

Barbri Evidence Outline

I **Exam Tip:** General Approach for Determining Admissibility

- A) Step 1: Is the E relevant?
- B) Step 2: Should the E be excluded for public policy considerations?
- C) Step 3: Is there a proper foundation? (Consider: W's competency, authentication e.g., handwriting or phone calls, reliability of scientific tests)
- D) Step 4: Is the E in proper form? (Questions properly phrased, w/in scope of proper lay or expert W testimony, do written statements comport w/Best Evidence Rule)
- E) Step 5: Does the E fall w/in an exclusionary rule?
 - 1) Discretionary exclusion for prejudice (FRE 403)
 - 2) Policy based measures (subsequent remedial measures, settlement negotiations)
 - 3) Privilege
 - 4) Hearsay
 - 5) Parol E

II Step 1: Determining if the E is relevant

A) Definition

- 1) **Rule:** Evidence is relevant if it has any tendency + to make a material fact of consequence to the action + more or less probable + General rule: to be relevant, E must relate to the event, time & persons w/in the present litigation.
 - (a) **Direct E:** is E which directly speaks to the matter in issue + does not require the trier of fact to make an inference & is therefore is always relevant
 - (b) **Circumstantial E:** is E from which the trier of fact must make an inference as to the matter in issue. Unlike direct E which is always relevant, circumstantial E may be relevant
- 2) Exceptions to the rule that E must relate to the event, time persons w/in the present litigation:
 - (a) Difficult issues of causation (e.g., D's blasting caused damage to nearby homes. Relevant to whether D's blasting damaged P's home)
 - (b) Similar Accidents/Injuries Caused by Same Event/Condition:
 - (i) P's suffering similar injury/filing previous similar claim inadmissible to show current claim's validity BUT:
 - (ii) E of filing prior *false* claims relevant to show 1) P's current claim likely false & 2) P's prior condition contributed to current injury
 - (c) Absence of Similar Accidents/Injuries: may be admissible to show D's lack of knowledge of a danger
 - (d) Previous Similar Acts May be Introduced to Prove Party's Motive/Intent: E.g., hiding cocaine in wood sculpture
 - (e) Rebutting Claim of Factual Impossibility: E.g, D claims car can't go over 50 mph
 - (f) Sales of Similar Property: relevant to prove value (though mere quotes in offers inadmissible).
 - (g) **Habit:** E of a frequently repeated, regular response to a specific set of circumstances) relevant and may be admissible to prove conduct of person on a particular occasion was in conformity w/habit. Distinguish w/character.
 - (i) **Exam tip:** trigger words "instinctively," "automatically," "always," "habitually", "invariably"
 - (ii) Distinguish bw character & habit E:

- (1) E.g., Sally is always in a hurry (Character E) vs Sally takes two steps at a time
- (h) Business routine: E that a business has established a routine is relevant to show a particular event occurred.
- (i) Industry custom: relevant E of standard but not conclusive (entire industry may be acting negligently)
- 3) **CEC**: Prop 8 – governs criminal cases in CA state cts. States that all relevant E is admissible. 6 Exempts
 - (a) Exclusionary rules based on the Q (e.g., self-incrimination, *Miranda* violations, Testimonial hearsay violating confrontation clause)
 - (b) Attorney client privilege & other privileges recognized, inc spouse- W privilege & marital communications privilege.
 - (c) **CEC** prohibits ct from holding media member in contempt for refusing to reveal confidential news source (unlike FRE)
 - (d) Hearsay
 - (e) Rape shield statutes
 - (f) **CEC** 352: judges discretion to exclude E if probative value is substantially outweighed by its dangers
- 4) **CEC**: Exam approach to Prop 8: 1) does prop 8 apply – criminal case in CA state ct? 2) fall w/in above exemptions 3) admissible under **CEC** 352?
- 5) When **CEC** (GENERAL – not Prop 8) applies: civil/criminal cases but not grand jury proceedings. Federal cts apply federal rules but in diversity cases, use **CEC**
- B) Step 2: Discretionary Exclusion of Relevant Evidence
 - 1) Rule: Trial judge’s broad discretion to exclude E where the probative value is outweighed by prejudicial effect (e.g., unfair prejudice, misleading the jury, confusion of the issues, undue delay).
 - (a) **Unfair surprise** not a valid ground of exclusion (FRE)
 - (b) * **CEC distinction**: judges discretion to exclude E if probative value is substantially outweighed by its dangers
 - 2) Relevant E May be excluded for public policy considerations:
 - (a) Liability Insurance
 - (i) FRE:
 - (1) E of liability insurance is inadmissible to prove culpable conduct, negligence/acted w/due care or ability to pay substantial j’ment
 - (2) Admissible to: show ownership + impeach (e.g., bias) + as part of an admission (E.g., “I’m sorry my insurance will cover it” is not an admission?).
 - (ii) **CEC**: Prohibits use of liability insurance only as E that insured person acted negligently/wrongfully. May be able to use it as E that D acted w/due care.
 - (b) Subsequent Remedial Measures
 - (i) FRE:
 - (1) Not admissible to show: negligence, culpable conduct, defective design, or need for warning
 - (2) Admissible to: prove ownership/control + rebut a claim that precaution wasn’t feasible + prove opposing party destroyed E
 - (ii) **CEC**: Prohibits doesn’t apply in SL cases. E.g., defective design case P may introduce E. (But in federal diversity cases, federal ct would apply federal rule & exclude).
 - (c) Settlement Offers/Negotiations

- (i) Exclusionary rule operates when there is a dispute as to liability/amount or likely to occur (E.g., after accident, D says to P, "I admit I owe you 10K. I'll pay you 5K." Admissible bc no dispute.
 - (ii) Not even direct admissions of liability admissible
 - (d) Withdrawn Guilty Pleas/Offer to Plead Guilty
 - (i) FRE: statements made during plea negotiation inadmissible
 - (ii) **CEC**: CA cts haven't decided whether Prop 8 allows prosecutor to use D's statements
 - (e) Offers to Pay/Payment of Medical Expenses inadmissible but subject to severance Exception: Admissions of fact accompanying offers to pay admissible (severance)
 - (i) **CEC**: non-severable. Just like settlement offers/negotiations. Offers to pay & admissions of fact both inadmissible
 - (f) **CEC**: Mediation Proceedings – parties' statements, mediator's reports, writings/settlement agreements resulting from mediation inadmissible in subsequent non-criminal proceedings. Parties can waive by mutual agreement
- C) Step 3: Determine Materiality
- 1) FRE: E must be material
 - 2) **CEC**: E must be material to a disputed fact

III Character Evidence Substantively

A) Exam Approach to Character E:

- 1) Step 1: Determine if civil or criminal case
- 2) Step 2: Determine the purpose for which the E is being offered
- 3) Step 3: Determine if the method being used is proper

B) Character E in Civil Cases

- 1) General Rule: Not admissible bc slight probative value outweighs prejudicial effect (collateral, confuses jury, undue delay)
- 2) Exception: Where character is directly in issue, all three types of character E admissible – specific acts, reputation & opinion.
 - (a) E.g., where character is directly in issue:
 - (i) defamation (P's character bc truth is absolute defense)
 - (ii) negligent entrustment (e.g., ER charged w/negligently retaining an EE, entrustee's character)
 - (iii) child custody – both parents'
 - (iv) fraud/deceit/misrepresentation/perjury – D's character for honesty (v untruthfulness)
 - (v) Self-defense: victim's character is in issue**

C) Character E in Criminal Cases:

- 1) General Rule: Prosecution May Not Introduce E of Bad Character Unless D Has Introduced E for Good Character concerning the trait in question in the form of reputation or opinion T. If D has → D has "opened the door" On direct exam: only reputation & opinion T admissible. Specific bad acts only admissible on cross.
 - (a) **Exam tip: FRE** - Must be the trait in question. E.g., D charged w/assault. Defense W testifies D is respected in community. Has not opened the door.
 - (b) Cases for sexual assault/child molestation: prosecution can FIRST enter into E that D committed other acts of sexual assault/child molestation.
 - (c) **CEC**: D not restricted to introducing E only for pertinent trait. General character E admissible

- (d) **Exam tip:** D's mere taking of the stand puts D's credibility in issue, not character
- 2) Once D opens the door to character E, prosecution may rebut using only reputation &/or opinion T
- (a) **Exam tip:** If D asks Defense W, "**did you know** D committed 3 acts of robbery?" etc – this goes to Defense W's credibility & the basis for Defense W's testimony - not D's character so admissible. Prosecution can't use extrinsic E bc collateral matter rule. (REVIEW)
- 3) Introducing E of Alleged Crime Victim's Bad Character Trait:
- (a) Admissible if relevant to show D's innocence using reputation/opinion T. Prosecution may rebut by introducing E of victim's good character OR D's bad character for the same trait if D has introduced E of Victim's character trait (E.g., D charged w/assault. Presents E of victim as violent. Prosecution may rebut w/ E that D is violent). **REVIEW: CA – is it for the same trait?**
- (i) EXCEPTION: bad character of alleged rape victims to prove victim's sexual disposition inadmissible.
- (1) EXCEPTION: E to prove someone other than the accused is the source of physical E (semen, injury) + specific instances of sexual behavior bw victim & accused admissible to prove consent.
- a. E.g., D charged w/nonsexual assault of an elderly woman. D claims self-defense. During case in chief, DA offers E that woman is peaceful.
- (b) FRE: May Only attack Victim's bad character using reputation or opinion. NO specific acts.**
- (c) * CEC: D may use reputation, opinion, & specific act E to prove crime victim's character as E of how the victim acted on the occasion. Prosecutor may rebut using all 3.**
- (d) FRE allows in propensity E in civil + criminal but CEC restricts to criminal charges involving sexual assault, child/elder abuse & domestic violence. E.g., D's commission of prior rape admissible. REVIEW: WHAT'S PROPENSITY E – admitting it for the purpose of showing it's more likely he committed the crime – not character**
- (e) FRE: no rule permitting propensity E for domestic violence & elder abuse**
- D) E for Specific Acts of Misconduct (for which D has not been convicted)
- 1) Specific bad acts May only be inquired into on cross exam + no extrinsic evidence unless to attack credibility (note: prior acts of sexual assault/molestation may be offered by prosecution w/extrinsic E). If DA intends to use, must disclose 15 days before/good cause.
- 2) General Rule: Inadmissible if offered solely to establish criminal disposition (not CEC exceptions for attacking Victim's bad character) but may be admissible in civil OR criminal proceeding if independently relevant so long as sufficient E to support jury finding that probative value on MIMIC outweighs prejudicial effect (apply CEC 352). Examples of relevant misconduct: **"MIMIC"**
- (a) Motive
- (b) Intent: E D committed prior, similar wrongful acts negate good faith & may establish guilty knowledge
- (c) Absence of Mistake: (if D uses it as a defense)
- (d) Identity: Connects the D to the crime (e.g., D's theft of gun), modus operandi (signature crimes). Must have similarity & uniqueness ("pink tutu" ok but not victim stabbed in heart. D's other crimes stabbed in heart).
- (e) Common Plan/Scheme: Preparation
- (f) Similar acts to prove opportunity, knowledge or any relevant fact other than criminal disposition

IV Judicial Notice: recognition of a fact as true w/o formal presentation of E

A) Facts Appropriate for Judicial Notice

- 1) Matters of indisputable fact OR matters of common knowledge capable of verification by sources of unquestionable accuracy. Trend: scientific principles

B) Procedural Aspects:

- 1) Judicial notice at any time. Parties' motion not required. May be taken for the first time on appeal
- 2) Conclusive in civil cases but not criminal. Jury instruction in criminal case: "jury may accept as conclusive" permissible but not "must."

C) Judicial Notice of Law May Be Mandatory or Permissive

- 1) Mandatory if federal/state law, official regulations of forum state & fed govt.
- 2) Permissive: municipal ordinances, foreign law, Congress'/state leg resolutions

V Real/Demonstrative Evidence – General Conditions of Admissibility & Particular Kinds of Proof

A) Definition of Real/Demonstrative E: actual physical E addressed directly to the trier of fact

B) General Conditions of Admissibility:

- 1) Relevance
- 2) Authentication: Sufficient E to support a finding that the E is what the proponent claims it to be. 3 ways:
 - (a) T by one who has personal knowledge (e.g, W recognizes it)
 - (b) E has distinct markings (e.g., "pearl handed gun")
 - (c) Substantially unbroken chain of custody (**Tip: Heavily Tested**) – ability to account for the whereabouts from the time in question to the proceeding.
- 3) If condition of object is significant: it must be shown to be in substantially the same condition at trial
- 4) Legal Relevance: Probative value *substantially* outweighed by prejudicial effect (inconvenience, propriety) – must be "substantially"

C) Particular Types of Real Proof

- 1) Reproductions/Explanatory Real E: generally admissible but not admitted into E
- 2) Maps, Charts, Models: admissible if foundation for authenticity laid: **faithful reproductions of what it attempts to depict.**
- 3) Exhibition of Child in Paternity suits: prohibited as E the child is same race of putative father
- 4) Exhibition on injuries in PI suits: permitted if probative value not outweighed by prejudicial effect

VI Documentary Evidence:

A) General Requirements: 1) Relevant & 2) authentic

B) Every item of non-testimonial E must be authenticated: Stnd – proof to support a jury finding that it is what it's proponent claims it to be. Various Methods of authentication:

- 1) **Admissions**: the party against whom the writing is being offered has admitted its authenticity **OR acted upon it as authentic**
- 2) EyeW T: W sees it executed/hears it acknowledged (E.g., "I saw D sign the letter)
- 3) Circumstantial E: E.g., P testifies he mailed offer to D. 4 days later letter arrived postmark to D's town
- 4) Handwriting verifications: 3 ways 1) W's personal knowledge so long as not acquired for purposes of present litigation 2) Comparison by expert W 3) Comparison by trier of fact through a genuine exemplar: Disputed letter admitted along w/a provable example of D's signature. Jury compares & decides if signature is authentic.

