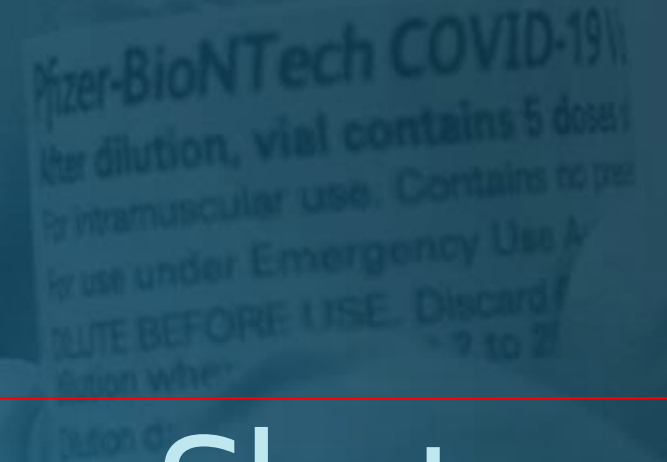


# COVID-19 BOOSTER SHOTS



## Trial Skills Booster Shot *The Gold Standards*

Professor TL Stewart, Saint Louis University School of Law

# The One Room School House

- JEDI Masters
- JEDI's in Training



*The Old Jedi Mind Trick:*  
"You didn't see what you just saw"  
—Obi Wan Kenobi



T. L. Stewart — Saint Louis University School of Law

# **The Gold Standards**

Criminal Justice Act Seminar 2022

# The Resolution Culture

- res·o·lu·tion
  - [ˌrezəˈlʊʃ(ə)n]
  - NOUN
1. a firm decision to do or not to do something.
  2. the quality of being determined or resolute.
  3. the action of solving a problem, dispute, or contentious matter: "the peaceful resolution of all disputes".





# Introduction: The Gold Standards



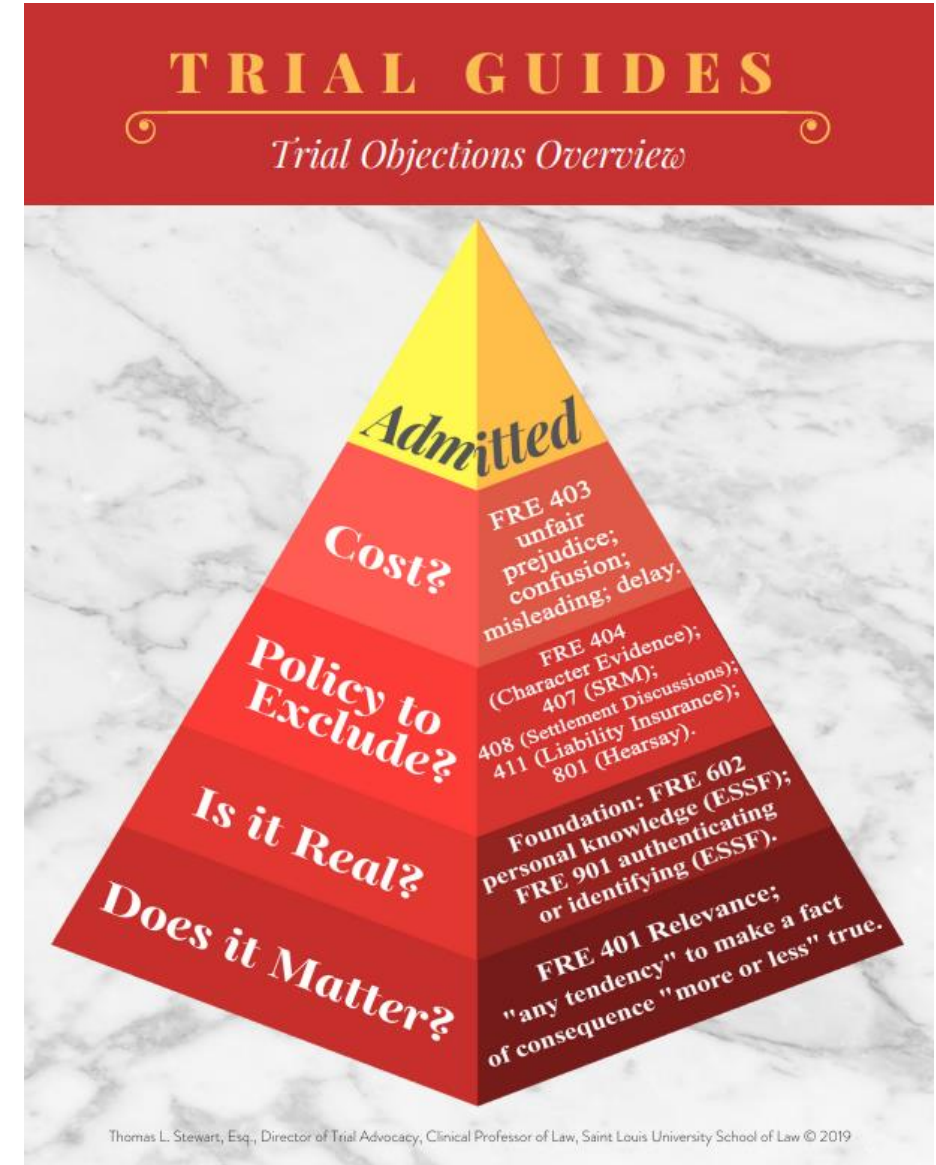
- Timely Objections & Specific Grounds (e.g., Rules of Evidence)
- The Dance of Exhibits
- Refreshing a witnesses' memory
- Impeaching a witness with an inconsistent statement
- Responding to a sustained objection for lack of foundation

Timely Objections & Legal Grounds

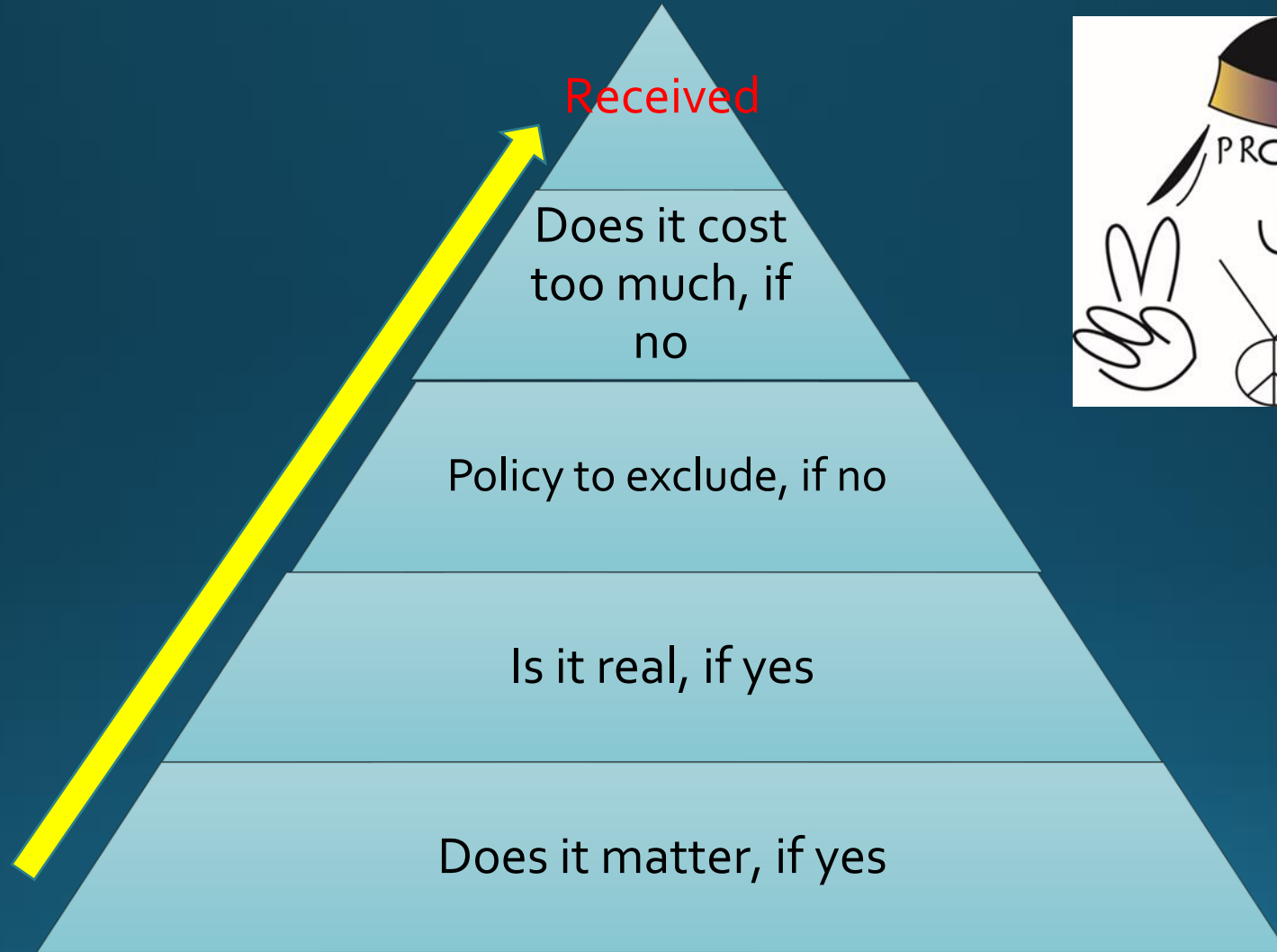
**The Gold Standard**

# Timely Objections & Legal Grounds (e.g. Rules of Evidence in Action)

- The Role of Anticipation
- Starts with the interruption
  - Timeliness
- Grounds/Language
- Ruling: Get one
- The misuse of *motions in limine*

