EVIDENCE

1) Introduction
   a) Sources of evid law
      i) Multistate – fed rules of evid (FRE)
      ii) NY law – 80% same as multistate, 20% NY distinctions (and appears on essays 50% of the time)

   b) Evid topics
      i) Major ones
         (1) Relevance
         (2) Character evid
         (3) Hearsay
         (4) Witnesses
      ii) Minor
         (1) Judicial notice
         (2) Documentary evid
         (3) Real evid
         (4) Privileges

   c) Method for learning evid
      i) Rules – and their exceptions
      ii) Hypos

2) **Judicial notice** – FRE 201
   a) Def: judicial notice is the recognition of a fact as true without formal presentation of evid.

   b) **Rule:** court may take judicial notice of **indisputable facts**, which comes in 2 forms:
      i) Matters of common knowledge within the court's territorial jx.
         (1) Example: a court in NYC could take judicial notice that Amtrak trains stop at Penn Station.

      ii) Matters capable of easy verification by resort to unquestionable sources.
         (1) Example: by resorting to an almanac, a court could take judicial notice that Nov. 22, 1964 was a Sunday.

   c) Procedure
      i) **Timing**: may be taken at any time, including on appeal.
      ii) **Effect**: judicially noticed facts are considered conclusive in civil cases, but not in criminal cases.
         (1) So the jury still has to decide whether to accept these facts as true.

3) **Relevance** – FRE 401
   a) Principles
      i) Def: evid is relevant if i**t has any tendency to make a material fact more probable or less probable than would be the case without the evid**.

      ii) **Rule**: all relevant evidence is admissible, unless…

      iii) **General exception** – FRE 403
         (1) The court decides that the probable value of the evidence is substantially outweighed by pragmatic considerations of:
            (a) Unfair prejudice
            (b) Confusion
               (i) Confusion of the issues
               (ii) Misleading the jury
            (c) Waste of time
               (i) Undue delay
               (ii) Waste of time
               (iii)Unduly cumulative

      iv) Exam tip – there is wide discretion in 403 balancing so not easy to put in MC questions.
         (1) Possible question: which of the following is the *least* likely reason for the court to rule evid inadmissible?
            (a) Unfair prejudice
            (b) Undue delay
            (c) Unduly cumulative
            (d) Unfair surprise ** (answer)

   b) **Policy-based exclusions**

      i) **Liability insurance** – FRE 411
         (1) **Rule**: evid that a person has or doesn't have liability insurance is inadmissible for the *purpose* of proving fault or the absence of fault.

         (2) **Exception**: such evid may be admissible for some other purpose, such as:
            (a) Proof of ownership or control (if that issue is in dispute), or
            (b) Impeachment of a witness.

            (c) Example: P falls down a well on D's property, contending that the well was impossible to see because of overgrown foliage that D should have cleared away. D denies negligence. To prove D's negligence, should P be allowed to introduce evid that D carried a homeowner's liability insurance policy on the property?
               (i) No. Proof of insurance is not admissible to prove D's negligence.

(d) Example: same as above, except that D also defends on the basis that he did not own the property. Should P be allowed to introduce evid that D carried a homeowner's liability insurance policy on the property?
(i) Yes. It is a dispute about ownership and fact that you have insurance on it suggests that you own it. It is not being used to prove negligence.

*** Key concept**: So admissibility often depends on the purpose for which the evid is offered. Purpose matters.

If evidence is admissible for one purpose but not for another, judge should give a limiting instruction to the jury.

(e) Example: same as above. D calls a witness who testifies that she had been on D's property many times in weeks prior to the accident and she saw the well. Should P be allowed to establish, during cross of witness, that witness is a claims adjuster employed by the company that issued the policy to D?
(i) Yes. It is being used to show bias.
1. It is D's witness and he is trying to show P's contributory negligence. But P can show that witness may have reason to lie.

*** Key concept**: Bias means there is some relationship between the witness and a party that could cause the witness to lie.

Evidence of witness's bias is almost always admissible.

ii) **Subsequent remedial measures** – FRE 407
(1) Def: repairs, design changes, or policy changes taken after an accident that could have prevented the accident.

(2) **Rule**: SRMs are inadmissible to prove wrongful or bad conduct, like:
(a) Negligence
(b) Culpable conduct
(c) Product defect
(d) Need for warning

(3) **Exception**: such evid may be admissible for some other relevant purpose, if that purpose is at issue, such as proof of:
(a) Ownership
(b) Control
(c) Feasibility (of safer condition or design)

(d) Example: P bought a cup of coffee at D's shop and scalded her tongue because of the hot coffee. She sues D in negligence, D denies. At trial, P seeks to introduce evid that after the accident, D installed new thermostats on its equipment.
  (i) Admissible to show that D was negligent?
    1. No. Basic rule applies, SRM is not admissible
  (ii) Admissible to show the feasibility of better safety measures?
    1. No. Feasibility is not at issue here! D did not claim that installation of thermostats was impossible, just that they were not negligent.

(e) Example: same as above, but now assume that P contends that D's negligence consisted of the failure to place warnings on its cups saying that the coffee was too hot for immediate consumption. D's response as that it is impossible to affix labels on its cups. P seeks to introduce evid that after the accident, D began to use cups that were pre-printed with warnings. Admissible?
  (i) Yes. Now D is contesting feasibility of safer design. D must be the one who places feasibility at issue.

(4) **NY Rule**: same basic rule, except that SRMs are admissible in a product liability action based on strict liability for a manufacturing defect.

(a) Example: P sues D-manufacturer for injuries in a car accident, claiming defective brakes caused it. P asserts theory of strict product liability and seeks to introduce evidence that after the accident, D changed the process for making brakes. D denies it, saying no defect. Is evid of change in process admissible to prove existence of defect at time of accident?
  (i) Under FRE – No.
  (ii) Under NY rule – Yes because it relates to a manufacturing defect.

(b) Example: assume in above, theory of liability was either defective design (and after accident D changed brakes) or failure to warn (and after accident D sent out recall notice). Admissible?
  (i) Under FRE – No.
  (ii) Under NY rule – No.

iii) **Settlements in civil cases** – FRE 408

(1) **Rule**: if there is a disputed claim, the following evid is inadmissible to prove liability:
  (a) A settlement, or
  (b) Offers to settle, or
  (c) Statements made during settlement negotiations.

(2) **Exception**: settlement evid may be admissible if offered to impeach a witness on the ground of bias.

(3) Example: P is hit by a truck D was driving. Before trial, they discuss settlement. P says "I will accept $50k to settle. The fact that I was jay-walking may confuse the jury." D declines. At trial, can D introduce:
  (a) P's offer to settle? No.
  (b) P's admission of jay-walking? No. made during settlement discussions.

(4) Example: same as above. Assume that in accident, D also hit a 3rd party. Before trial, D and 3rd party settled for $50k.
  (a) At trial can P introduce D's settlement as evid that D is acknowledging fault?
    (i) No. Settlement offer does not have to be between P and D to qualify under the rule.
  (b) At trial, 3rd party testifies that D did not drive negligently. On cross, can P prove settlement between D and 3rd party?
    (i) Yes. Purpose is to show 3rd party's bias.

(5) Disputed claim requirement
  (a) Ban on settlement evid only applies if, at the time of the discussion, there is a claim and the other side disputes that claim.

  (b) Example: P and D had car accident. D ran up to P and said "I will settle with you for $100k if you don't sue." P sues anyway. At trial, P seeks to introduce D's statement. D objects. Court's rule?
    (i) Overruled – evid is admissible. There is no claim at the time D makes the statement. Also, nothing has been disputed – i.e., if P says "I'll settle for $100k" and D says "ok it is my fault" then there is no dispute and rule would not apply at all.

iv) **Offer to pay medical expenses** – FRE 409
(1) **Rule**: evid that a party has paid or offered to pay an accident victim's medical expenses is inadmissible to prove liability.
  (a) This does not include other statements made in connection with an offer to pay (like settlements does).

(2) Example: D's car hit P. D runs to P and says 1) "don't worry about anything, I will pay for your hospital bills." D also says 2) "I'm sorry I ran the red light." P sues D.
  (a) Is statement 1 admissible against D?
    (i) No. Offer to pay medical expenses is always inadmissible. No disputed claim requirement here.
  (b) Is statement 2 admissible against D?
    (i) Yes. The 2nd statement is an admission and not an offer to pay.

v) **Pleas and plea discussions in criminal cases** – FRE 410

(1) **Rule**: the following are inadmissible against D in a pending criminal case or in a subsequent civil case:
   (a) Offers to plead guilty
   (b) Withdrawn guilty plea
      (i) **In NY**: this is admissible in subsequent civil cases.
   (c) Pleas of no contest
   (d) Statements of fact during any of the above.

(2) Purpose does not matter here – it is inadmissible for any purpose.

(3) Example: D is driving drunk and injures P. P sues D for damages and wants to introduce fact that D pleaded guilty to DUI and then withdrew his plea. Admissible?
   (a) FRE – No. Inadmissible regardless of context.
   (b) NY rule – Yes. In NY, a withdrawn guilty plea can be used in subsequent civil case.

(4) Guilty plea that is not withdrawn:
   (a) Is admissible against D in subsequent litigation based on the same facts in both fed and NY.
   (b) When you plead guilty, you basically did it!

(5) Example: D pleads guilty to arson for burning his own building down. Then he sues the insurance company for nonpayment. Is the plea admissible against D?
   (a) Yes. It is an admission and can be used against him.
   (b) If D wanted to sue insurance but prosecutor offered him a good deal to take, then D should have plead nolo contende (no contest).

Policy-based exclusions

Evidence	**Inadmissible purpose**	**Admissible purpose**
Liability insurance	Fault	Anything else Ownership, control (if at issue) Bias
Subsequent remedial measures	Wrongful behavior (negligence, culpable conduct)	Anything else (feasibility) **In NY**: allowed to prove mfg defects in strict liability
Settlement discussions	Liability	Anything else (bias)
Offers to pay medical expenses	Liability	Nothing
Withdrawn pleas	Guilt or civil liability	Nothing **In NY**: allowed in civil cases

4) **Character evidence**
   a) Def: refers to a person's general disposition or propensity.
      i) I.e., whether someone is honest (or not), peaceful (or not), careful (or not).

   b) For character evid problem, ask 4 questions:
      i) Is the character evid being offered for the purpose of proving <u>propensity</u>?
      ii) Is the case criminal or civil?
      iii) Has the door been opened for character evid?
      iv) Is the evid of the correct form?

   c) Propensity purpose
      i) **Rule**: **evid of a person's character or past acts is inadmissible if offered to prove that the person acted in conformity with that trait**. (FRE 404)
         (1) Character evid offered for other purposes is not barred under this rule.

   d) Non-propensity purposes – evid is permissible –
      i) MIMIC
         (1) **M: M**otive
         (2) **I: I**ntent
         (3) **M: M**istake (absence of) or accident
         (4) **I: I**dentity
         (5) **C: C**ommon scheme or plan

         (6) Example: D is charged with murder of cop. Prosecution seeks to prove that D was convicted and imprisoned 5 years ago for drug sales after an investigation and arrest made by the victim (murdered cop). D objects on grounds of impermissible character evid. Court should rule?
            (a) Overruled. Evid is admissible because the purpose is to show D's motive – revenge.
         (7) Example: D is charged with possession of drugs with intent to sell. He defends on grounds that he was just possessor and user, not a seller. Prosecution seeks to prove that D sold drugs a year ago in the same vicinity. Admissible?
            (a) Yes. D put his state of mind at issue, what his intent was in possession of the drugs, so it is admissible to prove intent.
         (8) Example: D is accused of intentionally killing mom with an ax. D says it was an accident. Prosecution seeks to show D threw a knife at mom during a fight 1 week prior to the killing. Is the evid admissible on the theory that it shows D's propensity for violence?
            (a) No. Cannot use evidence for propensity.
            (b) But if question did not specify propensity, it could possibly fall into MIMIC, absence of mistake or accident.