- (a) E.g., P authenticates the letter but experts & lay Ws dispute signature is D's. Letter admissible even if contradicting E as to authenticity bc burden of proof low (sufficient to support finding). Jury decides
- 5) Authentication of non-unique items: To authenticate non-unique items, the proponent must lay a chain of custody demonstrating that this is the specific item proponent claims it to be, whereby the location of the item may be accounted for.
 - (a) Little breaks in the chain permissible (cocaine left momentarily on evidence custodian's desk) but big breaks not (cop leaves coke bag overnight at Greyhound)
- 6) Special types of writings:
 - (a) Ancient documents authenticated by E that 1) it's at least 20 yrs old 2) in a condition where it's free from suspicion as to its authenticity & 3) was found in a place where such a writing would likely be kept
 - (i) **CEC**: A document over 30 yrs old may be authenticated by comparing it w/a diff document that appears to be authentic & is treated as authentic.
 - (1) Dispositive document (deed, will) presumed to be authentic if 1) over 30 yrs old 2) doesn't look suspicious 3) found where one would expect it to be found 4) is tx as authentic by ppl who care about its authenticity
 - (b) Reply Letter: Authenticity demonstrated by E that it was a reply to communication sent to the author
 - (c) Photographs: Admissible if 1) portray facts relevant to the issue & 2) W testifies it is a fair & accurate depiction of the facts based on personal knowledge (E.g., ok to ask W, "does this fairly & accurately depict but not ok to ask, "is this a photo taken at the time of the accident?")
 - (i) No requirement photographer testify
 - (ii) If camera unattended/no person to authenticate: photograph admitted if 1) camera was properly working at the time & 2) photograph developed from that camera's film (**Tip: chain of custody**)
 - (d) X-rays, pics, electrocardiograms: Authenticity demonstrated if 1) machine was in working order 2) operator was qualified & 3) chain of custody shows X-ray hasn't been tampered with
- 7) Authentication of Oral Statements – if a statement is admissible only if said by a particular person (e.g., admission of party opponent) authentication regarding the speaker's identity is required
 - (a) Voice Identification: Voice may be identified by any person who heard the voice *at any time* – including after litigation & for sole purposes of litigation (Contrast w/handwriting)
 - (b) Telephone Conversations:
 - (i) Residence: One of the parties must testify that 1) he called a designated number (phone book) & a voice answered identifying itself/residence 2) he recognized the speaker's voice 3) speaker had knowledge of certain facts that only a particular person would have
 - (ii) Business: 1 & 2 are the same. 3) called a business + talked w/person about matters relevant to business
- 8) Self-authenticating documents: Extrinsic E of authenticity not required for (7)
 - (a) Certified copies of public records
 - (b) Official publications
 - (c) Newspapers/periodicals
 - (d) Trade inscriptions: tag/label that purports to have been attached in course of business & indicates ownership, control or origin.

- (e) Acknowledged documents: notary
- (f) Commercial paper/related documents
- (g) Certified business records
 - (i) **CEC: authenticity presumed if writing carries certificate of acknowledgement, foreign entity diplomatically recognized, domestic public EE/notary public & case reports**

C) Best Evidence Rule:

1) General Rule:

(a) To prove the terms of any tangible collection of data, the original writing must be produced + IF the terms of the writing are material. The rule applies 1) Where the writing is legally operative/dispositive OR 2) the W's knowledge concerning a fact is reliant on having read the document

(b) If BER applies: E that's admissible to prove the contents of the writing include

- (i) Originals: computer printouts, & in case of public docs – certified copies
- (ii) Duplicates: copy of original produced by same impression that produced the original (e.g. carbon copy) or by a machine (photocopier/camera). Admissible unless authenticity challenged
 - (1) **CEC:** defines 2ndary evidence to include both duplicates (exact copies made by photographic, chemical or other process) & other E of content or original writing (e.g., penciled sketch). Federal ct the duplicate would be admissible but not the sketch. In CA: sketch admissible.

(c) 2ndary materials ((E.g., handwritten copies, notes, oral T) may be used only when the proponent can show the original is unavailable unless unavailable due to bad faith. Lost/destroyed, in custody of a 3rd party outside jx & unobtainable, custody of adverse party who refuses to produce after due notice)

- (i) **CEC:** oral testimony inadmissible to prove contents of a writing unless 1) original is lost 2) writing contains a multitude of items that can't be efficiently examined in ct & the objective is to prove a bottom line conclusion – not details 3) proponent can't get the original 4) writing is not important enough to make it worthwhile to track down.

(d) Where the Rule doesn't apply:

- (1) **CEC:** In criminal case, if DA/PD possesses/controls original, she should allow other side to inspect. If not, she must use either the original/duplicate at trial

2) Where the Rule doesn't apply: 1) Where the facts to be proved exist independently of the writing 2) Where the writing is collateral to the issue in controversy 3) summaries of voluminous record & 4) **copies of public records.**

3) Examples where it applies:

- (a) Party seeks to prove contents of deed, will, K, breach of warranty case etc through 2ndary T
- (b) Copyright/obscenity trial for book: party seeks to introduce newspaper review/W T
- (c) P claims she was defrauded by D who sold her a gown claiming it was an original. P wants to introduce E of a label she found in the gown.
- (d) Radiologist seeks to T regarding the x-rays w/o the x-rays there.

4) Examples where it doesn't apply:

- (a) D denies making a K w/P, P may introduce E to show a K exists, but not its contents
- (b) W may testify he's 30 + married w/o documents
- (c) W may testify to T he heard at a prior proceeding
- (d) W may testify he's a real estate broker w/o producing license – if not material

- (e) Nurse who took vital signs don't need to produce record
 - (f) Party may introduce chart summarizing personnel/billing records (BER doesn't apply to voluminous records)
 - (g) P may introduce certified copy of certificate of incorporation (public record)
 - (h) W may testify about a place crash she W, even if it was on video
 - (i) P may testify that D delivered to her a deed.
- 5) Determinations of Judge v Jury:
- (a) Judge determines admissibility of duplicates & other copies
 - (b) Jury determines: 1) whether the original ever existed 2) Whether a writing, recording or photograph is an original & 3) whether the E offered correctly reflects the original's contents
- D) Parol Evidence Rule:
- 1) General Rule: If agreement reduced to writing, that writing constitutes the agreement and prior OR contemporaneous terms are inadmissible to vary the terms of the writing.
 - 2) Where the Rule Doesn't Apply:
 - (a) K is incomplete/ambiguous: gap filling terms may be permitted etc.
 - (b) Reformation: If a party alleges acts (e.g., mistake) entitling her to reformation (reforming K: typos, mutual mistake)
 - (c) Subsequent modifications/discharge of written K
 - (d) Challenging Validity of K: Parol E admissible to show K is void/voidable or made subject to a valid condition precedent.

VII Testimonial E

- A) First: W's Competency Must be Established
- 1) W presumed to be competent
 - 2) Requirements:
 - (a) W must possess 4 basic testimonial attributes: 1) capacity to observe 2) recollect 3) communicate 4) appreciate the obligation to speak truthfully
 - (b) W (lay) must have 1) personal knowledge of the matter she'll testify to 2) declare she'll testify truthfully
 - (i) Interpreter: 1) must be qualified & 2) take an oath to make a true translation
 - (c) Modern Disqualifications:
 - (i) Infancy
 - (ii) Insanity: may T if understands obligation to speak truthfully
 - (iii) Presiding Judges/jurors: incompetent to T
 - (1) CEC: Merely calling judge or jury to W stand is grounds for mistrial but if no party objects to judge being a W, judge may testify. Arbitrator or mediator incompetent to T in a later civil proceeding, except for T about a statement that could constitute 1) contempt, 2) crime or 3) judicial misconduct.
 - (d) OLD CL/not followed: religion (atheists), interested parties, felons disqualified
 - (e) Dead Man's Statute
 - (i) States law: Party/person interested in event is incompetent to testify about a transaction or communication w/decedent if T offered against decedent's successors in interest
 - (ii) CEC: no dead man's statute

(1) **Tip:** Wrong answer on MBE

B) Form of Examining a W:

- 1) Leading questions (questions suggesting answer desired): generally improper on direct. Exceptions:
 - (a) Child, mentally ill
 - (b) Preliminary/introductory
 - (c) Refresh recollection
 - (d) Expert W
 - (e) Hostile W
 - (f) Cross exam
- 2) General Rule: W can't read T (except present recollection revived & present recollection recorded).
Infra

C) If Your W Forgets: Present Recollection Revived – Refreshing Recollection. **NON-HEARSAY** bc W is testifying from refreshed recollection

- 1) Any “writing” may be used to refresh W’s memory + need not be authenticated/admitted into E.
 - (a) Writing is broad. E.g., photos, L’s pre-trial notes
- 2) W can't read from writing while testifying
- 3) Opposing Counsel’s Rights: absolute right to inspect the document, to cross-examine using it, to introduce portions relating to W’s T into Evidence
- 4) **CEC:** whether refreshing done before/during trial, if opponent asks for writing, proponent must produce it. If proponent can't get it by subpoena etc, duty to produce may be excused