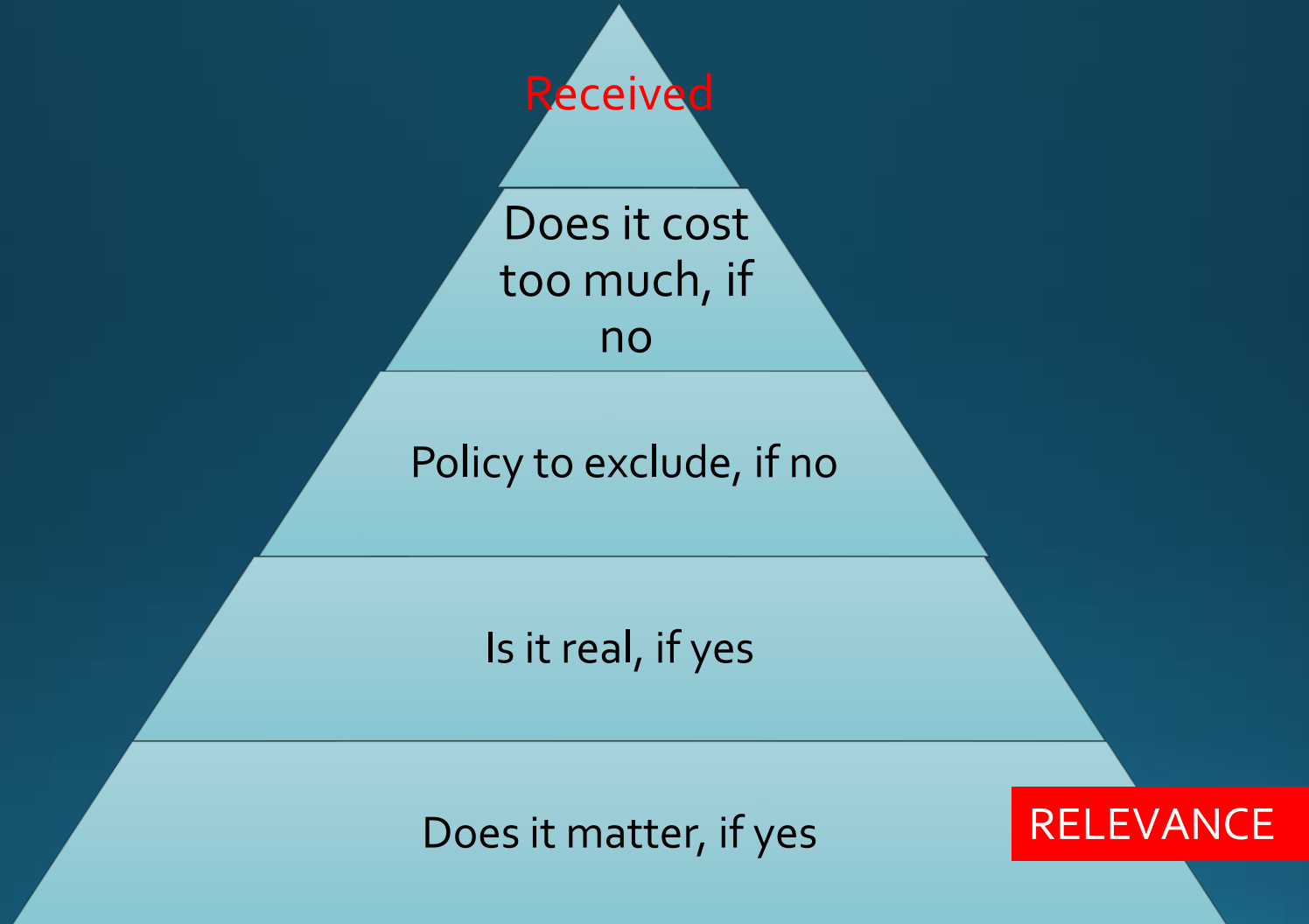


# Evidence 101





# Evidence 101



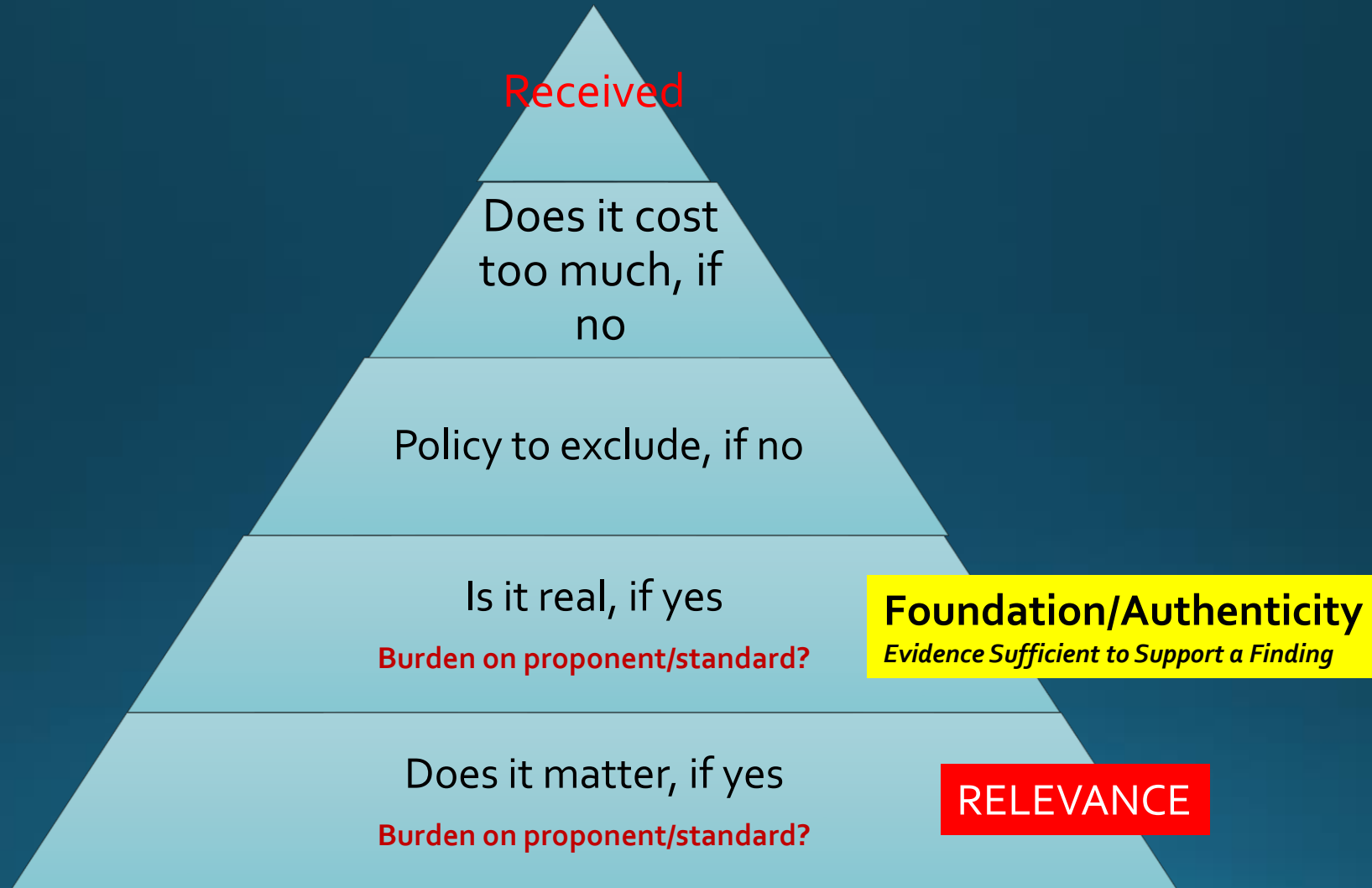
# Evidence 101



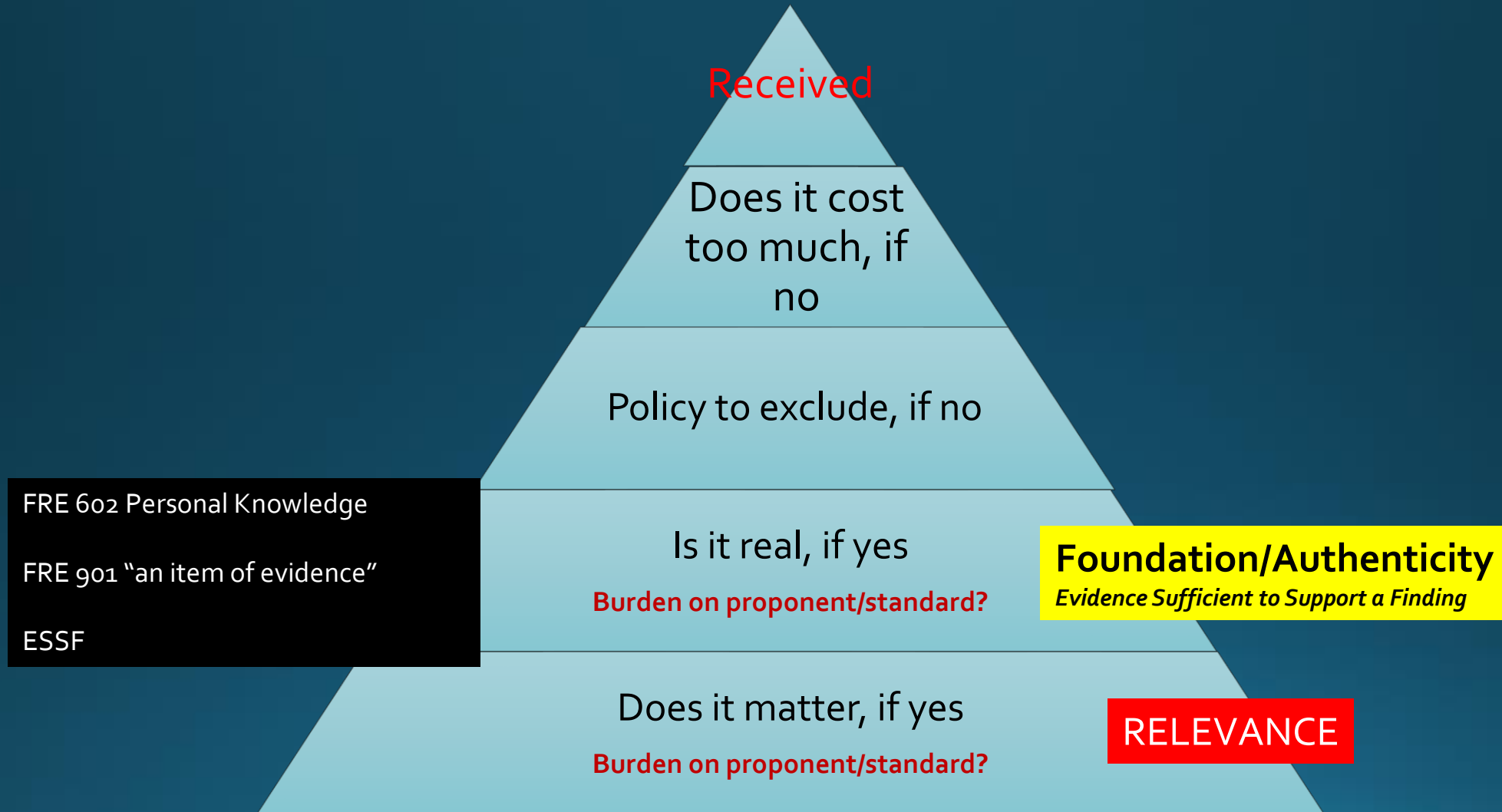
FRE 401

- \*Any tendency
- \*Fact of Consequence
- \*More/less Probable

# Evidence 101



# Evidence 101



# Evidence 101

Received

Does it cost too much, if no

Policy to exclude, if no

Is it real, if yes

Burden on proponent/standard?

Does it matter, if yes

Burden on proponent/standard?

RELEVANCE

## General Issues Concerning Foundation

ESSF standard

*Some evidence* - the item is what the proponent says it is

Personal knowledge ESSF

*Mark; the courtesies; foundation; move and use*

*Pretrial Compliance*

Moved but not used?