(9) Example: D is charged with armed robbery of Walmart in early afternoon of 7/1. D's defense is he was in Chicago. Prosecution seeks to introduce evid that around noon on 7/1, D robbed a Target and a Sears in same town. Admissible?
   (a) Yes. Other robberies are not being used for propensity. Closeness of time and place to Walmart is admissible to prove D's identity as the robber and it contradicts his alibi.

(10) Example: D is prosecuted for robbing Second Bank. D's defense is he has an alibi. Prosecution introduces evid that robber wore a red ski mask, carried a .38, and used an unusual stick-up note (zucchini with sharpie on the side). Prosecution then seeks to prove that D used the same m.o. when robbing First Bank a year ago. Admissible?
   (a) Yes. To show identity. Extremely unusual m.o. points to D likely being the same person in both robberies.
   (b) Make sure that the similarities are quite unusual. If it was just the mask and gun, not enough.

(11) Example: D is charged with robbing Second Bank. Prosecution seeks to prove that 2 days before the robbery, D stole a white Acura from neighbor in the same town. Robber of Second Bank used a white Acura as get-away. Admissible?
   (a) Yes. Theft of get-away car is part of the common scheme to rob the bank.
   (b) It is not being used for propensity – not for purpose of "car thief, so likely to be the bank robber."

ii) Procedure for MIMIC evid – **use for NY essays**
   (1) Rule 403 – court must weigh probative value vs. prejudice.
      (a) So state MIMC purpose, then discuss 403.
   (2) Limiting instructions
      (a) For dual use evid, judge must tell jury about the limited purpose of MIMC evid.
   (3) Pretrial notice
      (a) Upon D's request, prosecution must give pretrial notice of intent to use MIMC evid.

iii) Essential element – FRE 405
   (1) Evid of person's character is admissible in a civil action where such character is an essential element of a claim or defense.
      (a) So, it is not propensity evid.
   (2) Only in cases of:
      (a) Negligent hiring/entrustment
      (b) Defamation

(3) Example: P was struck in May 2008 by D in a truck while D was on the job. P sues D's employer, alleging negligence in hiring D in July 2007 and allowing him to drive for them.
  (a) P offers testimony of witness that says since 2005, D has had a reputation for being bad driver. Admissible?
    (i) Yes. Since this is a negligent hiring action, it goes to employer's knowledge of D's driving.
  (b) P offers evid that D had been involved in 3 accidents in 2006 an 3 since working for employer. Admissible?
    (i) Yes because the issue is not D was a bad driver then and he is one now.

(4) Example: P sues magazine co for libel based on story where P is accused of being dishonest business person. In its defense, which of the following are admissible?
  (a) Testimony that P has a reputation for dishonesty?
    (i) Yes
  (b) Testimony by 's business associates that they think P is dishonest?
    (i) Yes
  (c) Evid that P swindled several customers of his business.
    (i) Yes
  (d) All of these are allowed because magazine co's defense is truth. So P's character for truthfulness is an essential element of the defense.

iv) **Habit exception** – FRE 406

(1) Habit of a person is admissible to infer how the person acted on the occasion at issue in the litigation.

(2) Def: repetitive response to a particular set of circumstances.
  (a) Frequency – happens a lot.
  (b) Particularity – very specific type of action.

(3) Example: in auto accident case, issue is whether D stopped his car at the stop sign at the intersection of H and M streets.
  (a) P calls a witness to testify that during the last 6 months, she had seen D run red lights, change lanes without a blinker, and run through stop signs. Is this admissible habit evid to show D ran stop sign at H and M streets?
    (i) No. These prior acts just show reckless driving, not particular enough for habit.
  (b) Witness will testify that she saw D run the stop sign at H and M streets on at least 6 occasions. Admissible as habit?
    (i) Probably. Particular circumstance – that stop sign. However, frequency is a bit questionable/arguable here.

(4) On exam, look for key words for habit – "always," "invariably," "instinctively."

(5) Business routine
(a) Regular practice of an organization is admissible to prove conduct on a particular occasion.

(b) Example: P sues corp for breach of contract. To prove that letter was mailed, corp seeks to introduce evid that CEO put letter in her out-box and that messenger routinely pick up the mail from out-box at 3:00 each day for delivery to the mail room. Admissible?
(i) Yes. Key word is routinely – happens all of the time.

(6) **NY rules for habit**:
(a) Habit evid relating to a business, trade, or profession **is** admissible.

(b) Evid relating to personal habit on the issue of due care in negligence **is not** admissible.
(i) Exception:
1. Evid relating to personal habit in the use of a product **is** admissible.

(c) Example: car accident at H and M streets. Witness will testify that she has seen D run the stop sign at H and M streets on at least 6 occasions. Admissible as habit in NY?
(i) No.
(d) Example: P sues D toaster co for products liability alleging that he received shock from toaster. D wants to introduce evid that P has a habit of sticking a knife in toaster. Admissible in NY?
(i) Yes, because even though it is P's habit, it involves use of a product.

e) **True character exceptions**
i) **Character in criminal cases** – FRE 404(a)
(1) **D's character offered by D**
(a) Rule:
(i) Criminal D may introduce evid of his on good character for a relevant trait.
(ii) If so, prosecution may rebut with evid of D's bad character for the same trait.

(b) Form of it:
(i) When D offers character evid on direct exam, only proper methods are:
1. Federal – reputation or opinion
2. NY – reputation only
(ii) Specific acts are not allowed.

(c) Example: D is charged with murder.
  (i) During its direct case, should prosecution be allowed to introduce evid that D has been convicted 3 times for assault, has a bad reputation for violence, and recently threw rocks in anger?
    1. No to all. All are evid of D's character for violence. Prosecution cannot use propensity evid until D opens the door.
  (ii) What if prosecution claims that D's violent character is an essential element of the crime of murder?
    1. No. It is not an element of the crime – you don't have to be a violent person to commit murder.
    2. Note: D's character is <u>never</u> an essential element in a criminal case.
  (iii) During defense, D calls witness. Can witness testify to the following?
    1. "I'm familiar with D's reputation for peacefulness and it is excellent."
      a. Yes. D is allowed to introduce character evid for a relevant trait. And this is the right form.
    2. "I personally know D and in my opinion he is a peaceful person."
      a. Federal – admissible and form ok.
      b. NY – inadmissible, form of opinion not allowed.
    3. "I've send D turn the other check when assaulted by bullies and he's president of the pacifists club"
      a. No. This evid is of specific acts.
    4. "D's reputation for bravery and honesty is excellent."
      a. Not admissible. Bravery and honesty are irrelevant in murder prosecution.

(2) **D's character offered by prosecution to rebut**
  (a) If D opened the door to character, prosecution my rebut in 2 ways:
    (i) By <u>calling its own character witnesses</u> to testify to D's relevant bad character.
      1. Form:
        a. Fed – reputation or opinion.
        b. NY – reputation only.

    (ii) By <u>cross-examining D's character witness</u> by questioning their <u>knowledge of specific acts</u> by D that are relevant to the character trait at issue.
      1. Purpose – to test witness's knowledge, not to prove the specific act.

2. Form of cross-exam
    a. For opinion witnesses: Did you know… (that D beats his wife?)
    b. For reputation witnesses: Have you heard… (that D beats his wife?)

3. To cross-exam witness this way, prosecution must have a good faith basis to believe that the specific act took place.

(b) **NY rule – prosecution may also rebut D's good character evid by proving that D has been convicted of a crime that reflects adversely on the character trait in issue.**
   (i) So a specific act is allowed here.

(c) Example: D is charged with murder. D calls witness to testify to D's good character for peacefulness.
   (i) Could prosecutor ask witness, on cross-exam, "have you heard that D was arrested last year for assaulting M?"
      1. Yes. Prosecution can test witness's knowledge. Court should give limiting instructions.
   (ii) Could prosecutor ask witness, on cross-exam, "did you know that D was arrested last year for assaulting M?"
      1. Federal – yes. Federal rule allows opinion and reputation evidence.
      2. NY – No. Improper because it would be testing opinion and opinion is not permitted.
   (iii) If witness denies having heard or knowing of bad acts mentioned by prosecutor, may prosecutor prove that the acts actually occurred?
      1. No. Not allowed to prove that specific act.
   (iv) Could prosecutor properly ask witness, "have you heard that D cheated on his taxes last year?"
      1. No. It is reputation evid but question is irrelevant to murder prosecution.
   (v) After defense rests, may prosecutor call another witness to testify that he has known D for 20 years, if familiar with D's reputation for peacefulness in the community and that it is bad?
      1. Yes. Prosecution has 2 ways of rebutting D's character – cross-examine D's witness or call its own.
   (vi) After D rests, may prosecution introduce a 15-year-old certified conviction for assault?
      1. Federal – no. Specific acts are not allowed.
      2. NY – yes. Specific acts are limited to convictions that reflect badly on the relevant trait.

(3) **Victim's character in a self-defense case**

(a) **Rule**:

(i) **Federal**: a criminal D may offer evid of the victim's violent character to prove that the victim was the first aggressor.

1. **Prosecution rebuttal**: if D opens the door by offering evid of victim's bad relevant trait, then prosecution may rebut in 2 ways:
   a. Evid of victim's good character for that trait, or
   b. D's bad character for that trait.

2. Form – same rules apply:
   a. On direct exam, only reputation or opinion evid.
   b. On cross, specific acts can be used to test witness's knowledge.

(ii) **NY rule**: evid of victim's character is <u>inadmissible</u> to prove that the victim was the first aggressor.

(b) Example: D charged with assault for throwing chair at victim. D claims victim started the fight and lunged at him with a knife.

(i) To prove victim was first aggressor, may D call a witness to testify that victim has reputation for being violent?
   1. Federal – yes.
   2. NY – no.

(ii) To prove victim was first aggressor, may D call victim's roommate to testify that victim attacked her with a knife?
   1. No. In NY, automatically no. In Fed, it is a specific act and on direct, only reputation and opinion are allowed.

(iii) May D testify in his own defense that, at the time of the fight, he was aware of victim's prior knife attack on her roommate?
   1. To prove that victim was first aggressor?
      a. No. Specific acts not allowed on direct.
   2. For some other purpose?
      a. Yes. Not allowed to use to show violent character, but can be used to show why D might have thought self-defense was necessary. To show D's state of mind.

(c) **Special rule for D's knowledge of victim's character for violence**

(i) D may offer evid of his own knowledge of victim's bad character for violence for purpose of showing that he reasonably believed in the need to use self-defense.

(ii) Form:
   1. Since this is not propensity evid (it is evid of D's state of mind), any form is allowed.

(iii) NY also follows this rule.