D) If Present Recollection Doesn't Work: Past Recollection Recorded – **HEARSAY EXCEPTION**

- 1) Writing must be read into E if proper foundation is laid. Laying a proper foundation (5 steps)
 - (a) The W at one time had personal knowledge of the facts of the “writing” (broad)
 - (b) Writing was made OR adopted by the W
 - (c) Writing was timely made when the matter was fresh in W’s mind
 - (d) Writing is accurate
 - (e) W now has insufficient recollection to testify fully & accurately
- 2) Writing itself not admissible

E) Opinion Testimony

- 1) General Rule: opinion lay W T generally inadmissible. EXCEPTIONS: 1) rationally based on W’s perception (percipient) 2) helpful to an understand of W’s testimony/material fact in issue & 3) not based on scientific, technical or otherwise specialized knowledge
 - (a) **CEC:** Does not include the 3rd requirement
- 2) Areas where Law W Opinion T generally admissible: 1) General appearance/condition of a person (“he seemed intoxicated”) 2) state of emotion 3) matters involving sense recognition (“the bag was heavy”) 4) voice or handwriting ID (must lay foundation). 5) speed of moving object (e.g., “going very fast”) 6) value of own services 7) rational/irrational nature of another’s conduct (E.g., Sanity!“he was acting crazy”) & 8) intoxication (“she was drunk”). **REVIEW: Kaplan – value of property**
- 3) Not admissible w/r/t whether one acted as an agent or an agreement was made

F) Expert T: Expert T as to opinion admissible if: “**SQRF**”

- 1) Subject matter is one in which scientific, technical or otherwise specialized knowledge would assist the trier of fact
- 2) The expert is qualified as an expert & possesses skill, training, knowledge, experience etc

- 3) Expert is reasonably probable regarding her opinion
- 4) Opinion has a proper factual basis: based on 3 possible sources
 - (a) Personal observation
 - (b) Facts made known to expert at trial
 - (c) Facts supplied to expert outside of courtroom + of a type reasonably relied upon by experts in that field
- 5) May render an opinion on ultimate issue. Exception: Criminal case where D's mental state constitutes an element of the crime/defense
- 6) **CEC:** CA uses *Frye* test: proponent of scientific testimony must demonstrate that it is generally accepted as valid and reliable in the relevant scientific field. Doesn't apply to nonscientific expert T (including expert medical T).
- 7) Authoritative texts/treatises may be used to cross examine expert W AND introduced both to impeach AND substantively if:
 - (a) Expert on stand when excerpt read from treatise
 - (b) Relevant portion read into E but NOT received as exhibit
 - (i) **CEC:** Much narrower. Covers only "historical works," "books of science or art," & "published maps or charts." + writing admissible only to prove "facts of general notoriety & interest."
- G) Cross examination
 - 1) Matter of right to cross-examine an adverse W
 - 2) Limited in scope to direct examination, including all reasonable inferences + testing W's credibility (impeach, bias etc)
 - 3) Collateral matters: Must take W's intrinsic E. Can't refute w/extrinsic E

VIII Credibility: Impeaching Methods

- A) Three Step Approach to Determining Admissibility of Impeachment Evidence
 - 1) Is the source of impeachment extrinsic evidence OR is it T being given at this proceeding by W being impeached?
 - (a) Definition of extrinsic evidence: E other than the testimony + given at this proceeding + by the W being impeached. E.g., T of other Ws, writing, prior statements of W now testifying.
 - (b) Extrinsic E is never admissible to impeach on a collateral matter (a fact not material to the issues in the case + that says nothing about W's credibility)
 - 2) If it's extrinsic E, is extrinsic E admissible under this impeachment technique?
 - 3) Are there any foundational requirements that must be satisfied?
- B) Modern Rule: ANY party may impeach
 - 1) **Tip:** watch for traditional rule trick answers on MBE (requiring adverse W, surprise, hostility, if party required by law to call)
 - 2) Can't bolster credibility unless W's credibility has been attacked
 - (a) **CEC:**
 - (i) CA Civil cases – CA follows this rule
 - (ii) CA Criminal cases, either the Defense or the prosecutor may bolster W's credibility before it's attacked!
- C) Impeachment by Contradiction of the fact the W is testified to:

- 1) Extrinsic E is inadmissible to impeach on a collateral matter (a fact not material to the present issue + that says nothing about the W's credibility other than to contradict the W). E.g., Prosecution W claims he saw the murder while driving home. Another W testifies that the prosecution W drank 6 beers.
 - (a) Steps: 1) extrinsic E 2) method: by contradiction – that W “saw.” Extrinsic E not admissible on collateral matter. Ability to perceive not collateral bc affects T's reliability.
- D) Impeaching by Prior Inconsistent Statements
 - 1) State whether relevant: May be relevant both to attack W's credibility & substantively.
 - 2) PIS of a W who testifies at trial is not hearsay if given under oath at trial/deposition. Admissible substantively. PIS of a W not under oath admissible is hearsay & thus only admissible for impeachment purposes.
 - 3) For extrinsic E to be admissible: must not for the purpose of impeaching on a collateral matter + W must be given a chance to explain or deny the statement (E.g., D.A. doesn't cross examine W on deposition T. W excused). Can't the introduce extrinsic E bc foundational reqs not met.
 - (a) Foundational requirements dispensed only where “interests of justice require.” E.g. Dec unavailable
 - (b) **Tip:** the opportunity to explain/deny doesn't have to come before counsel introduces the prior inconsistent statement
 - 4) Evidentiary Effect of Prior Inconsistent Statements:
 - (a) Usually admissible only to impeach
 - (b) Admissible to BOTH impeach & substantively if: prior inconsistent statement was made under oath at a prior proceeding
 - (c) **CEC:** admissible both substantively & to impeach, even if not made under oath
- E) Impeachment w/Evidence of Bias/Interest/Motive to Lie
 - 1) Extrinsic E permitted bc not a collateral matter provided that W given the opportunity to explain or deny the E (foundational requirements).
 - 2) **Tip:** way to get E otherwise inadmissible (arrests, liability insurance) in if relevant to bias
 - 3) Examples of bias: paid to testify (e.g., inquire into cost of expert T), relationships/friendship (family, business, conduct), criminal case – Defense can ask if prosecution W is on parole, pending indictment, promised immunity, hostility – fight, pending lawsuit
- F) Impeachment for Conviction for Crime Involving False Statement to Attack W's character for Untruthfulness
 - 1) General Rule: ALL convictions (whether misdemeanors/felonies) for crimes of false statement are admissible. No balancing of unfair prejudice against probative value (BUT Consider if Remote)
 - (a) E.g., crimes of false statement: tax invasion, perjury, forgery, fraud to attack W's character for truthfulness: .
 - (b) Arrests/indictment not sufficient. Must be convictions. Pending appeal doesn't affect.
 - (c) Misdemeanors not for crimes of false statement inadmissible.
 - 2) **CEC:**
 - (a) Civil Cases: misdemeanor crimes inadmissible
 - (b) Criminal crimes: any crimes involving moral turpitude
- G) Impeachment for FELONIES Not involving dishonesty or false statement: Ct has discretion
 - (a) E.g., robbery, murder, rape.

(b) Ct has discretion to exclude if probative value outweighed by prejudicial effect (E.g., D.A. offers D's felony conviction for rape in non-sexual assault case; D.A. offers misdemeanor battery. Automatically excluded).

(c) **CEC:** In BOTH civil & criminal, may impeach a W with any felony conviction if 1) involves moral turpitude 2) probative value not substantially outweighed by dangers & 3) it hasn't been expunged or pardoned.