FRE 602 Personal Knowledge

FRE 901 "an item of evidence"

ESSF

Foundation/Authenticity  
Evidence Sufficient to Support a Finding



**Received**

Does it cost too much, if no

Policy to exclude, if no

Is it real, if yes

**Burden on proponent/standard?**

Does it matter, if yes

**Burden on proponent/standard?**

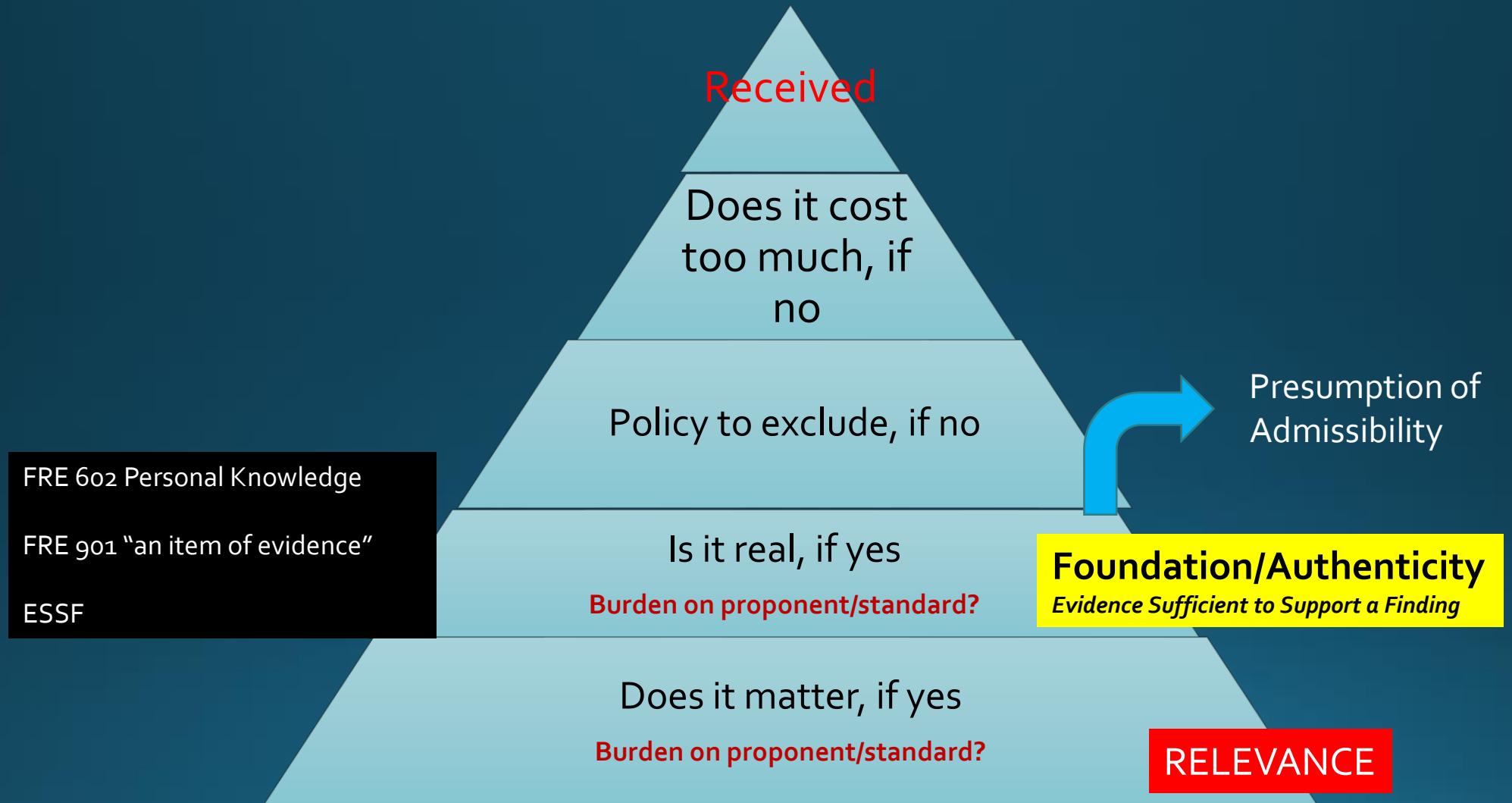
**RELEVANCE**

FRE 602 Personal Knowledge  
FRE 901 "an item of evidence"  
ESSF

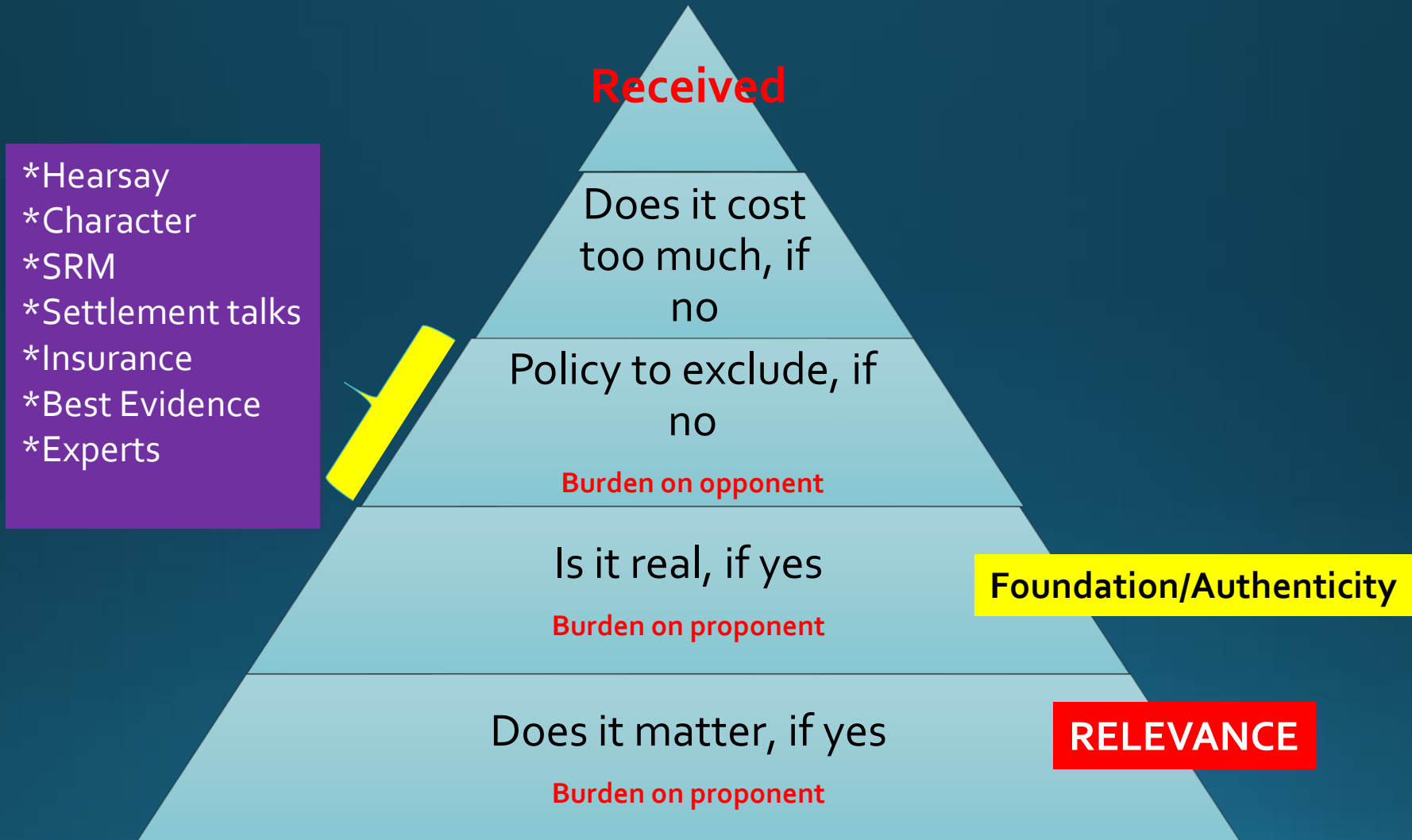
**Foundation/Authenticity  
Evidence Sufficient to  
Support a Finding**



