NAILING  THE BAR

Simple EVIDENCE Outline

(Federal Rules as tested on the MBE with CALIFORNIA Rules as tested on the California Bar Exam)

Tim Tyler, Ph.D., Attorney at Law

NINETY PERCENT of the LAW in NINETY PAGES®

NAILING THE BAR

Simple
EVIDENCE
Outline

Federal and California Rules

Tim Tyler, Ph.D.
Attorney at Law

NINETY PERCENT of the LAW in NINETY PAGES. ®

Published by Practical Step Press

--www.PracticalStepPress.com--

ISBN 978-1-936160-27-3

NINETY PERCENT of the LAW in NINETY PAGES.®

It takes thousands of pages to completely explain the rules of **EVIDENCE**. But such extensive knowledge is unnecessary to succeed in law school or on bar examinations.

This eBook gives a simple explanation of the **FEDERAL RULES of EVIDENCE** (FRE) for law students with comparison to the **CALIFORNIA EVIDENCE CODE** (CEC). The purpose of this eBook is to provide law students with an **understanding** of the **basic rules of evidence** without a lot of unnecessary blather.

This eBook simply explains the **FEDERAL and CALIFORNIA RULES of EVIDENCE** to the extent they must be known in law school and on the Bar Exam. The explanation is given in **plain English** with the aid of **examples**. Other than that, this book has --

- **NO EXTENSIVE HISTORICAL DISCUSSION OF THE LAW**
- **NO STATE RULES OF EVIDENCE**
- **NO FLOW CHARTS**
- **NO EXTENSIVE CASE CITATIONS**
- **NO CHECK LISTS**
- **NO PRACTICE QUESTIONS**
- **NO EXAM APPROACHES**
- **NO EXTENSIVE DISCUSSION OF DETAILS**

The reason for these deliberate omissions is that they are **UNNECESSARY** and **more CONFUSING than helpful** to beginning law students trying to gain a basic understanding of the law. The purpose of this book is to help you **become an attorney** NOT to teach you everything you need to know to **practice as an attorney**.

YOUR PROFESSOR may focus on the details of the law in one or more narrow areas of personal interest. Those details are not covered here. **As you realize a need for more detailed knowledge** in a particular and narrow area of law, consult an appropriate **hornbook from your library** or some other authoritative reference source.

OTHERWISE, THIS eBOOK HAS ALL THAT YOU NEED to understand the basic law.

UNDERSTANDING THE LAW IS NECESSARY BUT NOT ENOUGH to succeed in law school! You must also be able to **explain** how the law applies to fact patterns presented on examinations.

THEREFORE, after you have developed an understanding of the law of contracts using this eBook, you MUST make additional efforts to prepare for your law school exams in contracts. To do that, use Nailing the Bar's **How to Write Essays for Evidence Law School and Bar Exams (Ke)**.

Details on these publications and how to obtain them in both hard copy and eBook (PDF) formats are given at the back of this book.

Table of Contents

Chapter 1: Evidence Overview

The study of evidence in law school is almost entirely statutory. Yet it causes an inordinate amount of confusion because your law school has two conflicting goals.

The first goal of your law school is to prepare you to pass the Bar examination. That requires teaching the Federal Rules of Evidence that will be explained to you in this book.

A second goal of a law school is to teach you state evidence rules and courtroom procedures. That will not be explained in detail here because the rules are peculiar to the various states, it is not tested on the MBE (or typically anywhere on the Bar examination), and many attorneys never go to trial or need to know those rules.

The main things you need to know about evidence are:

1. What body of evidence rules do you need to know?
2. Why is evidence needed at trial?
3. What is the difference between burden of production and burden of proof?
4. What are the two possible forms of evidence?
5. How do you get access to evidence before trial?
6. What are the basic requirements of admissible evidence?
7. What privileges prevent some evidence from being obtained and used at all?
8. What procedures are necessary to present evidence at trial?
9. What can character evidence be used for?
10. What is hearsay and when can it be admitted at trial?

It is surprising how clear the big picture becomes when you realize the study of evidence boils down to these simple questions.

1. Federal Rules of Evidence: the Main Focus

The study of evidence in law school is generally a study of the Federal Rules of Evidence (FRE), and those are the only rules of evidence tested on the MBEs. They are often tested on Bar exam essay questions too, and beginning in 2007 the California Bar began holding students accountable for knowledge of how the California Evidence Code (CEC) varies from the FRE. Rules of evidence are statutory and although case law may be presented in your coursework, there is NO caselaw tested on the MBEs and none is so important that it is worth remembering and citing in your essays.

Your law school professor may instruct and test you on your state's evidence rules. Some states may test that as well, but the MBEs and many bar exams only require knowledge of the FRE.

But, the Federal Rules of Evidence refer to and incorporate both common law and State rules of evidence to some extent. For example, the Federal Rule of Evidence for "privileges" refers to the common law and State law rules in many cases. Therefore, some understanding of common law and State law rules is necessary to understand how the FRE would apply in a real situation.

In general, if your professor or your State Bar tests you on State evidence rules, **learn the FRE first** and then learn about the areas **where your state's rules are different** from the FRE.

In this outline the focus will be on the FRE, but each time a federal rule is cited the corresponding California Evidence Code section will be cited as well. In the vast majority of situations the California rule is virtually identical to the federal rule. **If the California rule is substantially different the differences will be explained** and emphasized with **bold font**.

2. Evidence is Needed to Prove the Material Facts at Trial

It seems almost too evident (no pun intended) that the purpose of using evidence at all is to **prove the material facts** at the trial of a matter. For example, to prove something happened, that someone did something, or that some injury was suffered. The "proof" is made to the **"finder of fact,"** and the **burden of proof** is generally on the party that has raised a claim. The finder of fact is either a trial jury or the judge in a bench trial.

Evidence may also be used before trial at preliminary hearings, hearings on motions for summary judgment or adjudication, at arbitration hearings or in motions in limine. At both pretrial hearings and bench trials the judge has a dual role of both deciding the law and acting as the "finder of fact." So the admissibility of evidence is important both before and during trial.

---o0o---

A. Material Facts Are Those Tending to Prove Required Legal Elements

The "facts" that must be proven at a trial or hearing are the **material facts.** Facts are material if they tend to establish the **required legal elements** of the charge, claim or affirmative defenses raised by a party to the action. **Each legally required element of the charge, claim or defense must be proven by admissible evidence**.

> **For Example:** Bevis is charged with the murder of Butthead, and Bevis claims self-defense. The prosecution **has the burden** of producing ("**burden of production**") admissible evidence that proves the three required legal elements of murder in its **case-in-chief**. Those three elements are 1) that Butthead was a human being that **died**, 2) that Butthead's death was **caused by Bevis**, another human being, and 3) that Bevis acted with **malice aforethought**. If the prosecution does not produce admissible evidence in its case-in-chief to prove each of these three elements it will fail to sustain its burden of producing a **prima facie case** and the charge against Bevis should be dismissed on motion or sua sponte by the Court.
>
> If the prosecution establishes a prima facie case the **burden of production shifts** to Bevis to present admissible evidence to support the two required legal elements of self-defense. Those two elements are 1) that he was **not the aggressor** and 2) that he used **reasonable force**.

---o0o---

B. Material Facts May be Proven by Direct or Circumstantial Evidence

Material facts can be proven by either **direct** or indirect **"circumstantial evidence." Direct evidence** usually means witnesses that testify from their own **personal knowledge**. A videotape, voice recording, etc. that the finders of fact can see or hear would also be direct evidence.

> **For Example:** Bevis is caught on videotape robbing a store. And the store clerk, Butthead, testifies he saw Bevis rob the store. These are both **direct evidence** establishing that 1) the store was robbed and 2) Bevis was the one that did it.

Circumstantial evidence is direct evidence about some fact (e.g. fact "X") that is not material, but if "X" is proven it supports an inference that some other material fact (e.g. fact "Y") is true. Circumstantial evidence may be more convincing that direct evidence, especially when there is corroborating circumstantial evidence.

> **For Example:** Tom is arrested for burglary. Nobody saw the burglary take place so there is no direct evidence. But there is substantial circumstantial evidence. Tom's fingerprints are found at the scene of the crime, stolen property from the burglary is found in his car, and he has been convicted of burglary in the past using the same unusual and distinctive method of entry that was used in the current burglaries. This circumstantial evidence is enough to support a finding of guilt.

---o0o---

C. Material Facts Cannot be Assumed Without Evidence

As a general rule the finder of fact **cannot assume material facts** that are never proven by any admissible evidence. There are **two exceptions** where facts may be assumed without evidence. These are when the Court takes **judicial notice** of a fact, and when there is a **legal presumption** of a fact. These two exceptions will be explained in Chapter 5.

Except for the two exceptions just stated each legally required element of a charge, claim or defense must be proven by **admissible evidence** sufficient for the applicable **standard of proof** (e.g. beyond a reasonable doubt). The standards of proof to different legal actions will be explained later.

> **For Example:** Homeless Harry is arrested for larceny of a ring from a jewelry store. Prosecutor Putz calls the security guard to testify that he searched Harry when he left the store and found a valuable diamond ring in his pocket. Putz must present evidence that the ring in Harry's pocket was the **personal property of another**. If he does not, the charge against Harry should be dismissed because the jury cannot just assume the ring did not belong to Harry.

---o0o---

D. Material Facts Cannot be Based on Assumed Facts

The proof of a material fact cannot be based on assumed facts.

> **For Example:** A store is robbed by a Black man with a beard and a woman with a pony tail driving a red car. Leroy and Trixie are arrested because they match the description. At trial an expert witness testifies that **if** the chances of a woman with a pony tail being in a red car are a thousand to one, and only one Black man in a thousand has a beard, then the chances Leroy and Trixie are NOT the robbers is one in a million. This is a bogus "proof" because it depends on assumed facts, not admissible evidence.

---o0o---

E. Proof of Possibility is Not Enough to Conclude Probability

Evidence that something might have happened is not enough for the finder of fact to conclude it did happen unless the **statistical inference** it happened meets the **standard of proof** for the action.

> **For Example:** Smith sued Bus Company because an unidentified bus forced her off Main Street. Smith presents evidence that Bus Company operates most of the buses that travel on Main Street. This is a **civil action** so Smith must prove the identity of the bus by a **preponderance of the evidence**. The mere possibility that the bus that ran her off the road was owned by Bus Company is not enough for the jury to conclude that it probably was a bus owned by Bus Company. On motion her case must be dismissed.

---o0o---

F. Assumption of Material Facts Without Evidence is Reversible Error

At trial an attorney cannot make claims about, imply the existence of or otherwise refer to evidence that has not actually been admitted. A verdict based on assumed facts may be reversible. The proper objection to such tactics is **"Objection, assumes facts not in evidence."**

> **For Example:** Without presenting any evidence prosecutor Putz tells the jury, "Harry must have stolen the ring because it sure didn't belong to him." If no evidence was introduced to show the ring "didn't belong to him," the proper objection would be **"Objection, assumes facts not in evidence."**

3. The Burden of Proof, Production and Persuasion

The party that raises a claim (e.g. a claim of injury, liability or a defense) has the **"burden of proof"** of that claim. The burden of proof has **two elements**. It means that the party raising a claim has 1) the **burden of production** of admissible evidence that **might prove** each legally required element of the claim, and 2) the **burden of persuasion**, by reasoning and argument, that the evidence **does prove** each legally required element to the degree required by the applicable **standard of proof** (e.g. beyond a reasonable doubt, by preponderance of evidence, etc.) The standards of proof will be explained below.

> **For Example:** Bevis is charged with burglary of Butthead's house to steal his TV. The prosecution has the burden of presenting a **prima facie case** supported by evidence that might prove each legally required element – that Bevis 1) **broke** and 2) **entered** the 3) **house of another without permission** with an 4) **intent** to commit a larceny.

---o0o---

A. Presentation of Prima Facie Case Shifts the Burden of Production

The party raising a claim (e.g. a criminal charge, claim of injury or legal defense) has the burden of proof, and the opposing party has no initial responsibility to present any opposing evidence. But if the party presents sufficient evidence to establish a **prima facie case** the **burden of production of evidence shifts** so that the opposing party must produce evidence to dispute the alleged material facts or present evidence supporting an affirmative defense.

> **For Example:** Buyco sues Sellco for breach of contract. The president of Buyco testifies that Sellco promised to deliver blue widgets but delivered yellow widgets so Buyco had to "cover" by buying blue widgets at a higher price. This testimony is enough to establish a **prima facie case** under the "perfect tender rule" of the UCC. That shifts the burden of production to Sellco to produce evidence disputing the testimony.

---o0o---

B. Great Deference to Finder of Fact's Weighing of Evidence

Once a prima facie case has been presented, the finder of fact is responsible for **weighing the evidence** to see if it is persuasive to the degree required by the applicable standard of proof. The appeals court will give **great deference** to the conclusions of the finder of fact regarding the persuasiveness of the evidence as long as a prima facie case was established with **some admissible evidence produced to support each required legal element**.

The appeals court will not reverse a finding of fact if a reasonable finder of fact (e.g. a "reasonable jury") could have been, by any reasonable means, **persuaded** that the required legal elements were proven. But the appeals court must reverse any finding by the finder of fact that a legally required element was proven if NO evidence was **produced** to prove the element or if the evidence produced was so weak **no reasonable finder of fact could have been persuaded by it**.

> **For Example:** Bevis' TV is stolen from his home. Later policeman Paul catches Butthead with the TV. Butthead is charged with burglary. At trial Officer Oscar testifies that Paul told him he caught Butthead with the TV. This testimony is stricken as hearsay, and no other evidence is admitted. The prosecution has failed to meet its **burden of production** by failing to produce **admissible evidence** that Butthead burglarized the house. [Note: Hearsay will be explained later, but generally witnesses cannot testify about events they did not personally witness.]

But the finder of fact can make **reasonable inferences** from the evidence actually admitted.

> **For Example:** Bevis kills Butthead because he thinks he is an alien from Planet X. At trial medical testimony shows Butthead died from being shot by Bevis. Bevis appeals that the prosecution failed to prove a **homicide** occurred because no evidence showed Butthead

was actually a human being. This appeal would fail because **a reasonable jury could infer from the medical testimony that Butthead was in fact a human** being.

---o0o---

C. The Applicable Standard of Proof at Trial

The party that raises a claim has the **burden of proof**, and that requires presentation of admissible evidence that **persuades** the finder of fact that each required legal element of the claim has been proven to the **standard of proof** required by law. The applicable standard of proof depends on the nature of the legal claim raised. The different standards of proof, from lowest to highest degree of certainty, are as follows:

1) By a Reasonable Doubt

The lowest standard of proof is to present evidence that creates **a reasonable doubt** about a required element of a criminal charge. This would be the standard required of a **criminal defendant** in a defense claim. [Note: Although it is impossible to give a precise mathematical probability for what is meant by "reasonable doubt" but it would generally mean a 5% to 10% probability that some material fact necessary for the prosecution's case is not true.]

2) By a Preponderance of the Evidence

The most common standard of proof in **civil actions** is to prove a claim by a preponderance of the evidence. It is generally agreed that "preponderance of the evidence" means the finder of fact finds the evidence has proven each required legal element with over 50% certainty.

3) By Clear and Convincing Evidence

Some statutes require proof of a claim by **"clear and convincing"** evidence. Again there is no mathematical rule. But proof by "clear and convincing evidence" probably means the finder of fact is convinced each element has been proven with something like 67% to 85% certainty.

> **For Example:** The County wants to have Bevis committed to the State institution for mentally retarded incompetents. State law requires proof by **clear and convincing evidence** that Bevis is 1) mentally retarded and 2) permanently unable to provide for his own care so that 3) commitment is necessary for his well-being.

4) Beyond a Reasonable Doubt

In **criminal prosecutions** the State must prove **each and every required legal element** of a criminal charge **beyond a reasonable doubt.** It is universally acknowledged that "beyond a reasonable doubt" does NOT mean proof with 100% certainty. There is no specific mathematical value for this, but it is probably a proof of each required element with 90% to 95% certainty.

5) To a Scientific Certainty

In some rare cases a statute may require proof of a claim **"to a scientific certainty."** Proof "to a scientific certainty" would mean the finder of fact must be 100% convinced of each required element.

4. The Two Possible Forms of Evidence

There are only two "forms" of admissible evidence. Evidence is either:

1) **Testimony**, oral statements by a witness under oath (or physical enactments by witnesses entered into the record with the Court's permission) recorded in the Court's trial transcript; OR
2) An **exhibit** consisting of a thing such as an object, photograph or document.

The evidence rules for each of these forms of evidence differ somewhat, so it is important to keep in mind whether the evidence in question is trial testimony or a trial exhibit.

5. Access to Evidence Before Trial

Before evidence can be presented at trial it must first be obtained. Access to evidence can be obtained through **investigation** or through the process called **"discovery."** Investigation is the most common means of obtaining evidence for a criminal prosecution, perhaps through the use of search warrants. Discovery is most commonly used in civil litigation. Later this will be explained in more detail in Chapter 2.

6. The Six Basic Requirements of Admissible Evidence

There are **six basic requirements** for evidence to be admissible in Court --

1. **Not privileged** information;
2. Of **minimally acceptable reliability**;
3. **Relevant** to proving material facts;
4. **Not unduly prejudicial** or a **waste of Court time**;
5. **Not inadmissible hearsay evidence**; and
6. **Not inadmissible character evidence**.

Any evidence that meets these five criteria in that it is 1) **not privileged** information that is 2) minimally **reliable** and 3) **relevant** to a material fact and 4) **not unduly prejudicial** or a waste of time and 5) **not inadmissible hearsay** 6) and **not inadmissible character evidence** will be admissible evidence.

---o0o---

A. Access to and Use of Evidence May be Denied by Privilege

Certain evidence is **"privileged"** information. In this case it can be concealed by a party, it cannot be accessed by legal process before trial, and even if it is obtained in some other manner it cannot be used or referred to at trial. For example, the 5th Amendment prevents a criminal defendant from being forced to confess, and even if confessions are obtained in violation of this privilege they cannot be used against the defendant at trial. Privileges will be explained in Chapter 3.

---o0o---

B. The Party Offering Evidence Must Establish Minimal Reliability

If evidence is not privileged, the party that offers the evidence at trial must establish to the satisfaction of the Court (i.e. the judge) that the evidence meets standards of minimal reliability.

When witness testimony is offered as evidence the witness must be shown to be **qualified** to testify, and must be **questioned in a proper manner**. The means by which witnesses are qualified is explained in detail in Chapter 8.

When things such as objects, photographs and documents are offered into evidence they must be **authenticated** and meet certain standards of reliability. The means by which other things are authenticated is explained in Chapter 9.

---o0o---

C. Evidence Must be Relevant to Proving Material Facts

Evidence that is not privileged and is shown to be reliable is still not admissible unless it is relevant to proving a material fact. To be admissible, evidence must be relevant. This seems so simple, yet the **purpose** for which evidence is offered is often unclear. So **it is absolutely critical to establish the purpose** for which evidence is being offered by a party to determine if it is relevant to proving a material fact or not.

Evidence is **"relevant"** if tends to prove or disprove some material fact. (FRE 401; CEC 210 is almost the same except that **the "fact of consequence" must be "disputed"**).

> **FRE 401: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."**

If the purpose is NOT to prove a **material fact** the evidence is NOT **relevant**. And if evidence is not relevant it is not admissible. (FRE 402; CEC 350)

> **FRE 402: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."**

Evidence may be **directly relevant** because it relates to material facts or it may be **indirectly relevant** because it shows other directly relevant evidence to be more or less reliable.

1) Directly Relevant Evidence

Evidence may be **directly relevant** to the material facts – what really happened or who really caused some result. Both direct and circumstantial evidence can be directly relevant evidence.

> **For Example:** Bevis is charged with burglary. The prosecutor offers fingerprints found at the scene of the crime as evidence that Bevis was the person that burglarized the home. This is evidence circumstantial but still directly relevant to proving Bevis was the burglar. (Duh!)

2) Indirectly Relevant Evidence Relates to Reliability of Other Evidence

But evidence may be **indirectly relevant** because it tends to **establish the reliability** (or unreliability) of other directly relevant evidence such as witness testimony or the authenticity of documents.

> **For Example:** Bevis is charged with burglary. Finger-print expert Gomer is called to testify that fingerprints from the scene belong to Bevis. On cross-examination Bevis asks Gomer, "You're an alcoholic, aren't you?" The prosecutor offers into evidence a certified public record showing that Gomer was convicted of perjury three years earlier for giving false testimony at other trials. This is indirectly relevant because even though it does not tend to prove whether Bevis committed the burglary or not, it impeaches the credibility of Gomer and his testimony.

3) Purpose of Evidence Determines its Relevance

Evidence may be **admissible for one purpose because it proves a material fact** yet it may **NOT be admissible for some other purpose** because that other purpose has nothing to do with a material fact or violates an evidence rule. The purpose for which evidence is being offered is not always obvious, and you must carefully consider WHO is offering the evidence and WHY.

4) Purpose of Evidence Often Implied by Which Party Offers

The purpose for which evidence is offered **is often implied by the party offering it**. The evidence may be admissible when offered by one party but not when offered by the other party.

> **For Example:** Bevis breaks into a home and is charged with burglary. Evidence is offered to show Bevis is schizophrenic. **If offered by the prosecution this is NOT admissible** evidence because it does not tend to prove any material fact the prosecution must establish. But **if offered by the defense it IS admissible** evidence because it would tend to prove he was incapable of forming criminal intent or understanding his actions.

5) Relevance Requires Only "Tendency" to Prove Material Fact

All evidence is relevant if it has a "tendency" to prove (or disprove) a material fact, even if the "tendency" is very slight or remote. It is up to the Court (i.e. the judge) to determine if evidence is relevant at all as a threshold issue before the evidence can be put before the finder of fact (e.g. the

jury), but it is up to the finder of fact to determine the weight that should be given to that evidence. (FRE 104; CEC 400-406)

> **FRE 104: "(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court…**
>
> **(b) Relevancy Conditions on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition…**
>
> **(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility."**

---o0o---

D. The Court Has Discretion to Exclude Relevant Evidence

Evidence that is not privileged, reliable and relevant may still be excluded by the Court (i.e. the judge) if its probative value (i.e. its value or weight in proving a material fact) is substantially outweighed by the danger it would be **unfairly prejudicial**, **confuse** the issues, **mislead** a jury or cause **unnecessary delay** in the trial. (FRE 403; CEC 352)

> **FRE 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."**

The Court (i.e. the judge) may make a preliminary evaluation of the weight of offered evidence and refuse to let the evidence go before a jury. The judge must **balance the probative value** of the evidence to the offering party **against the prejudice** the evidence would cause to the objecting party **in light of the interests of justice**.

Often FRE 403 (or CEC 352) is used to limit the amount and nature of evidence to prevent a party from simply using it to inflame the jury's passions.

> **For Example:** Bevis is charged with sodomizing Doofus, a mute and mentally retarded 4-year old boy. At trial Dr. Dud testifies that he examined Doofus and found physical injury consistent with sodomy and that semen matching Bevis' DNA was found in Doofus' rectum.[1] The prosecutor then offers as evidence twelve 8-by-12 glossy color photo close-ups of Doofus' anus. On objection or sua sponte the Court would be justified in excluding the photographic evidence because it is unnecessary to prove the prosecution's case in light of the testimony of Dr. Dud. The prosecutions only apparent purpose for showing the jury these pictures would be to inflame them to a rage.

---o0o---

[1] If you find these facts overly disturbing, consider that as an attorney you will come face to face with grim situations like this and it is best to anticipate them now.

E. Hearsay Evidence is Often Inadmissible

Special rules of evidence also often prevent the use of **hearsay** evidence. Hearsay is an out-of-court statement by some person that is being offered at trial to prove the truth of the matter asserted in the statement. The rules for hearsay evidence are explained in Chapter 6.

---o0o---

F. Character Evidence is Often Inadmissible

Even if evidence is not subject to privilege, reliable, relevant and not unduly prejudicial, it still might not be admissible if it is **character evidence**. Special rules of evidence limit the use of character evidence. What "character evidence" is, and the rules for using character evidence are explained in Chapter 7.

7. Procedures for Presenting Evidence at Trial Vary by Type of Evidence

To be admissible, evidence still must be presented at trial in the proper manner. The procedural rules for presenting **testimony** at trial are different from the procedures for presenting **exhibit**. The rules for presenting testimony are explained in Chapter 8, and the rules for presenting exhibit evidence are explained in Chapter 9.

8. Evidence Violations May Cause Reversal on Appeal

If the trial Court improperly admits or excludes evidence, it might be a **reversible error** that will cause the trial verdict to be reversed on appeal. The effect of an erroneous evidence ruling is governed by FRE 103 (CEC 353, 354).

> **FRE 103: "(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling with admits or excludes evidence unless a substantial right of the party is affected and**
>
> **(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or**
>
> **(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.**
>
> **(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.**

> **(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.**
>
> **(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."**

It should be noted that reversal of the trial Court is only possible if the trial record reveals an error that **substantially prejudiced** the appealing party because a **"substantial right of the party"** was affected. (FRE 103(a)) This is called a **"reversible error.**" The CEC is somewhat different in that it requires a finding that the error caused a "**miscarriage of justice**" (CEC 353, 354).

The appeals court can only reverse the trial court based on the **"trial record"** and no other evidence may be introduced. The trial record consists of the case file, the trial transcript with testimony and trial exhibits. The trial record would include all of the evidence that was admitted at trial, and it may also include a record of the evidence that was excluded from the trial.

Evidence that is not "excluded" or "stricken from the record" is sometimes said to have been admitted into "evidence". Conversely, it is said that testimony and exhibits are excluded from "evidence" when the Court excludes them from the trial record.

At a jury trial evidence is often "excluded" without the finder of fact, the jury, ever hearing or viewing it. But sometimes the jury hears or views evidence that is subsequently "stricken from the record." The jury would be instructed to disregard such evidence. And the judge in a bench trial always learns of evidence before deciding whether to "exclude" it from consideration.

---o0o---

A. Reversal for Plain Error is Not Precluded by Failure to Object

Under federal rules a finding of **plain error** by the trial Court in admitting or excluding evidence may be reversed by the appeals court whether the error objected to at the time or not. (FRE 103(d)) California appears to have no similar rule, and it appears the evidence MUST be objected to at trial as stated in the next paragraph.

---o0o---

B. Objection Needed to Challenge Admission of Evidence

An erroneous ruling **admitting** evidence at trial (other than **plain error** under federal rules) may be challenged on appeal only if it **affected a substantial right** of the appealing party and a **timely objection** or **motion to strike** appears in the trial record along with **a clear statement of the grounds for the objection**, unless the grounds for objection were clear from the context.. (FRE 103(a) (1); CEC 353(a)) If the evidence was offered and admitted without objection, all later objections to that evidence are waived and it cannot be challenged on appeal.

---o0o---

C. Offer of Proof Needed to Challenge Exclusion of Evidence

An erroneous ruling **excluding** evidence at trial (other than plain error under the federal rules) may be challenged on appeal only if it **affected a substantial right** of the appealing party and **the substance of the evidence was made known to the Court by offer** unless the substance is apparent from the context within which questions were asked. (FRE 103(a) (2)) The California rule (CEC 354) is slightly different. It requires a "**miscarriage of justice**", and the substance of the evidence does not have to be explained to the Court if that would have been futile OR the evidence was sought on cross-examination or recross-examination.

In **creating a record of the offer of proof**, the Court may add additional statements to the record to show the nature of the evidence excluded, the objection to it and the ruling thereon. The Court may also require the offering party to make an offer in question and answer form. (FRE 103(b))

> **For Example:** Defender Doofus asks the witness, "What did Victor say just before he died?" prosecutor Putz shouts, "Objection, hearsay!" Judge Judy, lost in a daydream, says, "Sustained." Doofus asks to approach the bench and states an offer of proof by explaining (on the trial transcript) that the offered evidence would be a "dying declaration," an exception to the hearsay rule. [Hearsay will be explained later.]

