

1  **Federal Rules of Evidence - Organization**


- 1 • 100 Series – General provisions, including procedures for admitting evidence, preliminary questions, limited admissibility, and rule of optional completeness.
- 200 Series – Judicial Notice
- 300 Series – Presumptions and Burdens
- 400 Series – Relevancy, including exclusion of otherwise relevant evidence, character evidence, and habit evidence

2  **Federal Rules of Evidence - Organization**


- 1 • 500 Series – Privileges
- 600 Series – Witnesses, including qualifications, impeachment, and means of examination
- 700 Series – Opinion and expert testimony, lay and expert
- 800 Series – Hearsay, including non-hearsay and exceptions
- 900 Series – Authentication and identification
- 1000 Series – Written evidence, including copies
- 1100 Series – Miscellaneous Rules

3  **100 Series General provisions, including procedures for admitting evidence, preliminary questions, limited admissibility, and rule of optional completeness**

- FRE 104 (a) Preliminary questions on admissibility to be determined by the court, subject to 104(b).
- FRE 104(b) Court can admit “subject to” later factual proof, *sufficient to support a finding of that fact by the jury*.
- FRE 105 Court can limit consideration of evidence if admissible for some purposes and not others.

4  **200 Series – Judicial Notice**

- Court can judicially notice facts without need for jury to determine
- Applies only to “adjudicative facts.”
- Facts generally known within the jurisdiction – such as the mayor’s name
- Facts capable of accurate and ready determination by reference to unimpeachable source (e.g., calendar)
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5  **200 Series – Judicial Notice**

- “Legislative facts.” E.g., facts that establish jurisdiction, such as determining that assault happened on federal reservation as jurisdictional to certain criminal charges
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6  **300 Series – Presumptions and Burdens**

- Presumptions – Rule of law that once base fact A established, fact B, the presumed fact, must be taken as established, at least if there is no evidence of non-B. E.g., presumption of mailing. Evidence that item was posted in U.S. mail raises statutory presumption of receipt.
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7  **300 Series – Presumptions and Burdens**

- Burdens – 2 types
- Burden of proof – “default winner”

- Burden of going forward with the evidence – party faced with presumption loses unless comes forward with rebuttal evidence.

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#### 8 ■ 300 Series – Presumptions and Burdens

- Thayer theory, or “bursting bubble” presumption – no evidentiary value once rebutted
- Modified Thayerian – presumption does not disappear unless “substantial” rebuttal proof presented
- Third approach – presumed fact must be found until and unless evid of non-existence makes non-existence at least as probable as existence
- Fourth approach – presumed fact must be found unless jury finds non-existence more probable than existence (shifts burden of proof)

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#### 9 ■ 400 Series – Relevancy and its Limits

- FRE 401. “Relevant evidence” is that evidence having any tendency to make the existence of a fact that is of consequence to the action more or less probable.
- FRE 402. Relevant evidence is generally admissible, irrelevant evidence inadmissible.
- “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by any other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

#### 10 ■ Relevance

- Evidence does not necessarily have to be relevant to a disputed fact.
- Evidence that makes more or less likely a matter “of consequence” to the litigation. May be ultimate, intermediate, or evidentiary issue.
- Ultimate issue is an issue to be decided by the jury on which the case turns. E.g., guilt.
- Intermediate issue is an issue that is necessary to establish a crime or claim, but not necessary for jury to decide, such as motive, intent, state of mind, etc.
- Evidentiary issue is an issue that is preliminary or collateral to an ultimate or intermediate issue. E.g., the scientific reliability of an expert’s methodology.

#### 11 ■ Relevance

- The *McCandless* definition. “A brick is not a wall.” Only “slight probative value” required. Thus, admissible if any tendency to make more likely matter of consequence. Remote relevance - the more remote, the less likely it is to be considered relevant. Consider chain of relevance as problematic; rain in Utah on New York assault case example.
- The *Craft* definition. Not “logical” relevance (“Tendency to raise belief in a reasonable person”)
- The *Engel* definition. Not “legal” relevance, which would require a balancing that it has more than a minimum of probative value. (“Makes desired inference more probable than not.”) Or is it? Rain in Utah example again. This tends to confuse relevancy with legal sufficiency to support a verdict. Introduce concept of factual and legal sufficiency on appellate review.