(4) **Victim's character in sexual misconduct case** – FRE 412
  (a) **Rape shield rule**: trumps all character evid rules previously discussed.
    (i) In a case involving alleged sexual misconduct, D ordinarily may not introduce evid of:
      1. Victim's reputation for promiscuity, or
      2. Victim's prior sexual conduct.
  (b) **Exceptions**: D may introduce:
    (i) Evid of victim's sexual activity with D, but *only* if the defense is consent.
      1. Prior consensual sex with D before makes it likely she consented this time.
    (ii) Evid of victim's sexual activity with others but *only* to prove that someone other than D was the source of the physical evid.
    (iii) Evid required to be admitted by D's due process rights.
      1. This is vague and unlikely to be tested.
    (iv) **NY only exception**: Evid of victim's conviction for prostitution within the past 3 years.

ii) **Character evid in civil cases**
  (1) **Rule**: character evid is generally inadmissible to prove propensity in civil cases.

    (a) Example: Victim's estate sues D for wrongful death damages, alleging D killed victim.
      (i) During defense, may D properly introduce evid of his peaceful character?
        1. No. Character evid not allowed in civil cases either.
      (ii) In support of his claim of self-defense, may D properly introduce evid of victim's violent character to prove that she was first aggressor?
        1. No. Same rule – no character evid to prove propensity.
  (2) *So this is not really an exception.*

iii) **Evid of other sexual misconduct in sexual assault cases** – FRE 413
  (1) **Fed rule**: in any criminal or civil case alleging sexual assault or child molestation, prosecution may offer evid of D's prior sexual assault for the purpose of proving D's propensity to commit sexual assault.

  (2) **NY rule**: this is NOT an exception.

(3) Example: Victim sues D for damages resulting from an alleged rape. D pleads not guilty on ground of mistaken identity. P offers evid that D has raped 3 other women over past 2 years. Admissible?
(a) Federal – Yes.
(i) Note: propensity allowed in sexual assault case, exception applies in both civil and criminal cases, and no restrictions on form – specific acts ok.
(b) NY – No. There is no sexual offender exception.

f) Character evid review
i) Purpose: evid of character or past acts in inadmissible when offered to prove propensity (action in conformity therewith.)
(1) Non-propensity uses – admissible
(a) MIMIC
(i) Motive
(ii) Intent
(iii) Mistake (absence of)
(iv) Identity (including m.o.)
(v) Common scheme or plan
(b) Habit
(i) Frequency of habit, and
(ii) Particularity of the habit
(c) Trait as essential element
ii) Criminal vs. civil distinction
(1) Civil cases: character evid generally is inadmissible.
(2) Criminal case exceptions:
(a) D may always offer character evid about himself or the victim
(i) D offers, then
(ii) Prosecution rebuts.
(b) Remember, D is allowed to introduce knowledge of victim's character for aggression in a self-defense case.
iii) Form
(1) Direct: reputation or opinion.
(a) Form of question "have you heard…" of "did you know…"
(2) Cross: may ask about specific acts to test knowledge only.
iv) Special rules for sexual assault cases
(1) Victim's character for promiscuity is inadmissible.
(2) D's past conduct is admissible.

5) **Documentary evidence**
a) Exam tip: whenever a writing appears on the exam, look out for 3 issues (aside from relevance):
i) Authentication;
ii) Best evid; and
iii) Hearsay

b) **Authentication**

i) **Rule**: party seeking to introduce an exhibit must introduce sufficient evid for a reasonable juror to conclude that the item is what the party claims it to be. (FRE 901)

(1) Process is called laying the foundation.

(2) Exam tip: on exam, a witness's testimony that a document is genuine is sufficient to authenticate it.

(3) Example: during P's case-in-chief, witness testifies that a document is the contract she saw P and D execute. When P offers the document, D objects. D advises the judge that he intends to testify that the document is a forgery and argues that the judge cannot admit the document into evid until the judge is personally convinced that the document is in fact the contract. How should court rule?

(a) Overruled. It doesn't matter if the judge is personally convinced. He just needs to decide if there is sufficient evid to allow a reasonable juror to conclude it is genuine.

ii) **Methods** of authentication (party seeks to prove that document was written by X)

(1) Testimony by a witness with personal knowledge.

(a) Example: testimony from witness that he saw X write and sign the document.

(2) Proof of author's handwriting by:

(a) Lay opinion

(i) Witness must have familiarity with X's handwriting as a result of experience in the normal course of affairs and not as a result of preparation for the litigation.

(b) Expert opinion

(i) Expert must be qualified and must compare document to a genuine sample of X's handwriting.

(c) Jury comparison

(i) Trier of fact compares document to a genuine sample of X's handwriting.

(3) Ancient document rule – authenticity may be inferred if the document:

(a) Is at least 20 years old;

(i) **In NY** document must be at least **30** years old.

(b) If facially free of suspicion; and

(i) No erasures or cross-outs

(c) Is found where it would be expected

(4) Solicited reply doctrine
   (a) Document can be authenticated by evid that it was received in response to a prior communication to the alleged author.
   (b) Example: P mails contract offer to X, properly addressed and posted, and later receives an acceptance purportedly signed by X.

iii) **Self-authenticating documents**
   (1) Some documents are presumed authentic, so no testimony is needed for these docs:
      (a) Official publications
         (i) Govt pamphlets (IRS booklet)
      (b) Certified copies of public or private documents on file in public office
         (i) Deeds or mortgages filed in clerk's office
      (c) Newspapers or periodicals
      (d) Trade inscriptions and labels
         (i) Such as a candy bar wrapper to prove it was made by Hershey's
      (e) Acknowledged documents
         (i) Such as notarized document
      (f) Commercial paper
         (i) A check or promissory note
      (g) Certified business records, offered into evid under the business records hearsay exception.
         (i) It must be certified by someone within the business who knows how the records are regularly made and that these documents were made in the regular way at or about the time of the event recorded.

iv) Authentication of **photographs and recordings**
   (1) Photograph as demonstrative evid:
      (a) If purpose of photo is to illustrate a witness's testimony, a witness can authenticate the photo simply by testifying that it is a fair and accurate representation of what is portrayed.

      (b) Example: witness testifies that she observed the car accident that occurred at the intersection of H and E streets on 7/1/2008. She is shown a photo and asked whether it is a fair and accurate portrayal of the intersection as she remembers it on 7/1/2008. "Objection. No foundation that the witness was the photographer." What ruling?
         (i) Overruled. Evid is admissible. As long as witness has personal knowledge of what is depicted in the photo and testified it is an accurate representation of what it depicts, then it is sufficient.

(2) Photograph as a silent witness:
  (a) If photograph is itself the evidence (i.e., photo from surveillance camera), the offering party must show:
    (i) Camera was properly installed and working
    (ii) Recording or image has not been tampered with
    (iii)Common method is to show chain of custody.

c) **Best evidence rule**
  i) Scope: only applies to writings
    (1) I.e., documents, recordings, films, x-rays

  ii) **Rule**: FRE 1002
    (1) If a party seeks to prove the contents of a writing, the party must either:
      (a) Produce the writing, or
      (b) Provide an acceptable excuse.
        (i) If court finds excuse acceptable, the party may then use secondary evid, such as oral testimony or anything else to prove the contents.

  iii) **When** does best evid rule apply?
    (1) **Rule**: only when the party seeks to prove the contents of a writing, which arises when:
      (a) The writing is a legally operative document, or
        (i) I.e., the writing itself creates rights and obligations
        (ii) Such as deeds, mortgages, divorce decrees, written contracts.
      (b) The witness is testifying to facts that she learned solely from reading about them in a writing.

    (2) Example: D is charged with breaking into a warehouse. No one witnessed the break in but it was captured on film by surveillance camera.
      (a) Police officer testifies "I watched the film and it clearly shows D was the burglar." Objectionable?
        (i) Yes. Officer has no personal knowledge. He learned everything by watching the video, so he is trying to prove the contents. It must be done with the video itself.
      (b) This time, officer saw the break in himself. Can the prosecution have the officer testify as to his recollection without also introducing the tape?
        (i) Yes. Can testify as a witness with personal knowledge.

(3) Example: Worker sues boss for failure to pay wages and to reimburse for expenses.
  (a) Worker seeks to testify that she worked 100 hours. Boss objects, contending that the time sheets submitted by worker are best evid of the hours she worked. How should court rule?
    (i) Overruled. Best evid rule does not apply. Time sheets are not legally operative document and worker has personal knowledge of how many hours she worked.
  (b) Boss seeks to testify that time sheets submitted by worker show she worked only 80 hours. Admissible?
    (i) No. Best evid rule does apply here because boss does not have personal knowledge of how many hours worker worked. He only knows it by looking at the time sheet.

iv) What qualifies as an **original**?
  (1) Def:
    (a) Original includes writing itself or any counterpart intended to have the same effect. Originals include:
      (i) Film negatives and prints made from those negatives.
      (ii) Computer printouts and digital printouts of photos.
    (b) Duplicate is any counterpart produced by any mechanic means that accurately reproduced the original.
      (i) I.e. photocopy, carbon copy, computer print outs.

  (2) **Rule on duplicates**: a duplicate is admissible to the same extent as an original, <u>unless</u>
    (a) There is a genuine question about the authenticity of the original, or
    (b) It would be unfair to admit the duplicate.

  (3) **NY rule on duplicates**: photocopies and other duplicates are acceptable substitutes for the original only if the duplicates were made in the regular course of business.
    (a) So a copy or duplicate created solely for the purpose of litigation is not acceptable.

v) When will **non-production of the original be excused**?
  (1) **Rule**: a party need not produce the original (or acceptable duplicate) if the original:
    (a) Is lost or cannot be found with due diligence, or
    (b) Has been destroyed without bad faith, or
    (c) Cannot be obtained with legal process.

  (2) Standard of proof to establish excuse – preponderance of the evid

vi) **Escape** from the best evid rule

(1) Voluminous records can be presented through a summary or chart provided the original records would be admissible and they are available for inspection.
(2) Certified copies of public records.
(3) Collateral documents, if the court determines that the document is unimportant to the issues in the case.

vii) Summary of best evid rule
(1) The best evid rule applies to
(a) Only writings
(b) Only when proving their contents
(c) And even then, it is ok to have a duplicate
(d) And even if not, all you need is an excuse or an escape
(2) So on the bar exam, the best evid rule rarely applies. It is almost always the incorrect choice on multistate questions.

6) **Real evidence**
a) Def: actual physical evid that is displayed to the trier of fact.
i) I.e., drugs, guns, the offending product in a product liability case.

b) **Authentication rule**: party seeking to introduce real evidence must introduce sufficient evid for a reasonable jury to find that the item is what the party claims it to be.

c) Methods of authentication
i) If physical evid is distinctive (one of a kind):
(1) Personal knowledge is sufficient to authenticate it.
(a) Example: witness identifies notebook because it has name and markings on it. Officer identifies gun with serial number.
ii) If physical evid is generic:
(1) Party must show chain of custody.
(a) Example: bag of white powder found at crime scene. Chain of custody need not be perfect, but it should be substantially unbroken and based on reliable procedures for identification and custody.

d) Condition of real evidence
i) If condition of item before trial is relevant, it must be shown at trial to be in substantially the same condition (had not been tampered with).