---o0o---

D. Inadmissible Evidence Discussed Out of Jury's Hearing

In jury trials, to the extent practicable, statements, offers of proof and discussions of admissibility of evidence, other than objections and responses to objections, should be made out of the hearing of the jury, and discussions of the admissibility of confessions must always be conducted outside the hearing of the jury. (FRE 103(c) and 104(c))

> **FRE 104: "(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court…**
>
> **(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests…**

The California rule (CEC 402) is somewhat different. It allows but does not require discussion of admissibility of evidence to be heard outside the presence of the jury and requires the discussion of admissibility of confessions of a criminal to be discussed away from the jury ONLY if a party requests that.

Chapter 2: Pre-Trial Discovery and Investigation.

Prior to trial evidence is obtained by two methods, **investigation** and **discovery**.

Federal courts have **automatic discovery** and attorneys have an **affirmative duty** to reveal to opposing parties all evidence that is relevant to the matter in dispute. If an attorney has relevant evidence that is believed to be privileged, the attorney has a duty to inform the opposing party the evidence exists and is being withheld under the federal rules. **This is very different from California law**.

Under California rules attorneys have an affirmative duty to NOT reveal evidence to opposing parties that is damaging to their own client's interest unless they are forced to reveal it after it is requested in discovery. And if an attorney has evidence that is believed to be privileged, that fact is not to be revealed to opposing parties until and unless the evidence is requested in discovery under the California rules.

While this is a very important difference, and somewhat related to evidence rules, it may be more related to **civil procedure** than to evidence rules and will not be explained in detail further here.

1. Investigation and Attorney Work-Product

"Investigation" means that a party locates and records evidence such as photographs, witness statements and documents for later use at trial. This is called **attorney work-product.**

> **For Example:** Bevis and Butthead have an automobile collision. Bevis' lawyer, Larry, goes to the accident scene and takes photos of the skid marks. The photos may be used as evidence at trial and they are attorney work-product.

Investigation using search warrants is prevalent in a **criminal case**, since discovery tools such as "requests for admissions" conflict with the 5th Amendment prohibition against forced self-incrimination and may not be useable for compelling production of evidence.

In both federal and California courts attorneys have an **affirmative duty** to investigate facts to support and advance the interests of their own client, and not to initiate or pursue claims they know to be without false or without basis in law or fact. But in federal courts attorneys have an **additional affirmative duty to investigate** the validity of the **claims of their own clients** before filing any pleading with the court. If they fail to do that they may be sanctioned by the court under FRCP 11 for **lack of due diligence**. Under California rules courts attorneys do not have any equivalent duty to investigate the validity of their own client's claims. If the client is pursuing a false claim, unknown to the attorney, only the client is liable for that.

> **For Example:** Paula falsely tells her attorney, Al, that Dan negligently injured her. Al can file a complaint in a California court based on that allegation alone without further investigation. But if Al was going to file the same claim in a federal court he would have an affirmative duty to investigate whether or not Paula is telling him the truth.

This is a very important difference between federal and California rules, but it is more related to **civil procedure** than to evidence rules and will not be explained in detail further here.

2. Pre-Trial Discovery

"Discovery" means a period of time after an action has started and before trial when a party may force the opposing parties to reveal evidence. Third parties can also be required to produce both testimony and physical evidence. The discovery period is determined by statute.

As stated above, in federal court each attorney has an affirmative duty to reveal all relevant evidence to opposing parties **automatically**. Failure to automatically reveal relevant evidence (without being asked for it) can and often will result in severe sanctions against both the concealing party and her attorney!

The same general rule applies to **criminal actions** in California, but not to **civil actions**. As a result, **the discussion below pertains primarily to civil actions in California courts**.

Discovery is most commonly used in **civil actions**, and most evidence is **"discoverable"** even if it could NOT be admitted at trial (because it fails to meet the rules of evidence explained later). The general rule is:

> **All evidence that is relevant to the subject matter of pending litigation is discoverable unless it is privileged.** (Federal Rule of Civil Procedure 26(b))

The four basic discovery "tools" are **requests for admissions, requests for production** (or **examination** or **inspection**), **interrogatories** and **depositions**. These are served on the opposing party and third parties by written notices demanding access to evidence. If access is refused the opposing party may be compelled to comply or be subject to sanctions. The rules for discovery are set forth in the Federal Rules of Civil Procedure (and State rules) and are typically more a subject for discussion in **civil procedure** classes.

Requests for admissions, production (or **inspection** or **physical** and/or **mental examination**) and **interrogatories** may only be used in discovery against opposing parties. A **deposition subpoena** may be used to compel any person to testify whether they are a party or not (not a plaintiff or defendant.). And a third party may be forced to **produce physical evidence** for inspection by means of a special deposition subpoena called a **subpoena duces tecum** (instead of by means of a request for production of documents.)

Certain **privileges** prevent some evidence from being revealed in discovery. For example the **attorney-client privilege** prohibits the revelation of confidential discussions between parties and their attorneys. And the **attorney work-product privilege** may prevent a party from getting evidence through discovery that opposing counsel has developed through investigation. These privileges will be explained more below.

Two major differences between federal and California rules are **automatic discovery** and **Rule 11 sanctions** in federal courts. However, they are more often discussed as **civil procedure** issues than as evidence issues.

Chapter 3: Concealment of Privileged Evidence.

Evidence of certain **confidential information** may be concealed, both from discovery and from introduction at trial, under a claim of "**privilege**." A privilege is a preliminary consideration that is different from normal evidence exclusions at trial. Under federal rules the existence of privileged information must be revealed to the opposing parties, with a statement that it is being withheld because it is privileged. California rules have no equivalent requirement.

1. No Independent Federal Rule for Most Privileges

There is no independent Federal Rule of Evidence with respect to most privileges. The FRE incorporates **State and common law rules** of privilege in general, and in civil actions where State law provides rules of decision, State rules of privilege prevail. (FRE 501) But in federal court actions based on federal question jurisdiction FRE privilege rules, if any, prevail over State rules.

> **FRE 501: "Except as otherwise required … the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principals of the common law as they may be interpreted … in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person government, State or political subdivision thereof shall be determined in accordance with State law."**

Therefore, evidence privileges in federal courts depend largely on common law and the laws of the states where the federal courts are located, and in California evidence privileges are set forth in CEC 911, et seq. Under CEC 911 no evidence privileges exist except those set forth in statute.

2. Privileges Distinguished from Other Evidence Exclusions

Privileges are different from normal evidence exclusions because they reflect a **public policy** of preventing certain types of information from **both being revealed** or **used** as evidence.

The person who has the power to claim a privilege is called the **"holder."** Other parties that have access to privileged information have a **fiduciary duty to conceal** the information for the holder.

While other evidence exclusions just prevent evidence from being admitted at a hearing or trial, privileges actually **conceal evidence** from pre-trial discovery.

---o0o---

A. The Requirement of Confidentiality

Most privileges apply only to **confidential information** and **communications**. A communication is confidential only if the holder of the privilege had a **reasonable expectation of privacy** at the time of the communication. If a privilege applies only to "confidential" information, the privilege is waived if the holder reveals the information to anyone that has no legal duty (e.g. fiduciary, statutory or contractual duty) to keep it secret. (CEC 912)

Some privileges do not require the privileged information to be confidential.

> **For Example:** On a crowded subway Bevis tells his attorney that he committed a crime. Doofus, a bystander, hears the statement. At trial prosecutor Putz calls Doofus to testify about what Bevis said to his attorney. Bevis objects that the attorney-client privilege applies. Wrong. The statement was not made in confidence if it was on a 'crowded' subway in front of strangers so Bevis had **no reasonable expectation of privacy.**

Confidentiality **extends to professional associates** of parties to the information.

> **For Example:** Bevis tell his attorney that he committed a crime. The attorney's secretary, Buffy, hears the conversation. Buffy cannot reveal what Bevis said because she is a **professional associate** of the attorney and Bevis had a **reasonable expectation of privacy** that neither Doofus nor his office staff would reveal his statement.

The sphere of confidentiality **may extend to close family members** but does not extend to friends and distant relatives. All states recognize a sphere of confidentiality between **spouses**, and many states recognize a privilege that shields conversations between other **close family members** such as between children and parents. But this privilege does NOT extend to mere friends.

> **For Example:** Bevis tell his attorney that he committed a crime. Bevis' homosexual lover, Butthead, is present during the conversation. At trial prosecutor Putz may call Butthead as a witness and asks him everything Bevis said because Butthead is not a spouse or close family member. Even if Bevis had an expectation of privacy with Butthead listening it was not a **reasonable expectation of privacy**.

If the holder of a privilege deliberately and voluntarily reveals the privileged information to third parties that are not also privileged, the privilege is often **waived**. And once waived, the holder may subsequently be barred from claiming the privilege.

---o0o---

B. The "Holder" of the Privilege and the Fiduciary Duty Not to Reveal

A privilege is the right of **a particular person** to keep his or her communications from being revealed without permission. The person that has this right is called the **"holder"** of the privilege. Sometimes two people are holders of the same privilege. (CEC 912)

People that know the privileged information but are not holders of the privilege often have a **fiduciary duty** to keep the privileged information confidential. But the holder of the privilege can **consent to reveal** it or **waive** the privilege. But, the holder can not unilaterally waive the privilege if another person also is a holder of the privilege.

> **For Example:** In confidence Bevis tell his attorney, Doofus, that he saw Butthead kill Victor. At trial prosecutor Putz calls Doofus as a witness and asks him what Bevis said. Doofus cannot reveal the conversation because it was subject to the attorney-client privilege. Doofus is under a **fiduciary duty** not to reveal its substance without the consent of Bevis. But Bevis can reveal what he said because he is the **holder** of the privilege.

In some situations **all parties** in the conversations are holders of the privilege. In this case none of the parties can reveal the conversation without the **unanimous consent** of all holders, and **each party has a fiduciary duty to the others**.

> **For Example:** In confidence Bevis tells two priests, Fathers Futz and Frick, that he sexually molested a child. All three people, Bevis, Futz and Frick are **holders** of a privilege (the priest-penitent privilege) to keep the conversation secret. Each has a fiduciary duty to the other, and no one of them can reveal the conversation unless the other two parties unanimously consent.

---o0o---

C. Public Policy Considerations are the Reasons for Privileges

Evidence privileges are based on public policy concerns that revelation of the evidence would have a **negative effect on future behavior outside the courtroom**. In contrast other rules of evidence are based on concerns the evidence offered lacks reliability and relevance.

Some **public policy goals** that underlie privileges are;

1. To encourage individuals to seek legal counsel;
2. To protect the sanctity of marriage;
3. To encourage patients to seek medical and psychiatric treatment;
4. To encourage individuals to seek religious counseling;
5. To encourage people to report crimes to the police; and
6. To encourage the elimination of dangerous conditions.

But evidence privileges are still rules the Court must follow, so admissibility of evidence still depends on the evidence rule, not on the public policy that caused adoption of the rule.

---o0o---

D. Concealment Broader Than Just Exclusion at Trial

Privileges **prevent information from being revealed**, and that is a broader protection than just preventing the information from being **admitted at trial**. Rules of privilege even apply to preliminary questions where the Court is determining the **existence of a privilege.** This is broader than when the Court is trying to determine the **admissibility** of evidence. (FRE 104(a))

> **For Example:** Tim sues used car dealer Jim, for misrepresentation. In discovery Jim's attorney, Kyle, deposes Tim's wife, Chris, and asks her what Tim told her about the case. Tim objects and refuses to let his wife answer the question. Kyle threatens to have her sanctioned, but the **marital communication privilege** shields **confidences between husbands and wives** at both trial and in discovery. Chris cannot reveal what Tim told her in confidence, even if she wanted to. [2]

---o0o---

[2] True story. When opposing counsel makes these empty threats of sanctions you can be confident you are dealing with a real moron with little common sense or knowledge of the law.

E. No Public Policy to Conceal Wrongful Acts

Privileges are for public policy considerations and do NOT conceal **discussions in furtherance of criminal acts** such as **solicitation**, agreements for **conspiracies**, or discussions of **how to commit** crimes, **hide evidence** or **elude capture**.

> **For Example:** Tilly the telephone operator eavesdrops when Bevis tells Attorney Al he committed a murder. Attorney Al says, "Head for Mexico." This statement is NOT covered by the attorney-client privilege because it urges flight to avoid prosecution.

3. Specific Evidence Privileges

Each California evidence privilege incorporated into federal law by FRE 501 is explained below.

---o0o---

A. The Privilege Against Forced Self-Incrimination

The 5th Amendment, extended to the States by the 14th Amendment, prohibits forced self-incrimination. This "evidence privilege" is usually more a subject of discussion in **criminal procedure** classes than evidence classes. (CEC 930, 940).

The **purpose of the privilege** is that forced confessions are repugnant to the concept of ordered liberty. **Criminal defendants may not be called as a witness** by the prosecution at their own trials. But they can voluntarily testify in their own defense. No witness (whether the defendant or not) can be forced to give self-incriminating testimony (unless granted immunity from prosecution).

The **holder** of this privilege is anyone being asked for incriminating evidence. It is a blanket privilege that **covers all potentially incriminating information** known by the individual.

This privilege only applies to **forced** self-incrimination so it may be voluntarily **waived**.

---o0o---

B. The Attorney-Client Privilege

The **attorney-client privilege** shields **confidential** communications about legal matters between attorneys and their clients from both discovery and use as evidence. This is an **absolute** privilege recognized in **every State and jurisdiction** but is **strictly construed**. In California it is set forth at CEC 950-962.

The **purpose of the privilege** is to encourage individuals to seek legal counsel without concerns their confidences will be used against them, and the **holder** of the privilege is the **client** and NOT the attorney. (CEC 953) The holder of the privilege may also be the client's personal representative, if the client is dead. The attorney has a **fiduciary duty** to keep the confidences of the client secret.

The attorney-client privilege only exists when the holder **reasonably believed they were speaking in confidence with an attorney**, or that attorney's associates, employees, and agents.

> **For Example:** Bevis asks Butthead, a law student, for free legal advice. Butthead can be called as a witness and forced to reveal the entire conversation because **Bevis knew Butthead was not a lawyer**.

The attorney-client privilege only exists when the **purpose** of the conversation is **legal advice and counsel**. In most states the privilege arises as soon as the client makes it clear he or she is seeking legal counsel, whether or not the attorney agrees to accept the case. (CEC 952)

Discussions about **legal liability** and **defenses** are privileged.

> **For Example:** Bevis tells his attorney Al about acts he has committed and acts contemplates committing. This conversation is privileged, even if Bevis' past or contemplated acts are illegal, because it is not illegal for an attorney to advise a client as to what is legal, what is not, and help the client prepare a legal defense (Duh.)

But the privilege does NOT apply to conversations about **court scheduling and other purely procedural matters**.

> **For Example:** Bevis' attorney, Al, tells him to be in Court at 8:00 a.m. Tuesday for sentencing. Bevis fails to show up. Judge Judy asks Al, "Did you tell your client when to be here?" Doofus cannot refuse to answer the judge on the grounds of attorney-client privilege because the conversation was not about legal advice and counseling. (See *United States v. Woodruff* (1974) 383 F.Supp. 696)

But the privilege may extend to other statements by clients to attorneys that have **legal implications**, even if they were not made for the purpose of obtaining legal counsel and advice.

> **For Example:** In the middle of his criminal trial defendant Bevis tells his attorney, Al, "The jury knows I'm guilty. I'm skipping town." When Bevis fails to return from lunch Judge Judy asks Al, "Why isn't your client here?" The attorney-client privilege prevents Al from revealing Bevis' comment because it implies Bevis' guilt. [3]

The attorney-client privilege also covers communications about the legal matters of a company **between employees and the company's attorney**. The company is the holder of the privilege.

> **For Example:** Tycoon Corp. is indicted for money laundering. Al, the corporation's attorney, asks Bevis, an accounting employee, to write him a memo explaining the firm's accounting practices. Although the prosecution can question Bevis about the company's practices, the letter he wrote is a confidential communication between a company employee and a company attorney concerning a legal matter of the company. Therefore the letter is covered by the attorney-client privilege. (See *Upjohn Co. v. United States* (1981) 449 U.S. 383)

[3] Al's best comment might be, "I couldn't say."

The attorney-client privilege does NOT prevent the attorney from revealing client confidences, as reasonably necessary, to defend against **charges of legal malpractice** made by the client.

The attorney-client privilege does NOT prevent the attorney from revealing client confidences to **prevent an impending violent crime**. (CEC 956) "Violent" means posing a person serious harm or death.

> **For Example:** Bevis tells his attorney, Al, that he attempted to kill Butthead. The statement is privileged so Al cannot reveal it. Bevis then tells Al he is going to make another attempt to kill Butthead. That statement is not privileged in most states because it concerns a threat to commit a **future violent crime**. Al can report Bevis' new threat to the police **to prevent** the commission of a violent crime.

The attorney-client privilege is **permanently waived if the holder deliberately reveals a significant amount of the confidential information to a non-privileged third party**. (CEC 912)

> **For Example:** O.J. writes a book, "If I Did It" in which he reveals his private conversations with his attorney Johnnie. That waives the attorney-client privilege, and Johnnie can be forced to testify on the information that was previously privileged.

The Attorney-Client privilege **must be asserted** by an attorney if he is authorized to claim it, but **cannot be asserted if no holder of the privilege exists** (CEC 953, 954).

---o0o---

C. Attorney Work-Product Privilege

The **attorney work-product privilege** is a **qualified** (i.e. "limited") **privilege** that shields the work-product of an attorney from discovery by opposing counsel in certain circumstances. This is **more of a discovery rule** than an evidence rule, set forth in California Code of Civil Procedure 2018.010-2018.080, not in the California Evidence Code. The **holder** of the privilege is **the attorney**, and the **reason for the privilege** is to prevent attorneys from seeking to benefit from the efforts of opposing counsel.

Attorney "work-product" means all records, notes, photographs and other information compiled by or for an attorney **in anticipation of impending or potential litigation**. Information that is compiled for reasons other than for use in anticipated litigation is NOT attorney work-product, even if it could foreseeably have usefulness in litigation.

> **For Example:** FoodCo requires management to prepare a written accident report every time someone is injured in a FoodCo store so hazardous conditions can be identified and eliminated. Bevis slips in a FoodCo store, and his attorney, Al, asks for the past accident reports in discovery. The accident reports can NOT be withheld as attorney work-product because they were created before Bevis' accident for purposes other than litigation.

This privilege is "qualified" because it is not an absolute shield. Under **Federal Rule of Civil Procedure 26(b)(3)** opposing counsel may gain access to the attorney's work-product if 1) there is **substantial need** for the evidence and 2) the evidence cannot otherwise be obtained without **undue hardship.**

---o0o---

D. Marital Communication Privilege

There are two quite different "marital" privileges, the **marital communication privilege** and the **spousal testimony privilege**. But the **purpose** of both is to protect the sanctity of marriage.

The **marital communication privilege** shields **confidences between spouses during marriage** from being revealed at any time during or after marriage. It is defined at CEC 980-987. It is an **absolute** privilege that applies to **both civil and criminal** actions. The **holder** of the privilege is the **spouse** that wants to conceal their confidences from being revealed.

> **For Example:** Brunehilda is arrested for shoplifting. To get a reduced sentence she offers to testify that her former husband Bevis told her **in confidence while they were married** that he killed Butthead. Bevis is the "holder" of the privilege to prevent Brunehilda from revealing his statement because it was a **confidential statement between spouses during marriage**.

As with other privileges there is **NO privilege to conceal evidence about planned future crimes or torts.**

The privilege only applies to **confidential communications during the marriage**.

> **For Example:** Bevis tells his girlfriend Bunny that he killed Butthead. Later Bevis is arrested for murder so he marries Bunny to prevent her from testifying. Bevis CANNOT prevent Bunny from testifying against him at trial (if she wants to) **because they were not married at the time he made the statement.**

The privilege does NOT apply in **legal actions by one spouse against the other.**

The privilege does NOT shield statements concerning **child or spouse abuse**.

> **For Example:** Bevis tells his wife Brunehilda in confidence that he broke their child's arm while beating him. Bevis is tried for child abuse and Brunehilda is called as a prosecution witness. Bevis CANNOT prevent Brunehilda from testifying against him at trial about his confidential statement **because it does not extend to child abuse issues.**

The privilege applies to confidences and can be waived by disclosure to third parties. The privilege can also be expressly waived.

---o0o---

E. Spousal Testimony Privilege

The second "marital" privilege is the **spousal testimony privilege**. It is defined at CEC 970-973. In many States the privilege only applies to the **current spouse of a defendant**. In many states the spousal testimony privilege only applies to criminal defendants. But in California the privilege applies to **all proceedings, both criminal and civil**. The privilege allows the spouse to **refuse to be called as a witness to testify against the other spouse** in any proceeding, subject to a number

of exceptions. The subject of the testimony is not restricted to just confidences. It is an **absolute** privilege subject to exceptions.

If this privilege is claimed the opposing party may not even call the spouse holding the privilege as a witness. But the witness **must be married** to the defendant at the time of trial.

One important exception is that a spouse cannot refuse to testify (claim the privilege) in a **civil action** brought or defended their own immediate benefit. (CEC 973(b))

> **For Example:** Bevis is driving with his girlfriend Bunny when he causes an accident injuring Butthead. Later Bevis marries Bunny, and then he is sued for negligence by Butthead. Bevis is liable to Butthead but Bunny is not because she was not married to Bevis at the time of the accident. Bunny can refuse to give any information, whatsoever, against Bevis because she is **married to him** and Bevis is not raising a defense for her immediate benefit.

The **holder** of the privilege is the **spouse being asked to testify**, and the other spouse can NOT force them to exercise the privilege.

As with the marital communication privilege, this privilege does NOT apply in **legal actions by one spouse against the other**, and it does NOT shield statements concerning **child or spouse abuse**. In addition, this privilege does NOT apply to a prosecution for **bigamy**.

The privilege is **waived** by spouses that **voluntarily testify in the matter in any proceeding**. A waiver is not permanent; the privilege can be claimed again in the future in a different proceeding. (CEC 973(a))

There is NO privilege to refuse to testify FOR a spouse. Under the 6th Amendment, extended to the states by the 14th Amendment, due process demands that criminal defendants must have a means of compelling witnesses to testify on their behalf. Refusing to testify for a spouse is contrary to the purpose of this privilege. Therefore, a criminal defendant can compel a spouse to testify on their behalf the same as any other witness.

---o0o---

F. Patient-Physician Privilege

The **patient-physician privilege** shields confidential statements by **patients to physicians** (and their medical and clerical staffs) for purposes of obtaining **medical diagnosis and treatment**. It is defined at CEC 990-1007.

> **For Example:** Bevis goes to Dr. Spine, a chiropractor, after an auto accident with Butthead. Butthead sues Bevis for the personal injury he suffered in the accident, and he wants Dr. Spine to reveal what Bevis told him. The patient-physician privilege does NOT shield Bevis' statements to Dr. Spine because **Dr. Spine is a chiropractor**, not a physician. Therefore, NO patient-physician privilege existed.

The **purpose** of the privilege is to protect the free exchange of medical information between patients and physicians without fear that the information will later be used against the patient. The

holder of the privilege is the patient or the patient's personal representative, if the patient is dead. The physician (and associated staff) has a **fiduciary duty** to claim the privilege and conceal the medical information for the patient as long as there is a holder of the privilege in existence. (CEC 993-994)

The patient-physician privilege is broadly recognized, but it applies **only in civil actions**, and cannot be used to conceal evidence in a criminal case. (CEC 998).

The patient-physician privilege does NOT apply to medical examinations that are done for **purposes of litigation**, and the privilege is **waived** whenever litigation is pursued by the patient for **personal injury** or when the patient accuses the physician of **medical malpractice**. The privilege can also be **waived** by signing a **consent form** or **revealing a significant amount** of the privileged information to a non-confidential third party. Any waiver of the privilege is permanent. (CEC 996, 999, 1001).

And as with most privileges it cannot be claimed if the physician's services were sought to commit or escape liability for a tort or crime. (CEC 997).

---o0o---

G. Patient-Psychotherapist Privilege

The **patient-psychotherapist privilege** allows patients to keep statements **to psychiatrists, psychologists, licensed clinical social workers in psychotherapy** and **licensed marriage and family counselors** confidential. It is defined at CEC 1010-1027.

The **purpose** of the privilege is to encourage individuals to seek psychiatric counseling, and the **holder** of the privilege is the patient. The psychotherapist or psychologist has a **fiduciary duty** to claim the privilege and conceal the information for the patient.

This privilege has the same features as the patient-physician privilege except that **it does apply to criminal cases**. This is a significant difference. Under California law criminal defendants can apparently prevent statements to psychotherapists from being used against them in criminal proceedings but cannot claim the same privilege to prevent statements to physicians from being used against them.

---o0o---

H. Priest – Penitent Privilege

The **priest-penitent privilege** allows **both clergy and parishioners** to keep statements confidential if they were first made with a **reasonable expectation of privacy** while the individual (i.e. the "penitent") was seeking moral or religious guidance. It is defined at CEC 1030-1034.

The privilege is held **both by the priest and the penitent** and each party has a **fiduciary duty** to claim the privilege and conceal the information for the other. The **purpose** of the privilege is to encourage individuals to seek counseling and guidance from the clergy, and for the clergy to give counseling, without fear that the confidences and advice of either will be used later against them.

This privilege **applies in both civil and criminal cases** and will be recognized by all states, especially in a "confessional" situation within the sanctuary of a church.

> **For Example:** O.J. is arrested for murdering his wife. In the presence of a Sheriff's Deputy O.J. exclaims to his old football teammate Rosie, who is now an ordained minister, "I killed her, oh god, I did it!" Later at trial Judge Ito refuses to let Sheriff's Deputy testify about what he heard based on the priest-penitent privilege. Was Judge Ito right? Many attorneys think he was wrong. Why? Because O.J. could clearly see the deputy was present so he **did not have a reasonable expectation of privacy**. And if O.J. didn't have a reasonable expectation of privacy, neither did Rosie. There has to be a reasonable expectation of privacy, so the correct ruling should have been that the priest-penitent privilege did not apply.[4]

---o0o---

I. Sexual Assault Counselor-Victim Privilege

The **sexual assault counselor-victim privilege** is similar to the psychotherapist-patient privilege except that a Court may compel disclosure of confidential information on a finding that the probative value of the information outweighs the effect of disclosure on the victim. It is defined at CEC 1035-1036.2.

---o0o---

J. Domestic Violence Counselor-Victim Privilege

The **domestic violence counselor-victim privilege** is similar to the sexual assault counselor – victim privilege. A Court may compel disclosure of confidential information on a finding that the probative value of the information outweighs the effect of disclosure on the victim. This privilege does not limit or prevent the disclosure of child abuse. It is defined at CEC 1037-1037.8.

---o0o---

K. Human Trafficking Caseworker – Victim Privilege

The **human trafficking caseworker -victim privilege** is similar to the sexual assault counselor – victim privilege. A Court may compel disclosure of confidential information on a finding that the probative value of the information outweighs the effect of disclosure on the victim. It is defined at CEC 1038-1038.2.

---o0o---

L. News Reporter's Privilege

The **"news reporter's" privilege** is a **qualified** privilege recognized by some states. In California it is defined at CEC 1070. This privilege allows reporters for newspapers, magazines and radio and television stations to refuse to identify **their sources** that provided them with confidential

[4] You are probably wondering how you can be expected to know the rules of evidence if a Superior Court judge like Judge Ito doesn't even understand them. The answer, of course, is that Judge Ito heard all the evidence and argument and we did not. It is easy to be a Monday-morning quarterback.

information upon which news stories are based, or to reveal **unpublished information** in their possession, including notes, outtakes, tapes, etc. even if stories have been published based on those materials.

The **purpose** of the privilege is to protect the freedom of the press and encourage individuals to reveal information of public concern to the press without fear of exposure and retaliation.

