
    b. Convicted burglar's can give testimony of the use of burglar's tools;

c. Drug users and dealers can give testimony on drugs—their contents and affects.

IV. Proper Bases of Opinion

A. **Rule 702:** "a witness qualified as an expert…may testify thereto in the form of 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."

1. Rule 702 decides the sufficiency of the basis of the expert's testimony, which basically requires **reliability of the expert's opinion**
2. Rule 703, by contrast, sets out a "reasonable reliance" requirement for when an expert relies on inadmissible information.

B. **G/R:** Validity of Underlying Theory or Technique: [**Rule 702(2)**] the validity of the expert's underlying theory or technique must permit a reliable opinion to be formed, even by an expert. This is the *Daubert/Kumho* requirements, which must be satisfied—*see scientific evidence* below.

C. **G/R:** Sources of the Expert's Data: [**Rule 702(1)**] the opinion of an expert witness may be drawn from one of the following sources:

1. *Personal Knowledge:* the expert witness can express an opinion or conclusion based on facts personally observed.
    a. The expert can also take into account facts communicated to her by others;
    b. if the data on which the expert bases her opinion or inference is a type reasonable relied on by experts in forming their opinions or inferences on the particular subject, the data itself need not be independently admissible in evidence.
    i. Such data does not itself constitute affirmative evidence and is received only to show the bases of an expert's testimony.
2. *Opinion Based on Evidence Adduced During Trial:* an expert witness who has been present in the courtroom can also base an opinion on the evidence adduced at trail as long as the witness does not usurp the role of the jury be resolving credibility conflicts.
3. *Opinion Based on Hypothetical Question:* an expert witness can base an opinion on data transmitted to her by means of a hypothetical question drawn from the evidence at trial.
    a. **Rule 705:** allows hypothetical questions to be asked, but essentially places the burden on the *cross-examiner* because it allows the expert to testify in terms of opinion or inference **without** testifying to the underlying facts or data; thus, the need for the hypothetical question on direct is not needed and to get to the underlying facts the cross examiner must inquire into them.

4. *Opinion Based on Date conveyed by counsel or others:* under Rule 703 (see below) an expert can base her opinion on data presented by counsel or others outside of court.

D. **G/R:** Reliance by Experts on Inadmissible Data and Facts: [**Rule 703; Rule 705**]: under **Rules 703 and 705** an expert may give a direct opinion upon facts and data, including technically inadmissible reports provided that the reports or data are "of a type reasonably relied upon by experts in a particular field in forming opinions or inferences on the subject."

1. The substantive issue then is what kind of reports are "reasonably relied on."
2. **703** *Balancing Test:* when information is reasonably relied upon by an expert and yet is inadmissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this rule must consider:
    a. the information's probative value in assisting the jury to weigh the expert's opinion on the one hand; and
    b. the risk of prejudice resulting form the jury's potential misuse of the information for substantive purposes on the other.
    *If the otherwise inadmissible information is admitted, there must be a limiting instruction.
3. Experts can rely on the opinions of other experts in forming their opinion, if that is customary within the expert's discipline.
4. When an expert has relied on a learned treatise (scientific texts which are admissible under Rule 803(18)) or brought to bear on cross examination, those statements can be read into evidence.
5. **G/R:** nothing in Rule 703 restricts the presentation of the underlying facts or data when offered by an adverse party (and Rule 705 specifically allows for it); however, an adversary's attack on an expert's basis will often *open the door* to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been disclosable initially under the balancing test.

V. Cross-Examination and Impeachment of Expert Witnesses

A. **Generally:** an expert witness can be cross examined to the same extent as any other witness and can be impeached on the same grounds; however, there are five additional methods of impeachment of an expert:

1. *Lack of expert qualifications*: the cross examiner is free to show, either by cross-examination or independent (extrinsic) evidence that the witness ***lacks*** the qualifications claimed to have on direct examination or that those qualifications do not make the witness a *true expert* in the field which she claims;
    a. voir dire questioning: federal courts allow the adverse counsel to engage in a limited cross-examination immediately following the proponent's qualifying questions for the purpose of testing the witness's qualifications as an expert.
2. *Prior inconsistent opinions*: cross-examination may reveal that the expert previously expressed different opinions in the *present case*.

a. note: most courts do not allow impeachment on different conclusions arrived at in *other* cases, regardless of how similar they might be.

