### Evidence

### Relevance

Rule 102 – The rules of evidence should be construed so as to 1) Administer every proceeding fairly, 2) Limit expense and delay, and 3) Ascertain truth and secure a just determination

Rules 401 & 402 – (401) Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action. (402) Irrelevant evidence is inadmissible

1. Materiality (fact is of consequence) turns on underlying substantive law (i.e., time of theft/burglary hypo)
   1. Court documents proving murder victim’s previous violent history were admissible, because they supported defendant’s assertion that she feared victim and acted in self-defense – *U.S. v. James*
      1. Dissent agrees that documents were material and relevant. However, documents were overly prejudicial under Rule 403 and may have encouraged victim-blaming
2. Evidence may be probative of a single fact. A case is a wall – each piece of evidence is a brick
   1. When evidence’s relevancy depends on fulfillment of a condition, evidence is admissible, subject to introduction of evidence supporting the condition’s fulfilment – Rule 104(b)
      1. A judge must determine that a reasonable jury *could* make the requisite factual determination (of a condition’s fulfilment) – *Cox v. State* (court could infer that defendant heard about friend’s hearing since he spent significant time at friend’s home)
         1. Reasonable jury must find the fact by a preponderance of the evidence
            1. This is a different standard than “any tendency” from Rule 401
   2. A party’s failure to contest a fact limits, but does not eliminate, the probative value of evidence tending to prove that fact – *State v. Bocharski* (photos were not improperly admitted simply because defendant did not contest fact of murder by stabbing)
   3. Flight from authorities is probative as evidence of guilt if four inferences hold: (*U.S. v. Myers*)
      1. Defendant’s behavior to flight
      2. Flight to consciousness of guilt
      3. Consciousness of guilt to consciousness of guilt of the crime charged
         1. The more remote in time a flight is from a crime, the greater the likelihood that flight resulted from something other than guilt of the crime
      4. Consciousness of guilt of the crime charged to actual guilt of the crime charged

Rule 403 – The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of: unfair prejudice, confusing the issues, misleading the jury, or undue delay

1. Unfair prejudice in this context means a tendency to suggest decision on an improper (emotional) basis
   1. Evidence tending to convict is inherently prejudicial, but not unfairly so
   2. Intent of submitting party (i.e., to inflame a jury) is irrelevant; effect is all that is necessary
   3. Computer-generated animations are admissible if they are fair/accurate representations of expert opinions and meets requirements of Rules 401-403 *– Commonwealth v. Serge*
      1. How can this ever be the case – won’t “creative license” creep in?
      2. Can defendant’s indigent status make use of a CGA unfairly prejudicial?
2. Decisions under Rule 403 are only overturned on a finding of abuse of discretion
   1. Lack of prejudicial effect, even if court abused its discretion in admitting evidence, might allow jury verdict to be upheld – *State v. Bocharski* (gruesome photos shouldn’t have been admitted, but didn’t alter outcome)
3. Courts should examine effectiveness of a limiting instruction and availability of other means of proof when conducting a Rule 403 weighing
4. Introduction of direct evidence of previous crime (despite defendant’s offer to stipulate) is unfairly prejudicial – *Old Chief v. U.S.* 
   1. Government’s right to prove its case its own way has virtually no application to proof of a defendant’s legal status (as a felon)
      1. Rationales for the rule allowing prosecutorial discretion in stipulating facts include:
         1. A need for descriptive richness
            1. Bale of marijuana unfairly prejudicial in proving intent to distribute?
         2. Implicate the moral underpinnings of the crime
         3. Meet the jury’s expectations of the degree of proof required
      2. Dissent notes prior conviction is introduced solely to prove an element of the crime

Rule 407 (Remedial Measures) – When measures are taken that would have made an earlier injury/harm less likely, evidence of those measures is not admissible to prove negligence, culpable conduct, product/design defects or a need for warning/instruction. Evidence may be admitted for another purpose (sometimes only if disputed)

1. Conduct is not an admission (therefore, more prejudicial than probative?)
2. Social policy indicates impropriety of discouraging actions designed to reduce actions
   1. Legal rules don’t exist in a vacuum – this is a public policy exception
   2. Might prevent future harm, at the expense of present accountability or a positive outcome

Rule 408 (Settlement) – Evidence of (a)(1) furnishing, promising, offering or accepting consideration in settling a claim is inadmissible to prove or disprove the validity or amount of a disputed claim. (a)(2) Also inadmissible is conduct/statements made during settlement negotiations. (b) This evidence may be admitted for another purpose

1. Might be motivated by a desire for peace than as an admission of guilt or fear of adverse outcome
2. Social policy to encourage settlement negotiations
   1. Statements made during negotiations cannot be used to impeach witnesses
   2. It would be an abuse of Rule 408 to allow a party to “lull” an opponent to breach a contract and then hold evidence of the “lulling” inadmissible. A judge has discretion to allow evidence of settlement negotiations into evidence for a purpose other than establishing liability (*Bankcard*)
      1. The spirit/purpose of the rule triumphs over the plain text in this case