#### 12 ■ Rule 403

- Relevant evidence can be excluded, in the discretion of the court, if its probative value is “substantially outweighed” by its prejudicial impact.
- Examples of categories of substantial prejudice, misuse, confusion, misleading, cumulative, time-consuming, shocking, natural tendency to cause jurors to decide the case on an

improper basis.

13  **Rule 403 Balancing Test**

- It is important to keep in mind that this is not an equal balancing test. The probable prejudice must substantially outweigh the probative value for the judge to have the discretion to exclude.

14  **Rule 403 Balancing Test**

- When conducting a Rule 403 balancing test, the trial court should analyze:
  - How probative is the evidence;
  - The potential the evidence would have to impress the jury in some irrational, but nevertheless indelible way;
  - The time the proponent will need to develop the evidence;
  - The force of the proponent's need for the evidence to prove a fact of consequence, considering:

15  **Rule 403 Balancing Test**

- The availability of other evidence;
- The strength of other evidence; and
- Whether a fact of consequence is related to an issue that is in dispute.
- Important note: Rule 403 rulings virtually never reversed on appeal. Abuse of discretion standard.

16  **Rule 404**

- Evidence of character to prove conforming conduct not generally admissible.
- But, can prove pattern, intent, modus operandi, lack of mistake, etc.
- Habit evidence also admissible, if inevitable response to repeated circumstance.
- Special rules on admissibility of convictions.
- Special rules on prior allegations of sexual misconduct.

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- FRE 413-415. In civil or criminal sexual case, or child molestation case, evid. of def's prior similar sexual offenses are admissible for any purpose.
  - Prior similar sexual misconduct defined very broadly
  - Trumps Rule 404(b)
  - Strong presumption of admissibility
  - Still subject to balancing under Rule 403 (majority but not unanimous rule)

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- Note: Texas does not have in its Rules of Evidence rules similar to FRE 413-415. Thus, evidence of prior claims of sexual misconduct are generally inadmissible in the guilt-innocence phase of a Texas sexual crime trial.
- However, pursuant to Tex. Code Crim. Proc. 38.37, in a case involving sexual crimes against a minor, evidence of other crimes, wrongs, or acts are admissible if *committed by the defendant against the same victim*.
  - In this instance, the defense is entitled to a limiting instruction, like the following, if timely requested:  
"You are instructed that if there is any testimony before you in this case regarding the Defendant's having committed offenses against the alleged victim other than the offense alleged against him in the Indictment in this case, you cannot consider said testimony for

any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the state of mind of the Defendant and the child and the previous and subsequent relationship between the Defendant and the child.”

- Extraneous incidents are admissible generally in the punishment phase (after a finding of guilt), but the defendant is entitled to the following instruction:

“The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of assisting you, if it does, in determining the proper punishment for the offense for which you have found the defendant guilty. You cannot consider the testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other acts, if any, [sic] were committed.”

20  **500 Series - Privileges**

- No rules for privileges in FRE.
- In federal question cases, privilege determined by federal common law.
- In diversity cases, privilege determined by state law of the forum.
- State law privileges generally covered by state rules of evidence, combined with common law interpretations.
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21  **500 Series – Privileges**

- Privileges highly disfavored in the law.
- Tend to deprive jury of relevant evidence and defeat justice
- TRE 501 Except as stated in TRE, no person has a privilege to:
  - Refuse to be a witness;
  - Refuse to disclose any matter;
  - Refuse to produce any object or writing; or
  - Prevent another from being a witness or disclosing any matter or producing any object or writing.