3. *Altering facts of a hypothetical question*: the facts of any hypothetical question put in on direct examination can, on cross-examination, be altered or withdrawn and then the adverse counsel can inquire whether on the basis of the altered hypothetical, the expert would change her opinion.

4. *Showing compensation received (bias)*: the expert may be cross examined about the compensation and expenses she is receiving in connection with her reports and testimony.

5. *Contrary views of other experts through the use of scientific texts, learned treatises, and journals:* the federal rules allow cross-examination of an expert witness concerning the contrary views expressed **in any recognized (authoritative) scientific text, treatise, or journal** regardless of whether the expert relied upon them; however, the text must be admissible into evidence under **Rule 803(18)**.

§8.3: SCIENTIFIC EVIDENCE

A. **Generally:** scientific evidence, such as experiments conducted outside the courtroom (and sometimes inside the court room), must be several general requirements for admissibility as espoused in *Daubert v. Merril Dow Chemicals*.

B. **G/R:** Admissibility of Scientific Evidence: where experimental evidence is offered, it must always be shown that the experiment was conducted under conditions ***substantially similar*** to those existing at the time of the actual event being litigating.

1. Thus, in a skid test, there must be a showing of the same size car, same type of pavement, same weather conditions, etc…the conditions, however, do not have to be absolutely similar.

C. **G/R:** Scientific Expert Testimony: [**Rule 702**] when the proponent proffers the witness as a scientific expert (or any other expert, see *Kumho* below) the proponent must establish that the witness's underlying theory or technique qualifies as ***reliable scientific knowledge*** within the meaning of Rule 702.

1. *Scientific Validity Test:* to qualify, the expert's hypothesis must be empirically validated.

2. In considering evaluating the validity of the expert's hypothesis, the **trial judge** is to consider the following list of non-exclusive factors when deciding whether the to admit evidence under the scientific validity test:

a. *Testing and Testability:* a judge should consider whether the theory or technique in question is testable and, if so, whether it has been tested. A theory can be untestable if it makes indeterminate predictions or has too may escape hatches.

b. *Peer Review and Publication:* another factor a judge should consider is whether the theory or technique has been subjected to scrutiny and criticism by scientific peers.

i. Publication in a peer review journal (i.e. one that asks established experts to valuate articles before accepting them for publication) counts in favor of admissibility.

ii. Publication and peer review are not essential because some theories and techniques are not publishable or too new to expect that they would be published.

c. *Error Rate:* the judge should consider the "error rate" of a technique in making judgments about their admissibility—this is applicable to forensic tests [polygraph tests are an example that have been held inadmissible under this standard].

d. *Standards of Methodology:* the judge is also to consider the existence and maintenance of standard controlling the technique's operation [such as protocols for DNA labs designed to prevent lab error]. The existence of standards of methodology works in favor of admissibility.

e. *General Acceptance:* general acceptance in the field in question is one factor that works in favor of admissibility.

3. **Judge's Gatekeeping Function:** *Daubert* requires the trial judge to learn enough about scientific evidence and methods to decide for *themselves* (rather than deferring to scientists as was done under the *Frye Test*) whether the expert's testimony is based upon "good science".

4. The *Daubert* analysis is more likely to exclude techniques that are "scientifically questionable" even is accepted by practitioners in that field.

*[*Daubert v. Merill Dow Chemicals*].

D. **G/R:** Non-Scientific Expert Testimony: the *Daubert*-style scrutiny is appropriate for **all types of expert testimony**; that is, all kinds of expert testimony must amount to "knowledge" to qualify for admission under Rule 702.

1. The rationale is that the underlying premise of *Daubert* is the reliability of evidence and that is equally appropriate to all non-scientific expertise.

2. In addition, courts could not properly apply their gatekeeping function and adequately make a distinction between "scientific knowledge" and other "technical or specialized" knowledge.

3. *Caveat:* non-scientific testimony need not satisfy each of the *Daubert factors* in order to qualify for admission; the trial judge *may* consider the factors which he finds pertinent, but in a given case some or most the factors might be inappropriate.

