**Evidence Outline**

I. **Relevance**

1. **General Rule**: to be admitted, evidence must (1) be offered to prove a fact of consequence and (2) make that fact more or less probable.
   1. **CA**: fact of consequence also must be *in dispute*.
2. **General Exception**: Courts can exclude evidence if its probative value is substantially outweighed by unfair prejudice, confusion, or waste of time.
3. **Policy-Based Exclusionary Rules**
   1. **Liability Insurance**: cannot be used to prove culpable conduct or ability to pay. Can be used to prove any other purpose.
   2. **Subsequent Remedial Measures/Repairs**: cannot be used to prove culpable conduct or that product had defective design. Does not exclude evidence offered to rebut claim of “no way to avoid.”
      1. **CA**: admissible to prove defective design.
   3. **Settlements, Offers to Settle, & Pleas**: settlements, offers to settle, offers to plea, and pleas later withdrawn, as well as related statements, inadmissible to prove liability/guilt. In **CA**, also discussions during mediation. Exceptions:
      1. No Claim Filed or Threatened
      2. Nothing in Dispute (e.g., settlement offer on undisputed promissory note). Rationale: why encourage settlement?
   4. **Payments or Offers to Pay Medical Expenses**: inadmissible to prove liability for injuries but related statements are admissible, as this is a humanitarian gesture, not a settlement offer—you are not asking for anything in return.
      1. **CA**: related statements inadmissible.
   5. **CA: Sympathy**: in civil actions, expressions of sympathy for injury or death are inadmissible, but related statements of fault admissible.
4. **Similar Occurrences Exception**: sometimes, evidence about *other* people, things or events is relevant when there are similarities between that evidence and the people or events at issue in instant matter.
   1. Similar Accidents Caused by Same Event or Condition: relevant to prove causation.
   2. Plaintiff’s Prior Claims: relevant to prove (1) pattern of fraudulent claims or (2) preexisting (medical) condition.
   3. Intent at Issue: prior similar occurrences may be relevant to draw an inference of intent from a person’s prior conduct.
   4. Rebut Defense of Impossibility: relevant to prove that claimed incident is possible, and not fabricated.
   5. Comparable Sales: relevant to establish value of property.
   6. **Habit**: evidence of specific, frequently repeated conduct (which conveys no moral judgment) is relevant to prove that a person acted in the same way on the occasion in question.
      1. Distinguish from Character Evidence, which says something general about a person and conveys moral judgment.
   7. Routine Business Practice: relevant to show business acted in similar way on the occasion in question.
   8. Industrial Custom: relevant to prove standard of care.
5. **Character Evidence Exception**: evidence that says something general about a person and conveys moral judgment, but is arguably irrelevant because it does not address specific issues, offered to prove conduct/propensity in this case.
   1. **Civil Case**
      1. **Rule**: Inadmissible to prove conduct.
      2. **Exceptions**: only FRE.
         1. **Character at Issue**: e.g., defamation, negligent entrustment, child custody, loss of consortium.
         2. **Sexual Assault**: character evidence admissible to prove conduct in sexual assault or child molestation case. Unavailable in **CA**.
      3. If exception applicable, any method may be used to establish character.
   2. **Criminal Case**
      1. **Defendant’s Character**
         1. **By Defendant**: may offer evidence of his own good character for a relevant trait.
         2. **By Prosecution**: inadmissible, unless:
            1. Sexual Assault or Child Molestation
            2. Character Comparison: if defendant offers victim’s character, prosecution can offer defendant’s character for same trait. **CA**: exception limited to trait of violence.
            3. **Defendant Opens Door**:admissible to rebut with evidence of bad character for same trait.
            4. **CA**: Domestic Violence/Elder Abuse
      2. **Victim’s Character**
         1. **By Defendant**: admissible, by Reputation or Opinion only.
         2. **By Prosecution**: inadmissible unless
            1. **Defendant Opens Door**: may rebut.
            2. **Homicide Case**: if defendant offers evidence victim attacked first, prosecution can offer evidence of victim’s character for peacefulness. Homicide case *only*. In **CA**, no such exception.
         3. **Special Rule For Defendant’s State of Mind**: defendant may offer evidence of his own knowledge of the victim’s bad character for violence for the purpose of showing that he reasonably believes in the need to use self-defense. This shows only belief, not victim’s propensity, so it is ok. Any form is allowed (even Specific Acts).
      3. **Form of Character Evidence**: on Direct Examination, Reputation & Opinion. On Cross Examination, Reputation, Opinion, & Specific Acts. If witness denies knowledge of Specific Acts, offerror not allowed to prove them. In **CA**, no Specific Acts for Defendant’s character, but for victim’s character, Specific Acts admissible on both direct and cross.
   3. **Rape Shield Rule**: in a case involving alleged sexual misconduct, the defendant ordinarily may not introduce evidence of the victim’s reputation for promiscuity or the victim’s prior sexual conduct unless offered to prove:
      1. Consent: evidence of victims sexual activity with the defendant, but only if the defense is consent
      2. Wrong Guy: evidence of the victim’s sexual activity with others, but *only* to prove that someone other than the defendant was the source of the physical evidence.
   4. **Bad Act Evidence Offered for Other Purposes**: specific incidents of defendant’s bad conduct may be offered for permissible purpose apart from propensity to commit alleged conduct, including **MIMIC**: Motive, Intent, absence of Mistake or accident, Identity (must be similar and unique), part of Common scheme or plan.