7) **Testimonial privileges** – FRE 501
   a) Introduction
      i) Procedure: diversity cases and federal law
         (1) **General rule**: apply federal rules of evid
         (2) **Exception**: in federal diversity cases (where state law will govern the substantive claims), still apply the federal rules of evidence, but apply state law with respect to:
            (a) Burdens of proof and presumptions
            (b) Dead man's statutes
            (c) Privileges

      ii) Substance: recognized privileges
         (1) Federal
            (a) Attorney-client
            (b) Husband-wife (2 forms)
            (c) Clergy-penitent
            (d) Psychotherapist-patient
         (2) Majority
            (a) Doctor-patient
               (i) Federal common law does not recognize this one but most states do. On multistate, apply majority rule unless the question specifically tells you that you are in fed court.
         (3) **In NY**, all five listed above plus
            (a) Social worker-client (rape crisis counselor)
            (b) Reporter-source

      iii) Structure
         (1) Requirements – most privileges only apply to:
            (a) Communications, and not to
               (i) Underlying information,
               (ii) Pre-existing documents, or
               (iii)Physical evidence
            (b) Between members of a status relationship
            (c) When the communication is intended to be confidential
            (d) And sometimes only when made for a specific purpose.

      iv) Losing the privilege
         (1) Waiver
            (a) Voluntary (explicit) waiver
               (i) Only the privilege holder has the power to waive the privilege.

(b) Subject matter waiver
(i) A voluntary waiver of the privilege as to some communications will waive the privilege as to other communications if:
1. Partial disclosure is intentional, and
2. The disclosed and undisclosed communications concern the same subject matter, and
3. Fairness requires that the disclosed and undisclosed communications be considered together.

(c) Inadvertent waiver
(i) Will <u>not</u> waive the privilege, so long as the privilege holder took steps to prevent the disclosure (not negligent), and
(ii) Took reasonable steps to rectify the error.

(2) Exceptions
(a) Future crimes or frauds
(i) Example: client tells atty "help me disguise the bribes I made so that they look like legit business."
(b) Holder puts content in issue
(i) Example: D in tax fraud case claims that her atty told her to do it; patient in personal injury suit puts her physical condition in issue.
(c) Dispute between holder and the professional
(i) Example: client sues atty for malpractice; atty sues client for unpaid fees.

b) **Atty-client privilege**
i) **Elements**
(1) Confidential communications
(2) Status: between client and atty
(3) Purpose: for purpose of legal advice.

ii) Def:
(1) **Atty** – member of the Bar, as well as
(a) Someone the client reasonably believes is a member of the Bar, and
(b) A representative of the atty
(i) I.e., secretaries, paralegals, translators, investigators, and accountants, if they are helping they atty provide legal services.
(2) **Client** includes
(a) Person seeking to become a client
(b) Representatives of a client
(i) Any agent reasonably necessary to facilitate the provision of legal services. I.e., corporate employee.
(3) **Confidential** – client must intend confidentiality, so there is <u>no</u> confidentiality when:
(a) Client knows a 3rd party is listening.
(b) Client asks atty to disclose to 3rd party.

(c) Joint client rule: if 2 or more clients with common interest consult with same atty, their communications are privileged as to 3rd parties. But if the joint clients later have dispute with each other concerning the common interest, privilege does not apply as between them.

iii) Example: D is sued for his negligence in a car accident. He tells his atty that he was making a phone call at time of the crash and gives her the cell phone. Before trial, D is deposed by P's atty.
(1) Must D respond if he is asked "what did you tell your atty about the accident?"
(a) No. Privileged communication to atty, for legal services, presumptively confidential.
(2) Must D respond if he is asked "describe what you were doing at the time of the accident."
(a) Yes. No privilege because what is being asked is the underlying facts.
(3) If served with a subpoena, must D's atty produce D's cell phone?
(a) Yes. No privilege to physical evidence – it is not communication.

c) **Doctor-patient privilege** (not in fed court but applies in majority of states)
i) **Elements**
(1) Confidential communications and information
(2) Status: between doctor and patient
(3) Purpose: made for purpose of medical treatment.

ii) Def: doctor includes therapists, nurses, and doctor's assistants.
(1) **In NY**, includes dentists, podiatrists, and chiropractors.

iii) Psychotherapists
(1) Fed law – covers only psychotherapists
(2) For the bar – apply doctor-patient unless specifically told you are in fed court.

iv) Example: Patient's chest is being examined by doctor in hospital room while a visitor is present. 1) Patient asks doctor "do you suppose my wheezing is due to the 3 packs of cigarettes I smoke a day?" 2) after visitor leaves, patient tells doctor "know any good lawyers? I haven't paid my income taxes in 3 years."
(1) In civil litigation where condition of patient's lungs becomes an issue, could doctor be compelled to disclose statement 1)?
(a) Yes – not confidential because visitor was present.
(2) In prosecution for income tax evasion, could doctor be compelled to disclose statement 2)?
(a) Yes – privilege doesn't apply because not related to medical treatment.

v) Example: P sues D, alleging D was intoxicated at time of accident. P seeks pretrial discovery of an emergency room hospital report analyzing D's blood alcohol content shortly after the accident. D objects on ground of privilege. What ruling?
   (1) Sustained. Report is confidential information – acquired by doctor about patient's physical condition. But hasn't D put intoxication in issue? NO – this only occurs when patient affirmatively brings up condition as some type of defense.

d) **Marital communication privilege**
   i) **Elements**
      (1) Confidential communications
      (2) Status: between married spouses
      (3) Purpose: any purpose.
   ii) Rationale – to encourage candor between spouses.

   iii) Special consideration: either spouse may invoke this privilege, so it can be waived only by both spouses.

e) **Spousal immunity** (spousal testimony privilege)
   i) **Federal rule**: in a criminal case, prosecution cannot compel D's spouse to testify against D.

   ii) **In NY**, not recognized.

   iii) Rationale – to protect marital harmony (as opposed to encouraging candor)

   iv) **Elements**:
      (1) Applies only to criminal cases.
      (2) Covers testimony against a spouse.
      (3) So long as witness and D are currently married.
      (4) May be waived by the witness-spouse.

   v) **Exceptions** – apply to both spousal immunity and marital communication privilege
      (1) Communication or acts in furtherance of future crime or fraud
         (a) I.e., joint criminal activity.
      (2) Acts that are destructive of the family unit.
         (a) I.e., spousal or child abuse.

vi) Example: On night that husband's business partner is killed, H comes home wearing a blood-stained shirt. H is later prosecuted for murder.
   (1) At trial, prosecutor calls wife to testify to her observations of H's shirt, but she refuses to testify. Prosecutor seeks to compel her testimony. H objects on ground of privilege. How should court rule?
      (a) Federal – sustained. Prosecutor cannot compel spouse to testify. It is not communication but federal court recognizes spousal immunity.
      (b) NY – overruled. NY does not recognize spousal immunity.
   (2) Assume W is willing to testify against H and seeks to say "H told me when he got home that he stabbed the guy for starting another business." H objects on ground of privilege. How should court rule?
      (a) Federal – sustained. Spousal immunity not applicable but communication privilege applies.
      (b) NY – sustained. Same result.
   (3) Assume W divorces H before trial. Prosecutor calls her to the stand to testify to her observations about ex-H's bloody shirt. When she refuses, prosecutor seeks to compel her testimony and H objects on ground of privilege. How should court rule?
      (a) Federal – overruled. Marriage is ended – spousal immunity privilege does not exist. Communications privilege doesn't apply either because bloody shirt is not communication.
      (b) NY – same result.
   (4) Assume W divorces H before trial. Prosecutor calls her to stand to testify about ex-H's admission to her that he stabbed the guy. H objects on the ground of privilege. How should court rule?
      (a) Federal – sustained. Communication remains privileged and it doesn't matter what the marriage status is now – it matters at the time the confidential communication is made.
      (b) NY – same result.

Spousal privileges

Privilege	**Type of case it applies in…**	**Protects…**	**Must be married at the time of the…**	**May be waived…**
Marital communications (NY and Fed)	Any – civil or criminal	Confidential communications	Communication	By both spouses together
Spousal testimony (Fed only)	Criminal cases	Testimony against D-spouse	Testimony	Witness-spouse alone

8) **Hearsay**
   a) Def: FRE 801
      i) **Rule**: absent an exception or exclusion, hearsay is inadmissible.

      ii) Hearsay is:
         (1) An out of court statement
         (2) By a person (not animals or machines)
         (3) Offered to prove the truth of the matter asserted.

            (a) This purpose is key. An out of court statement will not be hearsay if it is not offered to prove the truth of the matter asserted in the statement.
            (b) So ask: "do we care whether the declarant is telling the truth?" if not, statement is not hearsay.

      iii) Example: Action by estate of P against D seeking damages for the pain and suffering P experienced in car accident cause by D. D asserts that P died instantly in accident. Witness on stand proposes to testify for P that shortly after the accident, P said "D's car ran the red light."
         (1) Is it hearsay if offered to prove who ran the red light?
            (a) Yes. Out of court statement made by declarant offered to show that D ran the red light.
         (2) Is it hearsay if offered to prove that P was alive following the accident?
            (a) No. Purpose here is not for the truth of the statement. Purpose here is to show that P was able to talk following the accident, that he was alive, therefore entitling estate to pain and suffering damages.

   b) **Non-hearsay purposes**
      i) **Impeachment**
         (1) A prior out of court statement may be offered to show that witness has been inconsistent, without being offered to prove truth of the matter asserted.
            (a) If purpose of prior statement is to prove TOMA, then it will be hearsay.

         (2) Example: D is sued for negligence in car accident where he drove a Dodge and P drove a Pontiac. Witness testifies for P that she saw the Dodge run the stop sign.
            (a) On cross, may D's atty seek to establish that a few days after the accident, witness told police that the Pontiac, not the Dodge, ran the stop sign?
               (i) Yes. Prior inconsistent statement is admissible to impeach the witness, to show that witness cannot keep her story straight and witness is not reliable.
            (b) May D use witness's statement to police as substantive evid that Pontiac, not Dodge, ran the stop sign?
               (i) No. it cannot be used for TOMA.

ii) **Verbal acts** (legally operative words)
  (1) **Rule**: words with independent legal significance will not be hearsay.
    (a) When the law attaches rights and obligations to certain words simply because they are said.
    (b) Because it is not the truth that is important – it is the speaking of the words themselves that has effect.

  (2) Examples:
    (a) Words of offer, repudiation, or cancellation of contract
    (b) Words that have the effect of making a gift or bribe
    (c) Words that are themselves an act of perjury or a criminal misrepresentation or defamation.

  (3) Example: P's complaint alleges that student and newspaper libeled him in an article stating that P stole student's car.
    (a) If P introduces newspaper article into evidence, should it be excluded as hearsay?
      (i) No. In defamation case, what matters is that the words were said. Obvious that it is not being offered for the truth, because they are claiming it was a lie.
    (b) To prove P had permission to drive student's car, may P testify, over a hearsay objection "as student handed me the keys to his car he said 'you may drive my car to buffalo for the weekend."
      (i) Yes. Not hearsay. Words have legally operative effect – they create permission under the law.

iii) **Effect on the listener**
  (1) **Rule**: statement that is relevant simply because someone heard it or read it is not hearsay.

  (2) Example: hearing something can:
    (a) Put someone on notice
    (b) Give someone a motive
    (c) Make someone's belief reasonable

  (3) Example: P alleges she slipped and fell on a broken jar of apple sauce in aisle 3 and that market had prior notice of the dangerous conditions. P's witness takes stand and proposes to testify "several minutes before P entered aisle 3, I head another shopper tell market manager 'there is a broken jar of apple sauce in aisle 3.'" Inadmissible hearsay?
    (a) Depends on the purpose.
      (i) If being offered to prove broken jar of apple sauce in aisle 3, then it is hearsay and is inadmissible.
      (ii) If being offered to show that manager had prior notice of it, then it is not hearsay. The only thing that matters here is that manager heard the words and should have checked it out.