22  **500 Series - Privileges**

- Philosophic considerations on creation and protection of privileges:
- Based on peculiar relationship between the communicating parties; priest, lawyer, doctor, spouse, etc.
- Communications must be made in confidence they will not be disclosed
- Element of confidentiality must be essential to maintenance and effectiveness of relationship
- Greater harm than good from disclosure
- General injury that would result to the relationship via the disclosure must outweigh harm resulting to search for justice by blanket exclusion; *however*,
- With some minor exceptions, no such balancing done with regard to particular assertion of privilege. In other words, if for example attorney-client privilege applies, court generally must exclude and cannot weigh harm of disclosure against benefit of same to determine whether to exclude.

23  **Privilege Examples**

- Physician – Patient
- Lawyer – Client
- But what about confessions of crime?


- Marital Privilege – 3 types
  - All communications
  - Testimonial – privilege of spouse to refuse to testify
  - Adverse – privilege of spouse to preclude other from testifying
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24  **Privilege Examples**

- Psychotherapist – Patient
- Jaffe v. Redmond, USSC 1996, privilege first recognized, over strong dissent.

25  **600 Series – Witnesses**

- Who can testify? Almost anyone, who is not insane, and can understand and appreciate the oath. FRE 601, 603
- Children can testify if the court is persuaded they have “sufficient intellect” to relate transactions about which questioned
- Does one’s religious beliefs have an impact on whether he would tell the truth under oath?
- Yes, but no such inquiries allowed.

26  **600 Series – Witnesses, including qualifications, impeachment, and means of examination**

- Hypnotically-enhanced evidence.
- Impeachment – what is it?
- Direct impeachment
- Indirect impeachment
- Cross-examination – is it important? Why?

27  **600 Series - Witnesses**

- Impeach by prior inconsistent statement
- Impeach by showing witness bias
- Impeach by admissible evidence of witness misconduct
- Impeach by showing conviction of certain crimes
- Impeach by showing character for truth and veracity

28  **600 Series – Impeachment with Evidence of Prior Criminal Convictions**

- If crime involves “dishonesty” or “false statement,” automatically admissible with no probative/prejudice balancing.
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- With other crimes, depends on whether crime more than 10 years old, and whether offered against criminal defendant or other witness
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- If crime more than 10 years old, burden is on proponent to show that probative value substantially outweighs prejudicial impact

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- ▶ Impeachment on a collateral matter – Generally not allowed.
- ▶ First question: What is a collateral matter?
  - Defined best by test: A matter is not collateral if the answer to the question could be admitted into evidence for some purpose other than impeaching the witness. Examples:
    - ▶ Impeachment regarding history of alcohol or drug use unless some evidence alcohol or drugs affected witness at time of event observed;
    - ▶ Evidence that insured in a fire claim had a previous suspicious fire loss (unless can

establish pattern);

- ▶ Evidence that police officer was involved in violent incident after incident in issue (again, unless pattern can be shown).

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### 30 **Prior Criminal Convictions for Impeachment**

- What crimes involve “dishonesty” and “false statement”?
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- Generally applies to crimes accompanied by element of deceit, or deliberate interference with court’s ascertainment of truth, such as perjury, fraud, *etc.*
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- Does not apply to crimes such as larceny, assault, possession of firearm, narcotics offenses.
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- Theft and robbery offenses depend on the nature of the crime. Purse snatchings - no. Ponzi schemes - yes.

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### 32 **Reputation for truthfulness**

- Can attack or support credibility of a witness by opinion or reputation, but:
- - Can only be character for truthfulness or untruthfulness; and
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  - Evid of truthful character admissible only after character for truthfulness has been attacked by opinion or reputation evidence or otherwise. FRE 608(a)

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### 34 **700 Series – Opinion and Expert Testimony**

- Differences between factual testimony, conclusions, and opinions
- FRE 701. Laypersons can give opinions so long as they are:
  - Rationally based on the perception of the witness; and
  - Helpful to a clear understanding of the witness’ testimony or the determination of a fact in dispute.

### 35 **700 Series - Opinions**

- “Collective Facts Rule.” In Texas, known as “Short-Hand Rendition of Facts Rule.” Allows witness to give his impressions, based on variety of circumstances and appearances.
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- Based on practicality and time considerations. E.g.,
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  - “He appeared drunk,” as opposed to having to explain everything the witness observed that led to that conclusion.
  - 
  - “The grape looked like it had been there a long time,” rather than the witness explaining in detail the color, the squishiness, etc.
  - 
  - “He appeared well,” rather than a description of his complexion, etc.