**II. Forms of Evidence**

1. **Witness Testimony**
   1. **Competency**: witness (1) has personal knowledge, (2) must testify from present recollection, (3) be able to communicate, and (4) takes an oath. **CA**: witness also must understand her legal duty to tell the truth.
      1. **CA**: Hypnosis: hypnotically-refreshed testimony inadmissible unless, in a criminal case, hypnotized by police using proper manner.
   2. Dead Man’s Statute: does not exist under Federal law. In some states, in a civil suit against an estate, an interested party is not competent to testify about a transaction or conversation with a dead man.
   3. **Objections to Form of Questions or Answers**: must be timely and specific:
      1. **Leading Question**: permissible on cross, impermissible on direct unless: preliminary introductory matters, youthful or forgetful witness, hostile witness (turns on you), adverse party or someone under control of adverse party.
      2. Others: Calls for Narrative; Non-Responsive; Cross-Examination Outside Scope of Direct; Assumes Facts Not in Evidence; Argumentative; Compound.
   4. **Writings in Aid of Oral Testimony** (not as evidence themselves)
      1. **Present Recollection Refreshed**: witness may not read from a prepared memo, but must testify on basis of current reflection. However, if a witness forgets something he once knew, he may be shown anything to refresh his memory. To prevent abuse, opposing party may inspect refresher, use it in cross, and enter it into evidence.
      2. **Past Recollection Recorded** (hearsay exception): writing may be read to the jury as a past recollection recorded if the witness (1) once had personal knowledge, (2) now forgets, (3) the writing was either made or adopted by witness, (4) the writing was made when the event was fresh in memory, and (5) witness can attest that, when made/adopted, the writing was accurate.
   5. **Opinion Testimony**: inadmissible, unless
      1. **Lay Opinion**: rationally based on witness’s perceptions and helpful to the trier of fact—i.e., gives the jury more information than would testimony limited to facts. E.g., sobriety, emotions, speed. Cannot be on expert subjects.
         1. **CA**: can be based on specialized knowledge, subject to court discretion.
      2. **Expert Opinion**: admissible if
         1. Helpful to Jury: expert is using specialized knowledge to reach a conclusion the jury could not otherwise reach.
         2. Expert is Qualified: must have specialized knowledge, however acquired (e.g. university, experience).
         3. Opinion is to Reasonable Degree of Certainty
         4. Opinion is Based on Proper Foundations: either Admitted Evidence, Personal Knowledge, or Inadmissible Evidence Reasonable Relied On by experts in the area.
         5. Opinion is Based on Reliable Principles Reliably Applied
            1. **Scientific Reliability Test**: *Daubert*: weigh the following factors: (i) has the methodology been tested, (ii) are there known rates of error, (iii) has the methodology been subject to peer review, (iv) has the methodology been reasonably accepted?

**CA**: *Frye*: reliability is determined only by whether opinion is based on principles generally accepted by experts in the field. This is more limiting standard. Unaffected by Prop. 8.