Rule 409 (Paying Expenses) – Evidence of furnishing, promising, or offering to pay medical expenses resulting from an injury is not admissible to prove liability for the injury

1. Statement usually made from humane impulses the legal system does not want to punish, and also might not be probative as an admission of guilt or fault
   1. Although apologizing doctors tend to get sued less (or settle for lower amounts), concerns with admissions of liability keep the practice a relatively rare one
2. Admitting evidence would discourage assistance – policy judgment to encourage specific conduct
   1. However, only the evidence of offering to pay is inadmissible – if connected to an admission of fault or statement of fact, those statements might be admissible
      1. The inessential nature of these communications (as opposed to settlement negotiations) leads to this differential treatment

Rule 410 (Guilty Pleas) – Evidence of: (a)(1) a guilty plea that was later withdrawn, (a)(2) a no contest plea, (a)(3) a statement made during a proceeding of either of these pleas, or (a)(4) a statement made during plea discussions with an attorney for the prosecuting authority are all inadmissible against the defendant. The court may admit the latter two statements (b)(1) if another statement made during the same plea or plea discussion has been introduced, and, in fairness, the statements ought to be considered together, or (b)(2) in a proceeding for perjury

1. This evidence is *always* inadmissible except where specifically permitted
   1. Guilty pleas are serious, overly prejudicial, since they might be offered solely to avoid risking even greater penalty at trial
   2. Exclusion promotes plea bargaining, which is even more important than settlement discussions, and might lead to the apprehension of other criminals
2. Voluntary admissions to police officers (or other non-attorney individuals) are not necessarily inadmissible
   1. Some jurisdictions use a totality of the circumstances test to decide if admission was made in expectation of plea negotiations

Rule 411 (Insurance) – Evidence that a person was or was not insured against liability is inadmissible to prove whether a person acted negligently or wrongfully, but may be admitted for another purpose

1. Knowledge of insurance might induce juries to decide on improper grounds
   1. Improperly have defendant pay because insurance will cover the bill
   2. Improperly deny plaintiff recovery because insurance has already covered medical bills
2. Nevertheless, juries frequently discuss insurance during deliberations. How effective is this rule?

#### Probabilistic Evidence

1. The use of probabilistic evidence leads to two significant errors: (*People v. Collins*)
   1. Probabilities must be based in sound statistical analysis (*Collins*’ probabilities were made up!)
   2. Statistics cannot indicate the probability that *this* defendant committed *this* crime

### Character Evidence

Rules 404

1. (a)(1) - Evidence of a person’s character is inadmissible to prove that on a particular occasion the person acted in accordance with his character (“The forbidden inference”, or “propensity evidence”)
   1. Two forms of unfair prejudice can arise from character evidence:
      1. Jury over-weights character evidence (he did it before, so he must be guilty this time)
      2. Jury convicts preventively (he *should* be locked up, even if he didn’t commit this crime)
   2. Both forms of prejudice are problematic because they distract jury from what *actually* happened
2. (a)(2) – In a criminal case,
   1. (A) Defendant may offer evidence of his pertinent trait, which the prosecutor may rebut
   2. (B) Subject to Rule 412, defendant may offer evidence of victim’s pertinent trait. Prosecutor may
      1. (i) rebut, and
      2. (ii) offer evidence of the defendant’s same trait
   3. (C) In a homicide case, prosecutor may offer evidence of victim’s trait of peacefulness to rebut evidence that victim was first aggressor
   4. Character is not an issue in a criminal prosecution unless the defendant makes it one – *Zackowitz* (guns left in apartment could not prove defendant was a vicious and violent person)
3. (b)(1) – Evidence of a crime/wrong is inadmissible to prove a person’s character and that on a particular occasion the person acted accordingly. (b)(2) – This evidence may be admissible for another purpose
   1. Almost all of 404(b) is superfluous, since 404(a)(1) makes evidence introduced to prove propensity inadmissible
   2. Two-part test for determining if evidence may be admitted under Rule 404(b)(2): (*Trenkler* – bombs had multiple elements indicating they were made by the same individual)
      1. Does evidence have “special relevance” independent of tendency to show criminal propensity?
         1. In determining identity, the 404(b)(2) evidence must be *sufficiently idiosyncratic* to conclusively identify the defendant as connected with both bad acts – *only* the defendant could be behind both
         2. Coalescence of a number of minor factors may create special relevance
            1. Dissent argues majority loses forest for trees – central ingredient in bombs were different (TNT vs. flashbang). Why is this idiosyncratic?
      2. Does it pass Rule 403 weighing?
   3. Common law’s “common plan” exception requires a showing that all “bad acts” were part of an overall scheme – it isn’t sufficient to show that each crime was “planned” in a similar way – *Kirsch* (man seduced young girls from church camp)
      1. This case comes out differently under Rule 414
      2. Does “similarity evidence”, as in *Trenkler*, only apply when identity is at issue?
4. The doctrine of chances is a particular subset of propensity evidence focusing on the defendant’s *modus operandi* of a specific crime – *Rex v. Smith* (all of my wives are recent heiresses that drown in bathtubs)