H) General Tips Applicable to ALL convictions:

- 1) Convictions may be proved w/extrinsic E
- 2) Even if conviction is otherwise admissible, conviction will be excluded if REMOTE: MORE than 10 yrs since conviction/date of release (whichever latest) *unless* judge determines probative value not substantially outweighed by prejudicial effect & 2) adverse party given notice
- 3) Juvenile adjudication generally not admissible. But can admit adjudication of a W who is not a criminal D + if necessary to a determination of accused's guilt/innocence
- 4) Pardoned conviction: inadmissible if based on innocent + hasn't been convicted of a subsequent felony

I) Impeachment with Non-Conviction Specific Instances of Misconduct

- 1) Rule: Admissible in both and criminal cases + if the acts involved false statement/lying/probative of W's untruthfulness + inquired into on cross exam + w/o use of extrinsic E.
- 2) Arrest not considered a "bad act." (E.g., permissible to ask W if she embezzled but not whether she was arrested for embezzling)
- 3) E.g., Prosecution for bank robbery. On cross exam, D.A. asks whether D lied on loan application. D denies. D.A. can't offer extrinsic E to impeach .
- 4) **CEC:**
 - (a) Civil cases: Specific bad acts to prove untruthfulness inadmissible
 - (b) Criminal acts: Extrinsic E admissible to prove specific bad acts.

J) Impeachment with Opinion or Reputation E Regarding Truthfulness

- 1) Extrinsic E admissible
- 2) W may be impeached by showing he has a reputation for untruthfulness in the community in which she resides/business circles
- 3) W may be impeached by a W's personal opinion regarding untruthfulness if based on acquaintance

K) Sensory Deficiencies

- 1) Method: Cross examination. Use of EXTRINSIC E PERMISSIBLE
- 2) Attack faculties of perception or recollection (e.g., dark, not wearing glasses), some cts permit psychiatric E of mental disorder that would affect a W's credibility

L) Lack of Knowledge

- 1) Expert W: attack general knowledge/particular knowledge of facts upon which opinion is based
- 2) Opinion W: E.g., if T about the value of land, can attack knowledge of land values etc
- 3) Character Ws: to show lack of knowledge
 - (a) If testifying to reputation: Cross exam may ask "have you heard ___ specific acts?"
 - (b) If testifying as to opinion: Cross exam may ask "did you know ___ specific acts?"

M) Impeachment on Collateral Matter: Neither extrinsic E nor prior inconsistent statement permitted. Bias is never collateral & extrinsic E admissible if showing bias.

N) Impeachment of Hearsay Declarant:

- 1) May impeach the credibility of someone who does not testify but whose out of ct statement is introduced using the same methods as if the declarant were testifying
- 2) No requirement to give Declarant an opportunity to explain/deny prior inconsistent statement

IX Rehabilitation

- A) General Rule: Opinions & Reputation permissible
- B) Prior consistent statements inadmissible. EXCEPTION: If W's T impliedly/expressly attacked as lying/exaggerating. Previous statement will be SUBSTANTIVELY admitted, even if not under oath

X Objections

- A) Timing
 - 1) General Rule: Should be made shortly after the question. If not possible, motion to strike (examining counsel may strike non-responsive answers. Opposing counsel may not)
 - (a) **CEC**: Any party may move to strike
 - 2) Deposition objections: Form of question objections/Assertions of testimonial privilege made after question posed but substantive objections may be postponed until depo offered into E
- B) Failure to object is deemed a waiver. Exception: Plain errors – Prosecution commenting on D's failure to take the stand
- C) Introducing Part of a Transaction, conversation or act permits the adverse party to introduce any other part that in fairness should be considered
- D) Offers of Proof: that disclose the nature, purpose & admissibility of rejected E, to persuade trial ct to hear E & preserve E for review on appeal permissible.

XI Testimonial Privileges: permit one to refuse disclosure/prohibit another from disclosing

- A) No Specific Privilege Provisions under Federal Rules, so governed by CL
 - 1) FRE don't recognize doctor-patient privilege but state cts do. IN civil action under diversity jx, state privileges apply in fed ct.
 - 2) Privileges recognized: attorney-client, spousal, psychotherapist-patient & social-worker cl
- B) General Considerations
 - 1) Privilege personal to holder
 - 2) Communication must be shown/presumed to have been in confidence.
 - (a) FRE: judge may require in camera inspection
 - (b) **CEC**: judge prohibited to require in camera inspection
 - 3) Privilege may be waived by 3: 1) failure to claim the privilege/object when privileged T being offered 2) voluntary disclosure of privileged matter by holder/someone w/the holder's consent unless disclosure is privileged 3) contractual provision waiving in advance the right to claim a privilege
 - (a) **Tip**: no waiver when someone wrongfully discloses information w/o holder's consent, eavesdroppers if holder was not negligent (eavesdropper can be prohibited from testifying)
- C) Attorney-Client Privilege
 - 1) Rule: A communication bw L & client or their representatives + that cl objectively appeared to intend by it to be confidential + made to facilitate the render of legal services is privileged in all civil & criminal proceedings unless waived by the cl: Objects & pre-existing documents not privileged
 - (a) Purpose must be professional legal services. Informal discussions bw L & civilian don't qualify (E.g., L at a party. Person says, "Are expenses tax deductible?" Causa Not in furtherance of proff services
 - (b) Client:

- (i) if a corporation, privilege covers statements made by corporate officials/EEs if authorized to make such statements (e.g., high end)
 - (1) **CEC:** communications bw corporation's Lawyer & a corporate officer/EE protected if 1) officer/EE is the natural person to communicate w/on behalf of the corporation OR 2) officer/EE did something for which the corporation may be held liable + the corporation instructed the officer/director to tell the L. (E.g., EE who merely W an incident + reported is not protected)
 - (ii) Exceptions: The attorney cl privilege does not apply where i) professional services sought to further what cl knew/should have known to be a crime/fraud ii) communication relates to an alleged brief bw L & cl iii) 2 + parties consult L on a matter of common interest & the communication I offered by one of these parties against the other & iv) parties claiming through a deceased cl (will)
- 2) Duration of Privilege: indefinite, even after cl's death
 - (a) **CEC:** duration until the client dies, estate fully distributed & personal representative discharged
 - (b) **CEC:** Privilege doesn't apply if 1) cl hired L to help anyone plan/commit crime/fraud 2) L reasonably believes she must disclose in order to prevent a crime (by anyone) that L reasonably believes is likely to kill or cause substantial bodily harm
- 3) Situation where cl examined by doctor at L's request: not covered by doctor-patient privilege bc no tx but covered by L-client privilege
- D) Attorney's Work Product: Documents prepared by L for own use aren't protected by attorney-client privilege but protected as "work product" & subject to discovery only under necessity
- E) Doctor-Patient Privilege
 - 1) Rule: A patient has a privilege to prevent disclosure of information confidentially conveyed to a physician + where the patient conveyed the information for the + purposes of obtaining diagnosis or tx + and the information was pertinent to diagnosis or tx
 - 2) Holder is the patient.
 - 3) Requirements for confidential communications bw doctor & patient to be privileged:
 - (a) Professional relationship exists
 - (b) Information acquired while attending the patient in the course of treatment
 - (c) Information necessary for treatment (so non-medical information isn't protected. Also not just diagnosis, unlike CEC). E.g., "I started having eye trouble after I was sent to prison for perjury." I started having eye trouble privileged but "to prison for perjury" not.
 - 4) Privilege Doesn't Apply where (5):
 - (a) Patient agreed by K to waive (insurance policy)
 - (b) Patient put his physical condition in issue (Patient's PI suit. E.g, L sent Patient to Dr who's intended to T)
 - (c) Doctor's assistance was sought to aid wrongdoing (crime/tort)
 - (d) Dispute bw Doctor & patient
 - (e) ** Where state law doesn't supply rule of privilege (i.e., in most federal question cases), no doctor-patient privilege but therapist-cl privilege still remains.
 - (i) **Tip:** if psychiatrist, apply the psychotherapist-cl privilege
 - 5) **CEC:** 1) Privilege only applies to licensed physician (or nurse if serving as physician's agent). Doesn't apply to dentist, nurse or other medical worker 2) Privilege applies if patient seeking either diagnosis

or treatment 3) DOES NOT apply in commitment proceedings, competency proceedings, revoke/suspend license, criminal cases OR information doctor is required to report to public offices (gun shot wounds, communicable diseases)

F) Psychotherapist-client privilege: covers therapists (inc psychiatrists & LSW). Same as attorney-cl.