> **For Example:** Woodward and Bernstein are contacted by a confidential source and given information about the involvement of the Nixon Whitehouse in the Watergate burglary. Woodward and Bernstein print an exposé in which they call their secret source "Deep Throat". Attorney General Mitchell subpoenas Woodward and Bernstein and demands to know who "Deep Throat" is. In some jurisdictions Woodward and Bernstein could refuse to answer on the basis of the "newspaper reporter's privilege."

---o0o---

M. Government Secret Privilege

The **"government secret" privilege** (a.k.a. "government privilege" or "official information" privilege) allows a government entity, in some situations, to conceal how the government discovered certain facts and who helped them if the information was developed 1) in the **course of duty** by 2) **confidential means.** This is effectively defined by CEC 1040-1047. The information covered might include the names and addresses of people that gave information to the government or how evidence was discovered.

The **purpose** of the privilege is to protect the sources of government information from being exposed, and the **holder** of the privilege is the government entity.

The "government secret" privilege may be an **absolute privilege** if it is based on a statute. Otherwise, it would be a **qualified privilege** limited to the extent necessary based on a balance of the government need versus the private interest.

> **For Example:** The Internal Revenue Service uses DMV records to discover that Bevis owns a Ferrari despite reporting an extremely modest income. An audit reveals he has been hiding his income and cheating on his taxes. In discovery Bevis demands to know how the IRS caught him. The IRS may refuse to reveal its methods to prevent Bevis and others from avoiding detection in the future.

But the privilege has **limited application in a criminal case** because criminal defendants generally have a right to know the witnesses and source of evidence to be used against them. If the government refuses to reveal this information in a criminal case the charges against the defendant generally must be dropped.

---o0o---

N. Secret Informant Privilege

The **"secret informant" privilege** is a privilege that police may conceal the identity of an informant that gave them information in confidence about criminal activity. It is defined by CEC 1040-1047. The law enforcement agency is the holder of the privilege, and it can be an **absolute**

privilege if it is based on a statute or a **qualified privilege** if it is based on public policy considerations.

If the information from a secret informant is used **only for probable cause** to get a search warrant that leads to an arrest, the defendant cannot generally force the police to reveal the identity of the informant. But if the information from the informant is **material to the prosecution** the identity of the informant must either be revealed or the charges dropped. To determine the question of whether the secret informant is a material witness or not, the Court (i.e. trial judge) would have to question the secret informants in camera.

> **For Example:** Bevis is an undercover police officer pretending to be a dope addict. He testifies in a sealed affidavit that he bought crystal meth from Butthead, and his affidavit is used to show probable cause for a search warrant. The search reveals stolen goods and Butthead is prosecuted for possession of stolen goods. Revealing that Bevis is an undercover officer would destroy his effectiveness. And since Bevis' information was only used to develop probable cause and has no material application to the charges against Butthead the information would remain concealed under the **secret informant privilege**.

---o0o---

O. National Security Privilege

The **"national security" privilege** allows the federal government to conceal information that has **national security importance**. This privilege is also loosely covered by CEC 1040-1047. The privilege must be claimed by the **department head** of a federal department, not by some lower level government functionary.

The **holder** of the military secret privilege is the federal agency, and the **purpose** is to protect national security.

This is a **qualified privilege** that only has application in a **civil case.** In a criminal case a criminal defendant has a right to demand access to all material evidence, and if the government refuses to reveal the evidence because of national security concerns the charges against the defendant must usually be dropped.

4. Evidence Exclusions Similar to Privileges.

Both California and federal law establish certain evidence exclusions that are similar in effect and purpose to privileges but they are not incorporated into federal law by FRE 501. As with privileges one or more parties are "holders" of the right to assert the exclusion.

---o0o---

A. Remedial Measures Exclusion

The **"remedial measures" exclusion** prevents a party from **proving negligence** in a **civil action** by presenting evidence that the opposing party **took action later** to eliminate a dangerous condition. This provision is codified in the FRE at rule 407 and in the CEC at section 1151.

> **FRE 407: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."**

The **holder** of the remedial measure exclusion is the party that acted to repair or eliminate some condition that the other party claims was dangerous and caused them injury, and the **purpose** of the exclusion is to encourage individuals to eliminate dangerous conditions without fear that their act will be used later as evidence against them.

This is a **qualified** exclusion because it does not clearly prevent information about repairs from being inquired about in discovery. And it may be **waived** if the holder claims 1) **the dangerous condition never existed** or 2) **the dangerous condition was unavoidable.**

> **For Example:** Worn brakes on Butthead's car cause him to run into Bevis. Bevis sues Butthead and calls Boomer, an auto mechanic, to testify that Butthead repaired his brakes after the accident. Boomer can be prevented from testifying because Bevis cannot use this remedial measure as **proof of negligence**. But if Butthead takes the stand and testifies, "I always kept my car in top condition," that claim would **waive the exclusion** because it is a claim the dangerous condition never existed at all. That would allow Bevis to call Boomer to testify.

And the exclusion does not prevent the introduction of the very same evidence for some purpose other than proving negligence, such as proving **ownership** or **control**.

---o0o---

B. Compromise and Offers to Compromise Exclusion

The **"offer in compromise"** exclusion prevents a party from trying to **prove or disprove the validity of or liability for** a claim by presenting evidence that the opposing party **settled or offered to settle a disputed claim**. This evidence exclusion is codified. (FRE 408; CEC 1152, 1154)

> **FRE 408: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."**

The **holder** of the compromise exclusion is the party against whom the evidence is to be used, and the **purpose** of the exclusion is to encourage individuals to settle disputes without litigation and set wrongs right without fear that their good-intentioned efforts will be used later as evidence against them to make their situation even worse.

> **For Example:** Butthead and Bevis have an auto accident. Butthead says, "Would you drop your claim against me for $100?" Bevis refuses. At trial Bevis asks Butthead, "Isn't it true that you offered me $100 after the accident because you knew it was your fault?" On objection the question should be stricken and the jury should be admonished to disregard it completely because the fact Butthead tried to settle the dispute is information that cannot be offered as evidence of liability.

This exclusion does not exclude evidence that shows an offer was made for **some other purpose** than settling a disputed claim, such as an attempt to prevent a criminal prosecution.

> **For Example:** Butthead's car is stolen. Later Butthead discovers Bevis is the thief. Bevis' father, Doofus, offers Butthead money if he will not report the crime to the police. Doofus is charged with obstruction of justice. Doofus' offer to Butthead is not covered by the **offer in compromise** exclusion because the purpose of the evidence is to prove the "offer" was for the purpose of obstructing justice, not to settle a disputed claim.

---o0o---

C. Medical Expense Payment Exclusion

The **"medical expense payment"** exclusion prevents a party from trying to **prove liability** by presenting evidence that the opposing party **paid medical, hospital or similar expenses** incurred by the party offering presenting the evidence. It is codified as FRE 409 and implied in CEC 1152, 1154.

> **FRE 409: "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury."**

The **holder** of the medical expense payment exclusion is the party that paid the expenses. And the **purpose** of the exclusion is to encourage individuals to help injured people without fear their good-intentioned efforts will be used later as evidence against them to prove they caused the injury.

---o0o---

D. Pleas and Plea Discussions

The **"plea and plea statement"** exclusion prevents use of pleas and plea discussions as evidence against a criminal defendant. (FRE 410; CEC 1153, 1153.5). This provision is narrow in the FRE and only applies to the use of guilty pleas that are later withdrawn, pleas of nolo contendere and associated statements. The CEC rule is somewhat broader.

The **holder** of this exclusion would be the criminal defendant, and the **purpose** of the exclusion is to promote the plea bargaining process without fear that statements made in the process of plea bargaining would be used against the defendant.

---o0o---

E. Liability Insurance Exclusion

The **"liability insurance"** exclusion prevents evidence of liability insurance from being admitted to prove the party with insurance acted negligently. It is codified at FRE 411. This provision is narrow and does not prevent the use of the evidence for other purposes such as to prove the bias of a witness.

There is no corresponding provision in the California Evidence Code, but in general the evidence would also be irrelevant for that purpose because the fact parties carry liability insurance does not tend to prove they have been negligent.

The **holder** of this exclusion would be the insured party. The purpose of the exclusion is to promote the use of liability insurance without fear that the existence of insurance would be used against the party.

5. Privilege and Exclusion Summary Table

Here is a summary table for comparison of the features of the various privileges and exclusions. [5]

	Holder	**Extent**	**Nature**	**No Privilege if -**	**Waiver?**
1. Forced Self-Incrimination Privilege (CEC 930, 940)	Individual (As Potential Defendant)	Absolute, **only criminal** matters	Privilege of **criminal defendant** not to testify at own trial or be forced to confess	If no potential criminal liability.	Waived to extent defendant voluntarily testifies at own trial.
2. Attorney-Client Privilege (CEC 950-962)	Client	Absolute, both criminal and civil	Conceals client confidences.	If talk is of future, violent crimes; If legal malpractice claimed by client.	Waived by significant revelation by client.
3. Attorney Work-Product Privilege (CCP 2018.010-2018.080)	Attorney	Qualified, mostly a civil issue	Conceals materials gathered by investigation by attorney	If other party shows **substantial need** and **undue burden**.	
4. Marital Communication Privilege (CEC980-987)	**Both Spouses**	Absolute, both civil and criminal	Conceals confidences between spouses **while married**	Talk is of planned crimes or torts; If legal actions between spouses; If child/spouse abuse case.	
5. Spousal Testimony Privilege (CEC 970-973)	Spouse that is called as a witness against spouse accused of crime	Absolute, **only criminal** prosecution of other spouse	Privilege of a spouse not to testify **while married** against other spouse in **criminal trial**	If accused spouses want the other spouse to testify **for** them.	Waived for current trial only if spouse voluntarily testifies
6. Patient-Physician Privilege (CEC 990-1007)	Patient	Absolute, **only civil actions**	Conceals confidences to **medical staff** (physician, nurse, etc., not chiropractors) for **diagnosis and treatment**	If **criminal action**, **personal injury** or **medical malpractice** case; If exam for **litigation purpose**	May be waived and waived forever if waived at all

[5] FRE = federal rules of evidence, CEC = California Evidence Code, and CCP = California Code of Civil Procedure.

	Holder	**Extent**	**Nature**	**No Privilege if -**	**Waiver?**
7. Patient-Psychotherapist Privilege (CEC 1010-1027)	Patient	Absolute, **only civil actions**	Same as Patient-Physician except to **psychiatrists, psychologists, licensed clinical social workers in psychology** or **licensed marriage and family counselors**	Same as Patient-Physician	Same as Patient-Physician
8. Priest-Penitent Privilege (CEC 1030-1034)	**Both** the priest and the penitent	Absolute, both criminal and civil actions	Conceals confidences to and by penitent and priest		
9. Sexual Assault Counselor-Victim Privilege (CEC 1035-1036.2)	The victim	Qualified. Subject to Court determination	Conceals confidences by victim of sexual assault	Court determines probative value of disclosure outweighs impact on victim	
10. Domestic Violence Counselor-Victim Privilege (CEC 1037-1037.8)	The victim	Qualified. Subject to Court determination	Conceals confidences by victim of violence. Does not conceal revelation of child abuse.	Court determines probative value of disclosure outweighs impact on victim	
11. Human Trafficking Caseworker – Victim Privilege (CEC 1038-1038.2)	The victim	Qualified. Subject to Court determination	Conceals confidences by victim of human trafficking.	Court determines probative value of disclosure outweighs impact on victim	

	Holder	**Extent**	**Nature**	**No Privilege if -**	**Waiver?**
12. Newspaper Reporter's Privilege (CEC 1070)	News reporter	Not all states may recognize. May be set by statute	Conceals confidences to news reporters concerning matters of public interest		
13. Government Secret Privilege (CEC 1040-1047)	Governmen t agency	May be absolute if defined by statute; Otherwise qualified privilege as necessary	Conceals source of information acquired by government agency in **course of duty** by **confidential means**	If concealed info material to criminal defense it must be revealed or charge dropped.	
14. Secret Informant Privilege (CEC 1040-1047)	Police agency	Absolute privilege if defined by statute; Otherwise qualified privilege as necessary	Conceals identity of secret police informant	If informant has personal knowledge of value to criminal defense beyond just probable cause for arrest the identity must be revealed or charge dropped.	
15. National Security Privilege (CEC 1040-1047)	Governmen t Agency. **Must be claimed by head of federal departmen t**	Qualified privilege	Conceals information important to national security	If information is material to a criminal defense it must be revealed or charge dropped.	
16. Remedial Measure Exclusion (FRE 407; CEC 1151)	Party that eliminated a dangerous condition.	Absolute exclusion in **civil actions**.	Prevents use of evidence that a dangerous condition was eliminated to prove the holder was negligent.		Waived if holder claims 1) **dangerous condition never existed** or 2) was **unavoidable**.

	Holder	**Extent**	**Nature**	**No Exclusion if**	**Waiver?**
17. Compromise and Offers to Compromise Exclusion (FRE 408; CEC 1152, 1154)	Party against whom the evidence is to be used.	Absolute exclusion.	Conceals offer of compromise, acceptance or promise of acceptance not admissible to prove **liability** or **value of claim.**	Evidence offered to prove things such as **witness bias,** claims of **undue delay**, or **criminal obstruction.**	
18. Medical Expense Payment Exclusion (FRE 409; CEC 1152, 1154)	Party that paid medical expenses.	Absolute exclusion.	Conceals use of payment of medical expense, etc. to prove liability.		
19. Pleas and Plea Discussion Exclusion (FRE 410; CEC 1153, 1153.5)	Criminal Defendant.	Qualified exclusion.	Conceals the fact a defendant withdrew a guilty plea or pled nolo contendere and associated statements.	Prosecution is for perjury or false statements under oath on record in presence of counsel.	Other statements from same plea or discussions have been admitted.
20. Liability Insurance Exclusion (FRE 411)	Party that has insurance.	Qualified exclusion.	Existence of insurance not admissible to prove liability.	Evidence can be used for other purpose such as proof of bias.	

Chapter 4: Order of Evidence at Trial

The order in which evidence is presented at trial involves both evidence and procedural rules. The evidence rules explained here are primarily from the Federal Rules of Evidence, although the California rules are almost entirely the same.

The procedural rules described here are typical of many courts but will differ. They depend on statutes (e.g. the Federal Rules of Procedure), broadly applied Court rules (e.g. the State Rules of Court), "local" rules of the particular court where the action is being heard (e.g. the Federal District Court for the Central District) and the habits of individual judges.

You do not need to know much about procedural rules to successfully answer questions about evidence. But you need to know something about procedure to **understand** the application of evidence rules.

In particular, **certain legal and procedural issues** have important effects on evidence rules:

1. Is it a **CRIMINAL** or **CIVIL** action?
2. If it is a criminal action, **WHAT CRIME** is the defendant accused of?
3. **WHO** has called the witness to testify and **WHY**? AND
4. **WHO IS QUESTIONING** the witness?

1. The Pleadings

A legal action is initiated by written **pleadings** filed with the Court by the moving party. The pleadings and answer in response are the **"moving papers"** that define the dispute. If the legal action is a civil action it will be defined by a **complaint** (or petition) that states one or more **causes of action** claimed by the movant (the prosecution, a plaintiff, or a petitioner). The written response to a complaint is the **answer** by the respondent (or defendant). If an action is a criminal prosecution it will be defined by an **indictment** that states one or more **"counts,"** the **criminal charges** the prosecution has filed against the defendant. The criminal defendant's "answer" is usually a **plea** of "not guilty."

The pleadings define the issues and circumscribe the admissible evidence because evidence is only admissible if it is "relevant." And **evidence is only relevant if it would tend to prove or disprove material facts** that might establish the required legal elements of the causes of action, charges listed in the moving papers, or plausible defenses. Relevance will be explained in more detail later.

In a criminal case there is only one moving party, the prosecution, and one or more defendants. But in civil cases there may be multiple movants raising claims against multiple defendants. And there can be cross-complaints among the several parties. To simplify explanation here I will speak as if there is a single female civil plaintiff and a single male defendant.

2. Opening Statements

A jury trial typically begins (after jury selection and pre-trial motions) with the judge reading a **statement of the case** to the jury explaining what the case is about. Then the plaintiff may make a short **opening statement** describing the evidence that will be presented and what it is intended to prove. After the plaintiff's opening statement the defendant may make a short opening statement about the defense's evidence and what it will prove. The defendant has an option of waiting and giving its opening statement after the plaintiff has presented its entire case-in-chief.

3. Presentation of Moving Party's Case-in-Chief

After the opening argument the plaintiff has the initial burden of production of evidence to establish her **prima facie case**. This initial presentation of evidence by the plaintiff is called her **case-in-chief**. The case-in-chief must present witnesses and evidence to establish a prima facie case as to each cause of action in the complaint. Certain evidence rules apply to the case-in-chief, so it is always important to understand whether evidence is being presented in the case-in-chief or later during the defense.

> **For Example:** Bevis is sued for negligence by Butthead following an auto accident. Bevis begins his case-in-chief by putting Doofus on the stand as his witness. Doofus testifies on direct examination that he saw Butthead cause the accident.

Each witness at trial is first questioned on **direct examination** by the party that called them. Then they are questioned **cross-examination** by the opposing party. Cross-examination is generally limited to either **attacking the credibility** of the witness' testimony or delving into the **matters raised on direct examination**. (FRE 611(b)) But the Court has discretion to permit inquiry into additional matters on cross-examination as if it were direct examination.

When the plaintiff is presenting her case-in-chief, only she can call witnesses. The defendant cannot call witnesses until after the plaintiff has concluded her presentation of her case-in-chief and rested.

After cross-examination the party that initially called a witness may question the same witness again on **re-direct examination.** Re-direct is limited to **rehabilitating the credibility** of the witness' testimony after it has been challenged and delving into any new matters that were raised on cross-examination.

As each witness is questioned other witnesses may be excluded from the courtroom on motion if they are not parties, representatives of parties or their presence is not essential to a party's case. (FRE 615; CEC 777).

4. Request for Directed Verdict at End of Case-in-Chief

After the plaintiff's has finished presenting her case-in-chief she will **"rest,"** and the defendant may (but does not always) request that the Court (i.e. the judge) grant him a **directed verdict as a matter of law** with respect to one or more of the **causes of action** in the **complaint** (or charges in the indictment) because the plaintiff has failed to present a **prima facie** case as to that claim.

If the Court finds that **as a matter of law** the plaintiff failed to present admissible evidence supporting one or more of the required legal elements of one of her causes of action, the Court MUST grant a directed verdict for the defendant as to that particular cause of action. In this case the verdict is based on law and not fact, so the verdict is **"removed from the jury"**.

In a jury trial the judge may NOT grant a directed verdict if some admissible evidence was presented supporting each required element of the cause of action, no matter how unpersuasive it may have been, because the **weight** of the evidence is a matter for the jury to decide.

5. Presentation of Respondent's Defense

If the plaintiff has presented a prima facie case for one or more of the causes of action, the **burden of production shifts to the defendant** to present evidence in **defense**. If the defendant did not present an opening argument at the beginning of the trial he can present one before the presentation of defense evidence.

Defense evidence either supports an affirmative defense claim or disputes or offers an alternative explanation of the plaintiff's evidence. The plaintiff's evidence may be challenged as being **unpersuasive**, **unreliable** or **dishonest**.

The defendant may call defense witnesses and question them in **direct examination.** After that the plaintiff has a right to question them on **cross-examination.** If the plaintiff challenges the credibility of defense witnesses or raises new issues on cross-examination the defendant then has a right to question the defense witness again on **re-direct**, and that might be followed by additional questions from the plaintiff on **re-cross**, etc.

6. Rebuttal to Challenge and Rehabilitate Credibility of Evidence

When the defendant has finished presenting all of his evidence the defense **"rests"** and the plaintiff has a right to present additional evidence in **rebuttal**. The rebuttal would be limited to either attacking the credibility of defense evidence or **rehabilitating** the plaintiff's evidence after it has been challenged by the defense. This would be done by presenting new evidence to show that the evidence is reliable.

> **For Example:** Butthead presents evidence in his defense that attacks the plaintiff's witness, Doofus, as a nearsighted liar. Plaintiff Bevis then recalls Doofus in rebuttal to defend his credibility. On direct examination Bevis has Doofus demonstrate that his eyesight is very good with the glasses he was wearing on the day of the accident. Then Bevis calls Reverend Ralph to testify that in his opinion Doofus is very honest.

When the plaintiff's rebuttal has been concluded the defendant may present additional evidence in **response** to "rebut the rebuttal".

7. Request for Directed Verdict Before Case Goes to Jury

After the defense rests its case both parties may move the Court for a **directed verdict as a matter of law** before the case goes to the jury. The defendant would argue that the movant failed to meet his burden of production as to one or more causes of action. The plaintiff would argue that the defendant failed to meet the burden of production as to one or more affirmative defenses claimed. This does not concern the burden of persuasion; that is for the jury to decide.

8. Closing Argument and Jury Instruction

If the Court denies the motions for directed verdict, the plaintiff would present a **closing argument** in which she reminds the Court of all of the evidence that has been presented and argues that it proves she deserves a verdict in her favor. That would be followed by a closing argument from the defendant in which he would remind the jury of his own evidence and how persuasive it is. The Court may direct the parties to present written closing arguments in a bench (non-jury) trial.

Following the closing argument the judge would provide the jury with **jury instructions** explaining the law as it relates to the case before them.

The jury would then retire to deliberate and eventually return with a verdict as to each cause of action or criminal charge in the moving papers.

Chapter 5: Judicial Notice and Legal Presumptions

As stated previously, the purpose of evidence is to prove **material facts**, facts that would tend to establish the legally required elements of a claim, charge or affirmative defense, and the party claiming the fact has the **burden of production** of evidence to prove it.

But there are two way material facts can be established at trial without presentation of any evidence at all. That is by **judicial notice** and **legal presumption**.

1. Establishing Material Facts by Judicial Notice

A material fact may be claimed without supporting evidence if the Court takes **judicial notice** of that fact.

Judicial notice is means that the Court may recognize a fact to be true if it is **not subject to reasonable dispute** because it is either 1) **generally known** (within the jurisdiction of the trial court) or 2) **capable of accurate and ready determination** by resort to sources whose accuracy cannot reasonably be questioned. (FRE 201(b); CRE 450-460)

> **FRE 201: "(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.**
>
> **(b) Kinds of Facts. A judicially notices fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.**
>
> **(c) When Discretionary. A court may take judicial notice, whether requested or not.**
>
> **(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.**
>
> **(e) Opportunity to be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.**
>
> **(f) Time of Taking Notice. Judicial notice may be taken at any time of the proceeding.**
>
> **(g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to accept as conclusive any fact judicially noticed."**

The purpose of judicial notice is to prevent a waste of the Court's time proving facts that everyone already knows to be true as a matter of general knowledge.

Some types of facts that are often subject to judicial notice are the following:

- Existing laws;
- Procedural rules, court rules, rules of professional conduct, etc.;
- Court records;
- Definitions of words;
- Calendar dates; and
- Local geographical boundaries and time zones.

Judicial notice may be taken by the Court at any time. (FRE 201(f)) The Court has discretion to take judicial notice sua sponte, and it is mandatory when requested by a party that provides the Court with the necessary information. (FRE 201(c), (d))

An opposing party has a right to be heard on the propriety of a taking of judicial notice. (FRE 201(e); CEC 453, 455)

In **civil trials** the Court must instruct the jury that any fact the Court has taken judicial notice of **must be accepted** as a conclusive fact. (FRE 201(e)). California rules give the Court discretion to inform the jury unless a party requests instruction, and then instruction is mandatory. (CEC 457)

But, in **federal criminal trials** the Court must instruct the jury that any fact the Court has taken judicial notice of **may be accepted** as a conclusive fact, but **does not necessarily have to be accepted** as a fact. (FRE 201(e)) California law has no similar rule.

> **For Example:** In his criminal trial Bevis testifies that he was out of town when the robbery took place. He cannot recall the exact date when he left town but he is sure that it was the day after the World Trade Center was attacked. Defense attorney Doofus asks the Court to take judicial notice that the World Trade Center attack was on September 11, 2001. Since this is a matter of **general knowledge** the Court grants judicial notice of this fact. In a federal court the judge must instruct the jury that it **may, but is not required to, accept** as a fact that the date of the World Trade Center attack was September 11, 2001. In the California Evidence Code there is no identical rule.

2. Establishing Material Facts by Legal Presumption

A material fact may be claimed without supporting evidence when the law establishes a **legal presumption** of the fact. A presumption is not evidence. It is the assumption of a fact, and in some cases the proof of one fact through introduction of evidence supports a presumption that some other fact is also true.

Some legal presumptions **always apply**, and others allow proof of a fact to be claimed only if some other preliminary, related fact has been proven to be true. When a presumption is initially established it supports summary judgment unless contrary evidence is presented to create an "issue of material fact" for the finder of fact (e.g. jury) to decide.

---o0o---

A. General Presumptions Create Burdens for Opposing Parties

A **general presumption** is one that always applies, and the party claiming the fact has **no burden of production.** The opposing party then starts with a burden of producing evidence to prove the general presumption is incorrect. This type of presumption may be phrased, "X is presumed to be true."

> **For Example:** State statute: "Marriages are presumed to be valid..."

A general presumption is usually a **rebuttable presumption** that may be attacked with any relevant evidence.

> **For Example:** Every person is presumed to be a competent witness. (FRE 601; CEC 700) Bevis presents Doofus to testify as a witness in his civil suit against Butthead. If Butthead objects that Doofus is incompetent to testify as a witness he has the **burden of production** of evidence to disprove the general presumption that Doofus is competent.

---o0o---

B. Conditional Presumptions Shift Burden to Opposing Party

A **conditional presumption** is one that, by statute, is established by producing evidence to prove some other related fact. (See CEC 630-647) The party claiming the presumed fact starts with a **burden of producing** evidence to prove the preliminary facts. Once the preliminary facts are proven the presumption is established. That **shifts the burden of production** to the opposing party. This type of presumption may be phrased, "If A is true, X is presumed to be true."

> **For Example:** Brunehilda claims Bevis is the father of her child, Doofus, and should have to pay child support. State law states that a child born to a wife cohabiting with her husband, who is not impotent or sterile, is presumed to be a child of the marriage. So Brunehilda can prove Bevis is the father by producing evidence of three facts: 1) she was Bevis' **wife,** 2) they were **cohabitating** when Doofus was born, and 3) Bevis is **not impotent or sterile**. If she meets that burden of production she had done enough to prove Doofus is Bevis' child. The burden shifts to Bevis to prove that Doofus is NOT his child.

---o0o---

C. Mandatory, Permissive, Rebuttable and Conclusive Presumptions

A conditional legal presumption may be phrased as permissive or mandatory. Mandatory presumptions may be rebuttable or conclusive.

1) Permissive Presumptions

A **permissive presumption** allows but does not require the finder of fact (e.g. the jury) to presume a material fact is true by inference if certain evidence is produced. It may be phrased, "If A is true, then X may be presumed to be true." In contrast, a mandatory presumption requires a finding.

> **For Example:** There is a **permissive presumption** in virtually all courts that IF a finder of fact determines a criminal defendant **intentionally** shot a victim with a gun it may be presumed that the defendant **intended to cause great bodily harm**.
>
> **For Example:** There is a **permissive presumption** in all courts that IF a finder of fact determines a criminal defendant's **fingerprints** are found at the scene of a crime it may be presumed that the defendant **was at the scene of the crime**.

2) Mandatory Presumptions

A **mandatory presumption** requires the finder of fact (e.g. the jury) to conclude a material fact is true by inference if certain evidence is produced. It may be phrased, "If A is true, then X shall be presumed to be true." In contrast, a permissive presumption allows but does not require a finding. Mandatory presumptions may be either conclusive or rebuttable.

> **For Example:** At common law there was a **mandatory presumption** a child under the age of 14 years old was too young to form criminal intent. That meant that if a child younger than 14 was accused of a crime (that required proof of criminal intent) the jury HAD to presume the child was too young to understand his acts were wrongful. But this was a rebuttable presumption in some cases as explained below.

3) Rebuttable and Conclusive Presumptions

Mandatory presumptions may be either **rebuttable** or **conclusive**.