#### Rule 405

1. (a) – When evidence of a person’s character is admitted, it may be proven by reputation or opinion testimony. On cross-examination of the character witness, inquiry of relevant specific instances of the person’s conduct is permissible
   1. A prosecutor’s good faith belief that specific conduct occurred is an adequate factual basis for specific instance questions, subject to significant judicial oversight – *Michelson*
   2. A cross examination may take in as much ground as character evidence is designed to verify – i.e., if reputation for honesty is established, rumors of previous dishonest actions may be asked about in cross-examination
      1. The price a defendant pays for attempting to prove his good name is the opening of previous unsavory actions to examination by a jury
2. (b) – When a person’s character is an essential element of a charge, claim, or defense, character may be proven by relevant specific instances of the person’s conduct

Rule 406 (Habits) – Evidence of a habit is admissible to prove on a particular occasion a person acted accordingly

1. Occasional conduct is inadequate – the conduct must be both predictive and predictable
   1. A regular practice of meeting a particular kind of challenge with a specific kind of conduct
   2. Might become semi-automatic
2. The line between habit evidence and propensity evidence is a *difficult* one to draw
3. Admissible if a party can provide evidence of the habit being repeated on a sufficient number of occasions – *Halloran* (method of heating Freon lead to explosion)

Rules 413-415 (Sexual Assault Propensity) - In a criminal case for (413) sexual assault or (414) child molestation, or (415) a civil case for either, a court may admit evidence that the defendant committed any other (413) sexual assaults, (414) child molestations, (415) or either

1. Evidence offered under Rule 413 must pass three threshold requirements
   1. The defendant is accused of an offense of sexual assault
   2. The evidence tends to prove the defendant’s commission of another sexual assault
   3. The evidence must be relevant under Rule 401
   4. Finally, the evidence must still pass a Rule 403 balancing
2. These rules have limited empirical significance since most sex crimes are state-based
   1. Addressed towards issues of pedophilia?
3. Rules 413-415 are the only *exceptions* to Rule 404 – Rule 404(b) covers uses of evidence that do not travel through the propensity box
4. Is it possible that Rules 413-415 are *so* unfairly prejudicial as to violate due process? – *Mound*
   1. Propensity evidence is automatically excluded in *every* other case, and the recidivism rate for sexual crimes is lower than almost any other major crime

#### Rules 607-608

1. (607) Any party may attack a witness’s credibility
2. Rules 608-609 only apply when a lawyer attempts to attack a witness’s *general* character for truthfulness – that the witness is generally untrustworthy
   1. May still attack mistakes (faulty memory, incorrect perception, narrative accuracy)
   2. May pursue “non-character impeachment” – evidence of contradiction by conflicting evidence, past inconsistent statements, or bias
3. (608)(a) A witness’s credibility may be attacked/supported by reputation or opinion testimony. Evidence in support of character is only admissible after the witness’s character has been attacked
   1. Reputation and opinion testimony must go to witness’s *character for truthfulness* – general character is not appropriate subject of inquiry
      1. Reputation evidence may not be too remote in time from trial, and be an accurate representation of a community familiar with witness – *Whitmore* (lying police officer)
4. (608)(b) Except for criminal conviction under Rule 609, extrinsic evidence is inadmissible to prove specific instances of a witness’s conduct to attack/support the witness’s truthfulness – witness’s answer is *final*
   1. Does not mean that there will be no consequences – witness could face perjury charges if they lie under oath, even if they cannot be impeached in the immediate proceedings
5. (608)(b) Specific instances of conduct may be asked about on cross-examination if probative of character for truthfulness of (1) the witness or (2) another witness whose character the witness being cross-examined has testified about
   1. The admissibility of the underlying evidence of specific conduct is irrelevant – a reasonable, good-faith evidentiary basis is all that is necessary (cf. *Michelson*)