# Evidence 101

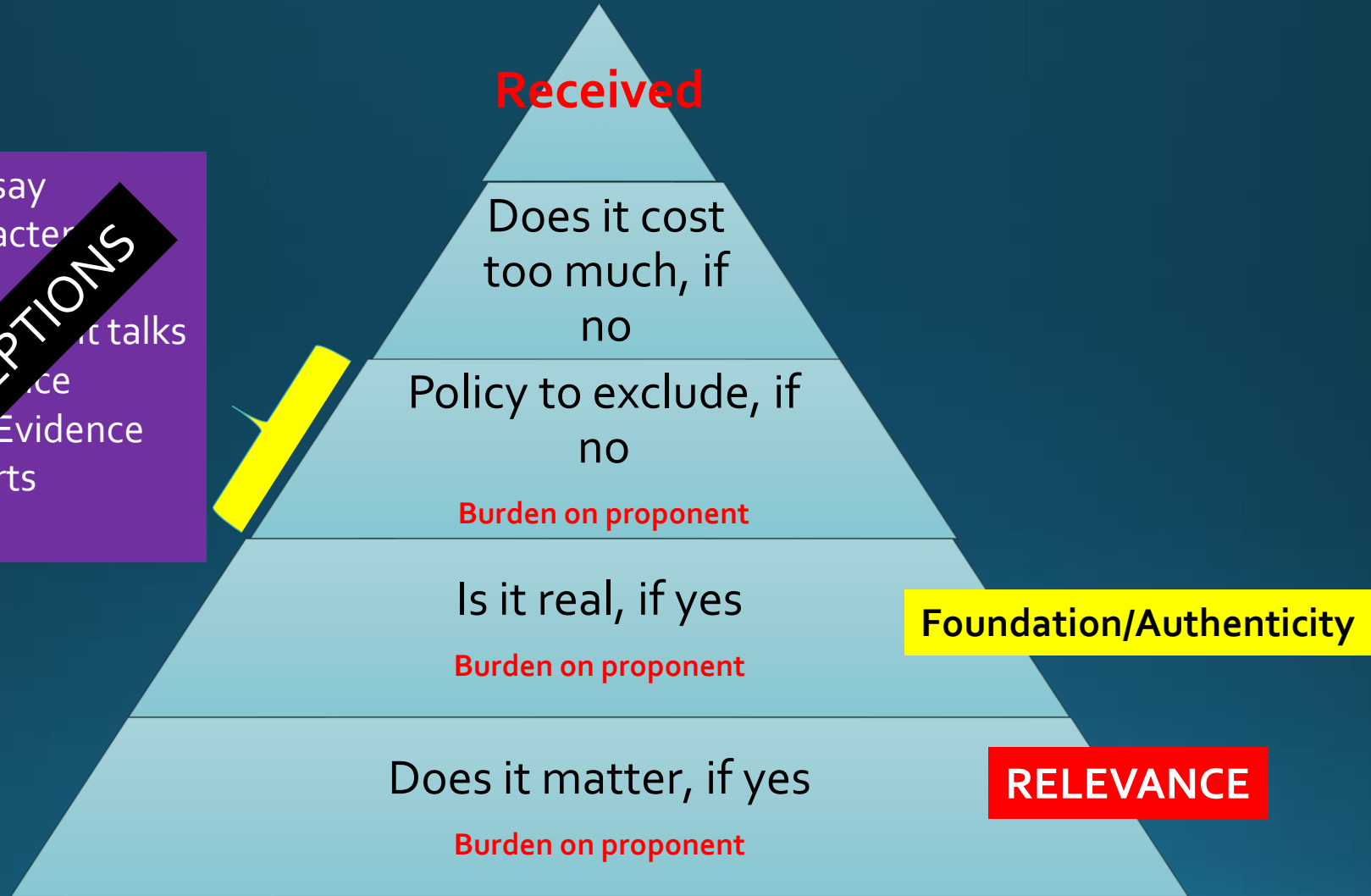


# Evidence 101



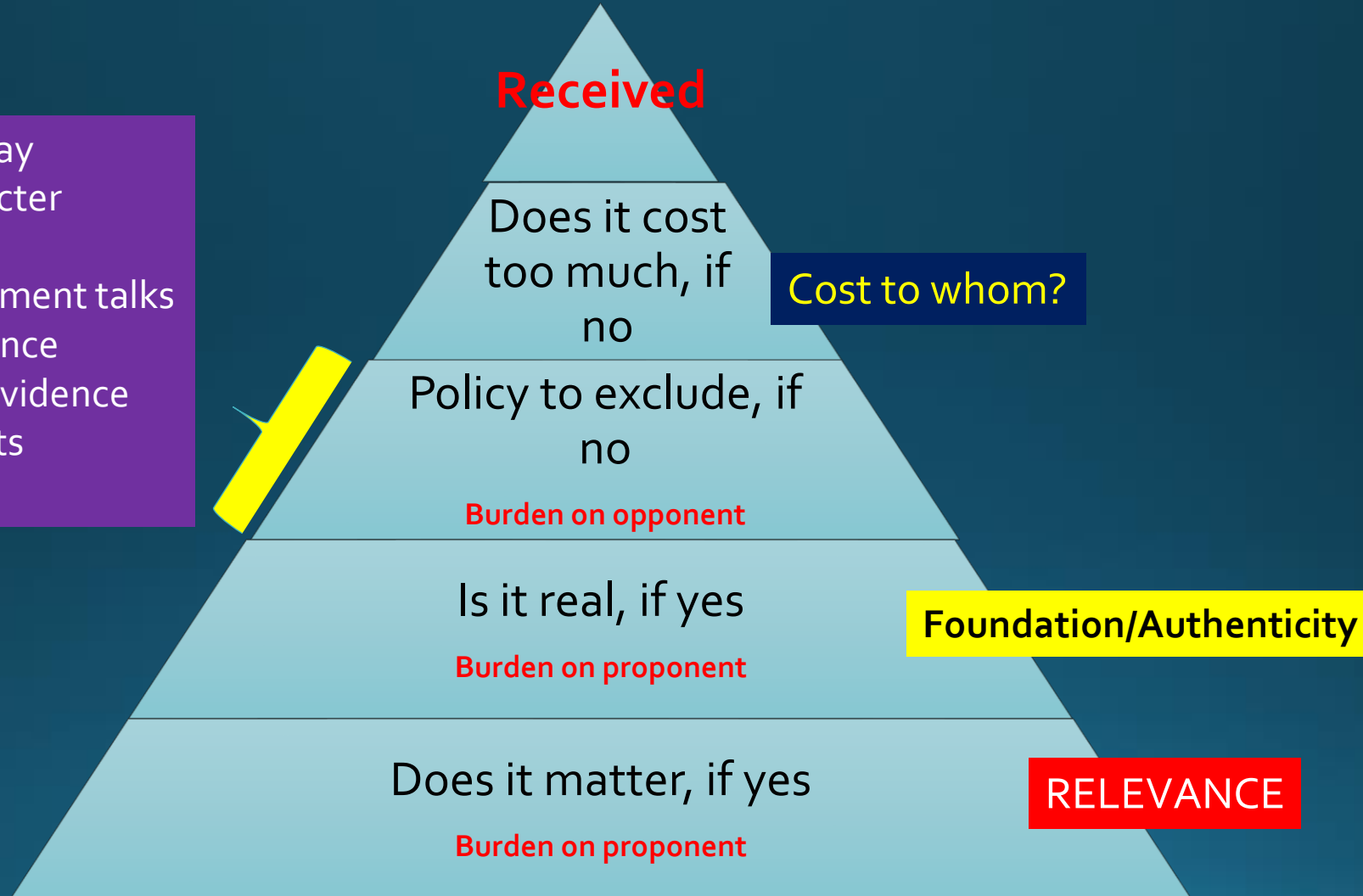
# Evidence 101

- \*Hearsay
  - \*Character
  - \*SRM
  - \*Settlement talks
  - \*Influence
  - \*Evidence
  - \*Experts
- EXCEPTIONS**

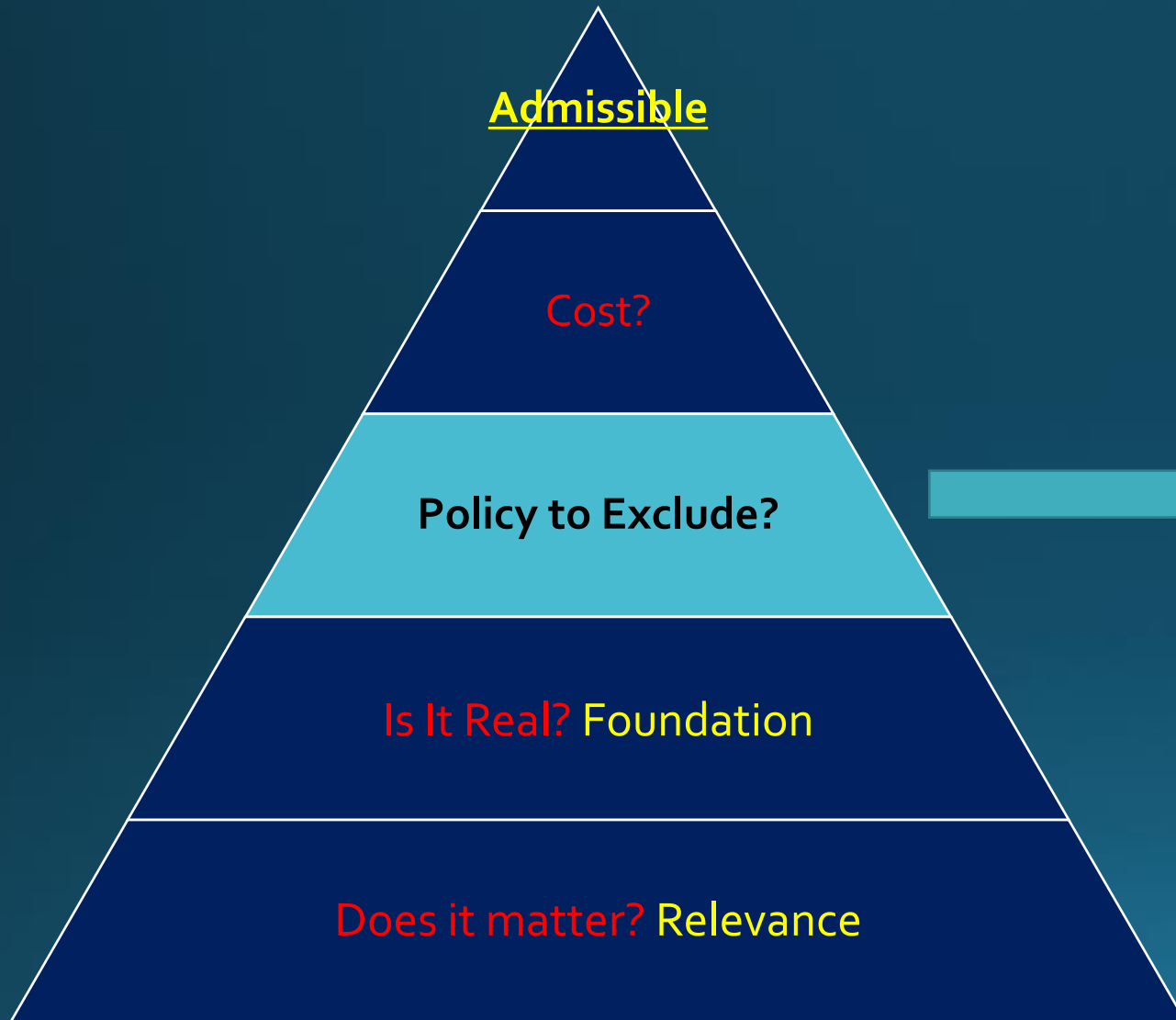


# Evidence 101

- \*Hearsay
- \*Character
- \*SRM
- \*Settlement talks
- \*Insurance
- \*Best evidence
- \*Experts







## Policy to Exclude Central Questions

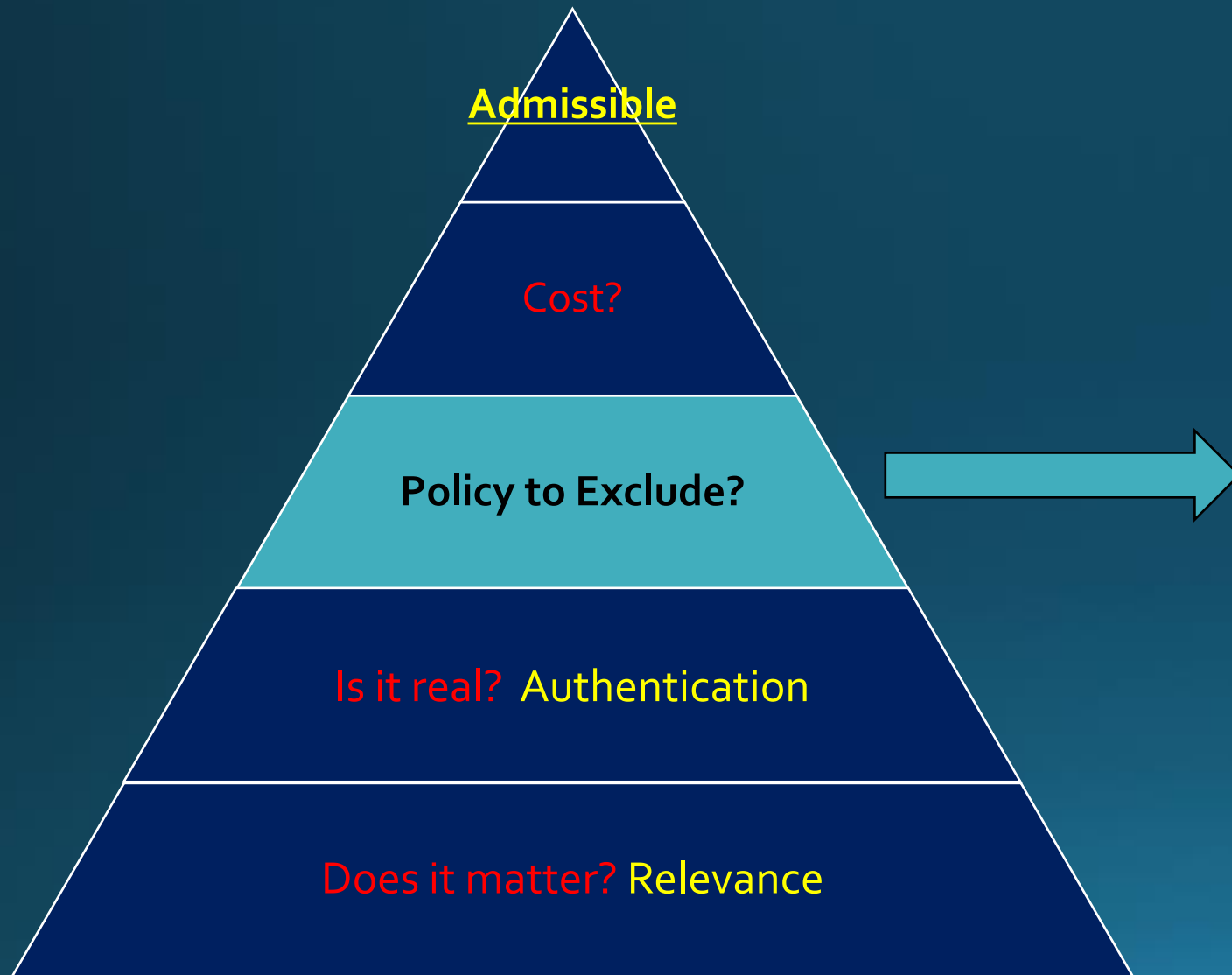
The purpose for the exclusion

The numerous exceptions/exclusion

Hearsay, character evidence  
propensity, SRM, settlement  
discussions, attorney-client,