* + - * 1. **General Reliability Test** (Science & Non-Science): *Kumho Tire*: must be reliable from common sense/logic perspective.

Learned Treatise Exception: a learned treatise (often used by experts in aid of testimony) admissible to prove anything stated therein if it is an accepted authority in the field. CA: only admissible to show matters of general notoriety or interest.

* 1. **Credibility, Impeachment, & Rehabilitation of Testifying Witness**
     1. **Evidence of Credibility**: inadmissible, unless credibility has been called into question. Note: this is not about relevance; credibility of a testifying witness is generally relevant.
     2. **Impeachment Evidence**
        1. **Types**
           1. **Intrinsic**: witness’s own statements at this trial.
           2. **Extrinsic**: evidence other than testimony given at this proceeding by witness being impeached.
        2. **Methods**
           1. **Contradiction**: showing that witness made a mistake or lied about any fact she testified to during direct. If the contradiction goes to an issue that is significant to the case, it may be proven by extrinsic evidence. If the contradiction goes to matter that is collateral, proof is limited to intrinsic evidence, and cross-examiner is stuck with W’s answer.
           2. **Prior Inconsistent Statements**: admissible to prove witness made an inconsistent statement (i.e., to impeach), but not admissible to prove the truth of the prior inconsistent statement (hearsay), unless—under federal law—given under oath. Extrinsic evidence impermissible to impeach on collateral matter, but permitted for significant matter. Foundation: to introduce extrinsic evidence, witness must be given an opportunity to explain or deny the prior inconsistent statement.

**CA**: Hearsay whenever offered to prove the truth, but still admissible under exception that extends to all prior statements, *even if not under oath*.

* + - * 1. **Bias, Interest or Motive**: Bias may be proven by intrinsic evidence, and may only be proven by extrinsic evidence if witness given an opportunity to explain or deny.
        2. **Convictions**

**Federal**

**Any Crime of Lying**: admissible for impeachment, and *no balancing* of unfair prejudice *even though* might be used for other purpose (except for old convictions).

**Non-Lying Crime**: felonies may be admissible to impeach, but *can* be excluded for unfair prejudice. Misdemeanors not admissible.

Conviction (or release from prison, whichever is later) must be within 10 years of trial, unless probative value outweighs unfair prejudice.

**California**

All felonies for moral turpitude (lying, violence, theft, sexual misconduct, or extreme recklessness) are admissible subject to balance of probative value and prejudice. Other felonies, and all misdemeanors, inadmissible. Prop. 8 might make misdemeanor conviction for moral turpitude relevant.

No age limit on conviction.

Conviction may be proved by extrinsic evidence.

* + - * 1. **Prior Bad Acts**

Federal: Admissible to impeach if the acts involved lying, but extrinsic evidence inadmissible.

**CA**: inadmissible. But Prop. 8 might make it relevant in criminal cases, if an act of moral turpitude, provable by any means.

* + - * 1. **Reputation/Opinion Concerning Truthfulness**: admissible, and may be proven by extrinsic evidence.
    1. **Rehabilitation Evidence: Prior Consistent Statement**: may be used to rehabilitate only if the opposing party has suggested through impeachment that the witness has a *motive to lie*, and the statement was made *before* the motive to lie arose. At federal law, admissible both to rehabilitate and as substantive evidence that prior statement is true.