- 1) Rule: A communication bw psychotherapist & patient or LSW & client, intended by patient to be confidential + made to facilitate rendition of professional psychological services + is privileged in all civil/criminal proceedings, unless waived by client (same rules as atty-cl)
- 2) **CEC: 1** covers wide range of mental health workers: shrinks, MFT, mental health nurses, intern, counselors etc 2) APPLIES IN CRIMINAL CASES – but not to ct appointed therapists 3) Does not apply if therapist has reasonable cause to believe that patient is in danger to himself/others + if disclosure is necessary to end danger 4) if patient is child under 16 + therapist has reasonable cause to think child has been victim of a crime & that disclosure is in child's best interest

G) Husband-Wife Privilege: 2 kinds

- 1) 2 types: For both there must be a legally valid marriage + neither applies in a civil action bw spouses OR in a criminal prosecution where one spouse is charged w/a crime against another spouse or kids
- 2) Spousal Immunity: Applies to criminal cases (**CEC**: applies to ANY proceeding- civil or criminal)
 - (a) One spouse can't be compelled to testify against the other spouse in any criminal proceeding
 - (b) Only the Witness Spouse May invoke spousal immunity (party spouse can't prevent)
 - (c) Privilege can be claimed only during a valid marriage but covers information learned before & during marriage.
 - (d) No immunity on divorce
- 3) Confidential Marital Communications: Applies to civil AND criminal cases
 - (a) Communications made in reliance on intimacy of marital relationship are privileged in both civil & criminal proceedings.
 - (i) E.g., can't be made in the presence of a known stranger.
 - (ii) No requirement the confidential communication be written/spoken. May be conduct so long as intended as communication
 - (b) BOTH spouses have privilege not to disclose & can prevent the other from disclosing confidential marital communications
 - (c) The privilege survives a divorce but communications made after divorce are not protected (only communications made during marriage).

H) Privilege Against Self-Incrimination: 5th A – W can't be compelled to testify against herself in a criminal proceeding. Applies only to testimonial

- 1) W privileged from giving incriminating E: E that ties him to commission of a crime.

I) Clergy or Accountant Privilege: similar to attorney-client

- 1) **CEC: 1** cleric must routinely receive communications 2) religion must require them to keep secret 3) **BOTH penitent & cleric's holders so both can prohibit either from testifying**
- 2) **CEC**: no accountant privilege

J) Professional Journalist Privilege: no Q right to protect source of information

- 1) **CEC**: Media can't be held in contempt for refusing to divulge confidential news sources (other sanctions possible)

K) Govt Privilege: Federal govt, state or state subdivision may refuse to disclose identity of person who furnished law enforcement w/information purporting to reveal commission of a crime.

- 1) Appropriate legal representative of a govt may claim: E.g., prosecutor
 - 2) No privilege if voluntarily disclosed
 - 3) Judge must dismiss the case if reasonable probability that informer's T is necessary to fair determination of guilt or innocence.
- L) Official Information: Communications made by or to public officials (E.g., govt intl affairs, judge to law clerk)

XII Exclusion/Sequestration of Witnesses

- A) General Rule: Ws MUST be excluded from ct room so they won't hear T of other Ws on party's request (**CEC**: Ws MAY be excluded)
- B) Exception: Ws who can't be excluded (3):
 - 1) Party/Designated officer or EE of party
 - 2) Person whose presence is essential to case's presentation
 - 3) Person statutorily authorized to be present

XIII HEARSAY

- A) **Exam Approach**:
 - 1) Relevance + Legal Relevance
 - 2) Provide the "definition of hearsay"
 - 3) Is this the E a statement?
 - 4) Is the statement offered for the truth of the matter asserted?
 - 5) Does the statement qualify as admissible non-hearsay? Is it an EXEMPTION? (4)
 - (a) Prior inconsistent statement given by the Declarant under oath (substantively + impeach v CEC)
 - (b) Prior consistent statement offered to rebut an implied/express charge that the W is lying or exaggerating?
 - (c) statement of identification
 - (d) admission of a party opponent
 - (i) **CEC**: the above statements are classified as "hearsay exceptions" – not admissible non-hearsay
 - 6) If the statement does not qualify as hearsay, does it fall under a hearsay exception?
 - (a) Is the Declarant Unavailable? If so → 1) Former T 2) Dying Declaration 3) Declaration Against Interest 4) **Statement of Personal/Family History** 5) Statement Offered Against Party Procuring Declarant's unavailability
 - (b) If the D is not unavailable, do any of the other hearsay exceptions apply: 1) State of mind 2) Excited Utterance 3) **Present Sense Impression** 4) Physical Condition (Medical Diagnosis/Tx) 4) Recorded Recollection 6) Business Records/Absence of 7) Public Records/Reports 8) Records of Vital Stats 9) J'ments of Prior Convictions 10) Ancient Docs 11) **Documents Affecting a Property Interest** 12) Learned Treatises 13) Reputation 14) Family Records 15) **Market Reports**
- B) Definition of Hearsay:
 - 1) An out of court statement + other than one made by the declarant while testifying at this proceeding + offered to prove the truth of the matter asserted
 - (a) What constitutes a statement: 1) oral or written assertion or 2) nonverbal conduct intended as an assertion by a person - "assertive conduct" (animals & machines don't make statements - unless machine reflects human input. Machine must be relevant & authenticated though).

- (b) “offered to prove the truth of the matter asserted” What’s not: 1) Verbal acts/legally operative facts that have independent legal significance (words of K, defamatory words, slander/libel, Statement made while property being transferred – adverse possessor says “That’s my land” or “I am giving you this car as a gift” in dispute about car’s ownership) 2) statements offered for the effect of the listener (e.g., prove notice in contributory negligence case) & 3) Circumstantial E of Declarant’s state of mind not hearsay
- (c) Statement given by the W in an earlier ct proceeding is hearsay.
 - (i) **Tip:** If using declarant’s state of mind to prove intent → hearsay. Ask whether we’re relying on Declarant’s credibility?
- (d) 3 step approach for determining if hearsay 1) Identify the statement 2) Ask what it’s intended to prove 3) Will jury be misled if out of ct speaker was lying/mistaken 4) Does it fit into an exemption?
- C) Step 2: Does the Statement Constitute Admissible Non-Hearsay? (FRE “Exemptions” v CEC – these are hearsay exceptions)
 - 1) Prior Statements by Ws:
 - (a) Prior inconsistent statements by Ws given under oath (FRE: impeach + substantively. If w/o oath, admissible only to impeach)
 - (i) **CEC:** NO requirement it be made under oath to be admissible to prove what it asserts. If criminal case: doesn’t violate confrontation clause if D had a meaningful chance at trial to confront/cross X W about the prior statement
 - (b) Prior consistent statements offered to rebut a charge that W is lying/exaggerating bc of some motive
 - (c) Prior statements of identification of a person
 - (i) **CEC: 2 req 1) W must have identified the person while memory still fresh & 2) Must confirm in ct that she made the prior ID +it truly reflected her opinion at that time**
 - 2) Admissions by a Party Opponent
 - (a) Definition: A statement by a party, or by someone whose statement is attributable to a party, offered by a party opponent is a hearsay exemption & thus admissible. Unlike declarations against interest:
 - (i) Statement need not have been against interest when made
 - (ii) NO requirement the D have personal knowledge of the facts (may be in opinion form or even predicated on hearsay)
 - (iii) No requirement Declarant be unavailable
 - (b) Adoptive Admissions: Non-party makes a statement + party either expressly or impliedly indicates belief in its truth.
 - (i) Silence may be an adopted admission if:
 - (1) a reasonable party would’ve responded + the party remains silent
 - (2) The party heard & understood the statement
 - (3) If the party was physically & mentally capable of denying the statement
 - (4) **Tip:** silence in face of accusations in a criminal case not an admission. 5th A priv
 - (c) Vicarious Admissions:
 - (i) Definition: Statement by the party’s authorized spokesperson or employee concerning matters w/in scope of employment and made during the employment relationship are admissible against the party as a vicarious admission.