(4) Example: D is charged with murder of her husband. Prosecutor seeks to introduce an anonymous note to D that was found in her possession at the time of her arrest. The note says "Your husband is having an affair with Polly."
   (a) If prosecution offers the note to prove motive, is it hearsay?
      (i) No. All that matters is whether D read the note.
   (b) If prosecution offers note to prove that D's husband was having an affair with Polly, is it hearsay?
      (i) Yes. It would then be offered for TOMA.

iv) **State of mind** (circumstantial evid of speaker's state mind)
   (1) **Rule**: statement that unintentionally reveals something about the speaker's state of mind is not hearsay.

   (2) Examples: statements demonstrating:
      (a) Insanity
      (b) Lies that demonstrate a consciousness of guilt
      (c) Questions that demonstrate a lack of knowledge

   (3) Example: D is prosecuted for murder. Defense is insanity. Witness for the defense proposes to testify "2 days before the killing, D said 'I am Elvis and it is good to be back.'" Hearsay?
      (a) No. Not offered for the truth. Offered to prove D's state of mind.

c) **Prior statements of trial witness**
   i) **Rule**: A witness's own prior (out of court) statement, even if the witness is now present at trial, is hearsay if offered to prove the TOMA, and is inadmissible unless an exception or exclusion applies.

   (1) Example: D is on trial for robbery. D takes the stand in his own defense and testifies: 1) "I didn't do it." And 2) "I told the cops when they arrested me that I didn't do it." Should 1) and 2) be excluded as hearsay?
      (a) 1) is not hearsay – it is a real-time assertion by D on the stand.
      (b) 2) is hearsay – it is an out of court statement offered for TOMA.

   ii) **Exclusions**: prior statements of witnesses that are excluded from the definition of hearsay:
      (1) Prior **statement of identification**:
         (a) Purpose: prior identification is seen as more reliable than the in-court identification.
         (b) Remember that this is only an exclusion to hearsay when the statement of identification is made by the <u>current witness</u>.
         (c) **In NY**, this <u>only applies in criminal cases</u>.

(d) Example: victim is mugged. Later that day, victim picks D out of a line-up at the station.
  (i) Months later, victim testifies at trial and identifies D as the person who did it. May victim also testify on direct about her prior identification at the station?
    1. Yes. It was a prior statement made by the current witness. And it is a criminal case, so ok in NY.
  (ii) Assume victim falls ill and is unable to testify at trial. May officer who was present at the line-up testify that victim identified D?
    1. No. Exclusion does not apply for other people who heard the identification. Must be a prior statement of id by the current witness.

(2) Prior **inconsistent statement**, if
  (a) Made under oath
  (b) During a formal proceeding.

  (c) Note: police statements, even if sworn, are not formal proceedings and never fall under this exception.

  (d) **In NY**, not recognized. No hearsay exception for inconsistent statements.

  (e) Example: in car accident case, witness testifies at depo that light was green. At trial, witness then testifies that light was red. May counsel now introduce depo testimony
    (i) For impeachment purposes?
      1. Yes – impeachment is a nonhearsay purpose. Used to show jury that they should not believe testimony.
    (ii) For its substantive truth?
      1. Federal – yes. It is hearsay, but it was made under oath in a formal proceeding and it is inconsistent.
      2. NY – no. (but still can introduce it for impeachment purposes)

(3) Prior **consistent statement**, if
  (a) Used to rebut an accusation of a motive to lie, *and*
  (b) Made before the motive arose.

  (c) **In NY**, not recognized. No hearsay exception for consistent statements.

(d) Example: On 7/1, witness observed P get struck by a car driven by D. Witness told police on 7/1 that P looked sober. At trial months later, witness testifies for P "he looked sober."

(i) May witness also testify that she told the police on 7/1 that P looked sober?

1. No. Prior statement is hearsay. Prior consistent statement exclusion does not apply because there is no accusation of fabrication.

(ii) Assume that on cross of witness, she is asked "isn't it a fact that after the accident, you and P became lovers" to which she answers yes. On re-direct, may witness properly testify that she told the police on 7/1 that P looked sober? For what purpose?

1. Federal – yes. Motive to lie is suggested and prior consistent statement was made before the motive arose. Can be used for substantive truth and for bolstering/rehabilitation of witness.
2. NY – cannot be used for substantive truth because no exclusion. But it can be used for bolstering/rehabilitation.

d) **Exceptions to hearsay**

i) **Party admission** – FRE 801(d)

(1) **Rule**: any statement made by a party is admissible if it is offered against the party.

(2) Example: D is charged with income tax evasion for 2004. Prosecutor wants to prove D's income in 2004 and offers into evid a loan application D submitted. D objects on the ground that the loan application, filled with inflated numbers, was self-serving and unreliable. How should the court rule?

(a) Admissible as a party admission.

(3) Example: P sues life ins company for non-payment of policy proceeds on life of her husband. Defense: suicide. D offers a letter by P to her friend that said "when I came home from shopping I found him dead on the floor with his revolver near. I didn't see what happened but this was not accident. He killed himself."

(a) Could P testify to this belief?

(i) Not admissible. Pure speculation, P has no personal knowledge.

(b) Is P's letter admissible?

(i) Yes. P was a party, statement was made by her and can be used against her. Lack of personal knowledge doesn't matter.

(4) **Vicarious admission** (extension of party admission)
  (a) **Federal rule**: a statement
    (i) By an agent or employee of a party
    (ii) Is admissible against the party
    (iii) If it concerns a matter within the scope of the agency or employment and was made during the agency or employment.

  (b) **In NY**, a statement by an employee or agent is admissible against the principal only if the agent or employee had speaking authority.
    (i) I.e., CEO, general counsel, VP for communications.

(5) Example: truck driver who works for company crashed into P's house while working. Driver descended from truck and told P "sorry, I was trying to answer my cell phone without spilling my beer and I wasn't watching where I was going." In suit brought by P against company, is driver's statement admissible against company?
  (a) Federal – yes.
  (b) NY – No. Driver does not have speaking authority.

(6) Example: P sues company for sex discrim in failing to hire her. She offers statement of a driver for the company, who told her "personnel dept for company has a policy against hiring women." Admissible?
  (a) Federal – not admissible. The statement concerned something that is not within the scope of the driver's employment. Driver does not hire employees.
  (b) NY – No. Driver does not have speaking authority.

(7) **Vicarious admissions by co-conspirators**
  (a) A statement of one co-conspirator is admissible against the other co-conspirators if the statement was made during and in furtherance of the conspiracy.

  (b) Example: D is charged with robbery with Accomplice. At D's trial, prosecution seeks to offer 2 statements that accomplice made.
    (i) The day before the robbery, accomplice told an undercover officer that D and he were planning to rob a bank and needed a get-away driver. Can the officer testify about the statement?
      1. Yes. Statement by co-conspirator, offered against another co-conspirator, made during and in furtherance of the conspiracy.
    (ii) The day after the robbery, when police arrested accomplice, he said "you got us. D and I robbed the bank." Admissible?
      1. No. Not made during or in furtherance of the conspiracy.

ii) **Former testimony** – FRE 804

(1) **Requirement** – unavailability

(a) Grounds for unavailability:

(i) Privilege
(ii) Absence from jx
(iii) Illness or death
(iv) Lack of memory
(v) Stubborn refusal to testify

(b) **In NY**, grounds for unavailability

(i) Privilege
(ii) Absence from jx
(iii) Illness or death
(iv) Declarant is located 100 miles or more from the courthouse
(v) Declarant is a doctor

(2) **Elements**:

(a) Declarant is unavailable
(b) Prior statement was given in a proceeding or deposition
(c) And is offered against a party who, on the prior occasion, had an opportunity and a similar motive to cross-examine or to otherwise develop the testimony.

(i) To establish similar motive, former testimony must have been taken in a substantially similar context (so that the party had a similar incentive to cross-examine).

(3) Rationale: if the line of questioning occurred previously and we can't get the witness live (unavailable) then we'd rather have the transcript than nothing.

(4) Example: passengers A and B were injured in bus accident and both sue bus company. At A's trial, witness testifies that the bus driver was drunk at time of accident. Witness then dies. At B's trial, B seeks to introduce the transcript of witness's testimony from A's trial. Admissible?

(a) Yes.

(5) Example: same as above. Now driver is prosecuted for DUI. At trial, prosecutor seek to introduce a transcript of witness's grand jury testimony where witness testified that driver was drunk. Witness has died. Admissible?

(a) No. Grand jury proceedings are secret, no other atty are present besides prosecutor, so no opportunity to cross-examine.

(6) **In NY,** in criminal cases only
  (a) Former testimony by a now-unavailable witness must have been given at a criminal trial, a hearing on felony complaint, or at conditional deposition. D and charge must be the same in both former and current case.
    (i) Former testimony given at a suppression hearing is not admissible against D.

Former testimony v. prior inconsistent statement

	When made?	**Declarant?**	**Prior statement?**
Former testimony	From a proceeding	Unavailable	Admissible only if opponent had opportunity and similar motive to cross-examine
Prior inconsistent statement	From a proceeding	At trial, on the stand	Inconsistent (with trial witness's current testimony)

iii) **Forfeiture by wrongdoing** – FRE 804
  (1) **Elements**: a declarant's out of court statement may be offered against any party who:
    (a) Intentionally, and
      (i) The intent must be to prevent the witness from testifying. Includes acquiescing in wrongdoing that was intended to procure the declarant's unavailability as a trial witness.
    (b) Wrongfully
    (c) Made the declarant unavailable.

  (2) **Burden of proof** regarding party's wrongdoing:
    (a) Federal – preponderance of the evidence.
    (b) NY – clear and convincing evid of party's wrongdoing.

  (3) Example: D is on trial for loan-sharking. Key govt witness has been found dead. All indications are that D is responsible for witness's demise. At the trial for loan-sharking, witness's grand jury testimony and interview statements to the police are offered by the prosecution against D. Objection: hearsay. Admissible?
    (a) Yes.
      (i) If fed judge is convinced by preponderance.
      (ii) If NY judge is convinced by clear and convincing evid.

iv) **Statements against interest** – FRE 804

(1) **Elements**

(a) Declarant is unavailable, and

(b) Statement is against declarant's pecuniary, proprietary, or penal interest.

(i) Ridicule or disgrace is not enough.

(2) In criminal cases, a statement against penal interest offered to help the accused must be supported by corroborating circumstances.

(3) Example: P sues a trucking company based on a driver's negligent driving. Driver was fired immediately after the accident. 2 weeks later, driver tells insurance adjuster that he had been drunk. At trial, driver refuses to testify on the ground of self-incrimination. P offers the adjuster's testimony about driver's statement as evidence.

(a) Admissible as a vicarious party admission?

(i) No. Driver was no longer employed by company when statement was made.

(b) Admissible as a statement against interest?

(i) Yes. Saying he was drunk exposes him to civil and criminal liability and he is unavailable because he asserted the privilege.

Party admission v. statements against interest

	Declarant?	**Offered against?**	**Additional conditions?**	**Personal knowledge required?**
Party admission	Party or his agent	The party (declarant)	None. Any statement	No
Statement against interest	Unavailable, but could be anyone	Anyone	Statement must be against interest	Yes, declarant must have personal knowledge

v) **Dying declaration** – FRE 804

(1) **Elements**:

(a) Declarant is unavailable,

(b) Statement was made under a belief of certain and impending death, and

(i) If victim asks for a doctor, then he thinks he might survive.

(c) Statement concerns the cause or circumstances of the impending death.