1. **Written (Non-Testimonial) Evidence**
   1. **Authentication**: the party seeking to introduce an exhibit must introduce sufficient evidence for a reasonable juror to conclude that the item is what the party claims it to be—i.e., foundation.
      1. **Authenticating Writings**: if the relevance of a writing depends upon its source or authorship, the party offering the document must prove the source or authorship to authenticate the writing.
         1. Testimony by witness with personal knowledge (“I wrote it”; “I saw X write it”).
         2. Proof of the Author’s Handwriting by lay opinion (must be familiar with X’s handwriting as a result of experience in the normal course of affairs, not as a result of preparation for the litigation), expert opinion and comparison (expert must be qualified and must compare document to a genuine sample or exemplar of X’s handwriting), or jury comparison (trier of fact compares document to a genuine sample or exemplar of X’s writing).
         3. Solicited Reply Doctrine: a document can be authenticated by evidence that it was received in response to a prior communication to the alleged author.
         4. Ancient Document Rule: authenticity may be inferred if the document is (i) at least 20 years old (federal), (ii) is facially free of suspicion, and (iii) is found where the document would be expected.
            1. CA: must be at least 30 years old.
         5. Self-Authenticating Documents: no foundation necessary for: official (governmental) publications, certified copies of public or private documents on file in public office, trade inscriptions and labels, acknowledged documents (basically notarized docs), commercial paper (checks, promissory notes), and certified business records – offered under the business records hearsay exception (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).
            1. CA: trade inscriptions are not self-authenticating.
      2. **Authenticating Photos & Recordings**: depends on purpose
         1. As Demonstrative Evidence: authenticated by witness testifying, based on personal knowledge, that the photo is a fair and accurate representation or the people or objects portrayed. No need to know photographer’s identity.
         2. As Silent Evidence (is itself evidence): party offering such evidence must show that (i) the camera was properly installed and working, (ii) the film was properly removed and developed, and (iii) the film has not been tampered with (most common way to show third element is by chain of custody).
      3. **Authenticating Non-Unique Items**: requires chain of custody. Little breaks in chain not problematic, big breaks potentially problematic.
   2. **Best Evidence Rule**: if a party seeks to prove the contents of “writing”—a tangible collection of data (documents, recordings, pictures, x-rays, films)—the party must either produce the “original writing,” or provide an acceptable excuse for its absence. If the court finds the excuse acceptable, the party may then use secondary evidence, such as oral testimony to prove the contents.
      1. **When Applicable**: (1) the writing is a legally operative document, or (2) the witness is testifying to facts learned *solely* from reading about them in the writing.
      2. **“Original Writing”**: duplicate admissible to the same extent as original, and thus no excuse or court approval necessary, unless there is a genuine question about the authenticity of the duplicate or it would be unfair to admit the duplicate. Handwritten copy is not duplicate.
         1. CA: handwritten copy is admissible.
      3. **Valid Excuses**: a party need not produce the original (or an acceptable duplicate) if the original (1) is lost or cannot be found with due diligence, (2) has been destroyed without bad faith, or (3) cannot be obtained with legal process. In these cases, oral testimony as to contents is permitted to prove contents.
      4. Exception for Voluminous Documents: can be presented through a summary chart, provided the originals are admissible and available for inspection.
      5. CA: called “Secondary Evidence Rule”
2. **Judicial Notice**: a court may take judicial notice of indisputable facts, which come in two forms: (i) matters of common knowledge within the court’s territorial jurisdiction, and (ii) matters capable of easy verification by resort to unquestionable sources. Procedure: judicially noticed facts may be taken at any time, including on appeal, and judicially noticed facts are considered conclusive in civil cases, but *not in criminal cases*, where they are up to jury to decide whether to accept.
   1. **CA**: whether requested or not, court must take judicial notice of matters generally known within jurisdiction. Also, both civil and criminal juries must accept judicially-noticed fact.

**III. Privileges**

1. **State vs. Federal Court**

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| **Privilege** | **Federal** | **CA** |
| Attorney-Client | √ | √ |
| Spousal | √ | √ |
| Psychotherapist-Patient | √ | √ |
| Social Worker - Client | √ | √ |
| Doctor-Patient |  | √ |
| Clergy-Penitent |  | √ |
| Counselor-Violence |  | √ |
| Reporter Immunity |  | √ |