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- "It weighed about two pounds," as opposed to trying to otherwise describe the weight.

### 36 Expert Opinion

- Most controversial area in evidence law today, state and federal.
- Because of traditional rule requiring personal knowledge and testimony only to facts, opinions traditionally not allowed.
- Rule had to be relaxed, particularly where cases arose that involved areas jurors were ill-equipped to understand without expert guidance, such as medical malpractice, engineering issues, etc.
- Current rule, FRE 702, applies to allow opinion testimony when:
  - Must involve scientific, technical, or "other" specialized areas;
  - Must assist the jury in reaching decision on disputed issue; and
  - Witness must be qualified by knowledge, skill, experience, training, or education.

### 37 Experts

- Permissible Factual Bases and Form of Expert Testimony
- FRE 703. Expert can rely on facts perceived by him or made known to him prior to trial.
  - E.g., can review medical records, depositions, etc., or can be shown object at trial.
- Data relied on expert need not be independently admissible, but must be of the type typically relied on by experts in the field.

### 38

- The *Frye* Test
- The Frye Standard was the test for admissibility of proposed scientific testimony from 1923-1993
- *Frye* arose from a challenge to the admissibility of a crude predecessor to the polygraph. It was rejected as insufficiently reliable
- In general, the standard required only that the trial court conclude that the scientific principle be sufficiently established to have gained general acceptance in the particular field to which it belongs
- Frye was deemed difficult, because:
  - Relevant scientific community was ill-defined;
  - No objective basis for court to determine whether the scientific principle was "generally" accepted in the scientific community;
  - It could be difficult to identify the "scientific principle" in issue; and
  - It was not clear whether the test applied to anything other than scientific testimony.

### 39

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.* USSC 1993
- Court is now "gatekeeper" to determine admissibility of "junk science" opinions.
- Is the judge qualified?
- Is it necessary?
- Court must make determination whether the expert's conclusions "fit" with a rational conclusion relevant to the case. E.g., phases of the moon may be able to assist the jury in determining whether a particular night was dark, but not helpful in determining whether an individual was behaving irrationally on the night of a full moon.
- The former "fits" with the rational conclusion that it was light or dark, but the latter does not "fit" with the "irrational conclusion" that phases of the moon affect human behavior.
- Some commentators think this means that the trial court must hold a "werewolf hearing"

to determine whether the proposed testimony “fits” with a rational concept, rather than with “werewolf-type” reasoning.

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- Next question is reliability. Court focuses on what it calls the “falsifiability” of the testimony, or the chances that the results could be falsified.
- Court also looks at other vague criteria, whether the proposition has been reported in the peer-reviewed publications, the known or potential rate of error, and the “general acceptance” of the proposition.

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#### **Opinions after Daubert - Texas**

- *DuPont v. Robinson*. Tex. 1995.
- Adopted Daubert for Texas; 5/4 opinion
- Opponent of evidence makes challenge, burden is on proponent to prove expert’s qualifications and reliability of proposed testimony.
- Non-exclusive factors to consider:
  - Extent to which theory has been or can be tested;
  - Extent to which technique relies on subjective interpretation of expert;
  - Whether theory has been subjected to peer review or publications;
  - Potential rate of error;
  - General acceptance in community; and
  - Non-judicial uses which have been made of the theory or technique. In other words, fact that theory created solely for purposes of litigation not dispositive, but important consideration.

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- Texas - Havner. Epidemiologic probability evidence.
- Similar to Daubert/Robinson factors.
- For expert to testify on causation, must be scientific studies showing more than doubling of the risk of the effect, with greater than 95% confidence factor
- Expert must rule out other potential causes “with reasonable certainty.”