(2) Case limitations
  (a) Federal – civil cases and homicide cases
  (b) **In NY**, criminal homicide cases only.

(3) Example: D is on trial for murder. Victim was found by passerby lying in the gutter in a pool of blood with a knife in his stomach. He told passerby "I'm in bad shape. D did it, and I'm going to get him for this." Victim died an hour later. May passerby testify to victim's statement as a dying declaration?
  (a) No. No showing that victim spoke of impending or certain death. Victim's statement seems like he thinks he is going to survive. It is future-looking.

(4) Example: after a bank robbery, bank manager spoke with a wounded teller who gasped "I am a dead man. Get me a priest. D shot me as he made his getaway." Teller then lapsed into a coma from which he has not emerged.
  (a) At D's trial for bank robbery, may manager testify to teller's statement as a dying declaration?
    (i) No – it is not a homicide case. Unavailability is satisfied – coma. And teller thinks death is imminent.
  (b) In a civil action against D for teller's injuries, admissible?
    (i) Fed – yes.
    (ii) NY – no.

vi) **Excited utterance** – FRE 803(2)

(1) **Elements**:
  (a) Statement concerns a startling event, and
  (b) Was made while declarant was still under the stress caused by the event.

(2) Factors that may make statement qualify:
  (a) Event is traumatic
  (b) Relatively short passage of time
  (c) Look for verbal cues in hypo – like shooting, screaming, or exclamation points.
    (i) When see dying declaration, also consider this exception.

(3) Example: witness observes a horrific head-on car crash and excitedly tells the officer who arrived 10 minutes later "OMG, officer! Both of those cars were going 80 mph!" May the officer testify to witness's statement in subsequent civil litigation from the accident?
  (a) Yes – excited utterance. Unavailability of declarant is irrelevant.

vii) **Present sense impression** – FRE 803(1)

(1) **Elements**:

(a) Statement describes an event, and

(b) Is made while event is occurring or immediately thereafter.

(2) No requirement that event be startling. Time is so short (seconds) there is no time to fabricate.

(3) **In NY**, requires corroboration.

(4) Example: in civil trespass action against D for stealing vegetables from P's garden, P testifies that on the day in question, neighbor called P at work saying "I'm looking out my window and I'm watching D make off with your prized tomatoes." Admissible?

(a) Yes – present sense impression.

(b) In NY, need corroboration, some kind of match in description or D is found with the tomatoes.

viii) **Statements of then-existing mental, emotional, or physical condition** – FRE 803(3)

(1) **Elements**: Exception allows admission of

(a) A contemporaneous statement

(b) Concerning the declarant's then-existing:

(i) Physical condition, or

(ii) State of mind.

1. Includes emotions, mental feelings, intent or future plans, sensations and bodily health.

(c) Does **not** include statement of memory or statement of belief about a past condition.

(2) **In NY**:

(a) If a statement of present physical condition is made to a layperson (not a doctor) then the declarant must be unavailable.

(b) If a statement of future intent is offered to prove the conduct of a 3rd person, NY requires:

(i) Corroboration (of the connection between the declarant and the 3rd person, and

(ii) Declarant is unavailable.

(3) Example: P's estate sues D life ins company for nonpayment pf proceeds upon P's death. Defense: suicide. D seeks to introduce a note found in P's apartment (in P's handwriting) that said:
  (a) "I was sad."
    (i) Inadmissible. This is a statement of belief of past condition or memory.
  (b) "I am sad."
    (i) Admissible. Statement of declarant's then existing state of mind.
  (c) "I'm going to end it all next week."
    (i) Admissible. Statement of future intent.

(4) P, whose arm was broken in accident with D in Jan., sues for damages for pain and suffering. At trial in Dec., P testifies about the pain she experienced. P also calls neighbor to testify:
  (a) "Last May, P said 'I'm feeling a lot of pain in my arm."
    (i) Party admission?
      1. No. Not being offered against a party.
    (ii) Statement of present physical condition?
      1. Federal – Yes. When statement was made, described how she felt.
      2. NY – No, not admissible. Made to layperson, requires unavailability of declarant and P is available.
  (b) "Last Sept., P said 'I sure did feel a lot of pain in my arm in May.'"
    (i) Not admissible. It is hearsay if it is a backward looking statement.

(5) Example: before going out on Mon. night, victim told wife "I'm meeting D tonight at the bowling alley." Victim's dead body was found Tues. outside bowling alley. Is victim's statement to wife admissible at D's trial?
  (a) Federal – yes. Victim's statement shows future intent to do something with D. Permissible inference is that D met victim that night.
  (b) NY – need unavailability of declarant and corroboration for it to be admissible.

ix) **Statements for purpose of medical treatment or diagnosis** – FRE 803(4)
  (1) **Elements**: allows admission of a statement:
    (a) Made for purpose of
      (i) Diagnosis or
      (ii) Treatment
    (b) Concerning
      (i) Present symptoms, or
      (ii) Past symptoms, or
      (iii) General cause of medical condition.
        1. Generally, how you got that condition.
    (c) But <u>not</u>
      (i) Statements of fault, or
      (ii) Identity of wrong-doer.

(2) Rationale – incentive to be honest and accurate to get good medical care.

(3) **In NY**, does not apply to statements made solely for the purpose of obtaining expert testimony.
  (a) In federal court, statements to expert witnesses are admissible.

(4) Example: P v. D for pain and suffering damages based on accident at D's store. D disputes liability and damages. At trial, P calls her treating doctor to testify "when P came to see me for treatment a year after the accident, she said:"
  (a) "The pain in my arm is killing me."
    (i) Admissible – statement about present symptoms and made to doctor for treatment.
  (b) "The pain was even worse 6 months ago."
    (i) Admissible – statement of past symptoms to doctor for treatment.
  (c) "This all started when I fell down the stairs."
    (i) Admissible – general cause of medical condition.
  (d) "I fell down the poorly maintained stairs at D's store."
    (i) Not admissible – talks about fault and identity of wrongdoer.
  (e) On cross, doctor states that P also stated "but it was probably my fault for not looking where I was going." Evid offered by D.
    (i) Privileged?
      1. No – not for purpose of medical treatment or diagnosis and even if it were, it is waived because P put her doctor on stand to testify.
    (ii) Hearsay? Yes. Exception? Yes – party admission.

(5) Example: same as above, except that P made statements (a), (b), and (c) to a doctor who was retained solely for the purpose of testifying as an expert at trial concerning nature of injury. Still admissible?
  (a) Federal – yes.
  (b) NY – no. Exception does not apply to experts.

x) **Business and public records** – FRE 803(6) and (8)
  (1) **Elements**: allows admission of:
    (a) Records of a business
      (i) Broad category, includes public agencies.
    (b) Made in the regular course of business
      (i) Relates to what the business does.
    (c) Where the business regularly keeps such records
    (d) Made contemporaneously, and
      (i) At or about the time of the event recorded.
    (e) The contents consist of:
      (i) Information observed by employees of the business, or
      (ii) Statement that falls within some other hearsay exception.

(2) **Public records**
  (a) **Federal rule**: in addition to observations by employees of the public agency, may also include conclusions by public employees after an official investigation.
    (i) i.e., police officer's conclusion about fault in an accident report.

    (ii) **Exception**: a police report may **not** be offered against D in a **criminal** case.

  (b) **In NY**, observations only. Conclusions stay out.

(3) Laying the **foundation** for business records:
  (a) Live testimony
    (i) Call knowledgeable witness who can testify to the 5 elements for business records (custodian of records)
  (b) Affidavit
    (i) Submit a written certification under oath attesting to elements of business records.

    (ii) **In NY**, written certification may be used only in civil cases and only for the business records of a non-party.

(4) Example: P sues D for damages for recklessly running him down. At trial, P seeks to introduce the report of officer, who arrived at the scene 10 minutes after the accident. The report, which was prepared by officer at the scene, states:
  (a) "Upon arrival, I measured skid marks 50 feet in length."
    (i) Admissible – business record. Police is a business and it is germane to the business to observe the conditions at the accident scene and the employee made the record contemporaneous with the observation.
  (b) "Another officer, who witnessed the accident, told me that D was driving nearly 60 mph."
    (i) Admissible. So long as everyone is in the chain of the business, it is ok.
  (c) "Bystander told me, 'I saw the accident and D ran the stop sign.'"
    (i) Inadmissible. Double hearsay. Information comes to officer from bystander and bystander is not from business and has no duty to be accurate.
  (d) "Driver told me 'I didn't see the stop sign.'"
    (i) Admissible. Double hearsay, but the first level exception is party admission, then business record.
  (e) "Cause of the accident: D's excessive speed and failure to yield."
    (i) Admissible. Conclusion of public official after an investigation.

(5) Example: after accident, P taken to ER where she was cared for by nurse. P sues D saying D's negligence caused the accident. D seeks to introduce ER record in which nurse noted immediately after examining P:
(a) "Slight bruises on arms and legs."
(i) Admissible. Hospital is a business and regularly makes these records. These are nurse's direct observations and germane to what the hospital does.
(b) "P says she feels no pain."
(i) Admissible. Double hearsay. First level admissible as 1) party admission, 2) then-existing statement of physical condition, and 3) statement made for medical treatment. Second level, business record.
(c) "P says she ran the red light."
(i) Inadmissible. Double hearsay. First level is admissible as party admission. But second level, the record is not germane to the hospital's business, so no business record exception.
1. However, the nurse herself could testify to P's statement.

e) Hearsay and the **confrontation clause**
i) **Rule**: <u>in criminal cases</u>, the 6th amendment requires that D be confronted with the witnesses against him.
(1) So, prosecution may <u>not</u> offer <u>testimonial</u> hearsay <u>in violation</u> of D's <u>right to cross-examine the declarant</u>.

ii) **Right to cross-examine** the declarant <u>is</u> satisfied if D:
(1) Already had the chance to cross-examine the declarant, <u>or</u>
(a) Former testimony exception
(2) Can cross-examine declarant at trial, <u>or</u>
(a) Prior statements of a trial witness
(3) Forfeited his right through tampering.
(a) Forfeiture by wrongdoing.

iii) **Testimonial**
(1) Grand jury testimony is testimonial.
(2) Statements in response to police interrogation:
(a) Testimonial if:
(i) The primary purpose of questioning is to establish or prove past events potentially relevant to later prosecution.
(b) Non-testimonial if:
(i) The primary purpose of the questioning is to enable police assistance to meet an ongoing emergency.

iv) Documents:
(1) Police reports are testimonial.
(2) Business records are not testimonial.

v) Example: D is charged with conspiracy to commit bank robbery. Accomplice confessed to the police that he was one of the robbers but is now asserting his 5th amendment right not to testify. At trial, prosecution seeks to introduce accomplice's confession against D as a statement against interest. Admissible?
   (1) No. Violates confrontation clause because it was testimonial.

vi) Example: D is charged with assaulting his wife. At trial, wife refuses to testify against D. To prove case, prosecution seeks to introduce a tape recording of the 911 call in which wife said "my husband is beating me again. He went upstairs. Please send the police." D objects on hearsay and confrontation grounds. How should court rule?
   (1) Admissible. Must pass hearsay test and confrontation clause test.
      (a) Hearsay – but exceptions of present sense impression and excited utterance.
      (b) Confrontation clause – not testimonial because purpose was to assist police in an ongoing emergency.