#### Rule 609 (Impeachment by Past Criminal Behavior)

1. (609)(a) When attacking a witness’s character for truthfulness by evidence of a criminal conviction:
   1. (1) For a felony (punishable by imprisonment for more than one year)
      1. (A) If the witness is not a defendant, must be admitted (subject to Rule 403)
      2. (B) If the witness is a defendant, must be admitted if the probative value of the evidence outweighs its prejudicial effect to that defendant
         1. Five factors for Rule 609(a)(1)(B)’s balancing test: 1) Nature of the crime, 2) Time of conviction & subsequent history, 3) Similarity between past crime and currently charged crime, 4) Importance of defendant’s testimony, and 5) Centrality of the credibility issue – *Brewer*
            1. Factors 4 and 5 tend to counterbalance each other
            2. Acts of violence have little to no bearing on credibility
            3. Convictions for similar crimes have extraordinary prejudicial effect (cf. *Old Chief*) and should be used sparingly
   2. (2) for any other crime, must be admitted if the court can readily determine that establishing the elements of the crime required proving a dishonest act or false statement
2. (609)(b)(1) – If 10+ years have passed since witness’s conviction (or release from confinement, whichever is later), evidence of conviction is admissible if probative value substantially outweighs prejudicial effect
   1. Time limit runs from the *last* release from confinement – if a prisoner is released on parole, then re-confined, the *second* release is the critical date (*Brewer*)
3. (609)(c) Evidence of a conviction is inadmissible if
   1. (1) the conviction has been the subject of a procedure finding that the person has been rehabilitated and the person hasn’t been convicted of a later felony or
   2. (2) the conviction has been the subject of a procedure finding that the person was innocent
4. (609)(d) Evidence of a juvenile adjudication is admissible only if (1) offered in a criminal case, (2) adjudication was of a non-defendant witness, (3) an adult’s conviction for the offense would be admissible to attack credibility, and (4) admitting evidence is needed to fairly determine guilt/innocence
5. Spectrum from most permissive evidentiary standards to least
   1. 609(a)(2) – only subject to 609(b), (c) and (d) – crimes involving deceit are especially probative of propensity to lie and are thus “automatically” admissible
   2. 609(a)(1)(A) – subject to Rule 403 – serious crimes reflect greater readiness to lie under oath
   3. 609(a)(1)(B) – probative value outweighs its prejudicial effect – extends greater protection to criminal defendants who take the stand
   4. 609(b) – probative value substantially outweighs its prejudicial effect – older crimes are less probative of present character
   5. 609(d) – never admissible in a civil case or to impeach accused, but may be admitted if necessary to fairly determine guilt – good chance that character has changed since witness was a juvenile
6. (609)(e) A conviction is admissible even if an appeal is pending
7. These rules create an intricate balancing game in deciding whether to have a defendant testify – will open up the defendant as a witness to questions about previous criminal conduct
   1. Made worse by *Luce* – an appeal for wrongful admission of criminal convictions cannot be sustained if the defendant does not testify
   2. Nor can a defendant preemptively introduce the convictions, then appeal its admissibility. By introducing his history, he waives his right to complain of its admission – *Ohler*
      1. Dissent argues this presents defendant with an impossible choice – either risk being seen as deliberately elusive

#### Rule 610 (Religion) - Evidence of a witness’s religious beliefs is inadmissible to attack or support credibility

#### Rule 412 (Rape Shield Law)

1. (a) Evidence of (1) a victim’s other sexual behavior or (2) a victim’s sexual predisposition is inadmissible in a civil or criminal proceeding involving sexual misconduct
   1. Protects sexual assault victims from unnecessary embarrassment, keeps focus of trial on behavior of defendant, not victim-blaming – *U.S. v. Knox*
2. (b)(1) In a criminal case, court may admit evidence of specific instances of a victim’s sexual behavior
   1. (A) To prove that someone other than the defendant was the source of physical evidence
   2. (B) With the defendant, if offered to prove consent or if offered by the prosecutor
3. (b)(1)(C) Court may also admit evidence whose exclusion would violate a defendant’s constitutional rights
   1. Defendant has right to expose a witness’s motive to lie during cross-examination – *Olden v. Kentucky* (victim’s motive to lie about consent to sex to protect ongoing relationship was proper subject of cross-examination – disallowing questions violated defendant’s constitutional rights)
   2. Defendant’s right to testify must be balanced against legislature’s policy decision to categorically exclude certain types of evidence – *Stephens v. Miller* (exclusion of “doggy fashion” statements)
      1. Serves the purpose of 412 very well in that it *protects* victim from embarrassment
      2. Dissent argues that majority overlooked significance of specific statements and hampered defendant’s ability to persuasively argue his case
         1. Legislature’s “policy choice” cannot be allowed to so significantly interfere with defendant’s constitutional rights as it does in this case
4. (b)(2) In a civil case, court may admit evidence offered to prove a victim’s sexual behavior/predisposition if probative value substantially outweighs danger of harm to any victim and unfair prejudice to any party
   1. Court may admit evidence of a victim’s reputation only if the victim has placed it in controversy
5. Rule 404 does not provide enough protection since the inference that frequent sexual encounters makes rape in *this* case more likely is incredibly weak
6. Under common law, the burden of proof depended on the *victim* – *People v. Abbot* (“there is not so much probability that a common prostitute . . . would withhold her asset, as one less depraved;”
   1. Elevates evidence of consent to the most important inquiry
   2. Goes to who judges were willing to protect

### Hearsay

1. Rule 801 – A statement is hearsay if (c)(1) the declarant does not make it while testifying at the current trial and (c)(2) a party offers it to prove truth of the matter asserted, and is inadmissible under Rule 802
2. Alternatively, “an out-of-court statement offered by a litigant to prove what the declarant asserted”
   1. Is the party offering the statement to prove what it says or was meant to say?
      1. Do we have to rely on statement’s truth to prove a point? If yes, hearsay (retirement home/suicide – statement is only probative of lack of intent to kill self if actually true)
   2. Did the declarant intend to communicate that fact?
      1. Sea captain who inspected ship did not intend to communicate anything, but government official who talked about taking family to nuclear test did
      2. Nonverbal conduct is only hearsay if it is intended to *assert* something (USPS did not intend to assert anything by delivering children’s letters to Santa Claus)
3. Hearsay is concerning due to problems with 1) reliability, inability to make credibility determinations, and the addition of four “testimonial capacities” (perception, memory, narration, sincerity)
   1. Most hearsay exceptions arise because of 1) necessity, or 2) lack of concern of reliability
4. Non-hearsay uses of out-of-court statements include:
   1. To prove the statement’s impact on someone who heard it
   2. To prove a legal right/duty triggered by the statement
   3. To impeach the declarant’s later, in-court testimony
   4. Nonassertive words (involuntary expressions)
   5. Words offered to prove something other than what they assert
   6. Assertions offered as circumstantial proof of knowledge
5. When a hearsay statement is admitted, the declarant’s credibility may be attacked, and then supported, by any evidence admissible if the declarant had testified as a witness
6. Hearsay within hearsay is not excluded if each part of the combined statements can conform to an exception to the rule against hearsay – Rule 805