Exceptions to the exclusions

# Policy to Exclude: Hearsay



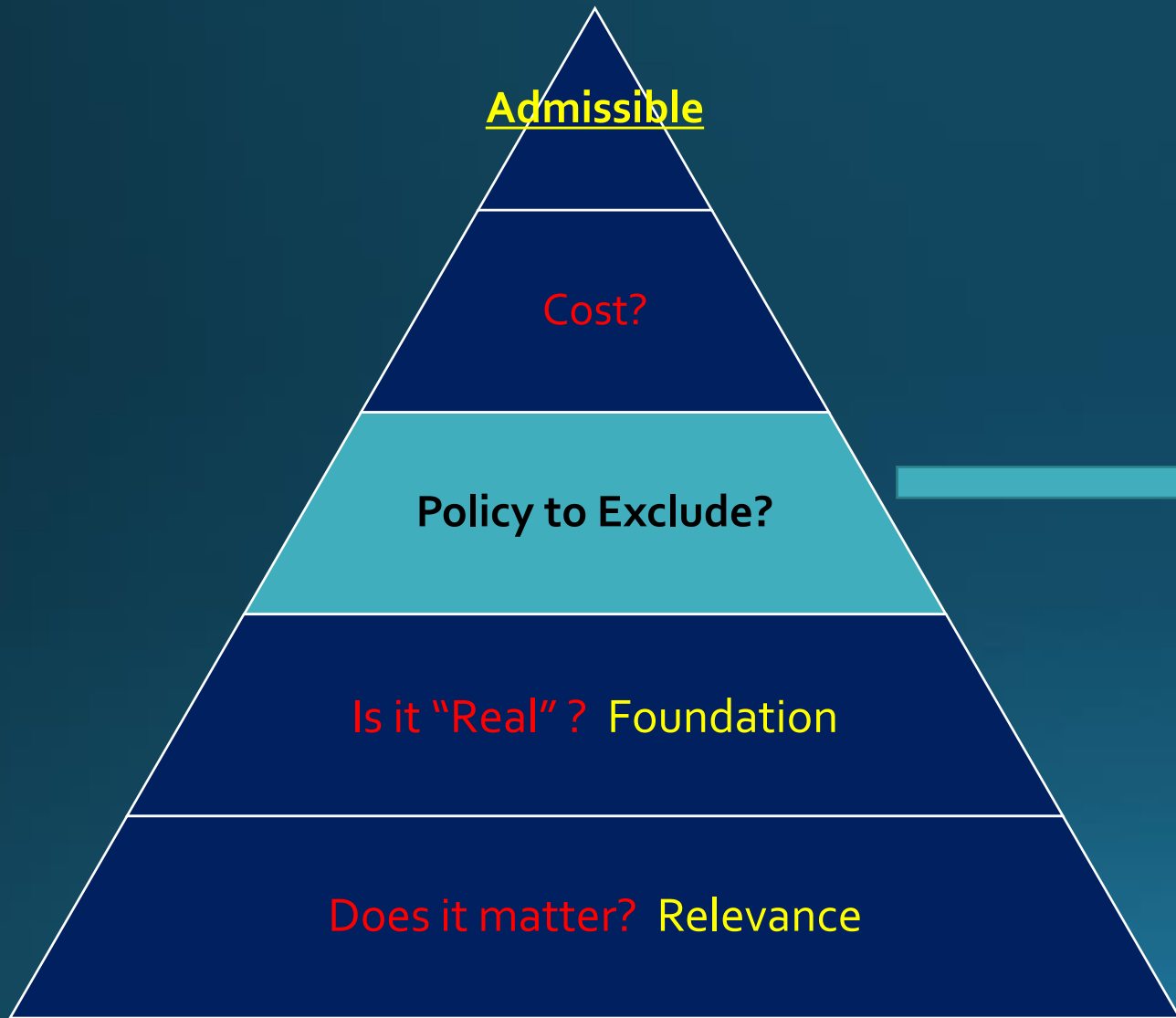
## Two Hearsay Scenarios:

1). In-court testifying witness ask about **what someone told them** outside of court.

2). In-court testifying witness ask about **something they said** outside of court.

Note: Concern isn't with "the hearer" but the declarant

# Policy to Exclude: Hearsay



## First Issue: Is it Hearsay?

Is it a statement?

Is it offered for its truth?