**Note:** in a federal civil action under diversity jurisdiction, state privileges apply.

1. **Attorney-Client**
   1. **Rule**: confidential *communications* between attorney and client (or their representatives) made to facilitate legal services/advice will be privileged unless the privilege is waived by the client or an exception applies.
   2. “Attorney”: includes representative of the attorney—anybody hired by the attorney to assist in representation.
   3. Rule for Corporations
      1. Federal Law: applies to communications by employees if the corporation authorized the employee to communicate to the lawyer on behalf of the corporation.
      2. CA: applies if this is the natural person to speak on behalf of corporation on the matter or the employee did something for which the corporation may be held liable and is told to tell lawyer what happened.
      3. Mere Witness: no privilege where employee is mere witness.
   4. **Waiver**: client holds privilege, and *alone* has power to waive. Privilege continues after relationship ends, and even after client’s death.
      1. **CA**: privilege ends upon distribution of decedent’s estate and discharge of executor.
   5. **Exceptions**: in furtherance of crime or fraud; when client puts legal advice in issue (e.g. in tax fraud prosecution; D defends on ground that she relied on legal advice); attorney client dispute (e.g. legal malpractice).
      1. **CA**: **Dangerous Client**: additional exception where, at time of communication, lawyer reasonably believes disclosure is necessary to prevent a crime likely to result in substantial bodily harm. Not privileged even if, at time of trial, danger has passed.
2. **Medical Professional**
   1. **Psychotherapist-Patient or Social Worker-Client**: communication intended by patient to be confidential and made to facilitate rendition of psychological services is privileged unless waived.
   2. **CA: Doctor-Patient**:*Not under federal law*. Prevents disclosure of pertinent communication *or information* confidentially conveyed for purpose of obtaining diagnosis or treatment. Does not cover doctors hired for litigation testimony.
   3. **Exceptions**:(1) patient puts condition in issue; (2) professional’ services sought to aid in crime or fraud or to escape capture (3) malpractice cases.
      1. **Additional CA Exceptions**
         1. Psychotherapist privilege does not apply if reasonable cause to believe patient is danger to himself or others and disclosure is necessary to end that danger.
         2. Doctor-patient not recognized in criminal cases or for information required to be disclosed to authorities.
3. **Spousal Privileges**
   1. **Spousal Communication Privilege**: confidential *communications* between spouses will be privileged, so long as the communication was made while they were still legally married, even if at time of litigation, they aren’t married. May be waived only by *both* spouses (one is not enough).
   2. **Spousal Immunity (Spousal Testimony Privilege)**: in a *criminal* case, current spouse cannot be compelled to testify against spouse about any matter that occurred before or during the marriage (so long, of course as they are still married at the time of trial). Witness (spouse) holds the privilege, and may waive it unilaterally and testify.
      1. **CA**: applies in both civil and criminal, need not assert privilege on the stand.
   3. Exceptions to Both Privileges: do not apply to communications or acts in furtherance of a crime, or destructive of the family unit, or in action involving domestic violence/child abuse.
4. **Additional CA Privileges**
   1. Counselor and Victim of Sexual Assault or Domestic Violence
   2. Clergy-Penitent
   3. Immunity from Contempt of Court to News Reporter

**IV. Hearsay**

1. **Rule**: absent an exception, an out of court (this court in this case) statement (written, oral, or assertive) by a person offered to prove the matter of the truth asserted is hearsay and inadmissible.
2. **Four Principal Categories of Non-Hearsay Purposes**
   1. Impeachment: a prior inconsistent statement may be offered to show that the witness is an inconsistent person, without necessarily being offered to prove the truth of the prior statement.
   2. Verbal Acts (Legally Operative Words): Words with independent legal significance (when the law attaches rights and obligations to certain words simply because they are said, regardless of whether they are true or believed or intended to do something) are not hearsay. E.g. “I accept the offer,” words of defamation, “you can drive my car for the weekend.”
   3. To Show Effect On Person Who Heard or Read Statement: a statement that is relevant simply because someone heard it or read it is not hearsay. Thus statements that put a person on notice of a danger may be used to prove notice, but not to prove that there was in fact a danger.
   4. Circumstantial Evidence of Speaker’s State of Mind: a statement that unintentionally reveals something about the speaker’s state of mind is not hearsay.
3. **Exclusions From Definition of Hearsay** (even though being used to prove truth of matter asserted). Tip: excluded from definition because in each, the declarant is present in court. In CA, all exclusions are considered exemptions.
   1. **Statement of Party Opponent**: any statement by party or by person whose statements can be attributed to party offered by party opponent. No limits for personal knowledge, legal conclusions, etc.
      1. Distinguish Declarations Against Interest, which must, *at time made*, be against interest, may be made by any party, and are an exception, not exclusion, to hearsay.
      2. **Vicarious Admissions**: admissible if made by (1) authorized agent/spokesperson; (2) agent/employee, if it concerns a matter within the scope of the agency or employment, and was made during the agency or employment, regardless of authority to speak; (3) other, and was adopted, or (4) co-conspirators if made in furtherance and course.
         1. **CA**: employee statement is admissible admission of employer *only* where employer is liable for employee’s accompanying conduct, e.g., employee’s negligence is basis of employer’s liability.
   2. **Prior Statements of Current Trial Witnesses**
      1. Prior Inconsistent Statement if made under oath during formal proceeding. In **CA**, admissible however made.
      2. Prior Consistent Statement used to rebut an accusation of a motive to lie, and made before motive to lie arose.
      3. Statement of Identification made after perceiving the person.
4. **Exceptions to Hearsay Rule**: may be offered to prove truth of the matter asserted