#### Rule 801(d) (Statements That Are Not Hearsay)

1. The following statements are not hearsay under Rule 801:
   1. (d)(1)(A) – Prior statement inconsistent with declarant’s testimony if under penalty of perjury *or*
   2. (d)(1)(B) – A prior statement consistent with the declarant’s testimony offered:
      1. (i) to rebut an express/implied charge that the declarant recently fabricated it
         1. Incorporates common-law requirement of pre-motive requirement. In order to be admissible hearsay, consistent prior statement must have been made before motive to lie/fabricate arose (*Tome v. U.S.*)
            1. Post-motive out-of-court statements have limited probative value of whether statement is true or motivated by other factors
            2. Dissent argues that 403 should govern the probative value inquiry rather than importing a probative value test into hearsay
      2. (ii) to rehabilitate declarant’s credibility as witness when attacked on other grounds; or
      3. (iii) to identify a person as someone the declarant perceived earlier
   3. (d)(2) – A statement made by the opposing party (or his agent) offered against the party
      1. Three possible rationales for this rule: 1) Statements made against self-interest are usually reliable, 2) Parties can’t complain about not being able to cross-examine themselves (what about self-incrimination concerns?) and 3) Litigation is WAR
      2. (2)(B) – a statement is admissible if a party manifested that it adopted/believed it
         1. Allows assent by silence (insurance fraudster didn’t deny attempt to defraud)

Rule 803 (Hearsay Exceptions) - Emphasis on reliability above and beyond that of ordinary hearsay

1. (1) A statement describing an event made while or immediately after the declarant perceived it
   1. Is this really extraordinarily reliable? Especially if an agenda was formed previously?
2. (2) A statement relating to a startling event or condition (objective), made while the declarant was under the stress of excitement (subjective) that it caused
3. (3) A statement of the declarant’s then-existing state of mind or physical condition, but not including a statement of memory or belief to prove the fact remembered or believed
   1. Evidence of an intent at a relevant time might be better evidenced by hearsay than by direct evidence – does not rely on perception or memory – *Hillmon*
      1. Limited evidentiary value – can only prove that declarant had specific intention regarding the future
4. (4) A statement that is made (A) for and is **reasonably pertinent** to medical diagnosis/treatment and (B) describes medical history, past/present symptoms, their inception, or their general cause
   1. Thought to be more reliable due to overriding desire to receive necessary medical care
      1. Does this rationale apply to children, as in *U.S. v. Iron Shell*?
      2. The rationale certainly doesn’t apply when statements to expert witness physicians/psychiatrists *not responsible for diagnosis/treatment* come in
   2. Two-part test for admissibility under Rule 803(4):
      1. Is the declarant’s motive consistent with the Rule’s purpose?
      2. Reasonable for a physician to rely on the information in diagnosis/treatment?
5. (5) A record that is (A) on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately, (B) was made by the witness when the matter was fresh in the witness’s memory, and (C) accurately reflects the witness’s memory
   1. Four elements for admissibility of records under Rule 803(5): (*Johnson v. State*)
      1. The witness had firsthand knowledge of the event
      2. The written statement was made at/near the time of the event while the witness had a clear and accurate memory of it
      3. The witness must lack a present memory of the event
      4. The witness must vouch for the accuracy of the written statement
   2. Note the difference between using a record to refresh a witness’s recollection (Rule 612) and this exception to hearsay testimony
6. (6) A record made and kept in the ordinary course of business
7. (16) A statement in a document that is at least 20 years old and whose authenticity is established
8. Rule 807 creates a residual (rarely used) exception to the rule against hearsay – statements must:
   1. (a)(1) Have equivalent circumstantial guarantees of trustworthiness
   2. (2) Be offered as evidence of a material fact
   3. (3) Be more probative of the point for which it was offered than means obtainable through reasonable effort; and
   4. (4) Best serve the purposes of the rules and interests of justice through its admission
   5. *Dallas County v. Commercial Union Assurance Co.* focused only on necessity and trustworthiness to assess whether hearsay that did not fall into exceptions should be allowed in

Rule 804 (Hearsay Exceptions if a Witness is Unavailable)