## Exceptions:

Admissions by a party

Excited utterance

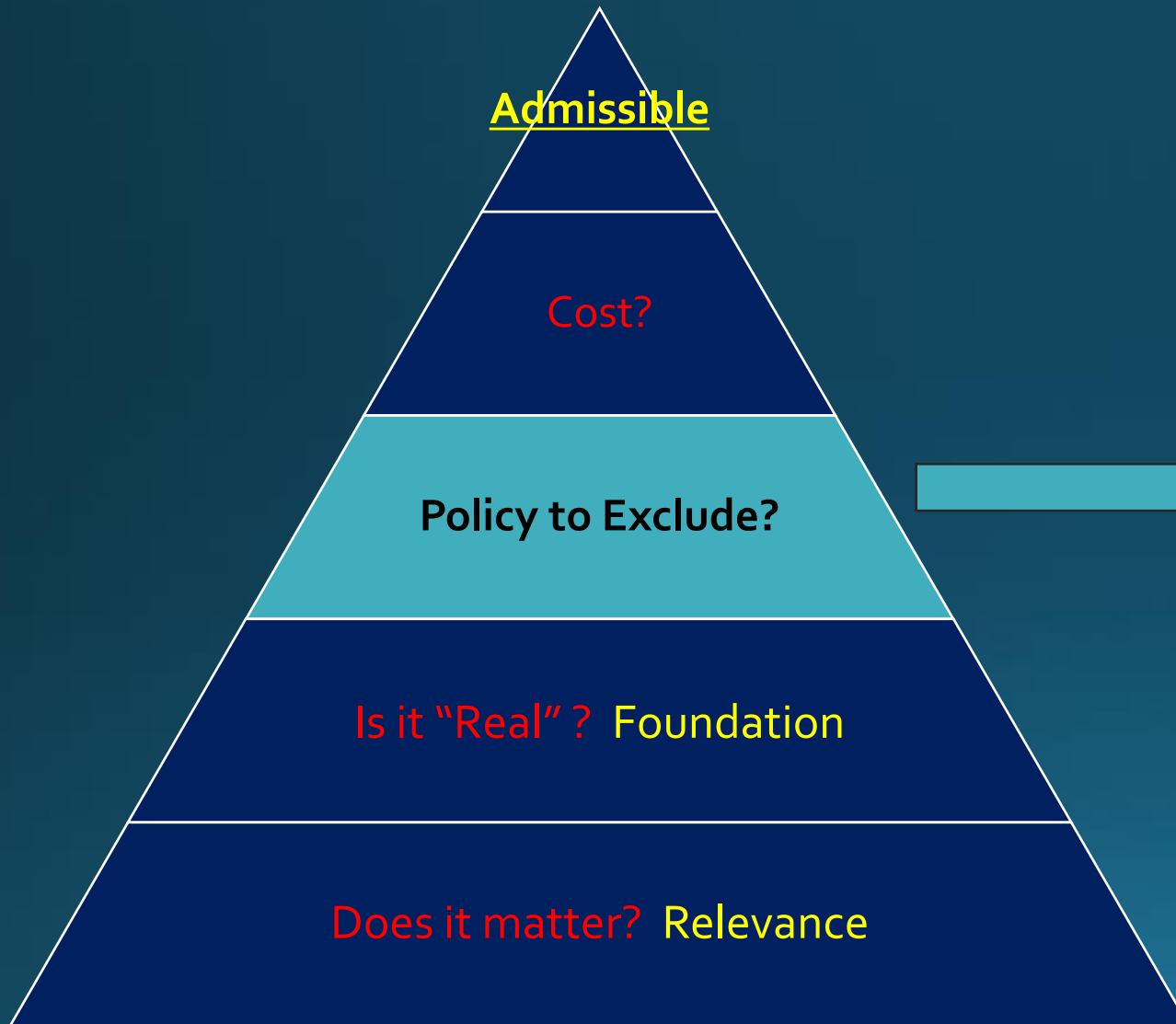
Present sense impression

State of mind

Statement made for  
medical purposes

Note: The importance of laying  
the foundation for the exception to apply

# Policy to Exclude: Hearsay



FRE 8 Rule 803. Exceptions to the Rule Against Hearsay

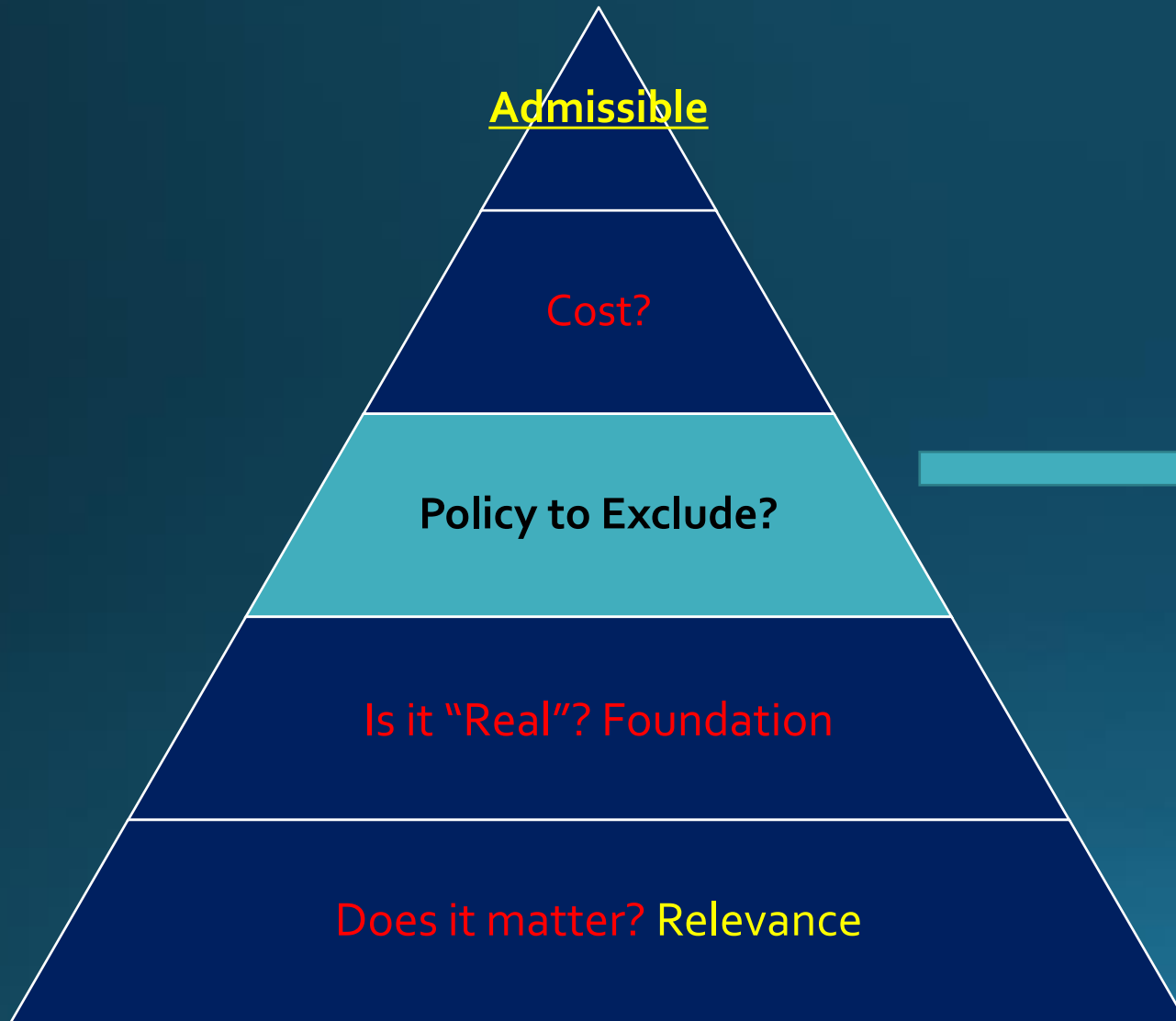
The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

Note: The importance of laying the foundation for the exception to apply

# Policy to Exclude: Hearsay



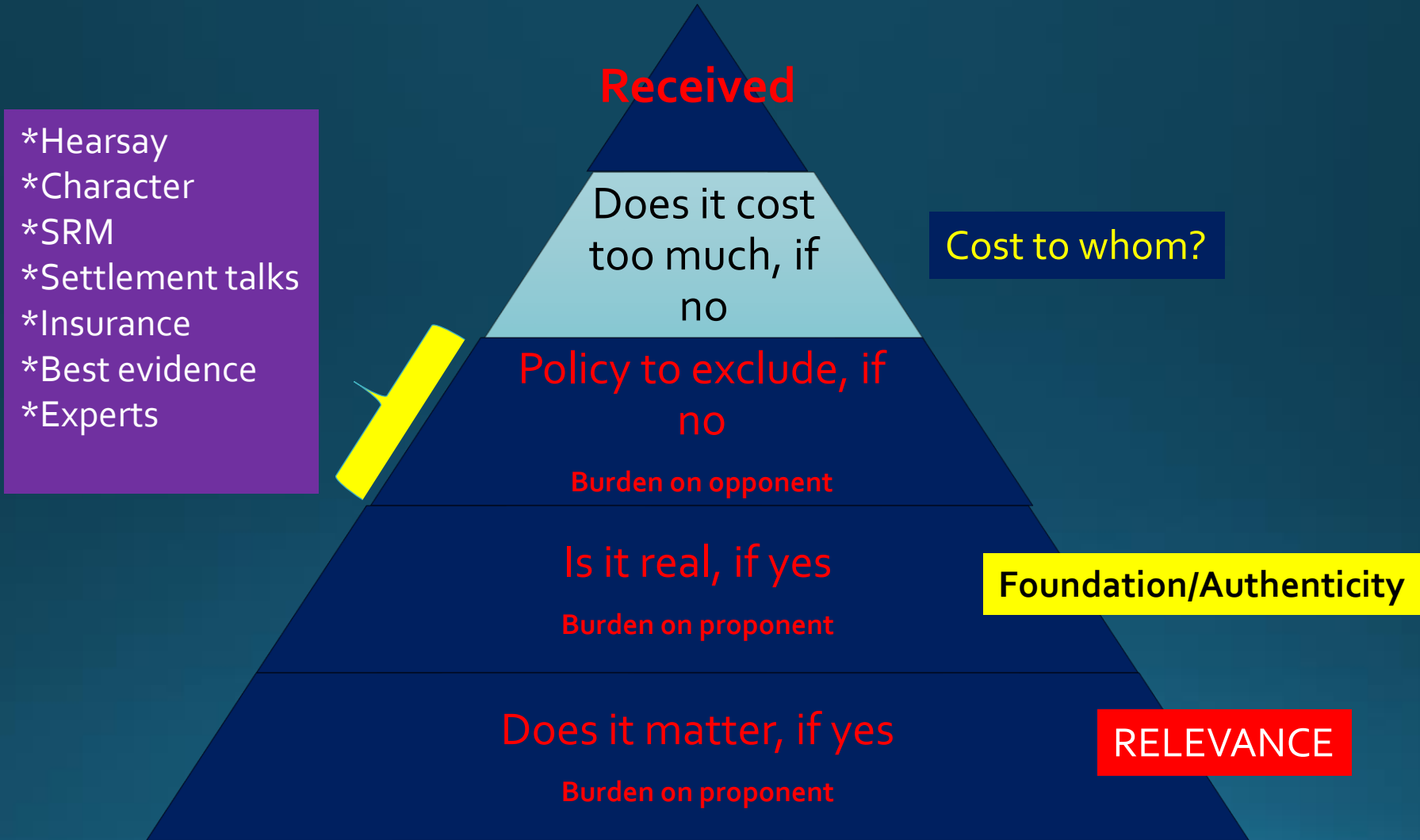
## Hearsay Additional Issues:

6<sup>th</sup> Amendment and "*testimonial hearsay*" (Only applies in criminal cases)

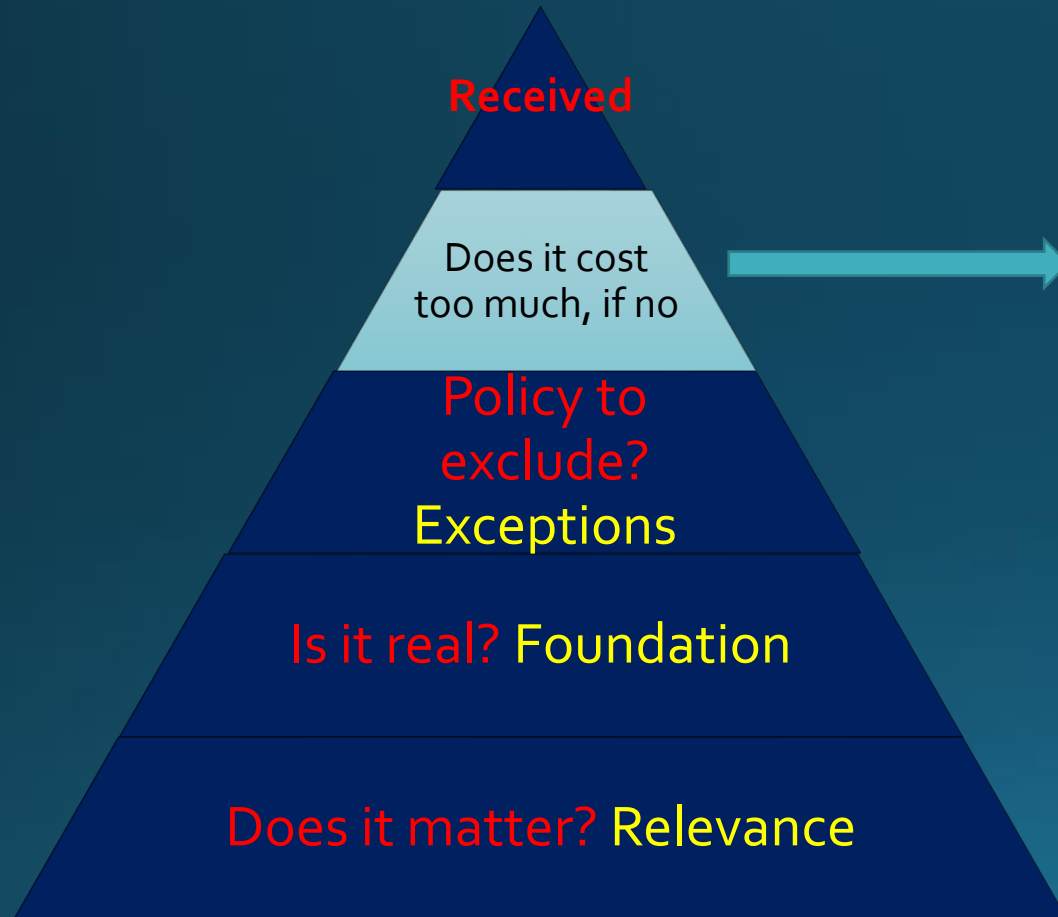
- Use of hearsay by **experts** FRE 703 – *reasonably relied upon*
- When can the jury hear the substance of hearsay relied upon by experts? *Probative value substantially outweighs prejudicial effect*