A **rebuttable presumption** requires a fact to be presumed if certain evidence is produced, but allows the presumption to be rejected on the basis of additional evidence. This presumption may be phrased, "If A is true, a rebuttable presumption is established that X is true." The presentation of contrary evidence is sometimes said to "burst the bubble" of the presumption.

> **For Example:** At common law there was a rebuttable presumption a child from 7 to 14 years old was unable to form criminal intent. That meant that if a child of that age was accused of a crime (that required proof of criminal intent) the prosecution **had to present admissible evidence** the defendant understood his acts were wrongful.

A **conclusive presumption** requires a fact to be presumed if certain evidence is produced and then no evidence will be allowed to refute the presumption. This presumption may be phrased, "If A is true, X shall be conclusively presumed to be true."

> **For Example:** At common law there was a conclusive presumption a child under the age of 7 was unable to form criminal intent. That meant a child of that age could not be convicted of a crime (that required proof of criminal intent) no matter how mature, experienced or worldly the child was.

Chapter 6: Hearsay

Even if evidence is not privileged and otherwise shown to be reliable and relevant, it may be inadmissible if it is hearsay. [6] **Hearsay is an out-of-court assertion or statement of fact by some "declarant" that is offered to prove the truth of the same fact asserted in the statement**. (FRE 801; CEC 1200) However, under the federal rules a statement that otherwise would be considered hearsay is non-hearsay if it falls into one of four specific categories that will be explained below (FRE 801(d)) This is **<u>one of the most important difference between California and federal law</u>.**

> **FRE 801: "…(c) "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted…"**

Hearsay is inadmissible evidence unless it falls into one of the statutory exceptions. (FRE 802; CEC 1200(b))

> **FRE 802: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by an Act of Congress."**

The **"declarant"** of a hearsay statement is the person that first made the statement. It can be the same person that is a witness relating their own prior statement in court, or it can be a third party that said something the witness is trying to repeat in court. (FRE 801(b); CEC 135)

> **FRE 801: "… (b) "A 'declarant' is a person who makes a statement."**

Hearsay may be offered in the form of **witness testimony** or in written form in a **document**.

An assertion for purposes of hearsay is typically a statement that **something is true.** This usually involves an assertion that:

1. Something **happened**;
2. Something **exists**; or
3. Something **is so**.

Hearsay evidence is **generally inadmissible,** but many out-of-court assertions are **not hearsay** at all. And there are **specific exceptions** to the general rule when a statement that is hearsay is still admissible into evidence anyway.

1. Three Reasons Hearsay is Generally Inadmissible

Hearsay is generally inadmissible for three reasons. First, **the declarant is not under oath** at the time of the statement so no threat of perjury assures the witness is being truthful.

[6] Note this is spelled "hearsay," not "heresay." It arises when a witness "hears" with their "ears" someone (a "declarant") "say" something and is later asked to "say" in court what they "heard" that person "say".

> **For Example:** Bevis sues Butthead over an auto accident. Gomer witnessed the accident and afterward **lied** saying, "Butthead ran a red light." Now Bevis calls Gomer to testify, "What did you say after the accident?" If Gomer is allowed to repeat his earlier statement he can **truthfully present his lie** to the jury without committing perjury. Instead of being asked about his prior statement Gomer should be asked **about the accident itself**.

Second, the **declarant was not qualified as a witness when they made the statement**, so there is no assurance they had **personal knowledge** to support their statement.

> **For Example:** Bevis sues Butthead over an auto accident. Gomer, a bystander at the accident scene, signed a sworn statement that said, "Butthead ran a red light." If Gomer is not available to testify at trial there is no way to know if he spoke from personal knowledge, knew Bevis from Butthead, was speculating or just repeating someone else. The fact the statement was "sworn" is irrelevant. This is hearsay in document form.

Third, the declarant is **not subject to cross-examination** so the opposing party is put at a distinct disadvantage. In the case of a criminal defendant this violates the 6th Amendment right to confront opposing witnesses. *Crawford v. Washington* 541 U.S. 36 (2004) held that hearsay statements by unavailable witnesses constituting "testimony" cannot be introduced at trial against a criminal defendant unless the defendant had an opportunity to previously confront and cross-examine the witness concerning the statement, no matter how reliable it otherwise appears to be. However in *Michigan v. Bryant,* February 28, 2011 the Supreme Court held a statement made by a dying crime victim was properly admitted because it was not "testimonial" in nature.

2. Not Everything Spoken is an Assertion of Fact

Statements are NOT hearsay if they are not assertions, statements that something **is true**, **has happened** or **some condition exists**. And even if a statement is an assertion, it is NOT hearsay if it is **not offered to prove the truth of the fact asserted** in the statement.

Many statements are not assertions because they do not state that anything is true, has happened or that any condition exits. They may be offered because they tend to prove something else. **Questions**, **imperatives**, **interjections**, **cheers** and **shouts** might NOT be assertions of fact.

> **For Example:** At trial Doofus testifies he heard a crime victim shout, "Help!" just before a shot rang out at midnight. This is not hearsay because "Help!" is an **imperative** that does not state anything is true, has happened or that a condition exists. While it <u>suggests</u> something was happening, the statement by itself does not <u>say</u> something is happening. It might only be relevant to establish the time of death.

But questions, imperatives, interjections, cheers and shouts might be hearsay if they are **presented at trial <u>for the purpose of implying an assertion</u>**. The implication depends on the context of WHO called the witness and WHAT the statement offered is intended to prove. A statement can be hearsay if offered for one purpose and not hearsay if offered for another. The determining question is always, "What is this supposed to prove?" That in turn often depends on "Who is offering the evidence?"

> **For Example:** Bevis is accused of murder. He denies being at the scene of the crime. The prosecution calls Doofus to testify he heard the homicide victim shout, "Bevis, don't

shoot!" just before a shot rang out. This is hearsay because the statement is offered to make the jury think the victim was saying, "Bevis is going to shoot me", and that is the very same thing the evidence is offered to prove. That makes it hearsay.

3. Some Gestures are Hearsay Assertions

A **gesture** or **nonverbal conduct** can be used as an assertion of fact, so evidence of an out-of-court gesture may be inadmissible hearsay if it 1) was made with the **intention of communicating** a statement of fact and 2) is **presented to prove the truth** of the matter asserted. (FRE 801; CEC 1200)

> **FRE 801: "(a) A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion…"**

Gestures of this sort might be the shaking or nodding of the head or the wave of a hand.

> **For Example:** Officer Oscar sees Bevis taking money from Butthead. He asks Butthead "Are you being robbed? Butthead nods. Bevis is arrested, but Butthead dies before the trial. At the trial Oscar is asked, "What did Butthead do when you asked him if he was being robbed?" This is inadmissible hearsay because Butthead nodded his head as an assertion that he was being robbed, and it is being offered as evidence to prove the very same thing, that he was being robbed.

But nonverbal conduct is never an assertion of fact **unless it was <u>intended</u>** by the declarant **to communicate an assertion of a fact**.

> **For Example:** Oscar sees Bevis taking money from Butthead. He asks "Are you robbing that guy?" Bevis runs away. At trial Oscar is asked, "What did Bevis do when you asked if he was robbing Butthead?" This is NOT hearsay because Bevis did not run away as a means of communicating a message, "Yes, I am robbing this guy".

4. Assertion Not Hearsay Unless Offered to Prove Assertion's True

A statement is never inadmissible hearsay unless the **purpose** of the party presenting the statement is to **prove the truth** of the statement. Statements are often presented for many other reasons, and if the statement is presented for one of these other reasons it is not hearsay.

---o0o---

A. Not Hearsay if Only Offered to Prove a Statement Was Made

An out-of-court statement can always be repeated in court for the purpose of proving that a statement was made and the nature of the statement as long as the purpose is NOT to prove that factual assertions within the statement are true.

> **For Example:** Monica sues Tripp for slander for saying "Monica is the cheapest whore in D.C." She calls Star as a witness and asks, "What did Tripp say?" Since the purpose of her evidence is to prove that Tripp made a defamatory statement and NOT to prove she is the "cheapest whore" this is not hearsay evidence.

Often statements of this type must be proven as an **element of a cause of action**. Some civil causes of action that require the proof of a statement are **defamation, false light, public disclosure of private facts, fraud, breach of contract,** and evidence of **marriage vows** for a **contract in anticipation of marriage** or family law actions.

Some crimes that require proof of a statement as an element are **solicitation, conspiracy,** and evidence of **marriage vows** for a charge of **bigamy**.

Sometimes this is cited as a "hearsay exception" called something like "statements of independent legal significance". That is really unnecessary because this is not an "exception" at all. These simply are not statements presented to prove the truth of the matter asserted.

> **For Example:** Seller enters into an agreement with Buyer. Seller asserts, "I (Seller) will deliver 10,000 widgets to Buyer by May 1". Seller fails to deliver, and Buyer sues for breach of contract. Buyer offers the contract as evidence to prove Seller made a contractual promise that was not fulfilled. It is not hearsay because it is not offered to prove the truth of Seller's assertion. It is offered to prove the **falsity** of Seller's promise because Seller did not deliver as promised.

---o0o---

B. Not Hearsay if Offered to Prove Presence or Existence of Declarant

Statements are not hearsay if presented to prove the **declarant was present or alive** at a certain time.

> **For Example:** Bevis is prosecuted for the murder of Butthead. Bevis claims he found Butthead's body after he was already dead. Tilly is called to testify that she was talking to Butthead on the phone just before he was shot and she heard Bevis in the background saying, "You are going to Hell, Butthead." This is not hearsay because it is presented to prove Bevis was present before Butthead died, not to prove he was "going to Hell."

---o0o---

C. Not Hearsay if Just Offered to Prove Knowledge of Facts

Statements are not hearsay if presented to prove the **declarant or some other person was knowledgeable of facts** at a certain time, but not to prove the facts themselves.

> **For Example:** Bevis sues Butthead for negligence in an auto accident. Bevis calls Doofus, an auto mechanic, who testifies that he inspected Butthead's brakes the day before the accident and found them to be defective. Bevis asks Doofus, "What did you tell Butthead about his brakes?" Butthead objects that this calls for hearsay. This is not hearsay if it is being presented to prove Butthead **was aware** of the defective brakes rather than to prove that the brakes were defective.

---o0o---

D. Not Hearsay if Offered to Prove the Assertion False

It is **never hearsay when false statements are presented to prove they are false** because hearsay requires presentation of statements to prove the assertions are true.

> **For Example:** Butthead is stopped by police, and he immediately blurts out, "I didn't commit no robbery." At his trial for robbery his statement is presented to show that he knew there had been a robbery, not to prove he did NOT commit the robbery. Therefore, the statement is presented to prove it **was a false statement**, not that it was a true one.

But a literally false statement can still be hearsay if it is offered to imply an assertion for the purpose of proving the implied assertion is true.

> **For Example:** Bevis sues over an accident. He calls Doofus to testify that after his accident Bevis cried and screamed "This broken arm is killing me!" This is hearsay even though it is not offered to prove the injury "killed" Bevis. The only relevant reason for Bevis to offer the statement is to imply the assertion, "This arm is broken and hurts." And he offered the statement to prove the same thing, that the arm was broken, causing him pain. Therefore this is hearsay.

5. No Hearsay if "Declarant" is Not a Person

Hearsay requires a declarant making assertions, and a declarant "is a **person**." (FRE 801(b); CEC 135) Therefore, the declarant must be a human, and there can be **no hearsay by an animal**.

> **For Example:** Bevis is arrested for burglary after a police dog indicated he was the burglar. The dog cannot be a declarant because dogs are not people. [7] So what the dog "said" cannot be hearsay.

Nor can the declarant be an inanimate object, so **photographs and other recordings of visual or factual evidence** are NOT hearsay. However **mechanically recorded assertions of people** MAY BE hearsay.

> **For Example:** Bevis is arrested for robbing a store. The prosecution presents a store videotape in which Bevis pulls a gun and the store owner responds, "Oh, my God. It's a robbery!" After Bevis leaves the store the owner says, "We've been robbed!" The video camera cannot be a declarant so none of the **visual recording** can be hearsay. But the statements by the store owner are recorded assertions there has been a robbery, and they are presented to prove the same thing. So the **verbal statements** are hearsay.

6. The Four Federal "Non-Hearsay" Categories

Under the federal rules (alone) **four specific types of statement are not hearsay** even though they otherwise would be hearsay. (FRFE 801(d)). Under California law these same four types of statements ARE hearsay, subject to exceptions. **This is one of the major differences between federal and California law**.

[7] Regardless of what many people in California and elsewhere apparently believe.

FRE 801: "… (d) "A statement is not hearsay if –

(1) *Prior Statement by Witness*. The declarant testifies at the trial … subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission of a Party-Opponent.* The statement is offered against a party and is (A) the party's own statement … or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (C) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

In other words, these four types of statement that are NOT hearsay under FRE 801(d), even though they otherwise meet the criteria of the hearsay definition, are:

1. **Admissions** of an opposing party;
2. **Inconsistent prior statements** by a witness under oath;
3. **Consistent prior statements** by a witness to rebut insinuation of dishonest testimony; and
4. **Prior statements of identification** of a person after seeing or perceiving them.

In the last three of these situations the person that made the statement (i.e. the declarant) MUST testify as a witness at the trial or hearing and be subject to cross-examination about the prior statements they have made.

---o0o---

A. Admissions of a Party Opponent

An admission of a party opponent is almost any statement by a party that is **presented as evidence by the opposing party.** Admissions by a party opponent ARE hearsay under California law but admissible under a statutory exception. (CEC 1220-1225) Admissions of a party opponent are NOT hearsay under the federal rules. (FRE 801(d) (2))

> **For Example:** Bevis is arrested for robbing a store. The prosecution presents a store videotape in which Bevis says, "This is a stickup!" The vocal statement by Bevis is an **admission of a party opponent** because it was **said by Bevis** and is being **used against him** by the prosecution. It is not hearsay under the federal rules and it is admissible hearsay under the California rules.

Admissions can be made by a party in the **pleadings,** either in the **plaintiff's complaint**, the **defendant's answer,** in the pre-trial **motions**, in **depositions,** in response to **requests for admissions** served in discovery, or otherwise in any type of **written or oral statement.**

1) Admission Can be by Opposing Party's Agent

An authorized admission by an **agent or spokesperson** for a party is an admission by the party.

> **For Example:** Bevis sues Butthead over an auto accident. Butthead's attorney Al writes a letter to Bevis stating, "Butthead's brakes were bad." This is an admission by Butthead, not hearsay, because **he authorized Al to speak for him** when he hired him.

2) Admission by Opposing Party's Co-Conspirator

A statement by a co-conspirator **during and in furtherance** of a conspiracy can be used as an admission of the other conspirators.

> **For Example:** Bevis and Butthead enter into a conspiracy to smuggle drugs into the country. Bevis urges Doofus to join them saying, "Butthead made a million bucks last year sneaking heroin in this way." At trial Doofus is called and asked, "What did Bevis say?" This is an admission of a party opponent and NOT hearsay since Bevis was Butthead's **co-conspirator** and he made the statement **during and in furtherance** of the conspiracy.

3) Admission by Silence or Adopting a Third-Party's Statement

Parties admit facts are true if they **"manifest an adoption or belief in the truth"** of any statement of the facts by others.

> **For Example:** Bevis and Butthead have an auto accident. The Highway Patrol the accident report says both drivers were at fault. In discovery Bevis admits the Highway Patrol accident report is correct. By admitting the report is correct Bevis has admitted that he was partly at fault.

Adoption of a statement of facts may be **manifested by silence** if a reasonable person in the same circumstance would voice disagreement. But a reasonable person may remain silent if a crime is involved to avoid self-incrimination.

> **For Example:** After an auto accident a witness approaches Bevis and says, "You went right through a red light." Bevis silently hangs his head in shame. The statement of the witness is can be treated as an admission of liability by Bevis because a reasonable person who was not liable would have denied responsibility in the same situation.

A "manifestation of admission by silence" is also implied when a civil defendant's **answer fails to deny** any allegation of material fact in a plaintiff's complaint because the rules of civil procedure require a denial of every disputed fact.

4) Admissions in Discovery Responses and Confessions

In **civil cases** responses to discovery requests are common sources of admissions. These are responses to **"requests for admissions," "requests for production of documents"** and **"interrogatories."**

---o0o---

B. Inconsistent Prior Statements

An **inconsistent prior statement** is a prior statement by a witness that is inconsistent with testimony given by the witness under oath, **offered to prove that the prior statement was true**.

Under federal rules inconsistent prior statements are **NOT hearsay if** the prior statements were **made under oath** subject to the penalty of perjury at a **trial, hearing** or other **proceeding** and the declarant testifies at the trial and is subject to cross-examination. (FRE 801(d) (1)) Otherwise inconsistent prior statements ARE hearsay under the federal rules but can still be used to impeach the declarant who must be given an opportunity to explain or deny the statement and subjected to cross-examination. (FRE 613(b))

Under California law inconsistent prior statements are admissible hearsay as long as the declarant is a witness and has been given an opportunity to explain or deny the statement or else is still subject to recall to testify. (CEC 1235, 770)

> **For Example:** Butthead states he saw Bevis rob a store but later at trial he says he didn't see anything. Under federal rules his prior statement can be offered to prove Bevis robbed the store IF it was made under oath. Otherwise he can only be confronted with it for impeachment purposes. Under California rules his prior statement can be offered to prove Bevis robbed the store if Butthead is questioned about it at trial or is still subject to recall to explain or deny it at the time it is offered into evidence.

---o0o---

C. Consistent Prior Statements

A **consistent prior statement** is a prior statement by a witness **offered to support the credibility of the witness' testimony** AFTER their credibility has been attacked, either because their later statements were inconsistent or else by express or implied suggestion their testimony is fabricated or influenced by bias or other improper motives.

Prior consistent statements can only be admitted if they were made BEFORE the **inconsistent statements** or implications of **bias, improper motives** or **motives to fabricate** arose.

Under federal rules consistent prior statements that meet these criteria are NOT hearsay IF the declarant testifies at the trial and is subject to cross-examination about the prior statement. (FRE 801(d) (1))

Under California rules consistent prior statements that meet these criteria are admissible hearsay but the **declarant does not have to be subject to cross-examination** about it. (CEC 1236, 791)

> **For Example:** Brunehilda witnesses a robbery. Bevis is charged with the crime. She is interviewed by the police and says she has never seen Bevis before and he is not the robber. Before trial Bevis and Brunehilda start dating. At trial Brunehilda testifies for Bevis' defense, but the prosecutor suggests she is lying to keep her "boyfriend" out of jail. Brunehilda's prior statement can be admitted to prove Bevis is not the robber because she

made the statement before she had any motive to lie. Under federal rules Brunehilda must be subject to cross-examination about the statement but not under California rules.

---o0o---

D. Prior Statements of Identification of a Person

A statement of identification is a statement identifying a person as a participant in a crime or other event offered to prove the truth of the statement.

Under federal rules statements of identification are NOT hearsay IF the declarant testifies at the trial and is subject to cross-examination about the prior statement of identification. (FRE 801(d)(1))

Under California rules consistent prior statements that meet these criteria are admissible hearsay if the statement was made when the occurrence was 1) **fresh in the witness' memory**, and the witness testifies that he 2) **made the identification** at that time and it was 3) a **true reflection of his opinion** at the time. (CEC 1238)

> **For Example:** Granny witnesses a robbery. At a line-up she tells police she recognizes Bevis as the robber. Granny appears at trial but is so senile she can't remember anything. The prosecution calls police officer Paul to repeat what Granny said at the line-up. Under federal rules it is not hearsay because it is a statement of identification of a person made after perceiving the person, she was at trial, and she was subject to cross-examination. The fact that she can't remember anything is irrelevant. But under California rules this is inadmissible hearsay because she can't testify at trial that she identified Bevis in the first place or that it was a true reflection of her opinion at the time.

7. Federal and California Hearsay Exceptions

Four California hearsay exceptions are given above for admissions of a party opponent, inconsistent prior statements, consistent prior statements, and statements of identification. Under federal rules those are not hearsay, so they are not hearsay exceptions. Other than those, there are a number of other hearsay exceptions in both California and federal law as explained below.

Hearsay can be admitted into evidence under a large number of **exceptions**. Those are circumstances when hearsay statements have enough inherent reliability that exclusion is not justified.

Five of the remaining hearsay exceptions require the declarant to be unavailable to testify. The other exceptions apply whether the declarant is available to testify or not.

Sometimes an exception applies to only a portion of what was said, and in that case the portion of the statement that does not qualify for the exception must be **redacted, excluded or removed** and only the admissible portion of the statement can be admitted into evidence.

---o0o---

A. Exceptions Admitting Hearsay When Declarant is Unavailable

There are situations when hearsay is admissible into evidence because the **declarant is unavailable** to testify. The exceptions are:

1. **Statements against the best interest** of the declarant that would subject them to such a loss of money, profits, ownership, civil or criminal liability, or hatred and contempt that no reasonable person would make the statement unless it were true; (FRE 804; CEC 1230)
2. **Former testimony** by the declarant at a trial, hearing or deposition where the opposing party had similar motives and an opportunity to question and challenge the declarant; (FRE 804(b)(1); CEC 1292) California rules also allow admission of former testimony that previously was used by the opposing party in other actions. (CEC 1291)
3. Statements of **pedigree**, a person's personal or family history including information about birth, adoption, marriage, death, ancestry or other similar fact of personal or family history; (FRE 804(b)(4); CEC 1310-1316)
4. A **dying declaration** by a person that believes they are about to die concerning the cause or circumstances of their impending death; (FRE 804(b)(2); CEC 1242)

[Note: Remember these four exceptions -- **S**tatements against interest, **F**ormer testimony, **P**edigree, **D**ying declarations -- by the mnemonic "**S**an **F**rancisco **P**olice **D**epartment." [8]]

1) Five Reasons a Declarant Might be Unavailable to Testify

There are **five reasons a declarant might be "unavailable" to testify**. (FRE 804(a); CEC 240):

1. The declarant is **dead** or so **physically or mentally ill** they cannot testify;
2. The declarant **cannot be found after reasonable effort** or **compelled to testify**;
3. The declarant **testifies to a lack of memory** about a prior statement or otherwise is **disqualified** or cannot be qualified to act as a competent witness;
4. The declarant **refuses to testify** after being ordered to do so by the Court;
5. The declarant is **exempt** from testifying because of a **privilege**.

2) Statements Against Interest

Out-of-court statements are admissible if 1) the declarant is **unavailable** to testify and 2) it is a **statement against interest** because it 1) **subjects the declarant to criminal or civil liability** or is 2) **contrary to the declarant's pecuniary or proprietary (i.e. financial) interest** so that 3) a **reasonable person would not have made** such a statement unless it were true. This is **admissible hearsay** under both the federal and California rules. (FRE 804(b) (3); CEC 1230)

For this provision to apply the **declarant cannot be a party**. Otherwise the statement is an **admission of a party opponent** and admissible for that reason even if the declarant is available.

> **For Example:** Doofus rams Bevis with a car registered to Butthead and flees to Berzerkistan. Bevis can't sue Doofus so he sues Butthead for negligent entrustment.

[8] For this and other helpful exam tips buy **"How to Write Evidence, Remedies, Corporations and Professional Responsibility Law School Exams"** by Tim Tyler, Ph.D., Attorney at Law, ISBN 1-879563-59-2 from any local law book store or internet vender.

> Butthead offers a signed contract showing that Doofus bought the car from Butthead before the accident. This is hearsay because it is an out-of-court assertion (by Doofus, the declarant) offered to prove he bought the car before the accident. But it is a **statement against interest** because it **subjected Doofus to civil liability** and **reasonable people don't say such things** unless it is true. Therefore it is admissible hearsay to prove the assertion that Butthead did not own the car at the time of the accident.

BUT there is an exception to this rule under federal law only when a statement against interest is offered in **criminal defense**. **Corroborating evidence** of **inherent trustworthiness is required** under the federal rule if the statement 1) would have **exposed the declarant to criminal liability** and 2) is **offered in criminal defense** of another accused. California law does not have this provision.

> **For Example:** Bevis is accused of murder, and Butthead confesses that he is the "real" murderer, not Bevis. This is not admissible by Bevis in his defense under federal law without **corroborating evidence** because it exposed Butthead to **criminal liability** and is **offered in criminal defense of another person**, Bevis. Perhaps Butthead knew or believed he would suffer no real "detriment" from his statement. So the federal rules require corroborating evidence, and the California rules do not.

3) Former Testimony

Former testimony is admissible hearsay if the declarant is **unavailable** to testify as a witness and it was given at 1) a **trial**, **hearing** or **deposition** where 2) the opposing party had **an opportunity and similar motives to question and challenge** the declarant. (FRE 804(b) (1); CEC 1291)

> **For Example:** Bevis is accused of robbery. Matilda, a 90-year old witness to the robbery, testifies about what she witnessed in a **deposition**. Bevis' attorney has an opportunity to participate in the deposition, and the same motive to question Matilda that he would have at trial. Later Matilda is too ill to testify at trial, so the prosecutor can introduce her testimony at trial under the **former testimony** hearsay exception.

4) Statements of Pedigree

Statements of pedigree are admissible hearsay if declarants are **unavailable** to testify at trial. This involves statements by the declarants about their own or some other relative or close friend's birth, adoption, marriage, divorce, ancestry, family history, death, etc. It also includes statements in religious documents, family bibles, church records, civil records, etc. (FRE 804(b) (1); CEC 1310-1316)

> **For Example:** Darth Vader tells Luke Skywalker, "Luke, I am your father!" Then he dies. Luke can admit this statement as evidence supporting his claim against Vader's estate, even though it is hearsay, because **Vader is unavailable** to testify and it is a **statement of pedigree** by Vader about his own **family history** and the **birth and ancestry** of his son, Luke.

5) Dying Declarations

Under federal rules a **dying declarations** are admissible hearsay in a criminal homicide or civil action if the declarant is **unavailable** to testify and made the statement while 1) **believing they would soon die** and the statement is about 2) the **cause or circumstances of the impending death**. (FRE 804(b) (2)) Under California rules the declarant must be "dying" at the time the statement is made. (CEC 1242) No California case law has been found holding whether or not the declarant must be dead by the time of trial.

> **For Example:** Tom and Dick, two convicts fresh out on parole, pick up Trixie, a stoned floozy, in a bar and go for a ride. Trixie jumps from the car and dives through the front window of a old house. Tom and Dick flee. Trixie tells the police Tom and Dick were trying to rape her. While Tom and Dick are awaiting trial Trixie is critically injured in a car wreck. She thinks **she is dying because God is punishing her** for her lie, so she confesses Tom and Dick were not really trying to rape her. This would have been admissible as a dying declaration (if she died) because she 1) **thought she was dying** and her statement 2) concerned **the cause of her impending death**. If she had not died and repeated her previous lie at trial it would have been admissible as an **inconsistent prior statement** as explained earlier. (CEC 1235, 770) [9]

6) The "Confrontation" Exception to these Exceptions

Be aware that the above rules concerning when out of court assertions can be admitted only because the declarant is unavailable are evidence rules. But they may come into direct conflict with the 6th Amendment right of a criminal defendant to confront adverse witnesses, which is a criminal procedure rule. Under *Crawford v. Washington* 541 U.S. 36 (2004) hearsay statements by unavailable witnesses that constitute "testimony" cannot be introduced at trial against a criminal defendant unless the defendant had an opportunity to previously confront and cross-examine the witness concerning the statement, no matter how reliable it otherwise appears to be. However it may be "arguable" whether the statement is "testimonial" in nature. In *Michigan v. Bryant,* February 28, 2011 the Supreme Court held a statement made by a dying crime victim was properly admitted because it was not "testimonial" in nature.

---o0o---

B. Previous Hearsay Exceptions that Required Declarant Unavailable

There used to be other hearsay provisions that required declarants to be unavailable. One of them, the "Inherently Trustworthy" exception was in FRE 804. But that provision has now been recodified as FRE 807, and the requirement the declarant must be unavailable has been eliminated. It will be discussed more below.