- (ii) Admissions of co-parties not admissible against each other
- (iii) Admissions of partners relating to matters w/in scope of partnership are admissions
- (iv) Admissions of co-conspirators 1) made to a 3rd party in furtherance of a conspiracy to commit crime/tort 2) while Declarant was participating in conspiracy are admissible

(v) Privies in title & joint tenants:

(1) STATE CT: admissions of joint owners admissible against ea other + admissions of former owner admissible against grantees

(2) FED CT: NOT admissible

- (d) Judicial v Extrajudicial admissions: Judicial admissions (pleadings, stip) conclusive. Extrajudicial or informal admissions: not conclusive & may be explained.

D) Hearsay Exceptions Requiring Unavailability (5):

- 1) What constitutes unavailability: 1) Declarant asserts a privilege 2) Refuses to testify 3) Testifies to lack of memory 4) Outside of the ct's jx & attendance unable to be procured by reasonable means 5) Death, physical or mental illness

(a) **CEC:** Refusal to testify or partial lack of memory aren't grounds for unavailability but treated as "mental infirmity."

2) Former Testimony: Requires unavailability.

(a) Rule: Testimony of now-unavailable W + given at another proceeding/deposition + is admissible if:

- (i) The party against whom the T is now offered had the opportunity to examine the person at that prior proceeding + a similar motive in interest the party now has **OR**
- (ii) Civil case: The party against whom the T is offered was not present in the earlier proceeding, but has a close privity type relationship w someone who was a party to that earlier proceeding (is a "predecessor in interest") & the party present at the earlier proceeding had an opportunity to examine the person + a similar motive.

(iii) Tips: The T must have been under oath. Subject matter need not be identical but similar.

(b) **Tip:** If prior proceeding was grand jury T, not admissible bc no opportunity to cross-exam. Note that prior inconsistent statements made under oath (grand jury) admissible substantively + to impeach

(c) **CEC:** the party against whom the T is offered does not need to be a 'predecessor in interest' so long as the prior party had opportunity + similar motive to cross examine the W (E.g., co-Ds)

3) Declaration Against Interest

(a) Rule: A hearsay statement and collateral facts accompanying a now unavailable Declarant's statement + are admissible + if Declarant knew the statement was against his pecuniary, proprietary or penal interest + there was no motive to misrepresent when the statements were made.

(i) **CEC:** recognizes statements against 'social interest' – statement that risks Declarant being made an object of "hatred, ridicule or social disgrace."

(b) Criminal defense cases: if being offered to exculpate the D, statement against interest only admissible if corroborating E.

(i) **Narrow scope: only statements exculpating the D allowed. "E.g., I sold the drugs" ok but not "X runs the drug ring."** E.g., X confesses to transporting drugs & that Y was the owner. X's confession to transporting admissible bc against interest but not statement about Y. **

(ii) Co-Ds confession may not be admissible bc of confrontation concerns (infra)

(iii) **CEC:** does not require corroboration

4) Dying Declarations: (NO attempted murder)

- (a) Rule: A hearsay statement made by a now unavailable Declarant under a belief of imminent death + describing the cause/circumstances leading to what Declarant believes is imminent death is admissible + in a homicide prosecution or civil action
 - (b) **CEC:** 1) Admissible in ANY case 2) Declarant must have actually died 3) statements must be about whatever killed him
- 5) Statements of Personal/Family History:
- (a) Rule: Statements of a now unavailable Declarant + concerning births, marriages, divorces, relationship, genealogical status, pedigree admissible if + D is a member of the family OR intimately associated with it + statements based on Declarant's personal knowledge of facts OR knowledge of family's reputation (E.g., Gilbert's T on our family admissible if Gilbert moves to Mexico)
 - (i) FRE: no Requirement the statement be made before controversy. Affects weight not admissibility.
 - (b) Other ways to prove personal/family history that don't require unavailability: vital stats, records of religious organizations (marriage certs), family records, statements in property docs, reputation, & judgments.
- 6) Statements Offered Against Party Procuring Declarant's Unavailability: admissible + forfeits ground to object to hearsay + preponderance standard
- (a) **CEC:** Only applies if there is **clear & convincing E** that D was killed or kidnapped + the out of court statement sought to be admitted must have been recorded by a law enforcement official before Declarant was kidnapped/killed

XIV Hearsay Exceptions Where D's Unavailability is Immaterial

A) Present State of Mind:

- 1) Rule: Statement of Declarant's then-existing state of mind, emotion, sensation, physical condition is admissible.
- 2) Usually offered to prove intent (e.g., domicile, criminal intent)
 - (a) **Tip:** not admissible to prove the truth of the fact remembered or believed (E.g., "I think I left the keys in the car" not admissible to show keys were in the car.
 - (i) Exception: facts remembered/believed during execution, revocation, identification or terms of Declarant's will)
 - (b) Admissible if Declarant's state of mind is material to the controversy
 - (c) May be admissible even if Declarant's state of mind is not material as circumstantial E offered to **show subsequent acts of D** (E.g., "I intend to go to Denver next week" admissible to show Declarant went to Denver; E.g., "I intend to commit suicide" was admissible to defend H in homicide charge)
 - (d) **CEC:** unlike FRE, judge may exclude statements of mind/body made in suspicious circumstances

B) Excited Utterances (**CEC:** Called "spontaneous statement")

- 1) Rule: A hearsay statement made by Declarant while under the stress of excitement produced by the startling event + had little time to reflect + the statement concerns immediate facts related to the startling occurrence
- 2) E.g., 2 yrs after an accident, D wakes up from a coma & screams, "Watch out for that truck!" D made the statement while under the stress of excitement + concerns immediate facts related to the occurrence.