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| **Exception** | **Declarant** |
| Former Testimony | Must Be Unavailable |
| Statement Against Interest |
| Dying Declaration |
| Excited Utterance | Availability Irrelevant |
| Present Sense Impression |
| Declaration of Then-Existing Physical or Mental Condition |
| Statement for Purpose of Medical Treatment or Diagnosis |
| Business and Public Records, Judgment of Conviction |

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| **Ground of Unavailability** | **Federal**  PAILS | **CA** |
| Privilege | √ | √ |
| Absence from jurisdiction | √ | √ |
| Illness or death | √ | √ |
| Lack of memory on subject | √ |  |
| Stubborn refusal to testify despite order | √ |  |
| Total Memory Loss |  | √ |
| Refusal to Testify Out of Fear |  | √ |

* 1. **Declarant’s Former Testimony:** where declarant (need not be party) is unavailable, testimony given by declarant in an earlier proceeding or deposition can be admissible:
     1. In Any Case: where party against whom now offered was party earlier and had, during earlier proceeding, opportunity and similar motive to exam.
        1. In CA, additional exception when former testimony is offered today against person or successor-in-interest to person who offered it previously. In such a case, no requirement for opportunity or motive.
     2. In Civil Cases Only: party against whom now offered had a predecessor in interest with opportunity and similar motive to exam. Federal law requires privity-like relationship, CA does not, and only requires similarity.
        1. CA: deposition testimony also admissible if declarant >100 miles from courthouse (i.e., addition ground for unavailability).
  2. **Statements Against Interest**: where declarant is unavailable, statement is admissible if, *when made*,was against the declarant’s financial or penal interest. **However**, in a criminal case, statement against penal interest offered to exculpate defendant must be supported by *corroborating circumstances*.
     1. **CA**: interests include social interests.
  3. **Dying Declaration**: where declarant is unavailable, statement by one believing he is about to die (he need not actually die), describing cause or circumstance leading to death, is admissible in any civil case, but not in any criminal case except homicide.
     1. **CA**: applies in both civil and criminal, and declarant *must* be dead.
  4. **Excited Utterance**: regardless of availability, statement concerns a startling event, and was made while the declarant was still under the stress caused by the event (even if some time has passed).
  5. **Present Sense Impression**: regardless of availability, statement describing event or condition made while or soon after perception.
     1. **CA**: narrower: only admits statement explaining conduct *of declarant* made while engaged in that conduct.
  6. **Declaration of Then-Existing Physical or Mental Condition**: regardless of availability, a (1) contemporaneous statement (2) concerning the declarant’s then-existing physical condition or state of mind, including intent or future plans, but (3) *not* including a statement of memory or belief about a past condition.
  7. **Statements for Purpose of Medical Treatment or Diagnosis**: regardless of availability, statement made (by anyone) to a medical professional concerning present symptoms, past symptoms, or general cause of the medical condition, for the purpose of diagnosis or treatment. Does not include statements about fault or identity of wrongdoer.
     1. **CA**: narrower: admits only statements if made by minor describing act of child abuse or neglect.
  8. **Business Records Exception**: regardless of availability, (1) made in the regular course of business, (2) contemporaneously (at or about the time of the event recorded), (3) the business regularly keeps such records, and (4) the contents of the statement consist of either information observed by employees of the business, or a statement that falls within some other hearsay exception. **Note**: if report contains statement, must be statement of person with a *business duty* to transmit such matters to the reporter. For police reports, witnesses are under no business duty to convey statements. Records prepared in anticipation of litigation do not count.
     1. **CA**: Where business records include opinions or diagnoses, courts will admit simple, but not complex, opinions or diagnoses.
  9. **Public Records Exception**: regardless of availability, admissible if: (1) describes activities and policies of the public office; (2) describes matters observed pursuant to duty imposed by law, *except*, in criminal cases, for police reports; *or* (3) contains fact-findings resulting from investigation made pursuant to authority granted by law, unless untrustworthy, *except*, may not be used in criminal cases. However, in both FRE & CA, statements contained within records must meet separate hearsay exception.
     1. **CA**: broader: admits record made by public employee if making record was within scope of her duties, made at or near time of event described, and circumstances show trustworthiness. Thus admits police reports, and factfindings, even in criminal cases.
  10. **Judgments of Conviction**: regardless of availability, admissible to prove any fact essential to that judgment. In criminal case, when offered by prosecution for any purpose other than impeachment, a judgment against person other than the accused is inadmissible.
      1. **CA**: exception applies only in civil, not criminal, cases. But, certified copy of conviction is admissible under public records exception, in both civil and criminal cases.
  11. **Catch-All**: if not covered by specific exception, federal law permits if: trustworthy, necessary, and notice given to adversary.
  12. **Additional CA Hearsay Exceptions**
      1. **Statement Describing Infliction or Threat of Physical Abuse**: where declarant is unavailable, made at or near the time of injury or threat and describing or explaining the infliction or threat of injury in writing or recorded or made to police or other professionals and circumstances seem trustworthy.
      2. **Declaration of Past Physical or Mental Condition** (including intent): where declarant is unavailable, to prove condition if that condition is at issue in the case. No need for seeking medical care.