# Evidence 101

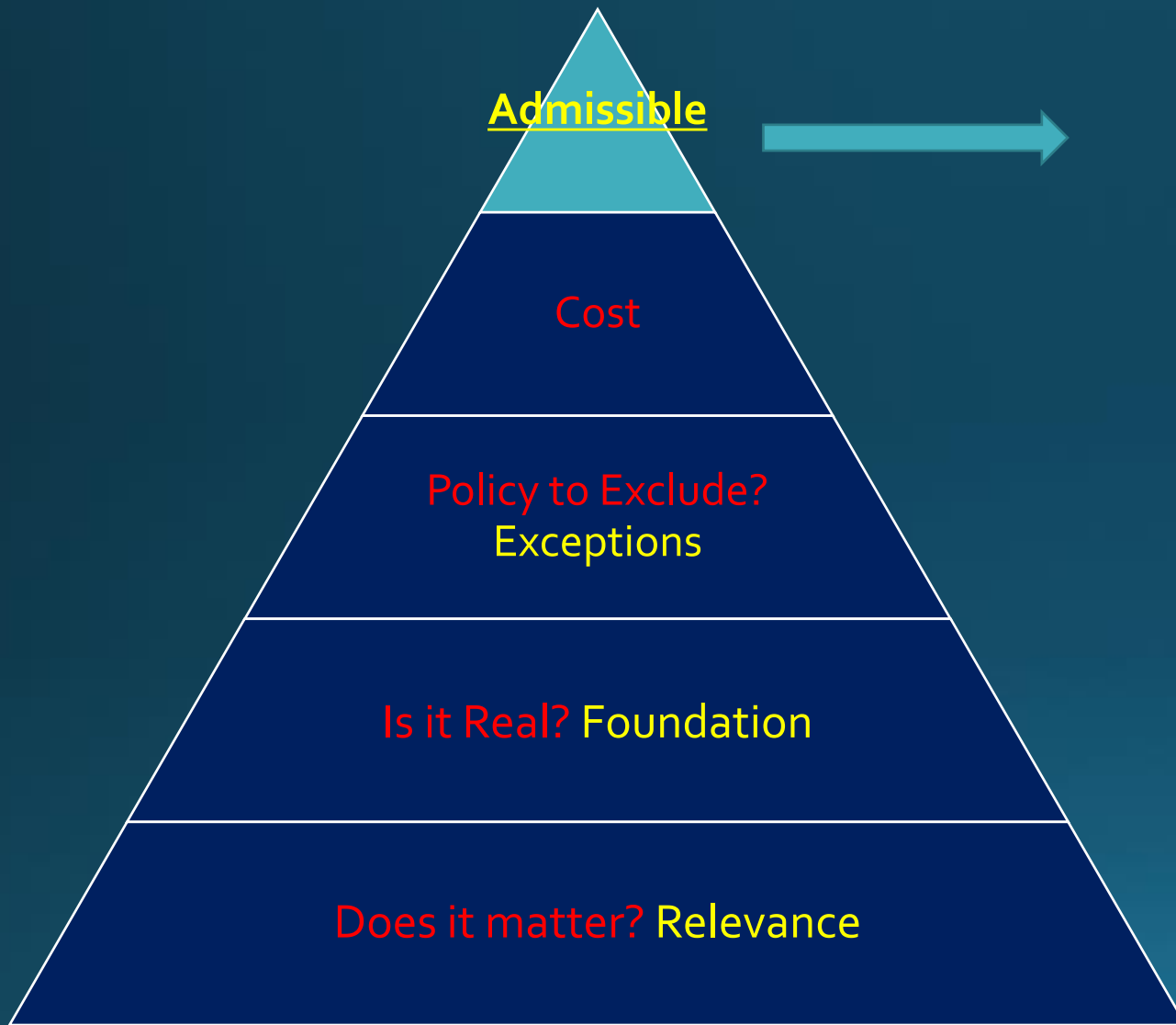


# Evidence 101



## Cost to Whom?

- FRE 403
- Evidence presumed admissible, unless. . .
- Probative value
- Substantially outweighed by
- "Cost": (e.g., confusion, delay, misleading, unfair prejudice etc.)



Admissible Evidence

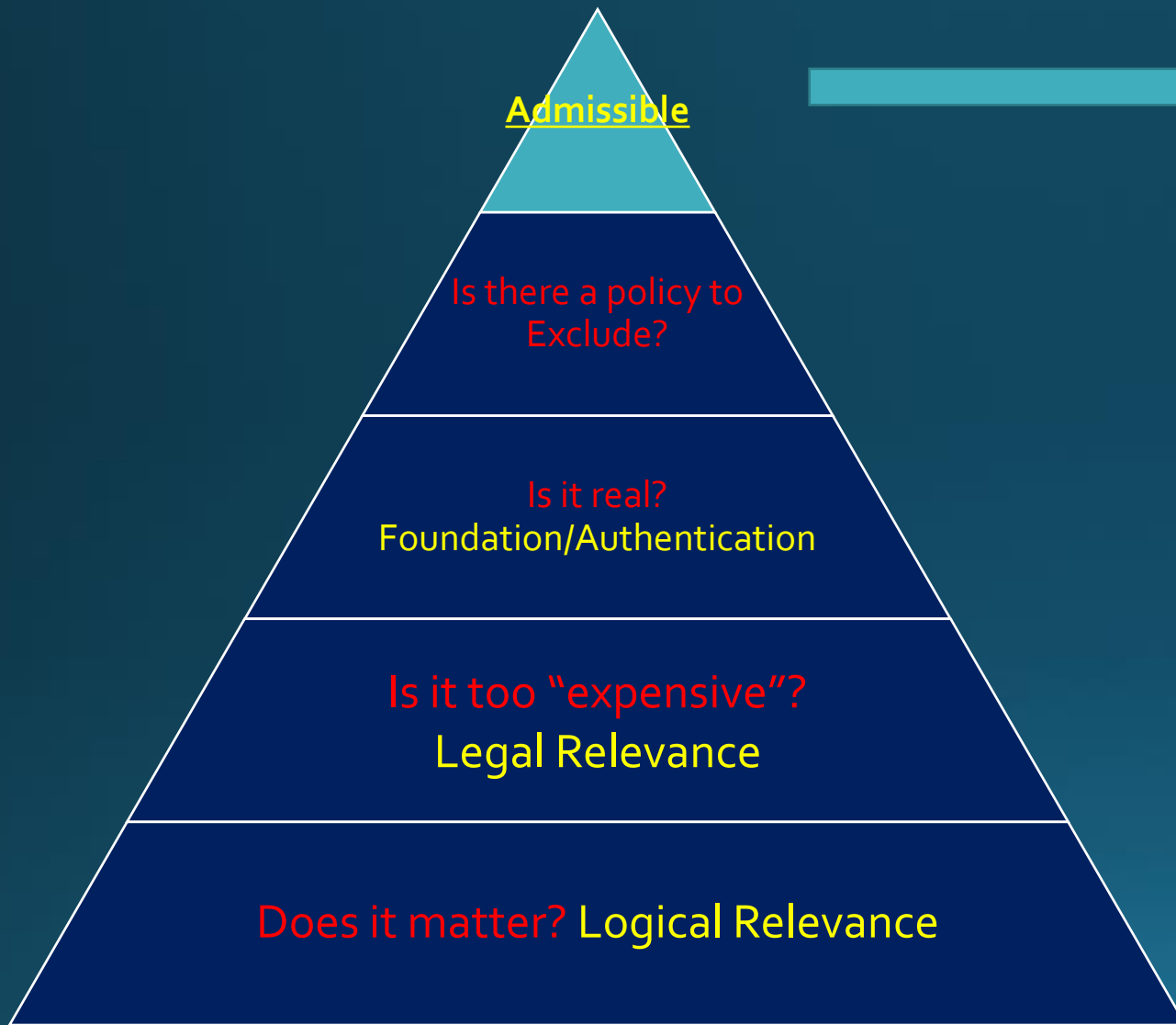
∨

Demonstrative  
Evidence

Real Evidence:

Objects offered as playing an actual and direct part in the incident or transaction giving rise to the litigated dispute. Such objects are treated as independent substantive sources of evidence because the trier of fact may draw inferences from the objects themselves about some fact of consequence.

*McCormick on Evidence; Eighth Edition §213*



Admissible Evidence

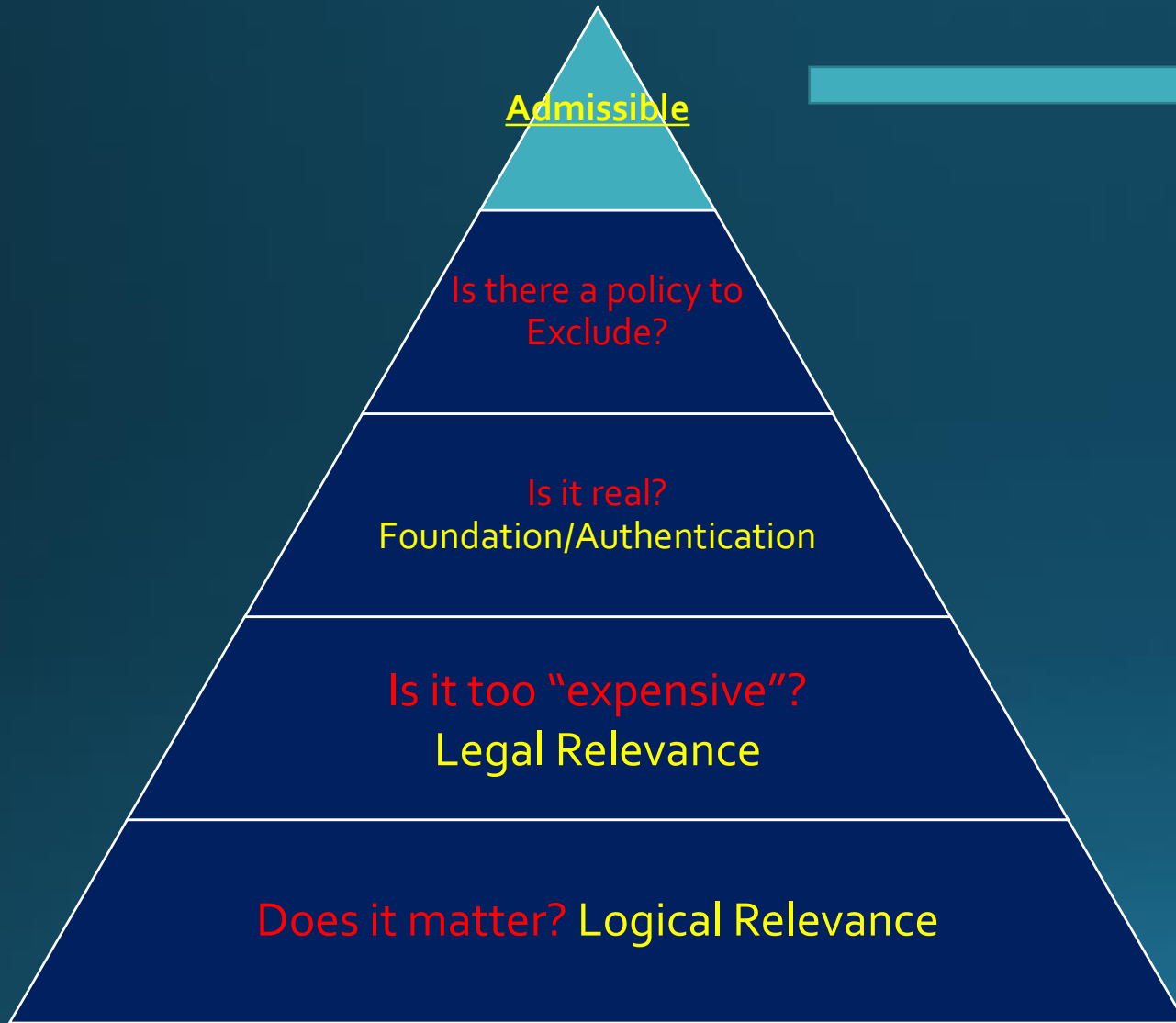
v

Demonstrative  
Evidence

### Demonstrative Evidence:

Demonstrative Aids are defined by the relevant purpose for which they are offered at trial – **to illustrate other admitted evidence rendering it more comprehensible to the trier of fact.** . . . They have been called "derivative evidence" because demonstrative aids do not have independent prohibitive value to determine a substantive issue in the case.