C) Present Sense Impression

- 1) General Rule: Hearsay statement is admissible if it describes or explains an event or condition + is made while declarant was perceiving the event/condition or immediately thereafter, before Declarant had time for calculated misstatement.
 - (a) E.g., A says to B, "Look at that car go." Admissible to prove car was speeding." E.g., Murder victim on phone to friend says, "Hold on. Joe (the D) just called me & wants to take me out tonight."
 - 2) Statements of intent also admissible as present sense impressions "E.g., " I intend to kill him."
 - 3) Statements of intent admissible to prove speaker acted in accordance w/intent. E.g., "Meera intends to give Elsy a graduation surprise admissible as both a present sense impression of intent and as proof that Meera gave Elsy a graduation surprise
 - 4) **CEC:** CA doesn't recognize. Closest thing is contemporaneous statements: applies only to statements to "explain, qualify or make understandable" something D doing at the very time (E.g., Sorry for driving so fast but I'll be late").
- D) Declarations of Physical Condition
- 1) Present Bodily Condition Admissible: Spontaneous declarations of present bodily condition admissible. No requirement it be made to a doctor. E.g., "My ankles hurt. They must be broken." Admissible to prove ankles hurt but not broken.
 - 2) Past Bodily Condition: Declarations of past physical condition admissible if made to medical personnel + to assist in diagnosing/treating the condition. EVEN if about cause/source so long as pertinent to diagnosis or treatment
 - (a) **CEC:** for statements of D's past bodily condition/state of mind: 1) NEED UNAVAILABILITY & 2) only if D's state of mind/body is itself an issue
 - 3) May cover multiple levels of hearsay: E.g., Mom asks child to describe symptoms. Mom tells doctor, "My son has a temperature of 103 & he says he has a headache." 2 levels of hearsay (what child says to mom & what mom says to Dr).
- E) Business Records
- 1) Rule: Hearsay is admissible i) if it is a record of events, conditions, opinions or diagnoses ii) kept in course of regularly conducted business activity iii) made at/near time of matters described iv) by person w/knowledge of the facts in that record/under a duty to record v) it was the regular practice of business to make such a record. Such records may be excluded if untrustworthy.
 - (a) Must establish authenticity - requirement entrant testify. Custodial/other qualified person may certify record meets business records requirements
 - (b) Hospital Records: admissible to extent they're related to opinions re diagnosis/tx
 - (i) **CEC:** judges admit hospital records if straight-forward, undebatable opinions (e.g., fracture) but unlikely if difficult/debateable (sexual psychopathology)
 - (c) Police Reports: not admissible against a criminal D (**v CEC**, infra)
 - 2) Absence of business records admissible to prove nonoccurrence if regular practice of business to record such matters
- F) Past Recollection Recorded (supra)
- G) Official Records/Official Writings:
- 1) Rule: Hearsay records of a public office are admissible except in a criminal case against D+ unless untrustworthy if
 - (a) The record describes activities of the office/agency of
 - (i) E.g., the police dept manual to show dept did not follow its own policies admissible

- (b) Describes matters observed pursuant to a duty imposed by law or
- (c) Contains factual findings resulting from investigation pursuant to authority
- 2) Admissibility:
 - (a) FRE: not admissible against D in a criminal case. (Civil case: admissible against D). E.g., Criminal prosecution for homicide. D.A. offers into E a police report stating that officer saw D w/vodka. Record containing factual findings not admissible against D in a criminal suit, would be in a civil suit
 - (b) **CEC:** Admissible for & against the govt if trustworthy.
- H) Records of Vital Stats: Records of births, deaths or marriages if report made to public office + as required by law
- I) Statement of Absence of Public Record: custodian of public records T/statement of diligent search admissible as circumstantial E that a matter didn't occur.
- J) Judgments of Previous Convictions:
 - 1) FRE: A hearsay statement describing a felony conviction not based on *nolo contendere* (e.g., copy of the j'ment of a conviction) is admissible in BOTH civil & criminal cases to prove any fact essential to the j'ment.
 - (a) In a criminal case: j'ments of previous conviction may only be used for the purposes of impeachment against persons other than the accused.
 - (b) E.g., Prosecution for felon of possession of a firearm. D denies he is a felon. D.A offers into E copy of a j'ment. Admissible.
 - (c) E.g., Prosecution for murder. D.A. offers into E certified copy of j'ment of conviction of D's accomplice. Inadmissible for purposes other than impeachment.
 - 2) **CEC:** Felony j'ment conviction to prove any fact essential to the j'ment ONLY in civil cases. Permissible to use felony convictions based on *nolo contendere*. J'ment in former civil case may be used in subsequent civil case for indemnification (no FRE counterpart)
- K) Ancient Documents: Supra
- L) Documents Affecting Property Interests: Any authenticated document admissible
- M) Learned Treatises: Admissible as SUBSTANTIVE E + IMPEACHMENT if 1) called to attn/relied on by expert W + 2) established as reliable authority by W's T, other expert T or judicial notice.
- N) Reputation: Evidence of character (see above), personal or family history, land boundaries & community's general history
- O) Family Records: Statements of fact concerning personal/family history in family Bibles, jewelry engravings, genealogies, tombstones etc.
- P) Market Reports/other publicshed compilations (lists, directories); admissible if generally relied on by public/persons in a particular occupation
- Q) Residual "Catchall" Exception of Federal Rules: Statement must have 1) Circumstantial guarantees of trustworthiness 2) statement must be offered on a material fact & interests of justice served on its admission & 3) notice to adversary
 - 1) **CEC:** no residual "catchall exception"

XV Procedural Considerations

- A) Confrontation Clause: Only applies in criminal proceedings
 - 1) Rule: Even if hearsay does not make the E inadmissible, E in a criminal proceeding may be inadmissible under the Confrontation Clause. The CC excludes Declarant's out of ct statement + if Declarant does not

testify at trial + is no unavailable + the statement is testimonial + D had no chance to cross examine Declarant about the statement when made.

- (a) Testimonial: meant to further a police investigation/produce E in contrast to statements to police to deal w/ongoing emergency (which don't violate CC to admit)
- (b) E.g., Prosecution for murder. When police arrive shooter at large. Victim tells police, "I going fast. Santa killed me." Dying declaration. No CC problem bc statement to police during ongoing emergency.
- (c) E.g., Same case. Police apprehend the shooter. Victim says, "I going fast. Santa killed me." Dying declaration. But CC problem bc testimonial.

B) Burden of Producing Evidence: burden of pleading/producing E on P or state.

C) Burden of Persuasion: civil cases – preponderance. Criminal – beyond a reasonable doubt. Always remains w/P or state.

D) Presumptions:

- 1) Definition: a rule that requires that a particular inference be drawn
- 2) Effect: shifts the burden of production to the party against whom the presumption is offered but doesn't shift the burden of persuasion.
- 3) E.g., presumption of innocence (criminal), sanity, legitimacy, ownership of car gives rise to presumption that driver was agent, presumption of death from continuous absence for 7 yrs, presumption of mail delivery – presumed to have been delivered if properly addressed etc).
- 4) Conflicting presumptions: judge weighs them according to weightier public policy

E) Inferences

- 1) Permissible inference: allows the party to meet burden of production but doesn't shift the burden to the adversary (Examples: res ipsa loquitur. Permissible inference is negligence. When attorney drafted W & it excludes the natural objects of bounty → inference of undue influence. Intentional destruction of relevant E gives rise to an inference that destroyed E is unfavorable to spoliator)

F) Relationship of Parties, Judge & Jury

- 1) Questions of law decided by the judge (preliminary determinations of admissibility, facts affecting E's competency, hearsay exceptions, privileges, expert T. Judges can consider any relevant E in deciding on admissibility, NOT co-conspirator)
 - (a) **CEC:** Judge must decide whether there is enough evidence to support a finding that handwriting is genuine or whether the co-conspirator exception should apply & then passes it to jury.
 - (b) **CEC:** FRE – judge may use any unprivileged E relevant to make preliminary fact determinations. In CA – judge may only consider admissible E.
- 2) Questions of fact for jury (agency, authenticity of a document, credibility & personal knowledge, secondary E of a writing – whether original writing was lost/destroyed), voluntariness of a confession
- 3) Jury must be excused on hearings of the voluntariness of a confession
- 4) Judge may comment on the weight of the E in federal courts
 - (a) **CEC:** trial judge may comment on E & credibility of Ws but must be fair & not usurp jury's function
- 5) Judge may call & interrogate a W on own initiative
- 6) Testimony by accused doesn't waive the Privilege Against Self-incrimination

G) **CEC Constitutional Issues**

- 1) Whether a statement is testimonial depends on who it was made to (e.g., boy physically abused. Statement to doctor for purpose of tx not testimonial but statement to investigator testimonial)