California rules have two other hearsay provisions that require declarants to be unavailable, but they are most certainly unconstitutional due to a recent holding of the US Supreme Court:

- **Recorded statements by witnesses** were admissible hearsay if they shown by clear and convincing evidence to have been **killed or kidnapped to prevent them from testifying** against criminal defendants accused of **serious felonies**; (CEC 1350)

[9] True story. My friend was appointed to represent Tom and Dick. Trixie survived.

- **Recorded statements by witnesses** were admissible hearsay if the declarant was **dead** and the statement concerned **gang activities**. (CEC 1231 et seq.)

In *Crawford v. Washington* 541 U.S. 36 (2004) the Supreme Court held that hearsay statements by unavailable witnesses that constitute "testimony" are inadmissible at trial against a criminal defendant unless the defendant had been given a reasonable opportunity to confront and cross-examine the witness concerning the statement, even if the statement otherwise seems to be inherently trustworthy. But in Michigan v. Bryant, February 28, 2011, the Supreme Court held a dying statement by a crime victim was admissible because it was not "testimonial" in nature.

> **For Example:** Tom is arrested for a crime. As part of a plea bargain he agrees to testify before the Grand Jury that he was a member of a gang and saw Dick, the gang leader, kill several people. All of his testimony is given in secret under oath. **If Tom dies** before Dick is tried for the alleged murders, and Dick is not given a reasonable opportunity to confront and cross examine Tom about his statement, the statement is inadmissible hearsay. It **cannot be admitted as "former testimony"** because Dick had no opportunity to confront and cross-examine Tom. It is **not a declaration against interest** because it was given precisely for the opposite reason, to gain a benefit. And under *Crawford* it **can not be admitted as "inherently trustworthy", "killed to prevent testimony"** or **"gang activity"** either.

---o0o---

C. Other Hearsay Exceptions Regardless of Declarant Availability

There are a number of other exceptions when hearsay may be admitted whether the declarant is available or not. They are:

1) Present Sense Impression (FRE 803(1); CEC 1241);
2) Excited Utterance (FRE 803(2); CEC 1240);
3) Statement of Existing Mental, Emotional or Physical Condition (Hillmon Doctrine) (FRE 803(3); CEC 1250);
4) Statement of Memory or Belief to prove Prior Mental, Emotional or Physical Condition. Federal rules allow this only if concerns the execution, revocation, identification or terms of declarant's last will and testament. (FRE 803(3)) California rules allow this only when the declarant is unavailable and the prior mental, emotional, physical condition is at issue, not to prove acts committed by the declarant. (CEC 1251)
5) Statements for Medical Diagnosis and Treatment (FRE 803(4); CEC 1253);
6) Recorded Recollection (FRE 803(5); CEC 1237);
7) Various Record Exceptions;
   a) Business Records (or absence thereof) (FRE 803(6), (7); CEC 1270-1272);
   b) Public Records (or absence thereof), other than the use of law enforcement agency records against a criminal defendant. Civil judgment records. (FRE 803(8), (10); CEC 1280,1284, 1301, 1302);
   c) Vital Statistics (or absence thereof) (FRE 803(9) (10); CEC 1281-1284);
   d) Church and Family Records (FRE 803(11), (12), (13); CEC 1313, 1315, 1316);
   e) Property Records (Deeds, Easements, Wills, Trusts, etc.) (FRE 803(14), (15); CEC 1321-1323, 1330);
   f) Ancient Records (20 years federal; 30 years California) (FRE 803(16); CEC 1331);

   g) Market Reports, Commercial Tabulations and Lists (FRE 803(17); CEC 1340);
8) Learned Treatises (FRE 803(18); CEC 1341);
9) Evidence of Reputation or History
   a) Reputation (or Judgment) on Personal and Family History (FRE 803(19), (23); CEC 1310-1316);
   b) Reputation (or Judgment) on Property Boundaries and Community History (FRE 803(20), (23); CEC 1320-1323);
   c) Reputation of Character (FRE 803(21); CEC 1324);
10) Felony Convictions (FRE 803(22); CEC 1300);
11) Inherently Trustworthy Statements. Federal only. (FRE 807);
12) Statements Concerning Creation and Existence of a Declarant's Will. California only. (CEC 1260)
13) Statements by Decedents Regarding Claims or Demands Against Their Estates. California only. (CEC 1261)
14) Statements by Children (under age 12) Minors to Prove Criminal Child Abuse. California only. (CEC 1360) Statement must be found to be inherently reliable or the declarant must testify.
15) Allegations of Physical Abuse. California only. Statements must be recorded or otherwise made to emergency or medical personnel within prior five years. If offered in a criminal action certain provisions apply concerning allegations of elder abuse, but this application is probably unconstitutional. (CEC 1370, 1380)

1) Exception: Present Sense Impression

A **present sense impression** is admissible hearsay if it is 1) a **statement describing or explaining an event or condition** that was 2) **made while the declarant was perceiving the event or condition or immediately thereafter**. (FRE 802(1), CEC 1241) The term "immediately thereafter" means so soon afterwards that the declarant speaks spontaneously.

> **For Example:** While looking out the window with binoculars security guard Doofus tells his supervisor, Gomer, "I see G. Gordon Liddy breaking into the Democratic National Headquarters in the Watergate building." Doofus' statement is admissible hearsay when repeated at trial because it is a **statement describing or explaining an event made while the declarant perceived the event or immediately thereafter.**

2) Exception: Excited Utterance

An **excited utterance** is admissible hearsay if it is 1) a **statement about a startling event or condition** that was 2) **made while the declarant was under the stress of excitement caused by the event or condition**. (FRE 802(2); CDC 1240)

> **For Example:** Doofus runs to Gomer and <u>excitedly</u> exclaims, "Golly, Butthead ran a red light and smacked Bevis!" Doofus' statement can be repeated at trial because it is a **statement describing or explaining a <u>startling</u> event** and it was **made while the declarant was under the stress of excitement caused by the event.**

Note the difference between the excited utterance and the present sense impression. An excited utterance requires a **startling event** and the declarant must be **under stress** at the time of the statement. A present sense impression can be about any kind of event but the statement must be

made **while perceiving (i.e. hearing, seeing) the event or immediately afterward**. "Immediately afterward" means an immediate verbal response upon perception of an event.

3) Existing Mental, Emotional Condition and Hillmon Doctrine

A **statement of existing mental, emotional or physical condition** is admissible hearsay. (FRE 802(3); CEC 1250) This may also be called a **"state of mind"** or **"physical condition"** exception. A broad range of statements qualify for this exception including claims of presently existing **pain, emotions, worries, concerns, ambitions, desires, plans, hopes, intentions, fears, anxiety, existing health, sleepiness, insomnia, knowledge,** and **awareness.**

> **For Example:** Bevis sues Butthead over an auto accident. At trial Doofus offers to testify that three weeks after the accident Bevis said "For the first two weeks my arm was killing me!" This statement is NOT ADMISSIBLE because it is a **statement of Bevis' MEMORIES about his past physical condition**. To be admissible Bevis has to state how his arm feels at the **present** time, not how it felt at some time in the past.

Under the **"Hillmon Doctrine" a person's statement that they plan or intend to do something** is admissible as evidence of "present mental condition" **to prove that they later did** the thing they said they intended to do. (*Mutual Life Insurance Co. of New York v. Hillmon,* (1892) 145 U.S. 285.)

> **For Example:** Bunny tells her roommate Trixie, "I am going to Bevis' to study." The next day Bunny's nude body is found on the edge of town. Bevis tells investigators he had not talked to Bunny in weeks. To prove Bunny went to Bevis' house, the prosecutor asks Trixie, "Where did Bunny say she was going?" This is admissible hearsay under the **Hillmon Doctrine** because it is a statement of Bunny's **plan, intent or mental condition**.

4) Memory of Prior Mental, Emotional or Physical Condition

Statements of memories or beliefs concerning **prior mental, emotional or physical condition** generally can NOT be admitted, but there are a couple exceptions to this general rule. Federal rules allow statements of memory or belief concerning the execution, revocation, identification or terms of the declarant's **testamentary Will**. (FRE 803(3)) And California rules allow **trustworthy** statements about memories or beliefs concerning prior mental, emotional, or physical condition, **if the condition is at issue**, not to prove acts committed by the declarant, if **the declarant is unavailable**. (CEC 1251)

> **For Example:** Tom executes a Will that gives his entire estate to his daughter, Dee, without knowledge that he also has a son, Sonny, born to a woman who did not tell him he was the father of her child. He later discovers the truth and tells attorney Al, "I wrote my first Will to give everything to Dee because I thought she was my only child. But now that I know Sonny is my son, I want to draft a new Will that will revoke the other Will and give my estate equally to Dee and Sonny." Tom dies before signing the new Will. If his statement is offered to prove that his first Will was the result of his mistake it is hearsay. But it is a statement about his prior mental state when he drafted his first Will, that he did not know Sonny existed at that time.

5) Exception: Statements for Medical Diagnosis and Treatment

A **statement made for medical diagnosis or treatment** is admissible hearsay, including includes statements of **present or past symptoms, medical history** and possible **causes of medical problems**. (FRE 802(4); CEC 1253)

> **For Example:** Baby Huey is taken to the hospital for treatment of a broken arm. Little Huey tells Nurse Nancy, "Daddy hurt me because I pooped my pants." At a trial for child abuse Nurse Nancy can repeat what Little Huey said because it was a **statement of medical history made for purposes of medical diagnosis and treatment**.

6) Exception: Recorded Recollection Exception

A **recorded recollection** is admissible hearsay that can be **read into the record** if it is a **memorandum or recorded statement of information about an event or condition** that the declarant made or adopted when it was 1) **fresh in the witness' memory** and 2) **accurately reflects** what the witness once knew, if 3) the witness is now **unable to testify fully and accurately** about the events. (FRE 802(5); CEC 1237)

The memorandum or recorded statement can NOT be offered into evidence as an **exhibit** by the party offering it, but it may be entered as an exhibit at the request of the **opposing** party.

> **For Example:** Granny sees a robbery and writes down the license number of the get -way car. At trial she **testifies she wrote down the license number carefully at the time of the robbery but cannot now remember what it is.** Her original notation is admissible hearsay as a **recollection recorded.** The number <u>can be read from the paper</u> into the record. The notation itself cannot be admitted as an exhibit by the prosecution but can be by the defense.

7) Exception: Various Records

Generally many types of records can be admitted into evidence as **exhibits**, even if they are hearsay, if they are **properly authenticated** to show the Court (i.e. the judge) that the documents meet minimum requirements of reliability. The means by which documents and other exhibits may be authenticated will be explained later in Chapter 9 on the presentation of exhibit evidence.

a. Business Records. Any report or record of activities, events, opinions, diagnoses, etc. 1) **made by a person with personal knowledge** 2) as a **regularly practiced activity** of any business, profession, occupation, institution, etc. is admissible, even if hearsay, to prove that an event occurred or an act was committed IF 3) **a custodian or other qualified witness testifies** to show these facts concerning the source of the information unless 4) the Court finds the evidence **lacks trustworthiness**. (FRE 803(6); CEC 1271)

The **absence of existing records** when they otherwise would exist also can be admitted as evidence as proof that an event did not occur or an act was not committed. (FRE 803(7)); CEC 1272)

Under California rules a claim based on business records MUST be authenticated by a custodian of records available to testify who is **knowledgeable about who created the record offered, how**

and why, but the **federal rules now allow the record to be admitted if it is certified** by the custodian of records. (FRE 902(11), (12))

> **For Example:** Bevis is sued by Sears. At trial administrative assistant Trixie is presented to authenticate a billing that shows Bevis owes Sears $500. But Trixie admits she has **no personal knowledge** about **who created** the billing, **how** it was created or if it was just created for presentation at the trial. The evidence is inadmissible hearsay in any court because Trixie lacks the personal knowledge required of a custodian of records.

b. Public Records. The regularly kept records of activities that a public agency has a **duty to report** or **regularly keeps** in the normal course of business are admissible, even though they are hearsay. Civil judgments can be included in this category. But **police and law enforcement records cannot be admitted against a criminal defendant** under this exception. (FRE 803(8), (10); CEC 1280, 1284, 1301, 1302))

c. Vital Statistics, Family, Church and Certificate Records. Records that are not from a public agency are still admissible to prove the event occurred or act was committed if they are regularly kept records of births, deaths, or marriages **reported to a public office** as required by law, OR certificates of marriage or baptism **made by a clergyman or public official,** OR **regularly kept church records** of the above events as well as of divorces, legitimacy, ancestry, blood relationships or family history OR **family records** contained in family Bibles, genealogies, etc. (FRE 803(9), (11), (12) and (13); CEC 1281-1283, 1313, 1315, 1316,). The **absence of such records** determined after a diligent search has been made for them can also be used to prove an event did not occur or an act was not committed. (FRE 803(10); CEC 1284)

d. Property Records. Copies of recorded documents and statements of other documents affecting property interests may be admissible hearsay if a statute authorizes their recordation or they are otherwise relevant to the purpose of the document. (FRE 803(14) and (15); CEC 1321-1323, 1330)

e. Ancient Documents. ANY statement contained in any properly authenticated document is admissible hearsay, regardless of its character. (FRE 803(16); CEC 1331) Under the federal rules the document must be over 20 years old, and under California rules it must be over 30 years old.

f. Market Reports and Commercial Lists. Market quotations, directories, tabulations and lists that people regularly depend on are admissible hearsay. (FRE 803(17); CEC 1340) This would include things like daily stock prices, weather reports and the telephone book.

8) Exception: Learned Treatises

Statements contained in **historical works**, **history, medicine, books of science or art**, **treatises**, and **published maps** are admissible hearsay. (FRE 803(18); CEC 1341)

Federal rules require these to be works an **expert witness relies on** or that are **brought to the expert's attention** on cross-examination and claimed or admitted to be a **reliable authority** on any subject. Statements made in the work can be read into evidence (but not received as an exhibit).

9) Exception: Reputation Evidence

When authenticated character evidence of reputation (i.e. local gossip, rumor and belief) is admissible at all it is not inadmissible because it is based on hearsay. The admissibility of character evidence is explained in Chapter 7.

a. Personal or family history. Evidence of a reputation among a person's family, among their associates, or within their community concerning their birth, blood relationship, ancestry, legitimacy, adoption, marriage, divorce, death, etc. may be admitted into evidence in that dispute even though it is based on hearsay. (FRE 803(19); CEC 1324) Further, federal rules make judgments concerning such matters admissible in lieu of evidence of reputation. (FRE 803(23))

b. Reputation of Boundaries and Local History. Properly qualified evidence of reputation as to property boundaries, land use or ownership and other aspects of local history that exist before a dispute arises may be admitted into evidence in that dispute even though it is based on hearsay. (FRE 803(20); CEC 1320-1323) Further, judgments concerning such matter are admissible as proof in lieu of evidence of reputation. (FRE 803(23))

c. Reputation of Character. Evidence of the reputation of a person is admissible under FRE 803(21) and CEC 1324, even if it is based on hearsay, gossip and rumor, both to prove material facts and to challenge the credibility of a witness, as will be explained in Chapter 7.

10) Exception: Felony Convictions

Evidence of a **felony conviction or guilty plea** may be admitted to prove **any fact essential to the judgment** (FRE 803(22); CEC 1300) HOWEVER, there is a **major difference between federal and California law**.

Federal rules do NOT allow a **nolo contender** plea to be used as evidence of a conviction (FRE 410); California rules DO ALLOW a **nolo contender** plea to be used as evidence of a conviction.

Further, it is IMPORTANT to understand that **this does NOT concern the use of criminal convictions to challenge the credibility of witnesses**. The use of character evidence to challenge the credibility of witnesses will be explained in Chapter 7.

11) Exception: Inherently Trustworthy Statements

Under federal rules, only, there is a general hearsay exception that the Court has discretion to admit out-of-court statements to prove the truth of the matter asserted if **no other hearsay exception applies** yet the circumstances indicate that the statement is **inherently trustworthy** to the extent that other hearsay exceptions generally justify admitting hearsay. (FRE 807). In the past this exception was only allowed if the declarant was unavailable, but recent changes to the FRE now allow admission of this sort of statement **whether the declarant is available or not**.

HOWEVER, in the case of *Crawford v. Washington* 541 U.S. 36 (2004) the Supreme Court held that hearsay statements by unavailable witnesses that constitute "testimony" are inadmissible at trial against a criminal defendant unless the defendant had been given a reasonable opportunity to confront and cross-examine the witness concerning the statement, even if the statement otherwise seems to be inherently trustworthy. However in *Michigan v. Bryant,* February 28, 2011 the

Supreme Court held a statement made by a dying crime victim was properly admitted because it was not "testimonial" in nature.

Crawford was based on Constitutional grounds. The Court held that the 6th Amendment right to confront and cross-examine adverse witnesses is violated by admission of hearsay if the prosecution unreasonably denied the defendant an opportunity to confront and cross-examine. This is not a consideration when it comes to many forms of hearsay such as dying declarations because in those circumstances the prosecution seldom has any ability to allow the defendant to confront and cross-examine.

12) Exception: Statements Concerning Wills

Under California rules, only, there is a general hearsay exception that the Court has discretion to admit out-of-court statements by a declarant concerning the **making, existence or revocation of a Will** if the Court finds that the circumstances do not suggest the statement lacks trustworthiness. (CEC 1260)

There is no exactly equivalent federal rule but it might be argued that FRE 803(15), a statement in a document establishing an interest in property, applies. Otherwise, under the federal rules one would have to argue that statements in Wills are "inherently trustworthy statements" subject to FRE 807, as discussed above.

13) Exception: Statements by Decedents Concerning Estates

Under California rules, only, there is a general hearsay exception that the Court has discretion to admit out-of-court statements by a decedent to prove or disprove **claims or demands against the estate of the decedent** if the statement was based on the personal knowledge of the decedent, was made when events had been recently perceived by the decedent, and the decedent's recollection was clear, unless the Court finds that the circumstances suggest the statement lacks trustworthiness. (CEC 1261)

Here again there is no exactly equivalent federal rule and it would have to be argued that FRE 803(15), a statement in a document establishing an interest in property, or FRE 807, the "inherently trustworthy statement" exception, apply.

> **For Example:** Tess gives her son, Benny, $10,000 and states, in a contemporaneous writing, that it is an advancement against her estate. She dies. The statement is presented to prove that the conveyance was, in fact, an advancement against her estate (disproving or reducing Benny's claim otherwise against to the estate). It is hearsay because it is an out-of-court statement offered to prove the assertion made. Under California CEC 1261 this is admissible hearsay. Under federal rules the party offering the statement would have to argue that it is an inherently trustworthy statement (FER 807) or else that it is admissible under FER 803(15) as a statement affecting Benny's interest in property (the estate).

14) Exception: Statements by Children to Prove Criminal Child Abuse

Under California rules, only, there is a general hearsay exception that the Court has discretion to admit out-of-court statements by **a child under the age of 12 to prove criminal child abuse** if the Court finds that the circumstances suggest the statement is inherently reliable. (CEC 1360)

HOWEVER, the holding in *Crawford v. Washington* 541 U.S. 36 (2004) appears to make this unconstitutional unless the defendant had been given a reasonable opportunity to confront and cross-examine the witness concerning the statement, even if the statement otherwise seems to be inherently trustworthy. Otherwise the defendant would be unreasonably denied the right to confront and cross-examine the witness. No known case has held this as yet but it is a logical inference from the *Crawford* decision.

15) Exception: Statements to Prove Criminal Physical Abuse

Under California rules, only, there is a general hearsay exception that the Court has discretion to admit out-of-court statements by **an alleged victim of physical abuse to prove criminal abuse occurred** if the Court finds that the circumstances suggest the statement is inherently reliable. (CEC 1370, 1380) This primarily applies to **elder abuse**.

HOWEVER, as is the case with CEC 1360 directly above, the holding in *Crawford v. Washington* 541 U.S. 36 (2004) appears to make this unconstitutional unless the defendant had been given a reasonable opportunity to confront and cross-examine the witness concerning the statement, even if the statement otherwise seems to be inherently trustworthy. Otherwise the defendant would be unreasonably denied the right to confront and cross-examine the witness. No known case has held this as yet but it is a logical inference from the *Crawford* decision.

8. Multiple Hearsay - Hearsay Within Hearsay

A hearsay statement may be repeated within another hearsay statement, and hearsay within hearsay is admissible **if each separate hearsay statement would qualify for a hearsay exception** provided in the rules of evidence when considered alone. (FRE 805; CEC 1201)

> **FRE 805: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."**

To determine whether "hearsay within hearsay" is admissible each sequential assertion must be examined, chronologically, and if each assertion in turn would qualify for a hearsay exception when considered by itself, every hearsay within the chain is admissible.

> **For Example:** Granny sees a robbery in progress and says to Grampa, "Write this down as I read it to you." Granny reads the license number of the getaway car as the robbers flee, and Grampa writes it down. At trial neither Grampa nor Granny can remember the license number, so the prosecution wants to read the written notation into evidence. This is hearsay within a hearsay because Granny told Gramps what she saw, and Gramps wrote on paper what he heard. Granny's statement to Grampa would be admissible as a **present sense impression,** a statement describing or explaining an event or condition while the declarant (Granny) saw it happen. What Grampa wrote may be admissible as present sense impression of what he heard, or perhaps as a **recollection recorded,** an accurate record of facts while fresh in his mind but that can no longer be remembered. Since each assertion is admissible when viewed alone, the combined hearsay within hearsay is admissible.

Hearsay within hearsay can be repeated many times over.

For Example: Prince offers to testify that he is the rightful heir to the throne of Saxony because his father was Duke who was told that his grandfather was Earl, and that Earl was told by Regent that he was the son of the King. Each of these statements is hearsay, but each is admissible, in turn, because of the exception for "statements of pedigree".

9. Attacking and Supporting the Credibility of the Declarant

If hearsay is admissible, or if an "admission of a party opponent" is admitted into evidence and the admission was not made by the opposing party but rather by the party's agent, servant, employee, spokesperson or co-conspirator, the credibility of the declarant can be attacked in the same manner as if the declarant were a witness testifying in court, and the declarant of statements admitted by opposing parties can be called as witnesses and cross-examined. (FRE 806; CEC 1202, 1203)

> **FRE 806: "When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.**

The means by which the credibility of a witness may be attacked or supported in this circumstance is explained in Chapter 7.

Chapter 7: Character Evidence

The rules of evidence restrict the admission of some **"character evidence"**, and this is possibly the most confusing area of evidence law for law students. Much of that confusion arises because the term "character evidence" is seldom explained or defined with clarity prior to discussion of the evidence rules.

Fortunately, there are **only a few differences between federal and California rules** for admitting character evidence.

1. Character Evidence is Generally Admissible

"Character" is actually not defined in the evidence codes but the term may be loosely used to describe four "characteristics" of people:

- **Abilities** (physical and mental, opportunity);
- **Physical state** (e.g. height, weight, race, sex, health);
- **Mental state** (e.g. preference, affection, bias, disdain, repulsion, knowledge, awareness, intention, beliefs, motive, plans); and
- **Past acts** (behavior, habits, honesty, violence, sexual acts).

Under the evidence rules of the FRE and CEC **most character evidence is generally admissible** and unaffected by the "character evidence" rules.

2. Only Evidence of Past Acts is Subject to Limitation

Evidence rules generally prohibit admission of "character evidence" from being admitted only when it concerns **past acts** of **people** and then **only for two particular purposes** in **certain situations**. Since these are the situations when understanding of the "character evidence" rules is most important, law school instruction tends to focus on these situations, often to the exclusion of all other types of "character evidence". This is the applicable logical hierarchy:

1) Character evidence is **generally admissible**;
    a) The main focus of Evidence classes is on **exceptions** to that general rule concerning **past acts of people** being presented for **two particular purposes** and **certain situations** when "character evidence" is **generally NOT admissible**, BUT
        i) There are several **exceptions** when character evidence is still admissible anyway.

Professors (and legal reference works) may focus so much on these exceptional situations when "character evidence" concerning **past acts** is generally NOT admissible that the term "character evidence" begins to be used synonymously with those "**past act**" situations. When that happens other character evidence that is always admissible may not be discussed at all, or it may not be considered to be "character evidence" at all. This produces confusion because the professor may say, "Character evidence is NOT usually admissible." That is wrong because "most" character is evidence IS usually admissible, unless the term "character evidence" is used to mean "past acts".

---o0o---

A. Inadmissible Character Evidence Always Concerns People

In the situations when "character evidence" is generally not admissible the evidence always concerns the **past acts of people** (or organizations comprised of "people") as opposed to the "character" of animals, places or things such as machines. (FRE 404; CEC 1101(a).)

> **For Example:** Bevis claims Butthead's dog, Fang, bit him. Bevis offers evidence that Fang has bitten people in the past. This has nothing to do with character evidence because Fang is a dog, not a person. The "character evidence" rules simply have no application.

---o0o---

B. Inadmissible Character Evidence Always Concerns Past Acts

In the situations when "character evidence" is generally not admissible the evidence always concerns the **past acts** of people.

> **For Example:** Vic is robbed by a 7-foot tall masked white man carrying a samurai sword. Don is accused of the attack, and the prosecution offers evidence that Don is a 7-foot tall white man who has been arrested in the past for robbing people while wearing a mask and carrying a samurai sword. The evidence of Don's height, race, and sex would NOT be inadmissible because of the "character evidence" rules because it has nothing to do with Don's "past acts". But his past acts of robbing people with a samurai sword while wearing a mask would generally be inadmissible "character evidence".

---o0o---

C. Some Evidence of Past Acts is Inadmissible for Other Reasons

Some "past acts" of a person may be inadmissible evidence for reasons other than as a result of limitations on the presentation of "character evidence":

- Evidence of **remedial measures by a person** are not admissible to prove negligence by the person or that a product was defective, but not because it is "character evidence". (FRE 407; CEC 1151)
- Evidence a person made **offers in compromise,** had **insurance coverage**, made **humanitarian offers and payments**, made **withdrawn pleas**, made **plea offers**, voiced **expressions of sympathy**, or made any statements made in conjunction with those acts are inadmissible to prove liability for a claim, invalidity of the claim, or amount of liability. (FRE 408-411; CEC 1151-1155, 1160)

---o0o---

D. Admissibility of Past Act Evidence Depends on Purpose, Party, Action and Form

The admissibility of evidence of past acts depends on whether it is offered for CERTAIN PURPOSES (e.g. to impeach the credibility of a witness), by CERTAIN PARTIES (e.g. criminal defendants), given the TYPE OF ACTION (e.g. civil or criminal), and the FORM (e.g. evidence of opinion or reputation). To determine if evidence is admissible one must consider:

1. WHAT is the evidence offered to prove (i.e. the PURPOSE of the evidence)?
2. WHICH PARTY is presenting it (e.g. defendant, plaintiff, prosecution)?
3. Is it a CRIMINAL or CIVIL action?
4. Is it evidence of SPECIFIC ACTS or evidence of OPINION and REPUTATION?

---o0o---

E. When Admissible, Usually Admissible in Form of Opinion or Reputation

If character evidence is otherwise admissible at all, it can usually be admitted in the form of **opinion** and **reputation**, even if that is based on **hearsay**. (FRE 405, 608, 803(21); CEC 1100) The exception is when evidence of **past sexual acts** or acts of **domestic violence** (California rules only) is used to prove an act is committed. The wording and context of the statutes for that demand evidence of specific acts.

---o0o---

F. Evidence of Past Acts Generally Not Admissible for Two Purposes

Evidence of past acts committed by a person (as evidence of the "character" of that person) is generally not admissible as evidence to prove one of two things about that same person:

1. That the person **committed some other similar act** that is denied or disputed; OR
2. To prove that the person **should not be believed** when they testify **as a witness**.

