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- **I. Relevance**
 - **A. Logical Relevance**
 - **1. Relevance and Materiality**

Evidence is "relevant" if it tends to establish the point for which it's offered, and "material" if the point bears on an issue in the case.
 - Rule 401 - Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
 - Rule 402 - Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution, Act of Congress, by these rules, or by other rules prescribed by the S.C. pursuant to its authority. Evidence not relevant is not admissible.
 - *Old Chief v. United States*

The relevancy of a given piece of evidence under FRE 401 is not affected by the availability of alternative proofs of the assertion to which the element goes. The prosecution is entitled to prove its cause by evidence of its own choice; to tell its own story.
 - **2. Establishing Relevance: The Evidential Hypothesis**

You should be prepared to advance an "evidential hypothesis" explaining why your proof is relevant. This can be based on deductive or inductive reasoning. Deductive: "if the premises stated are true, the conclusion must be true". Inductive arguments have a conclusion embodying empirical conjectures that go beyond what the premises say: "People who intend to do something likely do it. X intended to defraud Y. X likely defrauded Y."
 - **3. Relevance as Threshold: The Standard of Probative Worth**

Multiple theories as to what level of probative worth should be counted as "relevant", but the rule in FRE is simply that it makes the conclusion more or less probable than it was without the evidence. This is the most lenient and admissibility-biased standard.
 - **4. Relevance Reconsidered: The Problem of Induction**
 - Problem 2-C: Too Much Wax
- **B Conditional Relevance**
 - **Rule 104 - Preliminary Questions**
 - a. Judge determines what's admissible and what's not

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- b. Relevancy Conditioned on Fact
 - When the relevancy of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
 - Note
 - Judge here performs only a screening function: when different answers are reasonable, the jury decides whether or not the condition is satisfied. This evidence is admitted subject to introduction of enough other evidence to support the appropriate jury finding.
- **C. Categorical Rules of Exclusion**
 - **A. Prejudice**
 - Rule 403 - Prejudice, Confusion, Waste of Time
 - Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
 - Rule 105 - Limited Admissibility
 - When evidence is admissible as to one party or one purpose but not as to another party or another purpose, the judge shall instruct the jury, upon request, as to its proper scope.
 - 1. Prejudice and Confusion
 - *State v. Chapple*
 - Facts
 - Alleged first-deg. murder. Victim found in the bedroom of a trailer home, shot in the head. Δ claimed at trial to have been in another state at the time. Contends that admitting pictures of the charred body and skull of the victim was error.
 - Black Letter
 - Generally, photographs tending to prejudice the jury may still be admitted if they have a bearing on the case [are "relevant"]. However it's not an "always" kind of deal; cause of death, etc is always relevant in a murder trial: where the tendency to prejudice substantially outweighs the probative value, they'll be suppressed.
 - Note
 - In balancing probative value against inflammatory tendency, the court must examine the purpose of the offer of evidence. Must be offered to help prove a contested question.
 - Old Chief v. United States (II)

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- 2. Limited Admissibility - Confining the Impact of Proof
 - Rule 105 allows for limiting instructions that dictate what things evidence can bear on and what it can't.
- 3. "The Shortness of Life"
 - Undue delay or "piling on" of cumulative evidence -- evidence that's otherwise relevant can be excluded under 403 if it's needlessly delay-inducing or adds needlessly to an evidentiary point that's been made already with other evidence.
- **C. Civil Settlements, Settlement Negotiations**
 - Rule 408 - Compromise and Offers to Compromise
 - Settlements and settlement offers are not admissible to prove fault.
 - This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.
 - Rule 410 - Inadmissibility of Pleas, Plea Discussion, Related Statements
 - Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
 - (1) a plea of guilty which was later withdrawn;
 - (2) a plea of nolo contendere;
 - (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
 - (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or

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false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

- **D. Payment of Medical Expenses**

- Rule 409 - Payment of Medical and Similar Expenses

Evidence of furnishing, offering or promising to pay medical/hospital expenses stemming from injury is not to be used as proof of liability.

- **E. Proof of Insurance Coverage**

- Rule 411 - Liability Insurance

Evidence that a person was or was not insured against liability is not admissible on the issue of negligence or other tortfeasery. This does not require the exclusion of evidence against insurance against liability when offered for another purpose, such as proof of agency, ownership, control, bias or prejudice of a witness.

- **F. Character Evidence**

Character evidence doesn't mean "habit", but the propensity to act a certain way because of a certain trait. In those cases where character evidence is admitted as proof of conduct, it must be in the form of opinion or reputation evidence, rather than proof of specific instances. Specific instances, however, may be raised on cross.

- **1. Propensity**

- **Rule 404 - Character Evidence**

- a. Generally

Only admissible to prove action in conformity therewith in these situations:

1. Character of accused: Evidence of a pertinent trait of character offered by an accused, or by prosecution to rebut that. Or by prosecution to rebut evidence of character trait of victim introduced by defendant under section 2.