*McCormick on Evidence; Eighth Edition §214*

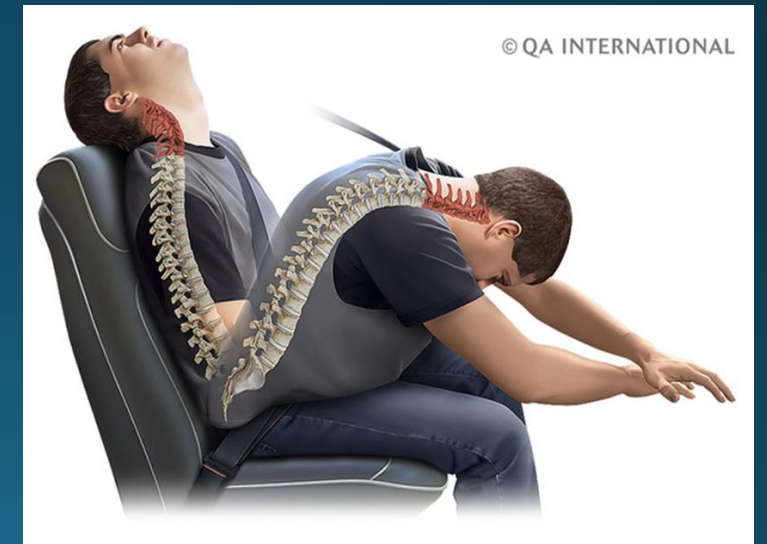


Admissible Evidence

∨

Demonstrative  
Evidence

Demonstrative Evidence:



The Dance of Exhibits

The Gold Standard

# The Dance of Exhibits

- The Mark
- The Courtesies
- Foundation (ESSF & Persuasion)
- Move the Admission
- Publish (e.g., USE!)

## TRIAL GUIDES

### Effective *Direct* Examination

#### The Dance of Real Evidence Exhibits at Trial: The 5-Step Process

##### 1 MARKING

*Exhibits should be marked pre-trial when possible.*

Many jurisdictions have rules (informal or otherwise) for marking of exhibits (e.g., "Plaintiffs must use numbers, defendants must use letters"). **Learn the judge's preference before trial.**

##### 2 COURTESIES

*Begin with the courtesies.*

- First for opposing counsel - show counsel the exhibit you intend to use.
- Next courtesy is for the court: "Your Honor, may I approach the witness?"

##### 3 FOUNDATION

Remember the standard: *Evidence sufficient to support a finding (ESSF)* that the exhibit is what the attorney suggests it is [FRE 901].

Asked as individual questions to the witness:

- "I am handing you what I have marked as Exhibit #2, can you identify Exhibit #2 for the court and jury?"
- "How do you recognize Exhibit #2?"
- "Does Exhibit #2 appear to be in the same condition as when you last saw it?"

##### 4 MOVE

*"Your Honor, Plaintiffs move the admission of Exhibit #2 into evidence."*

A wise barrister will move the admission of the exhibit as soon as an appropriate foundation is laid. In this way, any sustained objection to foundation can be dealt with while the witness is still on the stand.

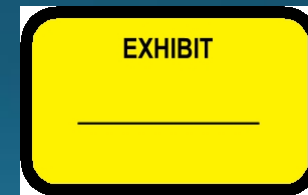
##### 5 PUBLISH

*Don't forget the important 5th step!*

After the exhibit has been received into evidence by the court, show the exhibit to the jury. This can be accomplished either by using the exhibit in the questioning of the witness while displaying it to the jury, or by showing it to the jury separately.

# *Dance of the Tangibles*

- **Step One:** Mark the exhibit
- **Step Two:** Lay FRE 901 authentication foundation
- **Step Three:** Move the admission of exhibit into evidence
- **Step Four:** Publish to the Jury





Refreshing a Memory

The Gold Standard



Uncle Leo's Deluxe

## Refreshing a Witness's Memory

- The Foundation Requirement
- Items that may be used
- Organization is Key



## FRE 612

### Writing Used to Refresh a Witness's Memory

- **(a) Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
  - **(1)** while testifying; or
  - **(2)** before testifying, if the court decides that justice requires the
  - party to have those options.
- **(b) Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, **and to introduce in evidence any portion that relates to the witness's testimony.** If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

# Foundation To Refresh



- Witness once knew based on personal knowledge
- Witness can not remember
- Experiencing the item will refresh

# Refreshing Memory, key points

- “*Present Recollection Refreshed*”
- Witnesses memory has failed
- Items that may be used
- Marked, not moved
- If a writing is used, adverse party can move admission (with redactions for relevance)
- Testimony based on newly refreshed memory





# The Dance

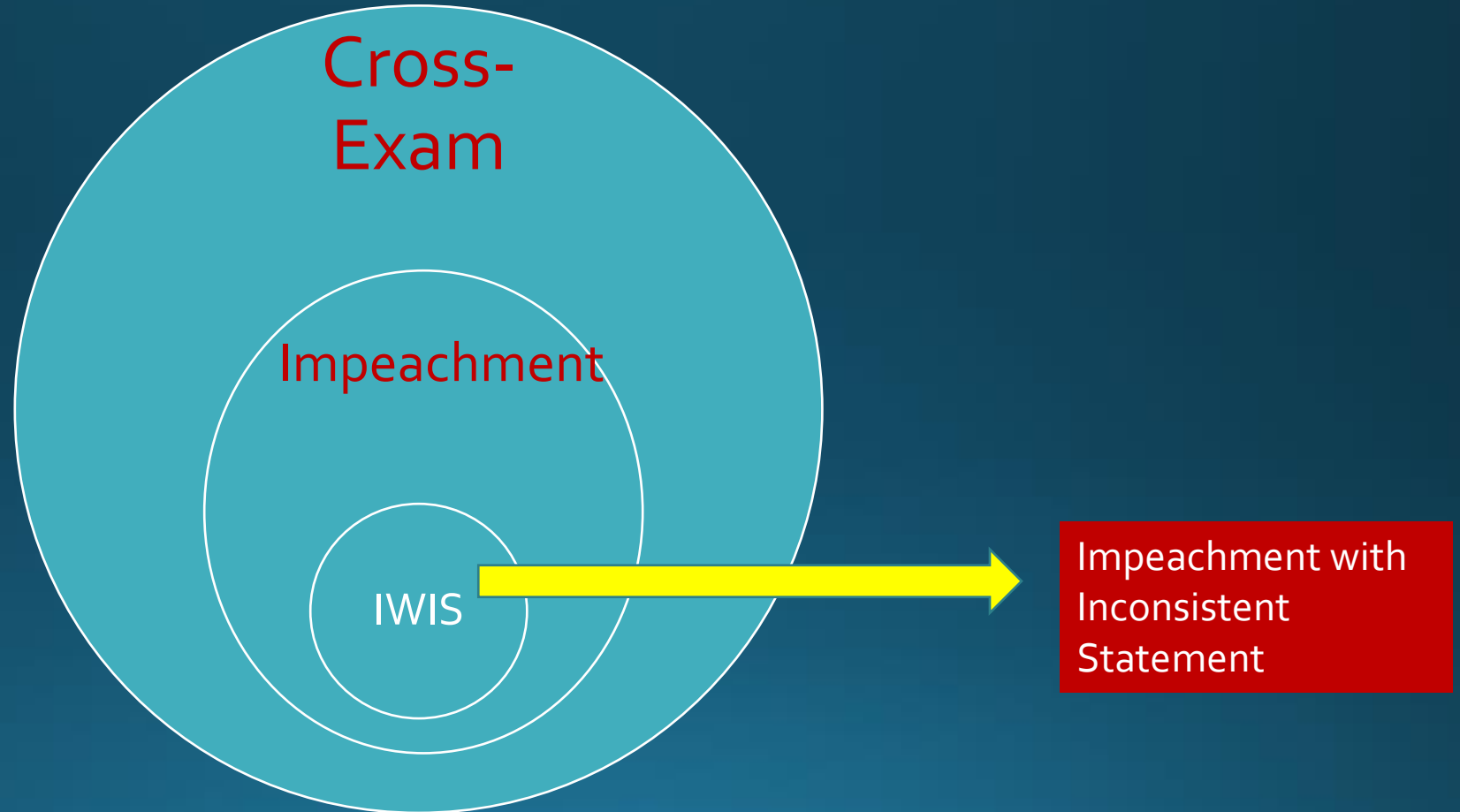
- Example of refreshing memory



Impeachment with an Inconsistent Statement

**The Gold Standard**

# Cross Exam 35k Level





# Rule 613. Witness's Prior Statement

- (a) Showing or Disclosing the Statement During Examination. When examining a witness about the **witness's prior statement, a party need not show it or disclose its contents to the witness.** But the party must, on request, show it or disclose its contents to an adverse party's attorney.
- (b) Extrinsic Evidence of a Prior Inconsistent Statement. **Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it,** or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

# Cross Exam/Impeachment

- The Scope of Cross
- First/best tool: Leading Question
- Role of Impeachment: To Discredit
- Impeachment: Bias, Impairment, Contrary Evidence, Character for Truthfulness
- Impeachment: Inconsistent Statement
- Organization is Key

## TRIAL GUIDES

### *Effective Cross Examination*

#### ***Impeachment with an Inconsistent, Out-of-Court Statement*** **The Four Step Process**

#### **1 COMMIT**

Commit the witness to the offending testimony.

*"Ms. Johnson did I just hear you tell this jury that the light was green when the black SUV entered the intersection?"*

#### **2 VALIDATE**

Validate the out of court statement.

*Asked to the witness as individual questions.*

*"You recall giving a deposition in this case? Lawyers were present? You were placed under oath by a court reporter just like in this courtroom?"*

#### **3 CONFRONT**

Confront the witness with the inconsistent statement.

*"Ms Johnson, I'm handing you a copy of your deposition transcript, page 27. Please look at line 17 and follow along as I read the question and answer: 'Question: What color was the light when the black SUV entered the intersection?' 'Answer: The light was red.' Did I read that correctly?"*

**4 Shut up and move on to your NEXT QUESTION!**

# Impeachment- Prior Statement

## *The Four Step Waltz*

- **Commit** —The set up question, two approaches
- **Validate** — Set the scene
- **Confront** — Hand out copies, pull the trigger
- *Don't forget the most important last step....*
- **SHUT UP** — and Move On!

# Two Types of Impeachment \*Vehicles\*



- Prior statements **given** under oath, **under penalty of perjury**
- Prior statements **not given** under oath, under penalty of perjury
- Effect: FRE 801 (d) (1)

Responding to the Sustained Foundation Objection

**The Gold Standard**

# Objection: Lack of Foundation

- The sustained objection; make sure you understand the ruling
- The Standard for the court: ESSF
- The standard for the Jury: Persuasion

## Building a Firm Foundation