3. Inadmissible Character Evidence Mini-Outline

The following "mini-outline" gives a condensed outline of the rules for "past act" character evidence:

THE TWO "WRONGFUL PURPOSES" FOR WHICH CHARACTER EVIDENCE IS GENERALLY INADMISSIBLE AND THE EXCEPTIONS FOR EACH

1. **PAST ACT CHARACTER EVIDENCE IS GENERALLY NOT ADMISSIBLE TO PROVE A PERSON COMMITTED A DISPUTED ACT** (or did not commit the act): Evidence of **past acts by a person** is generally **NOT admissible to prove the same person committed a disputed act** (or did not commit it) **on some other occasion**. (FRE 404(a); CEC 1101(a)).
    a. **EXCEPTION – IT CAN BE ADMITTED TO PROVE A CLOSELY RELATED ISSUE**: Character evidence may be admitted to prove a **closely related issue** such as WHO committed an act, WHY an act was committed or

WAS POSSIBLE to commit the act. (FRE 404(b); CEC 1101(b)) Specifically, evidence of past acts may be admitted -

i. To **identify** the person who committed an act;
ii. To prove a person had a **motive** to act;
iii. To prove a person had **ability** to act;
iv. To prove there was a **plan**, preparation or scheme to act;
v. To prove there was **intent** to act;
vi. To prove an act was **no mistake**;
vii. To prove a person had **knowledge** of facts; OR
viii. To prove there was an **opportunity** to act. [10]

b. **EXCEPTION - HABIT**: Evidence of **habitual** or **customary practices**. (FRE 406; CEC 1105) can be offered to prove a person committed (or did not commit) a disputed act.

c. **EXCEPTION - CRIMINAL DEFENDANT**: A criminal defendant can offer evidence of these past acts to challenge a prosecution claim or support a defense:
   i. **Evidence of their <u>own past acts</u>** (character) can be offered to prove it is inconsistent with the charges or consistent with their defense claims. (FRE (404(a) (1); CEC 1102(a)) This usually is evidence the defendant is honest or non-violent.
      1. **REBUTTAL**: But if a criminal defendant admits such evidence **the prosecution** can offer similar evidence in rebuttal. ((FRE (404(a)(1); FRE 1102(b))
   ii. **Evidence of an <u>alleged victims' past act</u>** (character) can be offered to prove it is inconsistent the charges or consistent with their defense claims. (FRE (404(a) (2); CEC 1103(a) (1)) This usually is evidence the alleged victim is dishonest or violent.
      1. **REBUTTAL**: If a criminal defendant admits such evidence **the prosecution** can offer similar evidence in rebuttal. ((FRE (404(a)(2); FRE 1103(a)(2))

d. **EXCEPTION - SEXUAL OFFENSES**: If a defendant is accused of sexual offenses, evidence of **past sexual offenses** by the same defendant may be offered as evidence to prove they committed the sexual offenses they have been accused of.
   i. **FEDERAL**: Under the federal rules of evidence:
      1. **SEXUAL ASSAULT and CHILD MOLESTATION**: Evidence of **past sexual assaults** or **child molestation** (only) can be presented when a **criminal OR civil** defendant is accused of **sexual assault** or **child molestation** (FRE 413(a), 414(a), 415(a)).
         a. **NOTICE**: 15 days notice to the defendant is required. (FRE 413(b), 414(b), 415(b).
   ii. **CALIFORNIA**: Under the California rules of evidence:
      1. **SEXUAL OFFENSES**: Evidence of **past sexual offenses** (essentially rape, child molestation and sodomy) can be presented in **criminal cases** (only) if a defendant is accused of the same sort of **sexual offenses**. (CEC 1108(a))

[10] Mnemonic "I'M A PINKO".

a. **NOTICE**: 30 days notice to the defendant is required. (CEC 1108(a))

iii. **California v. Federal**: Federal rules allow this evidence to be used in civil cases and California rules do not.

e. **EXCEPTION – PRIOR SEX ACTS OF ALLEGED VICTIM**: **Character evidence** of the **past sexual acts** of an **alleged victim** of a alleged offense CAN be admitted to:

i. **PROVE CAUSE/SOURCE OF CRIMINAL EVIDENCE**: Evidence of **specific prior sex acts** by the alleged victim CAN be offered by a **criminal defendant** to **prove those caused or are the source of physical evidence** that the defendant is accused of illegally causing (e.g. source of semen, cause of injury, etc.) (FRE 412(b)(1)(A); CEC 1103(c)(1), by omission)

ii. **PROVE CONSENT**: Evidence of **specific prior sex acts** by the alleged victim **with the defendant** (only) CAN be admitted in criminal or civil actions by a prosecutor or plaintiff, and it can be offered by a **criminal or civil defendant** to **prove the alleged victim consented** to sexual conduct. (FRE 412(b) (1) (B); CEC 1103(c) (1), (3), 1106(a), (b)). EXCEPT -

1. **EXCEPTION TO THE EXCEPTION - MANNER OF DRESS:** Evidence of the manner of dress of the alleged victim of a sexual offense is NOT admissible unless the Court determines it must be admitted in the interests of justice. (CEC 1103(c)(2))
2. **NOTICE**: Federal rules only allow admission of evidence after a hearing on noticed motion. (FRE 412(b)(2);)
3. **REBUTTAL**: If the prosecution presents evidence of the prior sexual conduct of the alleged victim of a sexual assault the defendant can admit evidence of the alleged victim's prior sexual conduct in rebuttal. (implied by FRE 412(b)(1)(C); expressly stated in CEC 1103(C)(4))

iii. **INADMISSIBLE VICTIM SEXUAL EVIDENCE:** The above rules are narrow and by omission and exception make evidence of the alleged sexual offense victim's prior sexual acts with anyone other than the defendant, sexual reputation or opinions about the sexuality of the alleged victim are all INADMISSIBLE to prove consent.

iv. **California v. Federal**: California has a specific statute making evidence of "manner of dress" inadmissible, and federal law has a special noticed motion requirement.

f. **EXCEPTION – PRIOR ACTS OF DOMESTIC VIOLENCE**: **Character evidence** of the **past acts of domestic violence** CAN be admitted under the California rules (only) to prove a **criminal defendant committed acts of domestic abuse**. (CEC 1109(a))

i. **California v. Federal**: Only California has such a rule.

g. ADMISSIBLE FORM OF PAST ACT EVIDENCE: When evidence of past acts is admissible to prove a person committed (or did not commit) a disputed act, it is **admissible in any form** including opinion, reputation and evidence of specific acts **EXCEPT evidence of sexual conduct** and **domestic violence** (California only). By implication, and construct of the statutes, admissible evidence in those situations must be evidence of specific acts.

2. **PAST ACT CHARACTER EVIDENCE IS GENERALLY NOT ADMISSIBLE <u>TO CHALLENGE THE CREDIBILITY OF A WITNESS</u>**: Generally evidence of **specific past acts** is not admissible to challenge the credibility of a witness. This concerns past acts by the witness or some other person that are not directly relevant to any material issues in dispute, but rather tend to make the witness less believable in general. Since evidence of past acts is generally inadmissible, the only "character evidence" that can generally be used to challenge the general believability of a witness is evidence of **opinion** and **reputation** concerning the witness' **honesty** or **reliability**. (FRE 608(a)(b); CEC 786, 787, 790) This is referred to as the "**Collateral Evidence Rule**".
    a. **WHO CAN CHALLENGE? Any party** can challenge the credibility of a witness. (FRE 607; CEC 785)
    b. **CHALLENGING WITNESS "CHARACTER" DISTINGUISHED FROM CHALLENGING WITNESS TESTIMONY**. Challenging the credibility of a witness means to attack the **<u>general</u> character** of the witness **NOT the testimony** of the witness. The testimony by a witness can always be challenged as being incorrect or unreliable. Specifically, evidence of specific past acts can always be admitted to challenge the -
        i. **Ability** of a witness to actually perceive, recollect, or communicate the facts;
        ii. The **opportunity** of a witness to perceive facts;
        iii. The **bias, motive** or **interest** of a witness in the matter in dispute;
        iv. **Prior inconsistent statements** by a witness about the matter in dispute;
        v. **Prior consistent statements** by a witness about the matter in dispute after credibility has been brought into question; (CEC 791)
        vi. **Incorrect or false factual statements** by a witness during or before testimony;
        vii. **Prior attitude** of a witness toward the matter in dispute; and
        viii. **Prior admissions of untruthful** statements by a witness.
    c. **NO EVIDENCE OF HONESTY UNTIL DISHONESTY SUGGESTED.** No evidence can be presented to show a witness is <u>honest</u> unless the honesty of the witness has previously been called into question. (FRE 608; CEC 790)
    d. **NO EVIDENCE OF RELIGION**. No evidence of the **religious beliefs of a witness** can be introduced to either attack or support the credibility of a witness. (FRE 610; CEC 789)
    e. **FEDERAL EXCEPTION FOR CROSS EXAMINATION.** Evidence of specific acts can be admitted, at the discretion of the Court, to challenge or support the credibility of a witness can be admitted under the federal rules (only) on cross-examination. (FRE 608(b))
    f. **GENERAL EXCEPTION FOR PRIOR CONVICTIONS**: Evidence a witness has previously been convicted of a crime may be admitted to challenge the credibility of the witness. The California rule is very simple and the federal rules are very complex.
        i. **GENERAL EXCEPTION TO THIS EXCEPTION - PARDON**: Evidence of a prior conviction cannot generally be admitted if a pardon has been granted based on innocence, rehabilitation, or similar procedure applies. (FRE 609(c); CEC 788)
        ii. **CALIFORNIA RULE**: **Any evidence of a prior conviction of a witness for a felony** can be admitted to challenge the credibility of that witness. (CEC 788)

1. **NO CONTEST PLEAS**: A plea of "no contest" is treated the same as a conviction.

iii. **FEDERAL RULE**: Evidence of a prior conviction of a witness can be admitted to challenge the credibility of that witness if –

1. **Any conviction of any crime of dishonesty**, felony or misdemeanor, issued **within the prior 10 years** is unconditionally admissible. (FRE 609(a)(1), (2))
2. **Felony** convictions issued within the **prior 10 years** if the court determines the **probative value of the evidence outweighs its prejudicial effect to the accused**. (FRE 609(a)(1))
3. **Felony** convictions issued more than **10 years prior** if the court determines the **probative value of the evidence substantially outweighs its prejudicial effect to the accused** and the adverse party is given sufficient **written notice** for a fair opportunity to contest the use of the evidence. (FRE 609(a)(1), (b))
4. **NO CONTEST PLEAS**: A plea of "no contest" is NOT treated the same as a conviction. (FRE 410(2))
5. **EXCEPTION – JUVINILE ADJUDICATIONS**: Juvenile adjudications are not generally admissible under this exception under federal rules. (FRE 609(d))
6. **PENDING APPEAL HAS NO EFFECT**: The pendency of an appeal has no effect on this rule. (FRE 609(e))

iv. **California v. Federal**: Three main differences:

1. California - only **felony** convictions can be admitted; federal - **misdemeanors** for crimes of dishonesty can be admitted;
2. California - **no time limit**; federal law - **10-year time limit**;
3. California - **no contest pleas** are convictions; federal law – no contest pleas are **not convictions**.

4. Past Act Evidence Generally Inadmissible to Prove Disputed Acts

Evidence of the **past acts of a person**, is generally **NOT admissible to prove a disputed act was committed** (or not committed) **on any specific occasion**. (FRE 404(a); CEC 1101(a)). This rule is strictly interpreted, and there are several exceptions to it.

> **FRE 404: "(a) Character Evidence Generally. Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except…"**
>
> **For Example:** Bevis negligently caused a traffic accident. Six years later he is accused of causing a second accident. To prove Bevis caused the second accident the plaintiff offers evidence Bevis caused the first accident. This is improper use of character evidence because the plaintiff cannot use evidence Bevis was negligent the first time to prove he was negligent in the second accident.

---o0o---

A. Character Evidence is Admissible to Prove Facts Other than "Action in Conformity"

Character evidence of the **past acts of a person** is admissible to challenge prove material facts other than "action in conformity with character". (FRE 404; CEC 1101(a)) This often is the case when the fact an act was committed is undisputed but **why** the act was committed or **who** committed it is disputed.

> **FRE 404: "… (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."**

In the federal rule a criminal defendant must be given **advance notice** if the prosecution intends to use evidence of past acts for these purposes. There is no equivalent California rule.

1) Past Acts Admissible to Prove Intent

Evidence of past acts can be admitted to prove that a person **acted intentionally** (or did not).

> **For Example:** Bevis hits Butthead. He claims it was an accident. Evidence that he has repeatedly hit Butthead in the past can be admitted to prove he **acted intentionally**.

2) Past Acts Admissible to Prove Motive.

Evidence of past acts can be admitted to prove that a person had (or did not have) a **motive** to act.

> **For Example:** Tippler is charged with stealing whiskey. He testifies **he does not drink**. This is admissible to prove he **did not have a motive** to steal the whiskey.

3) Past Acts Admissible to Prove Plan or Scheme

Evidence of past acts can be admitted to prove that a person had (or did not have) a **plan or scheme to commit some act**.

> **For Example:** Harris, the Florida Secretary of State, turns Black people away from the polls in Florida. She claims she acted because of a computer error. Evidence that Harris has repeatedly caused Black people to be barred from the polls in the past is admissible to show she had a **plan or scheme** to cause this result.

4) Past Acts Admissible to Prove Identity

Evidence of past acts can be used to **identify an accused person as being the perpetrator** of a wrongful act. But this is subject to a **strict rule**. When character is used for this purpose it requires

a **distinctive and substantial similarity** between the past acts (characteristics) of the accused and the wrongful acts of the unknown perpetrator.

> **For Example:** An Asian man wearing a ski mask robs a store at gunpoint. Wong is accused, and evidence is offered that he is an Asian man and has been convicted of robbing stores at gunpoint in the past wearing a ski mask. This evidence is NOT admissible because it does not identify Wong in any distinctive way. There are many other Asian men who could have committed this robbery in the same exact way. [11]

5) Past Acts Admissible to Prove Knowledge

Evidence of past acts can be used to prove **knowledge** (or lack of knowledge) of some fact.

> **For Example:** Granny is scaled when she spills hot coffee purchased at McDonald's. Granny offers evidence that numerous customers have been scalded by McDonald's coffee in the past. This is NOT admissible to prove McDonald's sold Granny coffee that was too hot (action in conformity with character). But it IS admissible to prove McDonald's **had knowledge** that hot coffee created dangers to customers.

6) Past Acts Admissible to Prove Opportunity or Ability

Past acts can be admitted to prove a person had an **opportunity** or **ability** to do some disputed act.

> **For Example:** Jackson is accused of molesting children at his Wonderland Ranch. Evidence is offered to show he often got in bed naked with children. This is not admissible to prove he molested the children (action in conformity), but it is admissible to prove he had ample **opportunity** to molest them.

---o0o---

B. Exceptions When Character Evidence CAN Prove Disputed Acts

There are **general exceptions** when evidence of the past acts of a person can be admitted to prove the person committed disputed acts.

1) Evidence of Habit

Evidence of a person's **habits** can be introduced to prove they committed a dispute act because they had a rigid habit of acting that way. (FRE 406; CEC 1105)

> **FRE 406: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."**

[11] For character evidence to be admissible to identify a person it must be **highly distinctive**. How distinctive in a criminal case? Easy answer – distinctive enough that it proves identity beyond a reasonable doubt.

> **For Example:** To prove that Don ran a red light and caused an accident Paul offers evidence that Don has had many tickets for running through red lights. This evidence is NOT admissible because it does not show **strict adherence** to a routine.

2) Character Evidence Offered by Criminal Defendant

Criminal defendants may admit evidence about their **own character** and the alleged **victims' character** to prove they did NOT commit criminal acts they are accused of and/or to prove alleged victims committed disputed acts. (FRE 404, CEC 1102, 1103)

> **FRE 404 (a) Character evidence generally**
>
> **Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:**
>
> **(1) Character of accused - In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a) (2), evidence of the same trait of character of the accused offered by the prosecution;**
>
> **(2) Character of alleged victim - In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;**

If criminal defendants offer character evidence about themselves or alleged victims for this purpose it "**opens the door**" for the prosecution to offer character evidence in **rebuttal**. (FRE 404; CEC 1103) CEC 1102 does not expressly state that a criminal defendant can admit evidence of his own past "specific acts" but that difference is without effect. [12]

> **For Example:** Don is sued for conversion. He asks Reverend Roy to testify that he is a very honest person. This is NOT admissible because he is not a criminal defendant.

Under federal rules, in a **criminal homicide** case (only) if the defendant presents any evidence the alleged victim was the **aggressor**, the **door is open** for the prosecution to introduce evidence that the victim was a peaceable person. (FRE 401(a) (2)) There is no exact California equivalent to this rule.

---

[12] In 1982 Proposition 8, the "Victim's Bill of Rights" was passed establishing Section 28(d) of Article I or the California Constitution which states, *"Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103."* That eliminated any restriction that CEC 1102 may have had in preventing criminal defendants from presenting "specific act" evidence.

> **For Example:** Del is charged with murdering Vic in a bar fight. Smitty testifies for Del that he was at the bar and Vic started the fight. That **opens the door** for the prosecution to offer evidence Vic was a passive fellow.

3) Evidence of Sexual Offenses by Defendant

If a defendant (civil or criminal) is accused of **sexual offenses** the prosecution or plaintiff may admit evidence of past sexual offenses by the same defendant to prove the sexual offense complained of actually was committed. The rules are different between federal and California law because federal law allows this in **both civil and criminal** actions while California only allows it in criminal actions.

Federal Law: Under federal rules the prosecution in a **criminal** case and the plaintiff in a **civil** case can introduce evidence of past **sexual assault or child** molestation by the defendant to prove that a sexual assault or child molestation was committed on a specific occasion. (FRE 413(a), 414(a), 415(a)) 15 days **notice** to the defendant is required. (FRE 413(b), 414(b), 415(b)).

> **FRE 413: "(a) In a criminal case … of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible…"**
>
> **FRE 414: "(a) In a criminal case … of child molestation, evidence of … another offense or offenses of child molestation is admissible…**
>
> **FRE 415: "(a) In a civil case [based on] … alleged … sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible …**
>
> **For Example:** Michael Jackson is sued for child molestation. The plaintiff offers evidence that he had previously been accused of child molestation and had paid the complaining child $15 million to make the problem go away. This IS admissible evidence in federal courts.

California Law: If a defendant (criminal only) is accused of sexual offenses (listed by penal code) of **past sexual offenses** (essentially rape, child molestation and sodomy) can be presented in **criminal cases** (only) if a defendant is accused of similar **sexual offenses**. (CEC 1108(a)) 30 days notice to the defendant is required. (CEC 1108(a))

> **For Example:** Michael Jackson is charged with child molestation. The prosecution offers evidence that he had previously been accused of child molestation and had paid the complaining child $15 million to make the problem go away. This IS admissible evidence in both California and federal court, and it is actually what happened in his trial in California.

4) Evidence of Prior Sex Acts of Alleged Victim to Explain Physical Evidence

Generally evidence of the prior sex acts of an alleged victim of sexual assault are NOT admissible to prove the victim acted in any way. (FRE 412; CEC 1103(c))

> **FRE 412: "(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):**
>
> > **(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.**
> >
> > **(2) Evidence offered to prove any alleged victim's sexual predisposition…"**

But there are two main exceptions to this general rule. The first is that both the prosecution and criminal defendants can admit evidence of **specific prior sex acts** by the alleged victim of an alleged sexual offense to **prove what caused or is the source of physical evidence**. (FRE 412(b) (1) (A); CEC 1103(c) (1), by omission) This is not proof that the victim acted in a certain manner as much as an explanation of the factual evidence.

> **FRE 412: "… (b) Exceptions –**
>
> > **(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:**
> >
> > > **(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;**
> > >
> > > **(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and**
> > >
> > > **(C) evidence the exclusion of which would violate the constitutional rights of the defendant…."**

For Example: Paris claims she was raped by the entire Duke lacrosse team, and bruises and sperm samples suggest it is true. The **criminal** defendants can admit evidence that Paris is a raging nymphomaniac who had sex with several other people at or about the time she claims to have been raped because it **explains the source of the bruises and sperm**.

5) Evidence of Prior Sex Acts of Alleged Victim to Prove Consent

Evidence of **specific prior sex acts** by the alleged victim **with the defendant** (only) CAN be admitted in criminal or civil actions by a prosecutor or plaintiff, and it can be offered by a **criminal or civil defendant** to **prove the alleged victim consented** to sexual conduct. (FRE 412(b) (1) (B); CEC 1103(c) (1), (3), 1106(a), (b)).

Also, federal rules also allow **civil** defendants accused of **sexual misconduct** to admit evidence of the prior **sexual behavior and sexual predisposition** of the alleged victim on a finding by the Court that the probative value substantially outweighs the danger of unfair prejudice and harm to the alleged victim. (FRE 412(b) (2)) California rules do not expressly address this issue. This might be offered to prove the alleged victim **consented** to sexual contact but might also be to prove the alleged victim did not suffer the **injuries** claimed.

> **FRE 412 … (b) Exceptions –**
>
> **(2): "In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if … its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim."**
>
> **For Example:** Flowers claims Clinton she was an innocent virgin when Clinton seduced her so she is scarred for life and should be awarded $10 million. Clinton may be allowed to admit evidence showing that Flowers had engaged in a lot of prior sexual activities, if not to prove consent at least to rebut the claim of damages.

A **motion and finding by the Court is required** 14 days in advance of the introduction of the evidence.

However, in California (only) evidence of the **manner of dress** of the alleged victim of a sexual offense is NOT admissible unless the Court determines it must be admitted in the interests of justice. (CEC 1103(c) (2))

> **CEC 1103: (c) (1) … in any prosecution [for various enumerated sexual offenses including child molestation] …evidence of [the alleged victim's] … sexual conduct … is not admissible by the defendant … to prove consent …**
> **(2) … evidence of the manner … the victim was dressed at the time of the commission of the offense shall not be admissible … on the issue of consent … unless the evidence is determined by the court to be relevant and admissible in the interests of justice. …**
> **(3) Paragraph (1) shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.**

Federal rules only allow admission of evidence after a hearing on noticed motion, but there is no equal California rule. (FRE 412(b) (2).)

And if the prosecution presents evidence of the prior sexual conduct of the alleged victim of a sexual assault the defendant can admit evidence of the alleged victim's prior sexual conduct in rebuttal. (implied by FRE 412(b) (1) (C); expressly stated in CEC 1103(C) (4))

> **For Example:** Paris claims she was raped by Dick. Paris testifies that she was a virgin when Dick brutally forced himself upon her. Dick offers evidence Paris previously had sex with the entire Duck lacrosse team to prove she consented to have sex with him. This is NOT admissible evidence **to prove Paris consented** to have sex with Dick because it is **not evidence Paris had sex with the defendant**, Dick, but the **prosecution opened the**

door on itself by having Paris claim to be a virgin. As soon as it did that, Dick had a Constitutional right to confront her (the witness) with any and all conflicting testimony that would impeach the credibility of her claims. That is not as much an evidence rule as it is a criminal procedure rule.

6) Evidence of Prior Acts of Domestic Violence

Evidence of prior acts of domestic violence (e.g. spouse abuse, child abuse, elder abuse) CAN be admitted in California (only) in **criminal actions** (only) to prove that acts of **domestic violence** were committed on a specific occasion. (CEC 1109(a)) There is no similar federal rule.

> **ECE 1109: "(a) (1) … in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is [admissible]…**
> **(2) … in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is [admissible] …**
> **(3) … in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of child abuse is [admissible] …"**

For Example: Britney is charged with beating her child. She denies it and says the child was injured by a fall. Evidence of prior acts of child abuse by Britney CAN be admitted to prove that the alleged act of child abuse occurred.

---o0o---

C. Admissible Forms of Evidence to Disputed Prove Acts

When evidence of past acts is not admissible to prove an act was committed (or not committed) on a specific occasion under the above exceptions, it is **generally admissible in any form** including opinion, reputation and evidence of specific acts. The only **exceptions** are that **evidence of sexual conduct** and **domestic violence** (California only) by implication, and construct of the statutes, must be evidence of specific acts.

---o0o---

D. Summary Comparison of Federal and California Rules

In general, there are **few differences between federal and California law** concerning the use of character evidence **to prove disputed acts were committed**, and the few differences are unlikely to be the subject of law school or Bar examination. The differences worth noting are:

1. California law (alone) allows the prosecution to admit evidence of past acts of **domestic violence** to prove further disputed acts of domestic violence;
2. Federal law (alone) allows a **civil** plaintiff to admit evidence of past acts of **sexual acts of a defendant** to prove acts of sexual misconduct were committed on a specific occasion; and
3. Federal law (alone) allows the criminal prosecution to admit evidence a **homicide victim** was non-violent if the defendant claims the alleged victim was the **aggressor**.

5. Generally No Specific Act Evidence to Impeach Witness Credibility

Evidence of specific acts of a person is **generally inadmissible to challenge the credibility of a witness**. Generally the credibility of a witness can only be challenged by evidence of **opinion** and **reputation**. (FRE 608(a) (b); CEC 785, 786, 787, 790)

> **FRE 608: "(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.**
>
> **(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.**
>
> **The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility."**

Under federal rules this is only true on direct examination but under the California rules there is no apparent distinction between direct and cross. (CEC 787)

> **CEC 787. Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.**
>
> **For Example:** Paul sues Don over an auto accident. In defense of Don, Jane testifies that she saw the accident and Don was not at fault. In rebuttal to Jane's testimony Paul calls Wendy to testify that Jane has lied to her in the past. Paul is offering evidence of **specific past unrelated acts to challenge the honesty of the witness** (Jane) so Wendy's testimony is NOT admissible.

---o0o---

A. The Credibility of a Witness Can Always be Challenged

As a preliminary matter, the credibility of a witness is always a relevant issue in every proceeding. The witness must assert that she has personal knowledge of the material facts, and also swears that she will testify truthfully.

Therefore, the parties to a proceeding can always challenge the credibility of witnesses and present evidence showing they lack personal knowledge, honesty, fairness, and other character traits for testimony to be credible. This is explained in more detail in Chapter 8.

The issue here is not whether the credibility of a witness can be challenged at all, but rather that evidence of **specific past acts** cannot generally be used to attack the **general credibility** of the witness.

---o0o---

B. Credibility of any Witness can be Challenged by any Party

Another preliminary issue is whether or not parties can challenge the credibility of their own witnesses or if they can only challenge the credibility of the opponent's witnesses. The rule on this is very simple: any party can challenge the credibility of any witness, whether that witness is called by the party challenging the credibility of the witness or whether the opponent has called that witness. (FRE 607; CEC 785)

> **FRE 607: "Who May Impeach**
>
> **The credibility of a witness may be attacked by any party, including the party calling the witness."**

---o0o---

C. Challenging Witness Credibility Versus Attacks on Testimony

The use of character evidence to challenge witness credibility is an **indirect attack** on witness testimony. That should be carefully distinguished from the use of evidence to **directly attack** the credibility of a **witness' testimony**.

An attack on witness credibility is an **indirect attack** on the testimony of the witness by creating the inference that if the witness is of a "dishonest or unreliable character" the testimony of the witness should be **generally disregarded**, no matter what that testimony is.

> **For Example:** Walt testifies that he was with defendant Don in Portland on June 15, the day Don is accused of robbing a store in Chicago. The prosecution calls Ann to testify that she knows Walt, and in her opinion he is a very dishonest person. This is **character evidence** because it is offered to impeach Walt's character, and thereby **indirectly attack** the credibility of Walt's testimony that he was with Don on the day in question. It does not establish where Don actually was on that day, it just suggests that Walt is not to be believed.

In contrast, a direct attack on the credibility of a witness' testimony is NOT character evidence because it directly **attacks the testimony** itself.

> **For Example:** Walt testifies that he was with defendant Don in Portland on June 15, the day Don is accused of robbing a store in Chicago. The prosecution calls Bob to testify that he saw Walt in Phoenix on June 15. While this is also evidence of a past act by Walt, it is admissible evidence because it **directly shows Walt's testimony** to be false.