1. (a) – A declarant is unavailable as a witness if:
   1. (1) The court rules that a privilege applies
   2. (2) The witness refuses to testify despite a court order
   3. (3) Testifies to not remembering the subject matter
   4. (4) Cannot be present at trial due to death or illness
   5. (5) Is absent and a party has not been able to procure the declarant’s attendance
2. (b) – The following are excluded from hearsay if declarant is unavailable (emphasis on necessity)
   1. (1) Formal testimony (trial, deposition, etc.) where opponent had opportunity to cross-examine
   2. (2) In a prosecution for homicide or in a civil case, a statement about the declarant’s death made by a declarant believing his death to be imminent
      1. Belief of imminent death is construed narrowly – statement must be made without hope of recovery and in shadow of impending doom (*Shepard v. U.S.*)
         1. Rationale is that people are unlikely to lie right before going to their eternal reward – does this still hold in modernity?
         2. Relatedly, testimony is only admissible under Rule 602 if a witness has personal knowledge of a matter – mere conjecture is inadmissible
   3. (3)(A) A statement so contrary to financial or legal interest that a reasonable person in declarant’s position would only make the statement if believed to be true and (B) if offered in a criminal case, a statement tending to expose the declarant to criminal liability is supported by corroborating circumstances indicating its trustworthiness
   4. (4) A statement of personal/family history of the declarant or a close relative
   5. (6) A statement offered against a party that wrongfully caused the declarant’s unavailability as a witness, and did so intending that result

#### Confrontation Clause

1. The Confrontation Clause provides that in all criminal cases, a defendant has the right to be confronted with the witnesses against him
2. Under the *Roberts* test, the Confrontation Clause did not act as a bar to hearsay if the out-of-court statements met the rules of necessity and reliability
3. In *Crawford v. Washington*, Scalia uses an originalist interpretation of the Constitution to create a new test: If a statement is “testimonial”, the 6th Amendment requires witness unavailability *and* a previous opportunity to cross-examine before the evidence may be allowed in
   1. It is unclear why looking to the *history* of the *text* (i.e., common law) is a good interpretive tool
4. The Court steps toward defining “testimonial” in *Davis v. Washington* – if the “primary purpose” of an interrogation is to establish/prove past events potentially relevant to later criminal prosecution, the out-of-court statements are testimonial
   1. If primary purpose was to meet an ongoing emergency, then non-testimonial
      1. When is an emergency no longer “ongoing”? *Highly* fact-sensitive inquiry
   2. Court moves further back to *Roberts* (and away from *Crawford*) in *Michigan v. Bryant*
      1. Majority argues that the “primary purpose” test requires examination of both interrogator’s and interrogatee’s responses
         1. Scalia rejects importance of interrogator’s intent – but doesn’t this conflict with his initial rule in *Crawford*?
5. Recent decisions in *Bullcoming* and *Williams* muddy the waters, since neither case can get a majority of justices to agree on what the rule for “testimonial” actually is
   1. *Bullcoming* rejects admission of lab reports without testimony of lab analyst who physically signed report certifying what a substance is
   2. In Williams, majority argues for the overruling of *Davis*, while the dissent pushes for its continued vitality. Thomas’ solo opinion is probably the narrowest, and therefore controls under *Marks*
      1. Evidence is testimonial if given with the primary purpose that it be used to prove past events at trial *and* given with adequate indicia of formality and solemnity
      2. Even thoug0h there is no majority opinion that overturns *Davis*, because there are five justices that explicitly state it is incorrect, it is effectively overruled
6. Dying declarations’ admissibility under Confrontation Clause *even if* testimonial is an open question

### Lay Opinions & Expert Testimony

1. Rule 704 – (a) An opinion is not objectionable just because it embraces an ultimate issue
   1. (b) In a criminal case, an expert witness must not state an opinion about whether the defendant had a mental state/condition constituting an element of the crime charged or a defense
   2. Expert testimony that expresses a legal conclusion or merely tells the jury what result to reach in the case must be excluded – *Hygh v. Jacobs* (Law professor as expert on “deadly force”)
      1. It is the judge’s *exclusive* province to instruct the jury on the governing law of a case
      2. Although experts cannot simply offer conclusory assertions, such assertions might be harmless error if surrounded by other, unobjectionable testimony
      3. Credibility of witnesses is also the exclusive province of the jury – *State v. Batangan* (expert that expressed confidence that a witness was credible was inappropriate, *but* general principles of behavioral science in an area beyond the knowledge of the jury (i.e., child’s response to sexual assault) are permissible topics of expert testimony)

Rule 701 – If a witness is not testifying as an expert, opinion testimony is limited to one that is

1. (a) rationally based on the witness’s perception
2. (b) helpful to clearly understanding the witness’s testimony or determining a fact in issue, and
   1. Does not limit lay witnesses to solely factual testimony – inferences (“It was dark, he seemed to be drunk”, etc.) may be admitted if adequate factual foundation has been laid
3. (c) not based on scientific, technical, or other specialized knowledge

Rule 702 – A witness qualified as expert by knowledge, skill, experience, training or education may offer opinion testimony if:

1. (a) the expert’s knowledge will help the trier of fact understand the evidence or determine a fact
   1. There must be a nexus between the qualifications of the expert and the opinion given – *Jinro America* (“expert” merely parroted stereotypes about Korean/Asian business)
2. (b) the testimony is based on sufficient facts/data
3. (c) the testimony is product of reliable principles and methods, and
4. (d) the expert has reliably applied the principles and methods to the facts
5. *Frye* created “general acceptance” as a standard of admissibility for novel scientific expert evidence
   1. Replaced by the *Daubert* test:
      1. The subject of expert testimony must be “scientific knowledge” (reliability)
         1. Has/can the technique be tested?
         2. Subject to peer review/publication?
         3. Known/potentially knowable error rate?
         4. Existence/maintenance of standards controlling technique’s operation
         5. General acceptance in scientific community
      2. Will the testimony help the trier of fact understand/determine a fact – sometimes described as “fit” (relevance)?
   2. Although *Daubert* seems to have been an attempt to liberalize *Frye*’s rule of “general acceptance”, it is widely seen as encouraging judges to keep junk science out
      1. However, there appears to be no practical difference between the two regimes
   3. *Kumho Tire* confirms that *Daubert* factors apply to *all* forms of expert testimony under Rule 702
      1. Trial court address specific question of whether an expert can help the jury gain additional insight about *this* case – NOT whether the method works *generally*
      2. Court has broad discretion to determine expert’s reliability and *how* that determination should be made
      3. Rulings on admissibility of expert testimony is reviewed for abuse of discretion – *Joiner*
         1. Courts may reject expert testimony not supported by anything other than the expert’s own statements
6. Rule 703 allows expert to base opinion on facts/data that the expert has been made aware of, or personally observed
   1. If experts in the field would reasonably rely on facts/data in forming an opinion, they need not be admissible for the opinion to be admitted
      1. Proponent of the opinion may only disclose underlying facts if their probative value in evaluating the opinion substantially outweighs their prejudicial effect
         1. This reverse Rule 403-weighing test creates a presumption *against* disclosure to the jury of the underlying hearsay evidence
   2. Note that this gets around the personal knowledge requirement of Rule 602
7. Expert testimony can be concerning for two reasons:
   1. Experts may be a way to smuggle otherwise inadmissible hearsay into court
   2. As an “expert”, testimony may carry special weight with the jury

### Authentication & Best Evidence Rule

Rule 901 – (a) To authenticate an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is

1. (b) The following is a *non-exclusive* list of evidence that satisfies the requirement
   1. (1) Testimony of a witness with knowledge
   2. (4) Distinctive characteristics (appearance, contents, substance, internal patterns, etc.)
      1. Multiple characteristics, including knowledge of a specific context, acquiescence to being called a certain name, speech patterns, can combine to make a sufficiently strong showing of authenticity to allow admission – *State v. Small* (phone call to “Dominique”)
   3. (5) Opinions identifying a person’s voice
   4. (6) Evidence that phone call was made to the number assigned at the time to a particular person, if circumstances (including self-identification) show that the person answering was the one called
   5. (8) Evidence of an ancient document is admissible if (A) in a condition creating no suspicion about authenticity, (B) in a place where, if authentic, it would likely be, and (C) 20+ years old
      1. Certification by competent expert, even without an unbroken chain of custody, can lead to admissible evidence – *U.S. v. Stelmokas*
   6. (9) Evidence describing a process/system and showing that it produces an accurate result
   7. Rule 902 provides a further list of items of evidence considered to be self-authenticating
      1. Opposing party may *always* contest authenticity, even of self-authenticating evidence
2. As in Rule 104(b) situations of conditional relevance, the jury must be able to find that the exhibit is authentic by a preponderance of the evidence – *Huddleston*
   1. Just because evidence is admissible doesn’t require a judge/jury to accept it as *credible*
      1. Opposing party can also challenge evidence as hearsay or unfairly prejudicial
3. Most frequent method of authentication for fungible items is “chain of custody”
   1. Chain of custody need not be perfect to permit admissibility – the standard is only preponderance of the evidence. Defects usually go to weight, not admissibility
   2. Chain of custody is good enough if it supports a finding that the item in question is *the same item* in *substantially the same condition*
4. Photographic evidence may be admissible even without the photographer’s testimony – witness must testify that the picture/video is an accurate representation of his version of the facts (is evidence being used to *illustrate* the witness’s testimony?) – *Simms v. Dixon* (photograph of crashed car)
   1. If the desire is to admit evidence to prove the truth of its content (if it has independent probative value), the reliability of the process used to create the evidence may be used to authenticate it
   2. The following factors should be considered in determining if evidence has been authenticated sufficiently to serve as a “silent witness” – *Wagner v. State* (drug purchase video)
      1. Evidence establishing date/time of photographic evidence
      2. Evidence of editing/tampering
      3. Operating condition/capability of equipment producing the evidence as it relates to accuracy and reliability of photographic product
      4. Procedure employed to produce the photographic product (prep, testing, operation, security of product itself, etc.)
      5. Testimony identifying the relevant participants depicted in the photographic evidence