2. Character of alleged victim -- offered by accused, or by prosecution to rebut that offered by accused, or by prosecution showing trait of peacefulness to rebut evidence that victim was first aggressor in a homicide.

3. Character of Witness - as provided in rules 607-609.

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- 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. May be admissible for other purposes; proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if court excuses pretrial notice on good cause shown.

- **Rule 405 - Methods of Proving Character**

- a. Reputation or Opinion
Proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-ex, inquiry is allowable into specific instances of conduct.
- b. Specific Instances of Conduct
If character or character trait is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

- Propensity Chain of Inference

[trait]----->(inference)---->[conforming conduct]

[H. is absentminded] ----->[H. probably forgot your birthday]

We try to raise an inference by introducing a character trait tending to indicate that the individual acted in a certain way.

This chain of inference is forbidden by rule 404(a), and exceptions established in (a)(1) to (a)(3)

- **2. Non-propensity**
- **G. Character in Sex Offense**
 - **Rule 412**
 - **a) Evidence Generally Inadmissible:**
 1. Evidence offered to prove that an alleged victim engaged in other sexual behavior (sexual history).
 2. Evidence offered to prove an alleged victim's sexual predisposition.
 - **b) Exceptions**
 - **1. In a criminal case, the following is admissible:**
 - A. Evidence of specific instances by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence

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- B. Evidence of specific instances by the alleged victim with respect to the person accused, offered by accused to prove consent
- C. Evidence the exclusion of which would violate Δ 's constitutional rights.

- **c) Procedure to determine admissibility**

To get something in under b) must

- a. file a motion 14 days before trial, specifically describing the evidence and stating its purpose.
- b. serve the motion on all parties and notify the victim or guardian

Court will hold in-camera review, and the stuff will be sealed.

- **Rule 415 - Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation**

Generally admissible.

- **H. Habit and Routine Practice**

- **Rule 406 - Habit, Routine Practice**

Evidence of habit or routine practice is relevant to show that the conduct of the person was in conformity with his habit or routine practice.

- What's the difference between habit and character?

character is a generalized description of disposition in respect to a general trait such as honesty, temperance or carefulness. Habit is more specific.

Suggests a regular way of meeting a certain situation with a given type of conduct, or a reflex behavior given a particular stimulus.

- **I. Privileged Material**

- **Rule 501 - Privilege Rules governed by Common Law**

- **Rule 612 - Writings Used to Refresh Memory**

These writings must be provided to the opposing side. If it's claimed that not all of it is related to the testimony, in-camera review will censor out the irrelevant portions. If that's objected to, the whole writing will be provided to the reviewing court on appeal.

- **II. Hearsay**

- **A. The General Rule Regarding Hearsay**

- **Rule 801 - Definitions**

- a. Statement

Oral or written assertion or nonverbal conduct, if it is intended as an assertion

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- b. Declarant
 - A person who makes a statement
- c. Hearsay
 - Statement other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted.
- **Rule 802 - Hearsay Rule**
 - Not admissible except as provided by these rules (exceptions)
- What's NOT hearsay, if it doesn't fall under an exception?
 - Rule 801(d)
 - Prior statement by witness (at trial or hearing) if inconsistent with current testimony (offered to undermine credibility), consistent with current testimony (offered to rebut a charge of recent fabrication) or one identifying a person made after perceiving the person.
 - Admission by party opponent
 - Party's own statement offered against party
 - statement of which the party has manifested an adoption in its belief
 - statement by an agent of the party about a matter in the scope of the agency
 - statement of a coconspirator.
 - None of these can be alone sufficient to establish the relationship implied.
 - Verbal acts
 - Something which gives rise to legal consequences, i.e. language of a contract.
 - Effect on hearer or reader
 - A statement offered to show that the listener knew or didn't know of something (not offered to show the truth or the thing known or not known).
 - Example: D is being charged with a crime that requires she knew of fact A.
 - Testimony that X told D A, offered to show that D knew A, is not hearsay.
 - Declarant's State of Mind
 - Testimony that before having sex D said "I know you're only 15" in order to show that he knew she was underage in a statutory rape trial...not hearsay.
 - "State of Mind" can include knowledge, or intent.
 - Nonassertive conduct
 - Witness X says "Z opened his umbrella" to prove to jury it was raining. Is offered to prove the truth of the fact that it's raining, but was not an ASSERTION.
 - Assertions and Assertive Conduct Offered for Different Purpose
 - Maybe an assertion offered to prove the truth of some other matter not asserted; X calls D's house and says "I want to bet \$10 on the pistons." It's

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an implied assertion, so it's not hearsay if offered to prove that D's house was used as a gambling center, because that's not what the assertion was saying. "The persons did not intend to make an assertion ABOUT THE FACT sought to be proved".