---o0o---

D. No Evidence of Witness Honesty Unless Dishonesty first Suggested

Witnesses are presumed to be honest after they have taken the oath. So no evidence can be admitted to show that any witness is <u>honest</u> until and unless other evidence has been offered suggesting the witness is not an honest person. (FRE 608; CEC 790)

---o0o---

E. No Evidence of Religious Beliefs to Challenge Witnesses

Another general rule that applies to all situations is that evidence of religious beliefs is not admissible, in any form or in any situation, to challenge or support the credibility of a witness. (FRE 610; CEC 789)

---o0o---

F. Collateral Evidence Rule: No Specific Act Evidence to Challenge Witness Credibility

The general rule is that evidence of specific acts cannot be admitted to challenge or defend the credibility of a witness. (FRE 608(b); CEC 787) This is called the "**Collateral Evidence Rule**". The term "collateral" means it is not evidence to "directly attack" the witness' testimony but rather an indirect attack on the testimony by attacking the credibility of the witness herself. But character evidence concerning the honesty or reliability of a witness is generally admissible if it is in the form of **opinion** or **reputation**. (FRE 405; CEC 1100) Consequently, evidence used to challenge or defend the credibility of a witness is generally restricted to evidence of opinion and reputation concerning that witness.

> **For Example:** Walt testifies that he saw Don rob the store. On defense Don's attorney calls Bubba to testify that Walt is a dishonest person. Don's attorney can have Bubba testify that in his **<u>opinion</u>** Walt is dishonest, and he can testify that Walt has a **<u>reputation</u>** for dishonesty. But any testimony by Bubba concerning specific past acts of dishonesty by Walt is objectionable as being "collateral", and upon objection should not be admitted.

The Collateral Evidence Rule often involves evidence about the honesty of a witness, but it can also involve other specific evidence offered to **<u>indirectly</u>** show a witness' testimony is unreliable or inaccurate.

> **For Example:** Don is accused of robbing a store in Seattle on June 1. Walt testifies for the defense that he saw defendant Don in Portland every day of June, including June 1, the day the crime was committed. The prosecution then calls Rob to testify that he saw Don in Seattle on June 25. The purpose of Rob's testimony is to show Walt's testimony that Don was in Portland "every day of June" is not true. But it is "collateral evidence" because it does not concern the specific day of the robbery. It does not prove Don was in Portland on the day of the crime. It just proves he was not in Portland on some other day. Therefore this is "collateral evidence" and objectionable.

The purpose of the rule is to prevent the finder of fact (e.g. the jury) from being confused by the presentation of evidence that is "collateral" or irrelevant to the material facts at issue.

---o0o---

G. Collateral Evidence Rule Does Not Bar Direct Challenge of Testimony

The Collateral Evidence Rule, FRE 608(a) and CEC 786, 787, does not prevent the admission of relevant evidence to directly challenge the credibility of witness testimony. Evidence of specific acts is not inadmissible to prove:

- The witness lacked **ability** to accurately perceive, remember, or communicate the facts;
- The witness lacked **opportunity** to accurately perceive the facts in the first place;
- The witness is **biased** or has other **motives** to give unreliable testimony;
- The witness made **prior inconsistent statements** about the matter;
- The witness made **prior consistent statements** about the matter in dispute after credibility has been brought into question;
- The witness made **incorrect or false factual statements** before or during testimony;
- The witness previously displayed an **attitude** toward the matter in dispute suggesting testimony is unreliable; and
- The witness has **admitted making untruthful statements** about the facts in dispute.

> **For Example:** Paul sues Don over an auto accident. In defense, Jane testifies that she saw the accident and Don was not at fault. In rebuttal Wendy offers testimony that Jane has been Don's lover for several years. Wendy's testimony IS admissible because it is NOT offered to prove Jane is a dishonest person. Rather, it is offered to prove Jane is biased toward Don. [13]

---o0o---

H. Federal Exception for Cross-Examination

Under the federal rules evidence of specific acts by a witness can be admitted **on cross-examination**, at the discretion of the court, to challenge or support the credibility of a witness. In other words, specific act evidence may be admitted to challenge or support the credibility of a witness if the party questioning the witness presenting the evidence is not the person who called that witness. (FRE 608(b)) The California rule does not have a parallel exception. (CEC 787).

[13] This point may seem obvious to law professors but it often causes law students to be very confused. The fact that a witness is biased does NOT mean they are dishonest. Biased people may be dishonest, but they also may honestly relate events they perceived without realizing they have unconsciously given a slanted account.

For Example: Willard testifies for the prosecution that he saw Don rob the store. On defense Don's attorney calls Bubba. Bubba can offer his **opinion** that Willard is dishonest, and Bubba can testify Willard has a **reputation** for dishonesty. That is all Don's attorney can ask Bubba on direct examination. But if the prosecution asks Bubba on cross-examination, "Isn't it true that Willard has been treasurer for the Little League for six years and no money has ever been unaccounted for?" it is an offer of specific act evidence. A federal court has discretion to allow the answer to be admitted. But the California rules do not have the same exception, and the evidence is not admissible (upon objection).

---o0o---

I. Prior Convictions Admissible to Challenge Witness Credibility

The main exception to the collateral evidence rule, in both federal and California rules, is that **evidence of prior criminal convictions may be admitted to attack witness credibility**. (FRE 609; CEC 788) Not all prior convictions may be used this way, and there are substantive differences between the federal and California rules.

FRE 609: "(a) General rule. For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

Use of evidence for this purpose is always subject to the limitations of FRE 403, including that the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.

1) Generally, Prior Conviction Evidence Not Admissible if Pardon Granted

As a general rule, under both federal and California rules, evidence of prior convictions cannot be used to challenge the credibility of the witness if the conviction has been the subject of a **pardon, annulment, certificate of rehabilitation, judicial finding of innocence** or equivalent action. (FRE 609(c); CEC 788)

> **FRE 609: "… (c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, [etc.] …, and that person has not been convicted of a subsequent [felony]…, or (2) the conviction has been the subject of a pardon, annulment, [etc.]… based on a finding of innocence…"**
>
> **CEC 788: "…**
> **(a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.**
> **(b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.**
> **(c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.**
> **(d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).**

2) No Juvenile Convictions to Impeach Under Federal Rule

As a general rule, criminal convictions of a witness **as a juvenile** are generally NOT admissible to impeach under the federal rules, but there is no parallel California rule. (FRE 609)

> **FRE 609: "… (d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule …"**

But the Court has **discretion** to allow admission of evidence of the juvenile conviction to impeach a witness 1) in a **criminal case,** 2) where the **witness to be impeached is NOT the criminal defendant**, 3) and the **conviction would have been admitted** to impeach if it had been an adult conviction, and 4) the Court finds **justice requires admission** of the evidence.

3) Pendency of an Appeal is Irrelevant

As a general rule, the pendency of an appeal does not prevent evidence of a conviction from being used to impeach witnesses under the federal rules, but there is no parallel California rule. (FRE 209)

> **FRE 609: "… (e) Pendency of Appeal. The Pendency of an appeal there from does not render evidence of a conviction inadmissible…"**

4) FEDERAL RULE: Using Convictions to Impeach Witnesses

The federal rules for using convictions to challenge the credibility of witnesses are very complex but boil down to specific rules for each of four distinct situations, as follows:

a. All Crimes of Dishonesty in Past 10 Years (Any Witness) – Admitted Without Limitation;
b. Other Felonies in Past 10 Years (Witness is not the Accused) – Admissible Without Limitation;
c. Other Felonies in Past 10 Years (Witness is the Accused) – Admissible If Probative Value Outweighs Risk Prejudicial Effect;
d. Felonies Over 10 Years Old (Any Witness) – Not Admissible Unless Probative Value Substantially Outweighs the Prejudicial Effect.

a. Crimes of Dishonesty

For these rules "crimes of dishonesty" are those involving perjury, theft, fraud, robbery, etc. In contrast, crimes of violence, drug possession, sex crimes, etc. are not crimes of dishonesty.

b. Measure of Time

For the federal rules a crime is "within the last 10 years" if EITHER the **conviction** or **release from prison or jail** after conviction occurred less than 10 years prior to the date of testimony.

c. Nolo Contendere Pleas are Not Convictions

Also for purposes of the federal rules a "nolo contendere" plea cannot be used against the individual as a "conviction". (FRE 410)

d. All Crimes of Dishonesty in Past 10 Years, Any Witness

Evidence ANY witness has been convicted of **any crime of dishonesty, whether a felony or misdemeanor, within the last 10 years** MUST be admitted by the Court to impeach the witness. The Court has no discretion. (FRE 609(a) (2) and (b))

> **For Example:** Bevis testifies that he did not rob the drug store, taking a substantial amount of "oxycodone". The prosecutor offers a certified copy of Bevis' misdemeanor conviction for petty theft three years previously to impeach Bevis. This evidence MUST be admitted because it is a **conviction for a crime of dishonesty less than 10 years old.**

e. Other Felonies in Past 10 Years, Witness Not the Accused

Evidence that witnesses, other than testifying criminal defendants, have been convicted of **felonies** that are **not crimes of dishonesty within the past ten years** MUST be admitted to impeach.

f. Other Felonies in Past 10 Years, Witness Is the Accused

Evidence that criminal defendants, testifying as witnesses on their own behalf, have been convicted of **felonies** that are **not crimes of dishonesty within the past ten years** MUST be

admitted to impeach the witness **IF the Court determines the probative value of the evidence <u>outweighs</u> the prejudicial effect.**

> **For Example:** Bevis testifies that he did not rob the Rite-Aid drug store, taking a substantial amount of the drug "oxycodone". The federal prosecutor then offers a certified copy of Bevis' felony conviction for illegal possession of "oxycodone" three years previously as evidence to impeach Bevis. This evidence MUST be admitted IF AND ONLY IF the Court finds the probative value of the evidence outweighs the prejudicial effect because Bevis is the accused.

g. Felonies Over 10 Years Prior, Any Witness

Evidence that **any witness** has been convicted of **any felony over ten years earlier** is NOT admissible to impeach the witness UNLESS the Court finds that the **probative value** of admitting the evidence **<u>substantially</u> outweighs its prejudicial effect** AND **advance written notice** is given to the adverse party so they have time to oppose the use of the evidence.

5) CALIFORNIA RULE: Using Convictions to Impeach

In contrast to the federal rules, the California rule for using evidence of prior convictions to challenge the credibility of a witness is very simple. (CEC 788) The evidence can be used (subject to the limitations previously noted) regardless of how old it is and regardless of who the witness is, as long as it is evidence the witness was convicted of a **felony**. And a nolo contendere plea to a felony charge is treated as a "conviction".

> **CEC 788: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony …"**

6) Comparison: Federal Rules v. California Rules

While the federal rules have detailed restrictions on the use of prior convictions to impeach the credibility of a witness, the California rule is very simple.

a. Federal Time Limit. The federal rules establish a 10 year time limit; California has no such rule.

b. Crimes of Dishonesty. The federal rules distinguish "crimes of dishonesty" from other crimes; California has no such distinction.

c. Nolo Contendere Pleas. The federal rules do not treat "nolo contendere" pleas as "convictions"; California does treat them as convictions.

d. Accused Testifying as Witness. Federal rules limit the use of certain convictions to impeach the testimony of a testifying accused; California does not.

e. Misdemeanor convictions. Federal rules allow misdemeanor convictions to be used to impeach a witness; California only allows the use of felony convictions.

Chapter 8: Presentation and Challenge of Witness Testimony.

As stated earlier, evidence is either in the form of **witness testimony** or an **exhibit**. Certain evidence rules apply to each form. Some evidence rules apply to both, especially when an "exhibit" is a document containing statements of fact by a person. The rules for presentation of testimony will be explained in this chapter, and the rules for presenting exhibits will be explained in Chapter 9.

Generally each party must provide the opposing parties before trial with a **list of all the witnesses** they expect to call on direct examination. Often **expert witnesses** must be revealed well in advance of trial so that opposing parties may depose them. These are rules of procedure, not evidence, but important to know anyway.

1. Witnesses are Presumed Competent

Every person is generally presumed to be a competent witness, even children and people suffering from mental illness. (FRE 601; CEC 700) But in a civil action where a State law determines the outcome (e.g. in a diversity case in federal court) the competency of witnesses would be determined by State rules. (FRE 601) In civil actions in federal courts based on federal question jurisdiction competency is determined solely by federal rules.

> **FRE 601: "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law."**

---o0o---

A. Oath Required

Witnesses must testify **under oath** in a manner designed to impress upon them the importance of telling the truth. (FRE 603; CEC 710)

> **FRE 603: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."**

All **interpreters** for witnesses must also be under oath to make a true translation. (FRE 604; CEC 751, 752)

> **FRE 604: "An interpreter is subject to the provisions of these rules relating to qualifications as an expert and the administration of an oath or affirmation to make a true translation."**

---o0o---

B. Incompetence of Witnesses

No federal rule provides that witnesses (other than judges and jurors) may be "ruled" incompetent for any reason other than lack of **personal knowledge** of the matter, but in a civil action based on diversity jurisdiction State law determines the competence of witnesses. (FRE 601, 602) California rules provide that witnesses must have **personal knowledge** if the matters in dispute, **capable of telling the truth** and **capable of expressing themselves** in a manner that they can be understood. (CEC 701, 702)

Parties may stipulate (agree) that a particular witness is incompetent to testify at trial. In that event statements by the witness are not admissible as hearsay any more than they would have been admissible as testimony.

> **For Example:** Tom sues Dick over an auto accident, and before trial they stipulate that a witness, 5-year old Gomer, is too young to be a competent witness. At trial Tom calls Wilber to testify that immediately after the collision little Gomer excitedly shouted, "Dick ran the red light!" The statement is inadmissible because they already agreed Gomer was too young to be a competent witness. If he is too young to be competent at the time of trial he was younger yet at the time of the accident. [14]

---o0o---

C. Judge and Jurors Incompetent by Law

Under federal rules **judges and jurors are incompetent to testify** as witnesses at the same trial where they are serving as judge and juror. (FRE 605, 606) California rules are somewhat less ridged but judges and jurors still cannot testify if an objection is raised, and the Court must declare a mistrial in that event. (CEC 703-704)

> **FRE 605: "The judge presiding at the trial may not testify in that trial …"**
>
> **FRE 606: "(a) At the Trial. A member of the jury may not testify as a witness …"**

Further, when there is an investigation into the validity of a verdict or indictment decided upon by a jury, the members of that jury may not testify about statements made in **jury deliberation** or the mental processes that led them to agree with or dissent from the jury verdict. But members of a jury may testify about whether extraneous prejudicial information was brought to the jury's attention or whether they were subjected to improper outside influences. (FRE 606(b); CEC 1150)

> **FRE 606 "… (b) Inquiry into the Validity of Verdict or Indictment. Upon an inquiry … a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror…."**

[14] When tested on this the vast majority of law students can't figure this one out.

For Example: During jury deliberations jurors Tom and Dick returned from lunch drunk and Tom went to sleep instead of participating in jury deliberations. After Butthead is found guilty juror Harry writes the judge a letter and tells him about the acts of Tom and Dick. Butthead can NOT use the fact that Tom and Dick were drunk and asleep to challenge the jury verdict fact because that is not evidence of an "outside" influence. (See *Tanner v. United States* (1987) 483 U.S. 107.)

---o0o---

D. Incompetence of Witnesses Influenced by Hypnosis

Some courts have held that the recollections of witnesses produced through hypnosis are inadmissible if it is likely that the testimony is the product of "suggestion" by the hypnotist and not the product of "personal knowledge." But there is **no federal rule** of evidence specifically to this effect.

California rules specifically allow testimony by witnesses that have been hypnotized to be used **in criminal trials** if 1) testimony is **limited to matters the witness recalled and related prior to hypnosis**, 2) the substance of the witnesses' recollection prior to being hypnotized **was recorded**, and 3) the hypnosis was **conducted according to set procedures** set forth in statute. (CEC 795)

CEC 795: "(a) The testimony of a witness is not inadmissible in a criminal proceeding by reason of the fact that the witness has previously undergone hypnosis for the purpose of recalling events which are the subject of the witness' testimony, if all of the following conditions are met:
(1) The testimony is limited to those matters which the witness recalled and related prior to the hypnosis.
(2) The substance of the pre-hypnotic memory was preserved in written, audiotape, or videotape form prior to the hypnosis.
(3) The hypnosis was conducted in accordance with all of the following procedures:
(A) A written record was made prior to hypnosis documenting the subject's description of the event, and information which was provided to the hypnotist concerning the subject matter of the hypnosis.
(B) The subject gave informed consent to the hypnosis.
(C) The hypnosis session, including the pre- and post-hypnosis interviews, was videotape recorded for subsequent review.
(D) The hypnosis was performed by a licensed medical doctor"

For Example: Tom sees a robbery and the license plate of the get away car. He knows it is a red Ford with a dented fender and a bumper sticker. A clear record is made of what Tom remembers before he is hypnotized. Under hypnosis he remembers the license plate number. Police track the car and arrest Dick. Under the California rules Tom can generally testify about what he remembered before being hypnotized, but not about what he remembered after being hypnotized. There is no general federal rule on this.

Any rule that hypnotically refreshed memory is inadmissible per se (i.e. in every case) is likely to be invalid when independent, reliable evidence corroborates the testimony. This would especially be true if **criminal defendants** seek to admit such testimony in their defense.

> **For Example:** Lorene is charged with manslaughter. She tells police she remembers holding a gun when Frank is shot, but not much else. After hypnosis she remembers the gun went off all by itself. As a result of her refreshed memory the gun is examined and found to be so defective it will shoot if just shaken. Lorene cannot be prevented from testifying simply because she has been hypnotized. Such a **blanket prohibition** unreasonably denies criminal defendants the right to testify in their own defense, and that is a denial of due process. This is especially true when other evidence corroborates the memories refreshed by hypnosis. (See *Rock v. Arkansas* (1987) 483 U.S. 44.)

2. Qualifying a Witness by Claim of Personal Knowledge.

A witness must have personal knowledge of the matters testified about. (FRE 602; CEC 702) Generally the party calling a witness must **qualify the witness** by **laying a foundation** at the beginning of direct examination to show the Court (i.e. the judge) that the witness has **personal knowledge** of the matter to which they are going to testify.

> **FRE 602: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by an expert witness."**

The means for qualifying a witness depends on whether they are a **percipient witness** or an **expert witness**. A **percipient witness** is one who was present during events in dispute took place and who testifies about what they perceived at the time of the events (i.e. what they saw, heard, smelled, felt, etc. at that time). An **expert witness** is one who examined evidence or listed to statements after the events in dispute took place and who offers the court an **opinion** based on that evidence.

If the Court finds a witness is qualified to testify the subsequent testimony may be presented to and **weighed** by the finder of fact. The persuasiveness of the evidence is the **ultimate issue** for the finder of fact (e.g. the jury) to decide, not the judge. In a bench trial, of course, the judge decides both the threshold reliability and ultimate persuasiveness of the evidence, so in that situation one person does it all.

> **For Example:** Bevis is sued for negligence by Butthead following an auto accident. Bevis calls Doofus to testify. Doofus states that he saw the accident and can still remember what happened. This claim of **personal knowledge** of the accident is necessary and sufficient to qualify Doofus as a witness. It is solely up to the jury to weigh whether Doofus' testimony is persuasive.

If a witness is asked to testify about matters for which no personal knowledge has been claimed, the opposing party may object that there is a **"lack of foundation."**

> **For Example:** Bevis puts Doofus on the stand as his witness and immediately asks him, "What caused the accident?" Since Bevis has not established that Doofus even saw the accident Butthead should interject, "Objection, lack of foundation."

---o0o---

A. Qualifying Percipient Witnesses

A **percipient witness** is a person represented to have personal knowledge about material facts that were **observed** and **understood** and can **remember** and **objectively relate** to the finder of facts. (FRE 602; CEC 702) On objection it must be shown that the witness has personal knowledge of the matters testimony concerns.

> **For Example:** Bevis is sued for negligence by Butthead following an auto accident. Bevis puts Doofus on the stand as a percipient witness. On objection it must be shown that Doofus can remember and relate personal knowledge about the accident. This is called a **"foundation"** for his testimony.

---o0o---

B. Qualifying Character Witnesses

A **character witness** is a percipient witness that offers testimony about the character traits of another person. The admissibility of character evidence is prohibited in certain situations as explained in Chapter 7.

To qualify as a character witness the witness must be shown to have sufficient personal knowledge of the character traits of the person being discussed that the testimony would be more than mere speculation.

---o0o---

C. Qualifying Expert Witnesses

An expert witness is a person that claims to have **scientific, technical or other specialized knowledge, skill, experience, training or education** that can give an **opinion** based on analysis that would **assist the finder of fact to understand** the evidence or determine a fact in dispute. Before testifying an expert witness must be qualified by claiming to have specialized knowledge that qualifies them to assist the finder of fact. (FRE 702; CEC 720)

> **FRE 702: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."**

The "specialized knowledge" to qualify an expert witness does not have to be from academic training.

> **For Example:** Vinnie Gambini calls Mona Lisa Vito to testify as an expert witness because she has enough experience working in auto repair shops to know the 1963 Pontiac Tempest was produced with the same "mint green" paint as the 1963 Buick Skylark but could "nevah, evah be confyooosed with a Chevrolet Corvette," the only other similar car produced with independent rear suspension and Posi-traction.

---o0o---

D. Testimony May Be Stricken if Unreliability Proven

While evidence challenging reliability are usually just for the jury to consider when weighing the witness' testimony, the testimony can be completely stricken where it is subsequently shown to lack the basic requirements of reliability. In a jury trial the jury would be instructed to totally disregard everything the witness had related.

> **For Example:** After considerable testimony Willard tearfully admits that he didn't really see the events in dispute because he was cooking some grits at the time. Since this admission renders Willard's prior testimony completely without foundation, his testimony should be stricken from the record, on motion or by the Court sua sponte, and the jury should be instructed to completely disregard everything Willard has said.

3. Court Duty to Provide Efficient Ascertainment of Truth

The overriding duty of the trial Court is to control the interrogation of witnesses and presentation of evidence as necessary to 1) **ascertain the truth**, 2) **avoid unnecessary delay** and 3) **prevent unnecessary harassment and embarrassment of witnesses**. (FRE 611(a); CEC 765) This gives the Court considerable discretion in controlling the style and nature of interrogation.

---o0o---

A. Need for Objection by Opposing Party to Exclude Testimony

If a party feels testimony is objectionable for any reason the party must generally voice a timely (i.e. "prompt") objection. (FRE 103(a); CEC 353) After an objection the Court will either agree to "sustain" the objection, preventing the witness from answering the question, or the Court will "overrule" the objection, allowing the witness to answer.

---o0o---

B. Form of Objection

The party that objects to a question in testimony should interject "Objection" and state the nature of the objection with a short statement informing the judge of the grounds for the objection, without extraneous legal argument. If the party feels additional explanation of the objection is necessary, and it is a jury trial, the party should ask for permission to approach the bench and explain the objection further, on the record but out of the hearing of the jury.

In a jury trial parties should not give more than a short statement in objection to or support of evidence within the jury's hearing. (FRE 103(c))

> **For Example:** Bevis asks Doofus, "What did Butthead's passenger say after the accident?" Butthead objects, "Objection, hearsay."

---o0o---

C. Motions to Strike Improper Testimony

If a witness has already answered a question, the party that objects to the testimony should "move to strike" the evidence from the record. In a jury trial the Court should direct the jury to disregard the testimony if the motion to strike is granted.

> **For Example:** Bevis calls Doofus as a witness and after preliminary questions asks, "Did you see Butthead enter the intersection? Doofus responds, "Butthead was drunk as a skunk." Butthead objects, "Objection, non-responsive. Move to strike." This objection should be sustained because the testimony is not responsive to the question asked. The judge should admonish Doofus to restrict his testimony to the question asked and direct the jury to disregard Doofus' remark.

---o0o---

D. Offers of Proof

When the Court sustains an objection the party questioning the witness may feel the ruling is incorrect. The party may ask the Court for permission to approach the bench and give an offer of proof on the record but out of the hearing of the jury. (FRE 103(a); CEC 354)

> **For Example:** Bevis calls Doofus as a witness and asks, "What did Butthead say after the accident?" Butthead objects, "Objection, hearsay." Judge Judy says, "Sustained." Bevis asks, "Your honor, may we approach the bench?" At the bench, where the court reporter can record the conversation but the jury cannot hear Bevis says, "Your honor, this is not hearsay because it is an admission of a party opponent." Judge Judy responds, "My ruling stands."

If the Court stands by its ruling the party questioning the witness may ask to make an "offer of proof" so that the evidence that would have been presented by the excluded testimony can be put on the record. This may not be necessary where the nature of the excluded evidence is evident from the context.

The Court may allow the party state for the record what the excluded testimony would have proven, or the Court may require the witness to testify to the question that had been objected to out of the hearing of the jury, after the jury has been removed from the courtroom.

> **For Example:** Bevis asks, "Your honor, the plaintiff asks to make an offer of proof." Judge Judy may say, "You may state for the record what your witness would have said in response." But Butthead may object to that or Judge Judy may not feel that Bevis should speak for his witness. Judge Judy may say, "It is almost noon. Continue questioning the witness and after the jury retires for the noon recess you can have his answer that question for the record."

4. Narrative Answers

Once witnesses have been qualified to testify they may (and probably should) be asked to **describe in their own words what they experienced** with respect to the incident that has resulted in legal action. This is a **"narrative approach"**.

If a question posed of a witness is too open-ended it will be objectionable as **"calling for a narrative."** But the narrative question approach is probably the more effective technique for getting testimony before the jury if the witness is able to respond intelligently without rambling and blurting out inadmissible statements. The Court has discretion under FRE 611(a) in this regard. (CEC 765) The Court's main concerns would be that the question would elicit **irrelevant** or otherwise inadmissible statements that **waste court time** and **prompt legitimate objections** from the opposing party.

> **For Example:** Bevis calls Doofus as a witness and asks, "So, what happened?" Butthead objects, "Objection, calls for a narrative." The objection should be sustained because the question is too broad.

The Court would be more lenient where a question involves a preliminary issue.

> **For Example:** Bevis calls Dr. Doofus as an expert witness on composite materials engineering. To qualify Doofus as an expert Bevis might ask, "Doctor Doofus, will you please describe your training and experience in the use of composite materials?" Butthead objects, "Objection, calls for a narrative." The objection would be overruled because it is simply a preliminary question to qualify the witness.

The examiner on direct must be prepared to interrupt the witness to focus the testimony.

> **For Example:** Bevis calls Doofus as a witness and asks him to describe the accident he saw. Doofus starts by declaring that cars drive too fast and the police don't do their jobs anymore. Bevis should stop Doofus and make him focus on the specific events of the accident.

The alternative to the narrative approach is for the attorney to ask tightly framed questions. The problem with that is that the examiner may appear to be "leading the witness" through a series of questions and responses that are rehearsed and unbelievable.

5. Leading the Witness

If a witness is unable (or not allowed) to give narrative answers on direct examination questioning may be objectionable because it is **leading**. Generally **"leading questions"** may NOT be asked of witnesses on **direct examination**, except as necessary to develop a witnesses' testimony, but leading questions are ordinarily allowed on **cross-examination**. (FRE 611(c)) The California rules appear to give the Court even less discretion when it comes to leading questions. (CEC 767)

> **FRE 611: "… (c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination.**

> **When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."**

---o0o---

A. Leading Questions Suggest The Desired Answer

A **leading question** is one phrased by the examiner to suggest the answer that the examiner wants to hear. The basic test for whether a question is a leading question is **if it is phrased so that an ordinary person would think** that the examiner sought a particular answer.

Generally leading questions seek a "yes" or "no" answer, but not every question that seeks a yes or no answer is leading.

> **For Example:** Bevis calls Doofus and asks, "Did you see an auto accident?" This is NOT clearly leading because the question does not suggest an answer of "yes" or "no." Besides it is a "preliminary question" that is generally allowable as explained below.

Questions that do not call for a yes or no answer are generally NOT leading.

> **For Example:** Bevis calls Doofus as a witness and after some preliminary questions asks, "What color was the light when Butthead entered the intersection?" Butthead responds, "Objection, leading." This is NOT leading because the question does not suggest an answer of "red," "yellow" or "green".