#### Rules 1001-1004

1. Rule 1002 – “Best Evidence Rule” applies to documents, photos and recordings if offered to prove content
   1. Evidence capable of “doctoring” must be presented in as close to original form as possible. This bars litigants from presenting a witness’s *memory* of a doc’s content instead of physical item
   2. However, Rule 1001 defines an “original” as a printout (or other output readable by sight) that accurately reflects the information, or negative/prints of a photograph
   3. Only really applies in two cases:
      1. When the writing/photograph *itself* is in issue? (Is this child pornography? Was the article defamatory?)
      2. If the document attains “independent probative value” – the evidence proves an event by proving the content
2. A duplicate is also admissible to the same extent as an original unless a genuine question of the original’s authenticity is raised, or it is unfair to admit the duplicate
   1. Rule 1001 defines a “duplicate” as a counterpart produced by mechanical, photographic, chemical, electronic, or other means that accurately reproduces the original
      1. Only thing seemingly prohibited as a duplicate is a manual transcription of the original
3. Rule 1004 – An original is not required, and other evidence may be admitted if:
   1. (a) All the originals are lost/destroyed, and not by proponent in bad faith
   2. (b) An original cannot be obtained by judicial process
   3. (c) The party against whom the original would be offered had control of the original, notice of intent to be used as evidence, and fails to produce it
   4. (d) the evidence is not closely related to a controlling issue

### Privileges

1. Rule 501 – The common law, as interpreted by the courts in light of “reason and experience” governs a claim of privilege, unless in a civil case (where state law governs)
   1. Almost all privileges exist due to concerns of a chilling effect on certain types of communication that enhance a societal good (psychiatrist, attorney, spouse, etc.)
   2. Three privileges in federal evidence rules: psychiatrist, clergy, and attorney

#### Proposed Rule 504 (Psychiatrist-Patient)

1. Patient may refuse to disclose & prevent disclosure of confidential communications made for diagnostic/treatment purposes
2. Exceptions if: (d)(1) communications are to be introduced in hospitalization proceedings; (d)(2) examination is by judicial order; or (d)(3) psychological condition is an element of claim/defense
3. Adopted through common law in *Jaffe v. Redmond*
   1. Rejects a balancing approach (need for confidentiality vs. importance of alleged communications), since privilege encourages honest communication in *any* circumstance
   2. Retains distinction of doctor-patient and psychiatrist-patient. What’s the difference?
      1. More stigma associated with mental health?
   3. Scalia’s dissent *hammers* injustice associated with privilege, argues that defendants shouldn’t get “social” benefits of psychiatric help without attendant consequences
      1. Do psychiatrists contribute more to mental health than parents, or best friends? Why no privilege for these communications?

#### Attorney-Client Privilege

1. PROPOSED Rule 503 – Client has privilege not to disclose not to disclose & prevent disclosure of confidential communications made for purpose of facilitating rendition of legal services
2. Lawyer-client privilege has four essential elements:
   1. The privilege is the *client*’s
   2. Communication must be to facilitate legal services
   3. Client must intend that communications *be* and *remain* confidential
      1. Privilege might be waived if client discloses or consents to disclosure of any significant part of the communication to someone outside the privilege
      2. Rule 502(b) also creates doctrine of inadvertent disclosure – *Williams v. D.C.*
         1. Inadvertent disclosure is *not* a waiver if:
            1. Attorney accidentally discloses privileged information
            2. Attorney took reasonable steps to prevent disclosure, and

Movant should address methodology of production/review, give a sense of burden of doc review

* + - * 1. Attorney promptly takes reasonable steps to rectify the error
  1. What was communicated is privileged – facts that were communicated are not

1. Attorney-client privilege extends posthumously, since client might still be concerned about harm to friends/family, embarrassment – *Swidler & Berlin v. U.S.* 
   1. Testamentary exception (no privilege for matters relating to a decedent’s will) serves to ensure deceased’s wishes are met, that is *not* the rationale behind this proposed rule
      1. Dissent notes that other exceptions (i.e., crime-fraud exception) don’t meet rationale either – we think in these cases the privilege should be subsumed
2. No privilege if: (d)(1) Services were sought to further commission of a future crime/fraud; (d)(3) Communication is relevant to breach of duty by lawyer *or* client (client didn’t pay attorney)
   1. In camera review of allegedly privileged material may determine applicability of crime-fraud exception – *U.S. v. Zolin*
      1. In camera review by a judge doesn’t destroy privilege, and categorical prohibition would lead to blatant abuse, since it will frequently be incapable of other methods of proof
      2. Before review, opponent of privilege must establish exception’s applicability under a reasonable person, good faith standard. This threshold showing may be made using excerpts of the privileged information, or other non-independent evidence
         1. Decision of whether to engage in in camera review is trial court’s discretion

#### Spousal Privileges

1. Difference between spousal testimonial privilege (limited by *Trammel*) and marital confidence privilege
   1. Spousal testimonial allows spouse to prohibit the other from testifying against him/her
      1. The privilege expires if the marriage expires
      2. Originally aimed at fostering harmony and the sanctity of marriage. However, if a spouse is willing to testify against another, not much left to save - *Trammel*
         1. Another instance of the rules of evidence being changed due to societal shifts
   2. Marital confidence privilege protects spousal communication intended to be confidential
      1. Either spouse may claim the privilege and bar the other from revealing the confidential communications (in a majority of states)