1. **Hearsay & Confrontation Clause**: even if otherwise admissible under a hearsay exception, in *criminal cases*, the 6th Amendment requires that the defendant be confronted with the witnesses against him; prosecution may not offer **testimonial** **hearsay** in violation of D’s right to cross-examine declarant. “Testimonial” includes grand jury testimony, statements in response to police interrogation if the primary purpose of the questioning is to establish or prove past events potentially relevant to later criminal prosecution (i.e., investigation), and police reports. *Does not include statements in police interrogation whose primary purpose is the enable police assistance to meet ongoing emergency*, or business records.

**V. California Constitutional Rule in Criminal Cases: Prop 8**: All *relevant* evidence is admissible in a criminal case even if objectionable under the Evidence Code.

1. **Relevance**: Prop. 8 only applies to relevant evidence, so if evidence is not relevant for any reason (e.g., character), Prop. 8 is inapplicable and does not permit evidence. However, impeachment evidence of almost any kind is relevant, and thus Prop. 8 can override its otherwise inadmissibility.
2. **Exceptions** (i.e., objections still viable in criminal cases)
   1. Exclusionary Rules Under U.S. Constitution
   2. Hearsay
   3. Privilege
   4. Limits on Character Evidence
   5. Secondary Evidence Rule
   6. Section 352: unfair prejudice substantially outweighs probative value

**Essay Tips**

1. Always address relevance for every item of evidence., even if obvious. Address even obvious issues.

2. Raise and resolve as many objections as you can to each item of evidence, even if told to assume all objections have been raised. Ask to strike for improper form.

3. Always keep general exception for unfair prejudice in mind, especially where evidence admissible for one thing but not another.

4. For any exclusionary rule, evidence may be used for *any* purpose *other than* that specifically excluded.

5. Always mention all possible exceptions for hearsay that apply to a given statement.

6. If no jurisdiction is provided, only address FRE. Address CA only if asked.

7. On CA questions: raise all objections under Evidence Code; for each objection, mention if Prop. 8 overrules the objection or if exception applies; always balance for unfair prejudice.

8. If the question asks about introduction of evidence regarding conduct/events other than conduct/events in this case, it is a relevance issue.

9. Sometimes, a potentially hearsay statement must be broken in two, as one hearsay exception applies to one part, but the other part requires a different hearsay exception.