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#### **800 Series – Hearsay/Exceptions**

- What is hearsay?
- Out of court statement offered in court to prove the truth of the matter asserted
- What does that mean?
- Cannot testify to someone else’s version of the facts

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- If not offered for TOMA, not hearsay
- E.g., is a contract hearsay?
- No, operative document. Not offered for truth of matters asserted therein, but as document with independent legal significance
- Hansen corn case. Witness wants to testify that declarant stated “that corn is yours.” Not h-s because the designation was the operative conduct. May have been that tenant was lying about intending to give that corn to landlord. Not offered to prove that. Rather, offered to prove that the corn was in fact segregated to landlord when statement was made.
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- Assembler wants to introduce manufacturer's brochure stating safer to weld than bolt assembly to auto chassis.
- HS if offered to show which method safest.
- Non-HS if offered to show reasonable reliance or lack of contrib. negl.

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- Statements admitted and defined as non-hearsay.
- FRE 801(d)(1)
- Prior inconsistent testimony by witness, under oath, in another proceeding is non-hearsay; *i.e.*, comes in unimpeded and is afforded substantive probative value (contrast from impeachment value of prior inconsistent statement not under oath).
- Also non-hearsay if consistent prior statement, offered to rebut claim of recent fabrication or improper influence of motive.
- Also non-hearsay if a statement of identification made after perceiving the person.
- FRE 801(d)(2)
- Admission by a party-opponent directly.
- Admission by a person authorized to speak for the party.
- Admission by an agent concerning matter within scope of agency, made during existence of relationship.
- Statement by co-conspirator in furtherance of conspiracy.

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#### **Hearsay Exceptions**

- HS Exceptions. Reasons for exceptions:
- Usually trustworthy circumstances.
- Necessary to get full hearing of facts
- FRE 803(1) *Present sense impressions*. Statement describing or explaining event or condition while being perceived or immediately thereafter
- *Houston Oxygen Co. v. Davis*. Witness testifies passenger said few minutes before collision, "They must have been drunk," and that they "would find them somewhere on the road wrecked if they kept that rate of speed up."
- Admissible under present sense impression because described passengers' observation of plaintiffs' car shortly before incident occurred.
- Does not have to be under stress.
- Rationale: Little chance of mistake in memory or time to fabricate b/c of contemporaneous nature of statement.

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#### **Hearsay Exceptions**

- FRE 803(2) *Excited Utterance*. Statement relating to a startling event or condition made while declarant was under the stress of excitement caused by the event or condition.
- *Staiger v. Gaarder*. ND 1977. Car wreck case. Witness Ray Sigl testifies that, at hospital 1 1/2 hour after wreck, Zent, passenger in car, said: "Mr. Gaarder turned around and was talking to me and took his eyes off the road for one minute.... He was doing about 65 MPH." Non-admissible HS.
- Not an excited utterance made while under stress of excitement.
- If Zent had been injured at the time, maybe comes in.
- If occurred closer to event, maybe comes in.
- Court discusses "res gestae" common law exception to HS Rule. Means "the matters transacted." Broad and sloppy common law exception, that went to all statements associated with the happening of the event.
- How could offering attorney have gotten this in? Showing stress, excitement, injury of

Zent, by deposition, mdr's, subpoena of trial witnesses, *etc.*

- What is policy behind exception? That folks under excitement unlikely to misperceive or exaggerate events? Is that true?

49  **Hearsay Exceptions**

- FRE 803(3) *Then existing mental, emotional, or physical condition*. Statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition.
- *Melton v. Dallas Co. Child Welfare Unit*. Child custody case. Kids stated wanted to live with mother or be adopted. Admissible as statements of then existing mental and emotional condition of children, relevant to issue whether mother had endangered children and where they would be happiest

50  **Hearsay Exceptions**

- FRE 803(4) *Statement for Purposes of Medical Diagnosis or Treatment*
- FRE 803(5) *Recorded Recollection*
- Witness must presently be unable to testify fully or accurately
- Witness had knowledge at the time record made or when adopted
- Must have been made when matter fresh in mind of witness
- If admitted, may be read into evid. but not received as exhibit unless offered by opponent
- *Contrast with Present Memory Refreshed*
- Witness can use anything to refresh recollection
- Document not an exhibit, not evid.
- But can be used to impeach witness