- **B. "Nonhearsay"**
 - **A. Declarant Testifying**
 - 1. Prior Inconsistent Statements
Inconsistent to what witness is now saying. Must have been given at trial or hearing under oath.
 - 2. Prior Consistent Statements
Consistent with declarant's testimony and offered to rebut charge of recent fabrication, improper influence or motive.
 - 3. Prior Statements of Identification
 - **B. Admissions by Party Opponent**
 - **1. Individual Admissions**
almost no limits here
 - **2. Adoptive Admissions**
Court will look at context and see if there was adoption. If so, it'll be admitted. Party must have a manifested belief in the truth of the statement.
 - **3. Admissions by an Agent**
 - **4. Admissions by a Person with Authority to Speak**
 - **5. Co-conspirator Statements**
- **C. Hearsay Exceptions - Availability Immaterial**
 - **A. Present Sense Impressions**
Immediacy is the key to present sense impressions under FRE 803(1).
 - **B. Excited Utterance**
An excited utterance does not have to be made at the same time of the startling event, but it must be made while the declarant is in the state of surprise or shock resulting from the incident to which the statement relates.

A statement made minutes, hours or even days after the startling event can be excited utterances, so long as the declarant is still under the stress of the startling event. However, the more time that elapses between a startling event and the declarant's statement, the more the statements will be looked upon with disfavor. The time duration between the startling event and the statement is an issue of weight given by the trier of fact, and not an issue of admissibility of the testimony in trial.
 - **C. State of Mind**

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- a. to prove declarant's then-existing physical condition
- b. his then-existing mental or emotional condition
- c. his later conduct
- d. facts about his will.
- **D. Statements to Physicians**
- **E. Past Recollection Recorded**

When present recollection refreshed fails, then the court can allow a past recording, so long as the witness lacks present recollection, the statement recorded accurately reflects former knowledge, the witness made or adopted the statement, and did so while the matter was fresh in her mind.
- **F. Business Records Exception**

Record admissible if made at the time of the occurrence or shortly thereafter, by a person with personal knowledge, and made and kept in the normal course of business routine.
- **D. Hearsay Exceptions - Declarant Unavailable**
 - **A. Definition of Unavailability**

unavailable due to privilege, lack of memory, death or physical or mental illness, absence from hearing and unable to be called by process or other reasonable means.
 - **B. Former Testimony Exception**

But only if the party against whom it's offered, or a precedent in interest, had an opportunity and similar motive to develop the testimony by direct or cross-X.
 - **C. Dying Declarations**

Civil action (any) or prosecution for homicide. Must concern cause or circumstances of what declarant believed to be impending death.
 - **D. Statements Against Interest**

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
 - **E. Constitution as a Bar against Hearsay**
- **III. Examination of Witnesses**
 - **A. Preliminary Considerations**

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- **A. Competency**
 - **Rule 601 - General Rule of Competency**

Every person is competent to be a witness except as otherwise provided in these rules.
 - **Rule 605 - Competency of Judge as Witness**

Judge presiding at trial may not testify in that trial as witness.
 - **Rule 606 - Competency of Juror as Witness**
 - a. At the trial: may not testify as a witness.
 - b. Inquiry into validity of verdict or indictment: may not testify as to any matter occurring during the course of deliberations, or with regard to anything on any other juror's mind/emotions influencing juror's vote except that juror may testify on the question of whether extraneous prejudicial information was improperly brought to bear on any juror.
- **B. Personal Knowledge**
 - **Rule 602 - Personal Knowledge Requirement**
- **B. Impeachment**
 - **A. Introduction**

Five ways to Impeach:

 1. Showing that the witness has bias, animus, motivation, or corruption which might lead him to shade his testimony.
 2. Showing a defect in sensory or mental capacity (perception or memory) that undercuts the testimony.
 3. Showing that he is by disposition untruthful. This can be done by:
 - a. cross-x about nonconviction misconduct; b. cross-x about convictions for certain kinds of acts (rule 609); c. testimony by a character witness that witness is untruthful.
 4. showing the witness has made prior inconsistent statement
 5. contradicting the witness on one point or another in his testimony (showing jury he's wrong).
 - **Rule 607 - Who May Impeach**

Any party!
- **B. Nonspecific Impeachment: Bias and Motivation**
- **C. Sensory and Mental Capacity**

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- **D. Character for Truthfulness**
 - 1. Nonconviction Misconduct
 - **Rule 404 - character evidence generally inadmissible**
 - **Rule 608 - exception to 404 when bears on character for truthfulness.**
 - *United States v. Manske*
 - Broad leniency towards attacking character for truthfulness.
 - Don't need to lay foundation for bias evidence.
 - 2. Prior Convictions
 - 3. Character Witnesses
- **E. Prior Inconsistent Statements**
- **F. Contradiction**
- **G. Repairing Credibility**
- **C. Opinion and Expert Testimony**
 - **A. Lay Opinion Testimony**
 - **B. Expert Witnesses**
 - **C. Scientific Evidence**