f) Hearsay review:
   i) Def: hearsay is an out of court statement offered for the TOMA.
   ii) Rule: hearsay is admissible, except for
      (1) Exclusions:
         (a) Non-hearsay uses – not offered for the TOMA:
            (i) Impeachment
            (ii) Verbal acts
            (iii) Effect on listener
            (iv) Circumstantial evid of declarant's state of mind
         (b) Rules for prior statements of trial witnesses (so declarant must testify at trial)
            (i) Prior statements of identification
               1. NY – in criminal cases only
            (ii) Prior inconsistent statements
               1. Federal only
            (iii) Prior consistent statements
               1. Federal only
      (2) Exceptions:
         (a) Party admission (offered against party)
         (b) Former testimony
         (c) Forfeiture by wrongdoing
         (d) Statements against interest
         (e) Dying declaration
         (f) Excited utterance
         (g) Present sense impression
         (h) Then-existing mental, emotional, or physical condition
         (i) Medical treatment statements
         (j) Business records

9) **Witnesses**
   a) **Competency**
      i) **Federal rule**: requirements for a witness to be competent to testify:
         (1) Witness must have personal knowledge, and
         (2) Witness must take an oath that:
            (a) Demonstrates an understanding of the obligation to tell the truth, and
            (b) Embodies a promise to tell the truth.

      ii) **NY rule for testimony by children**:
         (1) General rule is the same. Child may testify under the oath so long as child understands the obligation to tell the truth and promises to tell the truth.
         (2) Exception for criminal cases:
            (a) A child under age of 9 who cannot understand the oath may still testify.
               (i) So this means that the child may give unsworn testimony. But can give sworn testimony if they understand the oath.
            (b) BUT D cannot be convicted based solely on unsworn testimony. There must be some corroboration.

   b) **Dead Man's statute**
      i) **Federal rule**: there is no dead man's statute.

      ii) **Rule in some states**:
         (1) Some states have dead man's statute which generally provide:
            (a) In a civil action,
            (b) An interested party
            (c) May not testify
            (d) Against a dead party (or dead party's representative)
            (e) About communications or transactions with the dead party.

         (2) Def is narrow: a person is interested only if the outcome of the case will have a legally binding effect on the person's rights or obligations.

         (3) Waiver – dead person's rights may be waived if:
            (a) Decedent's representative does not object, or
            (b) Decedent's representative testifies about the transaction, or
            (c) Decedent's testimony is introduced.

         (4) Exam tip – if they want to test you on this, they will tell you that you are in a state with a dead man's statute.

(5) Example: P sues D for a breach of an oral contract. D denied that any contract was made. D died before trial.
(a) Under the federal rules, may P testify to what D said and did in negotiating the contract?
(i) Yes, no dead man's statute in fed court.
(b) In jx with a dead man's statute:
(i) May P testify to what D said and did in negotiating the contract?
1. No. P is an interested party. P is incompetent to testify about her dealings with dead D.
(ii) May P's friend, who witnessed the making of the contract, testify to what D said and did?
1. Yes. Friend is not an interested party. Friend may be biased, but allowed to testify if no direct interest in outcome.

iii) **NY Dead Man's statute**:
(1) **Rule**: this rule is similar to the rule in most other states with one exception.
(2) **Exception**: in an **accident case based on negligence**, the surviving party:
(a) May testify about the facts surrounding the accident (what decedent did)
(b) But may not testify about conversations with decedent.

(3) Example: P sues the administrator of D's estate in NY state court for injuries she suffered in an auto collision. D died shortly after accident.
(a) If no one else witnessed the accident, may P, over a dead man's statute objection, testify that immediately after the accident:
(i) D staggered as she approached P?
1. Yes – testimony is about decedent and the exception applies.
(ii) D said "it was all my fault, I shouldn't have had those drinks."
1. No – even though accident case involves negligence, conversations are off limits under NY dead man's statute.
(b) P's friend also witnessed the accident, may she testify for P that D admitted her fault?
(i) Yes. Friend is not a party and not interested in the outcome. So dead man's statute does not apply.

c) **Form of testimony**
i) **Leading questions** – FRE 611
(1) Def: leading when form of question suggests the answer.

(2) **Rule**:
(a) Leading questions are generally not allowed on direct exam.
(b) Leading questions generally are allowed on cross exam.

(3) Exceptions: leading questions may be allowed on direct in following situations:
(a) Preliminary introductory matters
(b) Youthful or forgetful witnesses
(c) Hostile witnesses
(d) Adverse party

d) **Cross-examination**
i) Is a right. If a witness testifies but then cannot be cross-examined, the witness's direct testimony will be struck.

ii) Scope of cross:
(1) Matters within the scope of direct examination.
(2) Matters that affect the witness's credibility.

e) **Opinion testimony**
i) **Lay witness opinion** – FRE 701
(1) **Rule**: lay opinion testimony is admissible if it is:
(a) Rationally based on witness's direct observations (personal knowledge), and
(b) Helpful to the jury.

(2) Examples – a lay witness may testify about such things as:
(a) Sobriety (or drunkenness)
(b) Emotions
(c) Speed
(d) Handwriting
(e) Smells
ii) **Expert witness opinion** – FRE 702
(1) **General rule**: witness may testify to an opinion as an expert only if:
(a) Witness is **qualified**,
(i) By education and/or experience

(b) Testimony is about a **subject matter where scientific, technical, or specialized knowledge will be helpful to the jury**,

(c) Opinion has a **proper basis**, and
(i) Opinion must be made to a reasonable degree of probability or reasonable certainty, and

(ii) Opinion must be <u>based on certain data sources</u>:
1. Expert's personal knowledge
   a. I.e., treating doctor
2. Evid that is already in the trial record.
   a. I.e., made known to the expert through a hypo
3. Facts outside the record (inadmissible evid such as hearsay) but *only if* those facts are of a type reasonably relied on by experts in the particular field.
   a. If this is used, the inadmissible facts may not be disclosed to the jury, though the opponent, on cross, may disclose this info.

(d) Opinion is **reliable**.
(i) **Rule**: to be admissible, expert opinion must be sufficiently reliable, which means
1. Expert has used reliable methods, and
2. Expert has reliably applied those methods to the particular facts of the case.

(ii) **Standard**
1. **Federal rule – Daubert standard**: the court examines reliability by asking such questions as:
   a. Has methodology been tested?
   b. Are there known error rates?
   c. Has the methodology been subject to peer review?
   d. Has the methodology been generally accepted?

2. **NY rule – Frye standard**: NY asks only:
   a. Whether the methodology has been generally accepted in the relevant professional community.

iii) **Ultimate issues** [most likely the wrong choice on MBE]
(1) **Rule**: opinion testimony generally is permissible even if it addresses an ultimate issue in the case.

(2) **Exception – in federal only**: in criminal case, an expert witness may not testify that D did or did not have the required mental state.
(a) Insanity defense case – psychologist can testify to general description of symptoms but expert cannot testify to legal conclusion of insanity.

(3) Example: in personal injury case, D is alleged to have been driving recklessly at the time of the accident. Witness who observed the event testifies that D looked angry, smelled of alcohol, and drove through at 80 mph.
(a) D objects that witness's testimony is improper opinion testimony. How should court rule?
(i) Overruled. Admissible, this is classic lay opinion.
(b) Witness then states "it looked to me as though D was engaged in conduct constituting a reckless disregard for the safety of others."
(i) Inadmissible. Witness's opinion is not helpful to the jury because it is the jury's job to apply the law, they do not need the witness to do it for them.

iv) **Learned treatise in aid of expert testimony – hearsay exception** – FRE 803(18)
(1) **Federal rule**: if a party can establish that a treatise is reliable authority, then
(a) The treatise may be used on direct or cross of the expert, and
(b) The treatise may be read to the jury as substantive evidence (hearsay exception), but
(c) Treatise may not itself be introduced as an exhibit.

(2) Establishing authoritativeness:
(a) Your own expert testifies that the treatise is authoritative,
(b) Your opponent's expert admits that the treatise is authoritative, or
(c) The judge takes judicial notice that it is authoritative.

(3) **In NY**,
(a) On direct
(i) A treatise may only be used for the purpose of showing the basis of the expert's testimony, not as substantive evid.
(b) On cross
(i) May only be used to impeach the opponent's expert's credibility, not as substantive evid, and
(ii) May only be used if the opponent's expert either:
1. Relied on the treatise in developing her own opinion, or
2. Acknowledged that it is a reliable authority.
(c) So no hearsay exception for learned treatise in NY.

f) **Writings in aid of oral testimony**
i) **Present recollection refreshed** – FRE 612
(1) **Basic rule**: witness may not read from a prepared memorandum. Must testify on basis of current recollection.

(2) **Refreshing recollection**: but, if a witness forgets something he once knew, he may be shown a writing, or anything else, to jog his memory.

(3) Example: P's house was robbed 2 years ago and several valuable items were stolen. P sued insurer for failing to pay for the loss covered by his policy. While on the stand, P cannot remember all of the stolen items. To refresh P's recollection, his atty shows him a copy of a list of missing items that P prepared for the police the day after the burglary. Insurer objects on ground of lack of authentication, best evid rule and hearsay.
   (a) May P's atty use the list to refresh P's recollection?
      (i) Yes. Anything can be used to refresh. It is not being offered for the truth, just to jog memory.
   (b) If P's recollection is refreshed, may he then read the list into evid?
      (i) No.

(4) If an item is used to refresh a witness's memory, the opposing party has a right to:
   (a) Inspect it
   (b) Use it on cross
   (c) Introduce it into evid

ii) **Past recollection recorded** – hearsay exception – FRE 805(5)
   (1) **Rule**: a writing may be read to the jury as past recollection recorded if:
      (a) Witness once had personal knowledge;
      (b) Witness now forgets and showing the writing to the witness fails to jog his memory;
      (c) The writing was either made by the witness or adopted by the witness;
      (d) The writing was made when the event was fresh in his memory (contemporaneously); and
      (e) The witness can attest that, when made, the writing was accurate.

   (2) **Method**: if foundation (above) is made, then:
      (a) Witness may read the document to the jury,
      (b) But witness may not show the document to the jury.
         (i) **In NY**, witness can show it to the jury.
      (c) But opposing party may show it to the jury.

   (3) Example: same as above, P cannot remember all the stolen items. But this time the list fails to jog P's memory and cannot testify based on recollection. P's atty seeks to offer the list into evid. How should the court rule? [the list is hearsay – an out of court statement offered for the TOMA – but exception is past recollection recorded]
      (a) Federal – No. The witness can only read the list to the jury.
      (b) NY – Yes.

g) **Attacking testimony**

i) Overview

(1) Attacks on testimony is against a witness's specific testimony.

(2) Character attacks challenge a witness's general character for truthfulness.

(3) Under FRE, any party may impeach or attack any witness, regardless of who called them.

ii) **Rule**:

(1) Attempts to discredit a witness's testimony are not subject to special restrictions if based on:

(a) Bias

(b) Mistake or misperception

(c) Inconsistency

(2) This means that the party can do so during cross or on direct by calling other witnesses or documents.

iii) **Bias**

(1) Def: some relationship between the witness and a party, or some other interest in the litigation, that could cause the witness to lie.

(2) Examples: witness is:

(a) Party

(b) Friend, relative, or employee of a party

(c) Someone paid by a party

(d) Someone with a grudge against a party

(e) Anyone who has something to gain or lose by the case coming out one ay or another

iv) **Misperception** – sensory deficiencies

(1) Def: anything that could affect the witness's perception or memory.

(2) Examples: bad eyesight, bad hearing, mental retardation, forgetfulness, intoxication at time of event or while on witness stand.

v) **Inconsistency**

(1) Def: prior statement that is materially inconsistent with witness's trial testimony.