51  **Hearsay Exceptions**

- FRE 803(6) *Business Record Exception*
- Can include acts, events, conditions, opinions, or diagnoses
- Must be made at or near the time of the event recorded
- Must be made by person with personal knowledge or from information transmitted by person with personal knowledge
- Must be in the course of a regularly conducted business
- Business can be any business, institution, association, profession, occupation, or calling of any kind
- Not necessarily a business for profit
- Must have been the regular practice of business to make this type of memo
- Can be shown by custodian or other qualified witness

52  **Hearsay Exceptions**

- FRE 803(8) *Public Records*
- Must be from public agency
- Must set forth matters within activities of the office, or
- Matters observed pursuant to duty imposed by law (but excluding criminal), or
- Factual findings resulting from investigation made pursuant to authority granted by law.
- Lack of trustworthiness may make excludable

53  **Hearsay Exceptions**

- FRE 807 *The Residual Exception or "Catchall"*
- Not specifically covered under 803 or 804
- Meets equivalent circumstantial guarantees of trustworthiness
- Court must determine:

- Material statement
- More probative on fact than other evid that could be procured through other means
- General purpose of rules would be served by admission into evidence.
- Must give advance notice of intent to use to make admissible at trial

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- The *Crawford* Doctrine. Out-of-court statements offered against criminal defendant at trial violate defendant's 6<sup>th</sup> Amendment right of confrontation, *if* the statement is *testimonial* in nature, *i.e.*, if the statement is taking the place of what would traditionally be trial testimony. Applies, for example, to police interrogations.
- However, *Crawford* does not apply if:
  - the statements are made in the process of an on-going emergency; or
  - The statements are a dying declaration; or
  - The witness is unavailable due to the wrongdoing of the defendant (with intent to make witness unavailable at trial).

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**900 Series – Authentication and Identification**

- FRE 901(a). Authentication sufficient if item proved by evidence sufficient to support a finding that the matter in question is what its proponent claims. Exemplar means of authentication:
  - Testimony of witness
  - Nonexpert opinion on handwriting
  - Comparison by jury or expert
  - Distinctive characteristics
  - Voice identification

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**900 Series – Authentication and Identification**

- FRE 902(a) only requires a showing that document is what it purports to be.
- Photographs
  - No photographer required
  - Can explain away changes in scene
  - Rule 403, "throw up" rule

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**900 Series – Authentication and Identification**

- Illustrations
  - Arguably hearsay
  - Really offered as demonstrative exhibits, to help explain testimony
  - Not usually independently admissible unless witness with personal knowledge identifies as accurate illustration of what it purports to reflect. Highly discretionary call, rulings differ by court and case.

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**1000 Series – Written evid, copies**

- No real "best evidence" rule
- FRE 1002. To prove contents of a writing or photograph, the original is required, *except as otherwise provided by the rules.*

59 

**1000 Series – Written evid, copies**

- FRE 1003. Duplicates admissible the same as originals unless genuine question as to authenticity.
  - Original lost, destroyed, or otherwise unavailable at hearing or trial - other evidence of contents.

- If original lost or destroyed, other evidence admissible, unless proponent lost or destroyed in bad faith FRE 1004(1)
- If original cannot be obtained by subpoena, other evid of contents admissible. FRE 1004(2)
- If opponent has possession of original, put on notice for need, and does not produce at hearing, can introduce other evid of contents. FRE 1004(3)
- If contents do not relate closely to a controlling issue, other evid of contents admissible (circumstantial evid rule). FRE 1004(4)

60  **Written evid., copies and summaries**

- FRE 1006. Summaries. Admissible if:
  - Records voluminous; and
  - Originals made available to opponent
  - Judge can require originals to be produced at trial

61  **Written evid., copies and summaries**

- FRE 1008. Copies. Court makes preliminary determination of admissibility. However, jury determination when issue raised as to:
  - Existence of original;
  - Whether document produced at trial is the original; or
  - Whether other evid of contents is true.