*see advisory committee notes for a list of factors the courts use with non-scientific experts.

*[*Kumho Tire Co. v. Carmichael*].

E. **G/R:** Standard of Review: abuse of discretion is the apporiate standard of appellate review of trial judge rulings under *Daubert* and *Kumho* analysis [*General Electric Co. v. Joiner*].

F. **G/R:** Types of Scientific Evidence: several types of evidence have been either to be *receivable as generally accepted* under the **Daubert Factors** and some have been held inadmissible, an *unreliable*:

1. *Psychiatry and Psychology* evidence is admissible as scientific evidence;
2. *Toxicology and other Chemical Sciences:* several types of toxicology and other chemical sciences have been accepted as scientific evidence (blood tests, hair analysis, breathalyzer].
3. *Forensic Pathology:* [time of death] is an accepted scientific evidence;
4. *DNA Profiling:* is becoming more widely accepted and valid [there are two types RFLP and PRC with the former being accepted and the latter more controversial].
    a. DNA evidence was held admissible under the Frye Test in *U.S. v. Porter* [decided before *Daubert*].
5. *Fingerprinting:* courts take judicial notice of reliability of fingerprinting;
6. *Ballistics Evidence:* case law upholds the admissibility of ballistics evidence as scientific;
7. *Questioned Document Evidence:* expert testimony regarding the genuineness of a document (in a case involving claim of forgery) is generally considered to be admissible [*US. v. Starzecpyzel*].
    a. **Note:** many courts allowed admissibility of this type of evidence based on the fact that the questioned document testimony could be admitted because *Daubert* did not apply because it was not a "science." Hence, after *Kumho*, courts may be more inclined to hold this evidence inadmissible.
8. *Polygraph Testing:* most courts continue to **exclude** polygraph testing on the ground that it is unreliable.
    a. Exception: if all parties stipulate *in writing* that the test results are admissible and stipulation can be had before the test is taken.
    i. *Minority view:* a few courts allow polygraph tests to be admitted in the absence of a stipulation to impeach or corroborate a witness's testimony, provided that notice is given and procedural safeguards are complied with [*U.S. v. Picconnna*].
9. *Voice Printing:* courts are split with some courts holding that voice identification is admissible and others holding that it is too unreliable.
10. In *State v. Chappel*, the court held that an expert could testify to the defects of eyewitness identifications if (a) a qualified expert; (b) proper subject; (c) conformity with generally accepted explanatory theory; and (d) probative value outweighed prejudicial effect—this was not a FRE case.

§8.4: DEMONSTRATIVE EVIDENCE

A. **Generally:** demonstrative evidence is evidence from which the trier of fact may derive a relevant firsthand sense of impression and is almost unlimited in variety.

1. *Distinguish:* demonstrative evidence must be distinguished from real evidence:

a. **Real Evidence:** is tangible evidence which itself is alleged to have some direct or circumstantial connection with the transaction at issue—the murder weapon for example.
b. **Demonstrative Evidence:** is *not the real thing* (it is not the alleged murder weapon) or the actual piece of evidence involved in the litigation. Instead, it is a tangible material used only for *explanatory* or *exemplifying purpose*s.
a. Demonstrative evidence is a visual aid—such as an anatomical model, a chart, a diagram, a map, film, etc…

B. **G/R:** Types of Demonstrative Evidence: there are two basic types of demonstrative evidence:

1. *Selected Demonstrative Evidence:* is existing evidence (e.g. existing, genuine handwriting specimens or exemplars used as standards of comparison by a handwriting expert).
2. *Prepared or Reproduced Demonstrative Evidence:* evidence made especially for trial (e.g. scale models, drawings, photographs, recreations, etc…).

C. **G/R:** Foundation Requirements for Demonstrative Evidence: because there is some danger of distortion, fabrication, or abuse with demonstrative evidence prepared especially for trial, the law seeks to minimize these dangers by requiring testimonial assurances of accuracy.

D. **G/R:** Admissibility of Demonstrative Evidence: because demonstrative evidence does not usually qualify as *substantive evidence* in the case, demonstrative evidence is not ordinarily offered into evidence and hence does not go to the jury's deliberation room.

THAT IS FUCKING IT, NOW JUST MEMORIZE IT!