(2) **Rule**: a prior inconsistent statement may be used to impeach a witness.

(3) Purpose: ordinarily, a prior inconsistent statement is admissible only to impeach. It is not admissible as substantive evid.

(a) Remember – only federal – a prior inconsistent statement may be admissible both as impeachment and as substantive evid if:

(i) Made under oath

(ii) During a formal proceeding.

(4) Procedure
  (a) **Rule**: witness who is being impeached with a prior inconsistent statement must be given an opportunity to explain or deny the prior statement.

  (b) Timing
    (i) **In NY**, witness must be given a chance to explain the statement while still on the stand.
    (ii) **Federal** is more flexible. Inconsistent statements may be proven by extrinsic evid as long as the witness is later given an opportunity to return to the stand and explain.

  (c) **Exception**: if the witness is the opposing party, there is no need to give them the opportunity to explain the prior inconsistent statement.
    (i) Don't forget, statements by a party are admissible under the party admission exception to hearsay.

(5) Example: in car accident case, P testifies that she was wearing her seat belt. D does not cross-examine her. During defense, D calls bartender, who testifies that P told him a week after the accident that she had not been wearing her seatbelt. Should P's motion to strike be granted on ground that P was not given an immediate opportunity to explain or deny?
  (a) No. Do not have to do this because witness was the opposing party.

h) **Character attacks on witnesses**
  i) Basics
    (1) Def: veracity – character trait of being truthful.
    (2) Methods for attacking veracity:
      (a) Reputation or opinion
      (b) Criminal convictions
      (c) Prior bad acts (without convictions)

  ii) **Reputation or opinion about witness's bad character for truthfulness** – FRE 608
    (1) **Rule**: party may attack a witness (target witness) by calling another witness (character witness) to testify to the target witness's bad character for veracity.

    (2) **Form of the testimony** – same as the rule for character evid
      (a) Federal – reputation or opinion
      (b) NY – reputation only
      (c) Not allowed – specific acts

(3) Example: eyewitness testifies for the prosecution that he saw D running from the crime scene. During the defense, D calls eyewitness's former boss who will testify that eyewitness has a lousy reputation for truthfulness among his co-workers and in the boss's opinion, is not a truthful person.
   (a) Is boss's testimony admissible?
      (i) Fed – Yes.
      (ii) NY – No to the opinion of the boss. Yes as to the reputation.
   (b) May the boss follow up his opinion or reputation testimony with a story about how he reached his opinion and the fact that eyewitness lied to him on 6 separate occasions?
      (i) No. Specific acts not allowed.

iii) **Criminal convictions** – FRE 609
   (1) **NY Rule**: any witness may be impeached with a conviction for <u>any crime</u>.
      (a) A person who commits a crime has *demonstrated his willingness to put his own interests ahead of society's* and may do so again on the stand by ignoring the oath. [use this language on the exam]

      (b) For <u>criminal D</u> – get a <u>Sandoval hearing</u>
         (i) When witness is criminal D, court must conduct a hearing to balance the probative value of the conviction (on the issue of truthfulness) against the risk of unfair prejudice.

   (2) **Federal rule**:
      (a) Time limit: to be admissible, conviction (or release from prison, whichever is later) must be within <u>10</u> years of the trial.

      (b) Crimes of <u>dishonesty of false statement</u> are <u>always</u> admissible.
         (i) Examples: perjury, false statement, fraud, embezzlement.
         (ii) Not crimes of violence, drug crimes, theft.
      (c) Other crimes:
         (i) Misdemeanors not involving dishonesty – not admissible
         (ii) Felonies – admissible if the probative value of the conviction (on the issue of truthfulness) outweighs the risk of unfair prejudice.

   (3) Example: D is prosecuted in federal court for arson. At trial, D testifies on his own behalf, saying it was an accident. On cross, may the prosecutor ask D:
      (a) Whether he was convicted 8 years ago for misdemeanor income tax fraud?
         (i) Yes – this is a crime of dishonesty.
      (b) Whether he was released from prison 9 years ago for misdemeanor convictions for possession of pot?
         (i) No. Inadmissible in fed court.

(c) Whether he was conviction 2 years ago of misdemeanor shoplifting?
    (i) No. It is a misdemeanor that is not a crime of dishonesty.
(d) Whether he was convicted 5 years ago for felony assault?
    (i) Maybe – assault is not a crime of dishonesty, but it is a felony, so balance test.

(4) **Balancing probative value and unfair prejudice** [on an essay]
(a) Factors that make a conviction probative:
    (i) Seriousness
        1. Murder is more probative of veracity than possession of pot.
    (ii) Relation to trust and deception
        1. Theft is more probative than reckless driving.
(b) Factors that make a conviction unfairly prejudicial:
    (i) Inflammatory nature
        1. Child molestation is more prejudicial that DUI. Worry about jury not liking person.
    (ii) Similarity to the currently charged offense
        1. Risk of propensity reasoning if similar offenses.

(5) Example: same as above, but how to answer under NY law?
(a) Only applies if D testifies, because then that is only when you are attacking his credibility. If D des not testify, none are admissible.
(b) (a)-admissible – probative value is high.
(c) (b)-(d) – apply balancing test.
(6) Example: same as above, but answer under NY law and if witness were not D but was D's friend who testified to D's alibi?
(a) All are admissible – not a great deal of unfair prejudice to criminal D.

(7) **Procedure**:
(a) Conviction may be proven intrinsically (ask on cross) or extrinsically (introduce record). There is no need to give witness a chance to explain.

Prior convictions

Purpose	Admissible?	Rationale
Propensity to commit a particular crime	No – basic propensity rule	Unfairly prejudicial
Propensity to commit sexual assault	Fed – yes (special rule) NY – no	Rape/molestation is treated differently
MIMIC	Yes	Directly relevant to the current charges – not offered for propensity
Attacking witness's character for veracity	Fed 1. crimes of deceit - yes 2. misdemeanors – no 3. felonies – balancing NY 1. criminal D - balancing 2. other witnesses - yes	Convictions for crimes of dishonesty or for serious crimes may show that a witness is wiling to lie under oath.

iv) **Bad acts** (without conviction) that reflect adversely on witness's character for truthfulness – FRE 608

(1) **Federal Rule**: a witness may be asked prior bad acts if those acts relate to truthfulness.

(2) **NY Rule**: a witness may be asked prior bad acts that show the witness's moral turpitude.

(a) This is broader than the fed rule.

(b) Includes criminal conduct that does not relate to truthfulness. (drug use)

(3) **Limitations**:

(a) Cross-examiner must have a good faith basis to believe that the bad act occurred.

(b) Bad act may be proven by intrinsic evid only.

(i) So cross-examiner is stuck with the witness's answer and you can only ask about prior bad acts on cross-examination.

(c) It can be shown with extrinsic evid only if the bad act is relevant for some other purpose (such as proof of bias).

(4) Example: witness testifies for defense that D drive through the intersection at a very slow speed.
   (a) On cross, P asks witness whether she assaulted her mailman 2 years ago but no charges were ever brought. D objects. How should court rule?
      (i) Fed – objection sustained. Inadmissible. Assault does not involve truthfulness. It is a crime, but no charges were ever brought.
      (ii) NY – objection overruled. Admissible. Crime of moral turpitude
   (b) On cross, P asks witness whether she made false statements in an application for food stamps 4 years ago (no charges were brought). D objects. How should court rule?
      (i) Admissible across the board – prior bad act involves dishonesty.
   (c) Same cross. Witness denies making false statements for food stamps. May P then call a welfare agent to prove witness made the false statements?
      (i) No. If witness denies it, you are stuck with it. No extrinsic evid.
(5) Example: at bank robbery trial, witness testifies for prosecution. On cross by defense, witness is asked whether he was arrested a month ago for selling pot and is awaiting trial on those charges. Proper?
   (a) Yes – but not under prior bad acts. This would go to purpose of bias. Witness still has charges pending so is biased to testify favorably for prosecution.

i) **Impeachment of own witness** – FRE 607
   i) **Federal rule**: any party may impeach any witness
   ii) **NY rule**: voucher rule – by calling a witness, a party vouches for that witness's credibility. So ordinarily, a party who calls a witness my not impeach that witness.

   (1) **Exceptions**: a party may impeach its own witness with a prior inconsistent statement that was:
      (a) Made in writing and was signed by the witness, or
      (b) Made in oral testimony and was under oath.
      (c) But in a criminal case, this exception may be used only if the witness' current testimony is *affirmatively damaging* to the party who called the witness, not merely a cloud on credibility.

iii) Example: in a domestic violence case, victim testifies before the grand jury that D assaulted her. At trial, prosecution calls victim to the stand to testify against D.
  (1) To prosecution's surprise, victim testifies that another person committed the assault. May prosecution impeach victim with her prior grand jury testimony?
    (a) Yes.
      (i) On multistate, anyone can impeach anyone.
      (ii) In NY, the exception applies – testimony was made under oath and is affirmatively damaging.
  (2) What if victim testifies "I don't remember who assaulted me."
    (a) MBE – can impeach.
    (b) NY – no. This is not affirmatively damaging.

j) **Rehabilitation**
  i) Def: process of trying to repair a witness's credibility after the witness has been attacked.
  ii) Timing:
    (1) **Rule**: generally, a witness may be rehabilitated only <u>after</u> the witness's credibility has been attacked through impeachment.
      (a) Introducing evid to support credibility is called bolstering and is not allowed.

  iii) Example: P calls witness to the stand, who will testify that he saw D's car run a red light. D's atty says she has no questions. P then calls witness's friend who says that witness has a good reputation for truthfulness. Objectionable?
    (1) Yes. Cannot offer good character for truthfulness until witness is attacked.

  iv) **Methods**:
    (1) **Character evid** – FRE 608
      (a) **Rule**: if a witness's character for truthfulness has been attacked, then the opposing party may introduce corresponding evid of the witness's good character for truthfulness.
      (b) **Form**:
        (i) Fed – reputation or opinion
        (ii) NY – reputation only
        (iii)Not allowed – specific acts

    (2) **Prior consistent statements** – FRE 801(d)
      (a) **Rule**: a prior statement may be used to rehabilitate if:
        (i) The prior statement is consistent with the witness's trial testimony,
        (ii) The opposing party has suggested through impeachment that the witness has a motive to lie, and
        (iii)The prior statement was made before the motive arose.

(b) Remember:
  (i) Federal law – prior consistent statement falls under a hearsay exception. So statements that fit within the rule are admissible to both rehabilitate and as substantive evid that the prior statement was true.
  (ii) NY law – prior consistent statement may only be used to rehabilitate – to show consistency, but cannot be used to show that prior statement was true.

10) **Preliminary facts**
  a) **For the jury**
    i) Jury decides questions of conditional relevance. Meaning that the jury finds the facts or preliminary facts that make evid relevant.
      (1) I.e., whether exhibit is authentic (if gun at trial is not the murder weapon, it is irrelevant); whether D is the person who committed the prior bad act offered as m.o. evid.
    ii) Judge's role for such questions is simply to ensure that there is sufficient evid for a reasonable jury to conclude that the conditional fact is true.

  b) **For the judge**
    i) Judge decides all other questions of admissibility
      (1) I.e., whether testimony is hearsay (or whether hearsay exception applies); whether communication is privileged; whether expert is reliable.
    ii) For these questions, the burden of proof is preponderance of the evid and the judge may consider anything (not limited to admissible evid).