Questions that ask "Isn't it true that…" and "Did you not…" clearly ARE leading questions.

> **For Example:** Bevis asks Doofus, "You saw Butthead enter the intersection on a red light, didn't you?" This IS a leading question because it clearly seeks a "Yes" answer.

Long questions filled with **numerous details** that end in a request for a "yes" or "no" answer are generally leading because they suggest the answer sought from the witness.

> **For Example:** Bevis asks Doofus, "Were you present at the corner of Main Street and Broadway on Tuesday, May 21, in a rainstorm when you saw Butthead come down Main Street in a red car from the west and enter the intersection in disregard of a red light?" This is a leading question because the string of "correct" details signals the witness that the answer sought is a "yes."

And questions that pose **one detailed possibility** against one or more vague alternatives are generally leading because the detailed nature of one alternative suggests that is the answer sought.

> **For Example:** Bevis asks Doofus, "Did Butthead run the red light to enter the intersection or did he enter in some other manner?" This IS a leading question because it suggests the answer should be "He ran the red light."

---o0o---

B. Leading Questions for Eliciting Preliminary Information

Leading questions are more often allowed on direct examination to elicit **preliminary information** to **qualify a witness**. This would be to show that the witness **claims personal knowledge**.

> **For Example:** Bevis calls Doofus and asks, "Did you see an auto accident on Tuesday, May 22 at the intersection of 12th and Main?" This is a leading question but it would often be allowed because it only qualifies the witness and does not prove material facts.

---o0o---

C. Leading Questions Generally Allowed on Cross-Examination

Leading questions are generally allowed on cross-examination. (FRE 611(c); CEC 767)

---o0o---

D Leading Questions Allowed with Hostile Witnesses

Leading questions are allowed on direct examination when a party calls an **adverse party** or a **hostile or adverse witness** to testify. (FRE 611(c); CEC 776) If the opposing party objects, the party seeking to use leading questions may ask the Court to find that the witness is hostile or adverse.

---o0o---

E Leading Questions Allowed if Necessary

The federal rules allow the Court discretion to allow leading questions as necessary to ascertain the truth, but the California rules limit this to "special circumstances where the interests of justice require" leading questions. (DRE 611(c); CEC 767)

1. Leading witness generally allowed to **remind witness** of prior testimony and forgotten facts;

   For Example: Bevis recalls Doofus as a witness and asks, "Do you recall that earlier you testified that you saw Butthead driving a red ford?" This is a leading question that will be allowed because it **reminds the witness** of testimony.

2. Leading questions may be necessary if the witness is a **child**, **elderly** or otherwise **mentally impaired** and is otherwise unable to remember or relate the facts;

   For Example: Bevis calls 5-year old Pugsley as a witness. Pugsley says, "The car hit the truck." Bevis asks, "And that was the red car?" This is a leading question because it suggests the car was "red" but the Court may allow it if necessary to assist the witness.

6. Confusing, Compound and Ambiguous Questions

Generally the Court will disallow questions, whether they are on direct examination or cross-examination, if they are **confusing**. (FRE 611(a); CEC 765) Even if the witness understands the question the jury or appeals court would not. Questions are confusing if they are **compound** or **ambiguous**. There is no particular evidence rule on this other than the general rules at FRE 611(a) and CEC 765.The proper objection would be "Compound question" or "Ambiguous."

A compound question **asks two things at once** so that it is not clear if an answer to the question is an answer to both parts or only to one part.

> **For Example:** Bevis asks Doofus, "Did you witness an accident and see Butthead run the red light?" This is confusing because it is a **compound question** that actually asks two things – "Did Doofus see the accident?" And, "Did Butthead run the red light?"

An ambiguous question is one that is subject to **two different interpretations**. Often these involve the use of pronouns with uncertain antecedents.

> **For Example:** Bevis asks Doofus, "Did you see Butthead and Bevis have an accident?" After Doofus says "Yes," Bevis asks, "What color was the signal when he went into the intersection?" This is **ambiguous** because it is not clear whether the "he" refers to Bevis or Butthead.

7. Non-Responsive Answers

A witness' answer is **non-responsive** if it does not pertain to the question asked, and upon objection the answer should be stricken from the record and jury instructed to disregard it.

> **For Example:** Bevis asks Doofus, "Did you see Butthead run into Bevis?" Doofus responds "Butthead was drunk." This is a **non-responsive answer** because it does not explain if Doofus saw the accident or not. The objection is "non-responsive answer!"

8. Assuming Facts Not in Evidence

A question is improper if it assumes facts that have not yet been supported by any admissible evidence. The facts don't have to be "proven" beyond doubt, but some evidence is required to justify the assumption of fact. Otherwise testimony reflects speculation or hearsay rather than personal knowledge. The proper objection is "assumes facts not in evidence" but it can also be "lack of foundation," "calls for speculation" or "calls for hearsay" depending on the situation.

> **For Example:** Tom calls Dick and asks, "Did you see Harry with a gun?" After Dick says "Yes" Tom asks, "What kind of ammunition was in the gun?" This **assumes facts not in evidence** that 1) Dick inspected the gun, 2) Dick found the gun to be loaded, and 3) Dick can recognize ammunition. If Dick is allowed to answer, "It was loaded with hollow-point rounds," he may just be speculating or repeating what he heard someone else state. The proper objection is either "assumes facts not in evidence", "lack of foundation" or "calls for speculation."

9. Calling for Speculation

Questions must ask what the witness knows from personal knowledge and NOT **call for speculation** about the facts. Asking a witness about **the motive or thinking of another person** calls for speculation.

> **For Example:** Tom calls Dick and asks, "Did you see Harry come into the store with a gun to rob the store?" This question is improper because it asks Dick to **speculate** about Harry's motive. The proper response is, "Objection, calls for speculation."

Asking a witness to **state the cause of a disputed event** calls for speculation.

> **For Example:** Bevis calls Doofus and asks, "Why did Butthead's car collide with Bevis'?" This calls for Doofus to speculate about the cause of the accident rather than simply relate the things he saw and heard happen.

Asking the **witness is asked to guess** about some fact calls for speculation.

> **For Example:** Bevis calls Doofus and asks, "What color was the light when Butthead entered the intersection?" When Doofus says "I'm not sure," Bevis asks, "What was your general impression?" This calls for speculation because Doofus is being asked to guess about material facts.

10. Witness Opinions Generally Admissible

The opinions of witnesses are generally admissible, even if they embrace the ultimate issues to be decided by the finder of fact. (FRE 704; CEC 805)

> **FRE 704: "(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact…"**

> **For Example:** Tom is accused of the criminal battery of Dick. Harry testifies as a lay witness and is asked, "Did Tom hit Dick deliberately or by accident?" This opinion is permissible because a lay witness is qualified to give an opinion whether a physical act they observed was done deliberately or accidentally based on personal observation even though the opinion "embraces" an ultimate issue.

---o0o---

A. Admissibility of Lay Opinions

A **lay witness** is a percipient witness (i.e. not an expert witness). Generally lay witnesses may only give opinions or inferences **about facts** based on their **personal knowledge** if they are 1) **rationally based on their perceptions** and 2) **helpful to give a clear understanding** of the witness' testimony. (FRE 701) This includes **considered estimates**, but not baseless speculation.

> **FRE 701: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a)**

> **rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."**

It is not improper for lay witnesses to give opinions about things they 1) **know about** and 2) that **most people would know about** from common experience to the extent it helps **explain the witness' testimony** or helps **establish a material fact**. FRE 405(a) and 608(a) specifically allow witnesses to give opinions about the character of another person.

As long as a foundation is laid to show that a lay witness has enough experience, background or knowledge to voice an opinion at all, the Courts will generally allow lay opinions about the following common things most people know about.[15]

1. Speeds: **For Example:** "The car was going very fast, about 40 miles an hour."
2. Temperature and color: **For Example:** "It was about 100 degrees in the shade."
3. Smells, tastes and sounds; **For Example:** "He smelled like he had been drinking."
4. Size or weight: **For Example:** "The robber was about six feet tall and 200 pounds."
5. Emotions or mental state; **For Example:** "He was nervous, angry and acting crazy."
6. Intoxication; **For Example:** "He was really drunk."
7. Deliberateness of another's act; **For Example:** "He deliberately hit me."
8. Identification and handwriting; **For Example:** "That's Bob's signature."

But it is never proper for a lay witness to give an opinion that requires **specialized knowledge**. The proper objection is that the question "calls for an expert opinion."

> **For Example:** Bevis sues Butthead over an auto accident and calls Doofus as a witness. Bevis asks Doofus, "Was Butthead's arm broken in the accident?" The question is objectionable because it seeks a **medical opinion** from Doofus.

---o0o---

B. Admissibility of Expert Opinions

An expert witness is one who presents an **opinion** or inference about the material facts. The witness must be 1) a **qualified expert** in some field of knowledge that is 2) **beyond the expertise** of ordinary lay jurors and the opinion, and their opinion must be given with 3) a **reasonable degree of certainty.** The opinion of the expert is only admissible if it 4) will **assist the finder of fact** to understanding the evidence or determine material facts if the opinion. (FRE 702)

The Court may appoint expert witnesses sua sponte or on the motion of any party. (FRE 706)

1) Factual Basis for Expert Witness Opinion

Expert witnesses may present **opinions** based on facts known to them before or learned by them at trial. If the facts are of a type reasonably relied upon by experts in their field when forming opinions the facts by themselves do not have to be admissible in evidence at the trial. (FRE 703; CEC 801)

[15] It's like Bob Dylan said, "You don't need a weatherman to know which way the wind blows." *Subterranean Homesick Blues.*

> **FRE 703: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."**

Expert witnesses may base their opinions on evidence or data from four sources:

1. Experts may base their opinions on evidence **personally observed** by them;
2. Experts may base their opinions on **uncontroverted evidence presented** in the courtroom;
3. Experts may base their opinions on **evidence made known to them before trial**, if it is the type of evidence upon which experts in the same field would normally rely on in forming an opinion, even if the evidence is not admitted or admissible at trial.
4. Experts may base their opinions on a **hypothetical question** that is drawn from the evidence introduced at trial;

2) No Preliminary Statement of Facts Required

An expert witness may give an opinion and explain the supporting reasons for it **without first stating all of the underlying facts and data**, unless the Court requires otherwise. (FRE 705; CEC 802)

3) Expert Witness Opinions Based on Hypothetical Evidence

An expert opinion can be based on a hypothetical situation presented in a question. But the opinion can NOT be based on hypothetical facts that have not yet been supported by evidence admitted at trial or else it would be objectionable for "assuming facts not in evidence."

4) Requirement of Expert Testimony in Some Cases

Expert testimony is required in some cases to prove a claim of **personal injury, medical malpractice** or **legal malpractice** because a lay witness is not qualified to give an opinion about such matters. The same rule holds for any claim requiring scientific or technical evidence.

> **For Example:** Bevis testifies, "My arm was broken when Butthead's car collided with mine." This is objectionable as an "improper lay opinion" because Bevis is not qualified to give a medical diagnosis that his arm as "broken." Expert medical testimony is required to establish the cause and extent of personal injury.

5) Expert Testimony Restricted to Opinions Based on Expertise

Expert witness testimony is **restricted to the presentation of an opinion based on their expertise**. They can state the factual basis for their expert opinion, and it may be based on otherwise inadmissible evidence. But they cannot testify about their own observations or otherwise present inadmissible evidence.

> **For Example:** Xavier is a qualified crime scene investigator. He offers to testify that he went to the scene of a crime to study blood spatters, but when he got there the blood had all been washed away by the defendant. That is not an "opinion" based on "expertise" so it

> is not admissible "expert testimony". It is just testimony about what he personally observed. And it may be based on hearsay because he may be trying to present what someone else told him the defendant did. [16]

6) Federal Exception: No Expert Opinion on Criminal Intent

An exception to the general rule is that under the **federal rules** an **expert witness** cannot give an opinion whether or not a **criminal defendant** possessed the necessary **mental state or mental condition** required by a charged crime or claimed defense. (FRE 704(b)) This effectively means that an expert witness cannot express an opinion as to whether the defendant acted with **criminal intent**.

> **FRE 704: "… (b) No expert witness … may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto …"**

This prohibits an expert opinion about whether the defendant did an act **deliberately**, **maliciously**, **knowingly**, with **criminal intent**, with **premeditation**, because of **irresistible impulses**, for **monetary gain**, with an **intent to defraud**, etc.

> **For Example:** Hinckley is charged with attempted murder of Reagan. The defense psychiatrist presents an opinion that Hinckley was so mentally ill he could not form criminal intent. This is NOT admissible in federal court because it gives an opinion whether the defendant had the mental state that constitutes an element of the crime. [17]

11. Refreshing Witness Memory with Writings and Things

The memory of a witness may always be refreshed before or while testifying by showing them a writing or anything else. This is a very broad rule and includes inspection of writings, photographs, and objects, and the memory of a witness may even be refreshed by having them listen to a sound, feeling some object or having them smell some substance.

> **For Example:** While testifying Butthead is asked what day an accident occurred. He can't remember, so Attorney Al hands him a letter and asks him if it will refresh his memory. Butthead looks at the letter and then testifies, "I remember now that it was October 7."

If a writing is used to refresh a witness' memory before testifying the **adverse party** may request the writing to be **produced** at the trial, and the Court has discretion to require production of such writings.

If a writing is used to refresh a witness' memory while testifying the **adverse party** has a right to **inspect** the writing and **cross-examine** the witness about it. Even if the writing is inadmissible hearsay, the **adverse party** may have a right to **introduce into evidence** those portions that relate to the witness' testimony. (FRE 612; CEC 771)

---

[16] Law students often fail to grasp this concept. Expert witnesses must present opinions based on their expertise and cannot state what they personally perceived (e.g. saw, heard, smelled) during their investigation if those perceptions have nothing to do with their unique expertise.

[17] This rule was adopted after the trial of John Hinkley, Jr. for shooting President Ronald Reagan in 1981.

For criminal proceedings Federal Rule of Criminal Procedure 26.2, codified as 18 U.S.C. section 3500, requires production, upon motion, of prior statements by a testifying witness whether the witness' memory is "refreshed" by the statement or not.

> **Federal Rule of Criminal Procedure 26.2: "Producing a Witness's Statement**
> **(a) Motion to Produce. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony…"**

An exception arises when a party claims a writing used to refresh memory is **privileged.** For example, it might be a letter covered by the attorney-client privilege. When a claim of privilege is raised, the judge must examine the writing **in camera** (i.e. in private in chambers) and the privileged portions of the writing may not be revealed or used as evidence. The privileged parts of such writings must be preserved in the trial record for future review by the appeals court.

If a party refuses to provide an adverse party with access to an non-privileged writing that has been used to refresh witness memory the Court may make any order justice requires. In a criminal prosecution where the prosecution does not produce the demanded document the striking of testimony or declaration of a mistrial may be required.

12. Conditional Admission

As explained above facts generally must be proven and may not be assumed. But the Court may **conditionally allow** evidence to be admitted subject to a condition that other evidence must be produced. (FRE 104(b); CEC 403(b))

Evidence conditioned on a promised presentation of supporting facts may be ordered stricken if the supporting evidence is not forthcoming, and the Court may even issue sanctions in some cases.

13. Directly Challenging the Credibility of Testimony

All relevant evidence can be used to directly attack (impeach) the testimony of a witness as being incorrect, unreliable or false. This is to be distinguished from the use of **character evidence** to challenge (impeach) the **general credibility of a witness**. (CEC 780)

This includes evidence that:

1) The witness **did not accurately observe, understand or remember** the events in dispute;
2) The witness is **biased** or has an **interest** or **motive to lie** about what happened;
3) The witness **testimony contradicts other inconsistent statements**; and
4) The witness **lied in testimony** or otherwise about the matters in dispute.

---o0o---

A. Evidence of Lack of Ability to Observe, Understand or Remember

All evidence that a witness **lacked an ability to observe, understand or remember** events in dispute can be introduced without restriction.

> **For Example:** Attorney Al asks Wilma if she saw the robbers and if she can identify the defendants as being those same robbers. She says she can. Al presents evidence Wilma has bad eyesight, low intelligence and dementia. This challenges her **ability** to see and **identify** the defendants as being the same people who committed the robbery, her ability to **understand** what happened, and **remember** what happened.

---o0o---

B. Evidence of Bias and Motive

All evidence that the witness is **biased** or has a **motive to lie or slant testimony** can be introduced without restriction. This is evidence attacking the credibility of testimony, not evidence attacking the credibility of the witness.

> **For Example:** Dr. Doofus testifies as an expert witness for Bevis in his personal injury suit against Butthead. On cross-examination Butthead, asks Doofus, "How much are you being paid to testify here today?" This is NOT character evidence to suggest Doofus is a generally dishonest person. Rather, it is directly relevant evidence that Doofus may have a financial motive to give testimony favoring Bevis. Therefore it is admissible evidence.

---o0o---

C. Inconsistent Prior Statements and Lies

Contradictory testimony may be used to show that a witness is **incorrect** or giving **false testimony**. The witness must be given an opportunity to explain or deny the prior inconsistent statement under FRE 613(b) or is still be available to testify. (CEC 1235)

> **FRE 613: "(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to the opposing counsel…"**

> **For Example:** Doofus testifies that he saw the collision between Bevis and Butthead. Then Butthead calls Boomer to testify that he was fishing with Doofus on the river when the accident took place. **This evidence can be admitted without giving Doofus any warning** because it is <u>NOT a prior inconsistent statement</u>. It has nothing to do with any prior "statement" by Doofus. It is **direct evidence Doofus lied** in his testimony. If instead Butthead had testified, "Doofus told me that he was fishing when the accident happened," it would have been a prior inconsistent statement. THEN it could not be admitted unless Doofus had a chance to deny or explain it.

---o0o---

D. Attacking and Supporting the Credibility of Hearsay Declarants

When hearsay or "admissions" by the opposing party's agent, servant, employee, spokesperson or co-conspirator are allowed into evidence, **the credibility of the declarant can be attacked** in the same manner as if the declarant were a witness testifying in court. (FRE 806; CEC 1202) And if the credibility of the declarant is attacked, **the declarant's credibility can be defended** with directly relevant evidence and character evidence.

Inconsistent statements by the hearsay declarant can be used to impeach **without giving the declarant an opportunity to deny or explain**, and the declarant can be called as a witness and questioned on direct examination as if under cross-examination by the party against whom the declarant's statement has been used. (FRE 806; CEC 1202) In other words, the hearsay declarant can be asked leading questions on direct examination and about specific acts of dishonest behavior, at the Court's discretion.

---o0o---

E. Attacking the Testimony of Expert Witnesses

Expert witnesses can be impeached by **attacking the witness' qualifications.**

> **For Example:** Dr. Doofus testifies, "Bevis' headaches are a direct result of the accident." On cross-examination "Doctor" Doofus is forced to admit that he does not have a medical degree and has never even graduated from college.

The expert witness can also be challenged for **bias**.

> **For Example:** On cross-examination Dr. Doofus is forced to admit that acting as an expert witness is his sole occupation and he gets $400 an hour to testify.

The expert witness can be confronted with **contradictory opinions** from other experts.

> **For Example:** On cross-examination Dr. Doofus is confronted him with an authoritative reference book that shows there are many possible sources of headaches besides trauma.

Opinions based on hypothetical facts can be challenged by **changing the hypothetical facts**.

> **For Example:** Dr. Doofus answers a hypothetical question by stating the accident caused Bevis' headaches. On cross-examination he is asked a hypothetical question with slightly different facts. Given those facts he is forced to give a different opinion.

Chapter 9: Presentation and Challenge of Exhibits

The previous chapter explained the presentation and challenging of testimonial evidence. This chapter explains how exhibit evidence is presented and how it may be challenged.

1. Exhibit Procedures

Local rules prescribe the procedures for preparing exhibits for presentation in Court. A party must usually provide the court clerk and opposing counsel labeled copies of all documents to be offered as exhibits before trial. The plaintiff's exhibits are often labeled "1, 2, 3..." and the defense exhibits are often labeled "A, B, C…" but this may vary in some courts.

Before exhibits are admitted into evidence they are often described as "marked for identification purposes only as Exhibit…" and after they are admitted into evidence they are often referred to as "admitted into evidence as Exhibit…"

Before attorneys (or parties) can approach witnesses to show them documents or other evidence the Court must be asked for permission to approach the witness. Most judges require this request only once for each witness. In some cases the judge may not let attorneys approach a witness. In these situations the Court Clerk must be asked to present the exhibits to the witness.

These are procedural rules of the Court more than evidence rules prescribed by the FRE.

2. Authentication of Exhibits

Before exhibits can be admitted into evidence most **must first be authenticated** by admissible evidence. Certain documents are "self-authenticating."

California has several statutes concerning authentication of "writings" but few rules concerning authentication of other exhibits. Authentication is generally left to the satisfaction of the Court.

---o0o---

A. Means of Exhibit Authentication

Authentication means that sufficient admissible evidence is provided to justify a conclusion that a thing offered as evidence is what it is purported to be. (FRE 901; CEC 1400)

> **FRE 901: "(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims…"**

Authentication is not proof that a thing is what it is purported to be, but just evidence that would justify a finding that the thing is what it is purported to be. Various means of authentication are illustrated by FRE 901(b). (Also see CEC 1410 et seq.)

1) Authentication by Testimony of a Witness

The most common means of authentication that a thing is what it is claimed to be is by testimony from a witness with personal knowledge of the exhibit. (FRE 901(b) (1))

> **For Example:** Bevis is called as a witness at trial, shown an object and asked if he can identify it. He says, "Yes, this is the rock that was thrown through the front window of my house." The rock is then entered into evidence as Exhibit 1.

2) Authentication of Handwriting by a Non-Expert

Handwriting purported to be that of a specific person can by authenticated by any person that has developed familiarity with that person's handwriting. (FRE 901(b) (2); CEC 1416) Under the federal rules the familiarity **must not be acquired for the purposes of the litigation**. (FRE 901(b) (2))

> **For Example:** Bevis is called as a witness at trial, shown some handwriting and asked if he can identify the person whose handwriting it is. He says, "Yes, I know this is Butthead's handwriting because **I studied his handwriting to testify here**." This would **NOT be sufficient** to authenticate the handwriting under the federal rules because Bevis only became familiar with Butthead's handwriting for purposes of the litigation.

3) Authentication by Comparison With Authenticated Specimens

Either the **finder of fact** (i.e. the jury or judge in a bench trial) or an **expert** in a particular area can authenticate evidence by comparing it to authenticated specimens. (FRE 901(b) (3); CEC 1418)

> **For Example:** A handwritten ransom note is offered into evidence, and Butthead is purported to have written it. Other specimens of Butthead's handwriting are authenticated by people that can testify that they saw Butthead write those specimens. Then the jury (or a handwriting expert) can compare the ransom note to the authenticated specimens and decide if Butthead wrote the ransom note.

4) Authentication by Distinctive Characteristics and Circumstances

Evidence that is not authenticated by any witness or other means can still be authenticated by the finder of fact based on its distinctive characteristics and other circumstances. (FRE 901(b) (4); CEC 1420, 1421 as to "writings")

5) Identification of a Speaker by Voice.

Any person hearing a voice, firsthand or in a recording, can give an opinion as to the identity of the speaker in the recording as long as that person has heard the voice of that same speaker at any other time in any circumstance that connects it with that speaker. (FRE 901(b) (5))

> **For Example:** Bevis is called as a witness at trial and asked if he can identify a person he talked to on the telephone. He says, "Yes, I know it was Butthead because after this litigation began I was able to hear his voice and it is the same person I talked to on the phone. The authentication is sufficient. Bevis did not have prior familiarity.

6) Identification of a Party on the Telephone

The identity of an unseen and unknown person in a telephone conversation can be authenticated by the telephone number called, by self-identification by the unseen party, by the circumstances of the conversation or by the business nature of the conversation. (FRE 901(b) (6))

> **For Example:** Bevis calls the number for United Airlines. A voice answers and says, "This is Butthead, how can I help you?" Bevis books a flight to Paris. Later United Airlines denies entering into a contract. At trial Bevis testifies as to the telephone number he called, who answered and the nature of the conversation. This is enough evidence to authenticate that he talked to Butthead, an agent for United Airlines.

7) Authentication of a Public Record

A document can be authenticated as a public record if it is **obtained from a public office** where documents of the same type are routinely kept, recorded or produced. (FRE 901(b) (7); CEC 1530, 1532)

8) Authentication of an Ancient Document

A document can be authenticated as an "ancient document" if it is **over 20 years old**, **found in a likely place** where such documents are kept and its **authenticity is not suspect**. (FRE 901(b) (8)) Under the California rules the document must be **over 30 years old**. (CEC 1419)

9) Authentication of a Process or System

A process or system may be authenticated by evidence describing the process or system and evidence that the process or system **produces accurate results**. (FRE 901(b) (9))

> **For Example:** Evidence is offered that DNA found at the scene of a crime matches Bevis' DNA. The process that produced the result is authenticated by expert testimony describing the process and evidence that the method produces accurate results.[18]

10) Authentication per Statute

Any method of authentication or identification is proper if it is provided by an Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority. (FRE 901(b) (10))

---o0o---

[18] DNA analysis is a great advance but a lot said about it in courtrooms is hokum.

Identical twins have essentially the SAME DNA and about one person out of 175 is an identical twin. Wouldn't a defendant know he has an identical twin? Not necessarily. Twins are harder to raise so they might be more likely to be abandoned by a single mother. Parents may abandon one child and never tell the other what they did. Birth certificates of adopted children get sealed, so it is all very hard to trace.

DNA "experts" usually just "assume" this possibility away.

B. Self-Authenticating Documents

Certain documents are self-authenticating by law. California rules are much less express in this regard than the federal rules.

1) Public Documents

Virtually any public record or document may be self-authenticating if it is **certified** to be valid and genuine or if it **bears the Seal** of the public entity that issued it along with a signature of attestation or execution. (FRE 902(1), (2), (3), (4); CEC 1530, 1532) This includes **certified copies of recorded documents.** The exact criteria for authenticating each type of document vary depending on whether the documents are from government agencies in the United States, foreign countries or are recorded documents. But the only important thing is that a public record must be certified or issued under Seal to be self-authenticating.

If a public record is properly certified it is self-authenticated and no witness or custodian of records is required to authenticate it.

> **For Example:** Bevis offers into evidence a copy of the deed to his house that has been certified by the clerk in the Office of the County Recorder as being a true and correct copy of a document held in its files. Since the record is certified already, he does not have to call an employee of the Recorder's Office to testify to the genuineness of the record.

But if a public record is not properly certified pursuant to FRE 902(1)-(4) the party offering the record as evidence must authenticate it by witness testimony or other means.

2) Publications

Newspapers, magazines etc. and books, pamphlets, etc. that are published or issued by a public authority are self-authenticating. (FRE 902(5), (6))

3) Trade Inscriptions

Inscriptions, labels, tags, signs, etc. that have been affixed in the course of business to indicate ownership, control or origin are self-authenticating. (FRE 902(7) Note that this is the **federal** rule and **State** rules may require additional authentication.

> **For Example:** Keegan sues the Green Giant company after biting into a piece of metal in a can of peas. He offers into evidence the can of peas with an affixed label that reads, "Green Giant Brand Great Big Tender Sweet Peas. Distributed by Green Giant Company." This label self-authenticates the exhibit under FRE 902(7) but in a State court Keegan may be required to have a witness with **personal knowledge** identify the can.

4) Acknowledged Documents

A document may be authenticated by a certificate of acknowledgment executed by a notary public or some other person authorized by law to take acknowledgments. (FRE 902(8); CEC 1451-1453)

> **For Example:** Bevis offers a "Power of Attorney" form with Butthead's signature as evidence. Butthead's signature was before a notary public that certified the signature and affixed her seal. Therefore this "acknowledged" document is self-authenticating.

5) Commercial Paper

Commercial paper, signatures on commercial paper and related documents are self-authenticating to the extent provided by commercial law. (FRE 902(9))

6) Self-Authentication per Statute

Any method of self-authentication provided by an Act of Congress is proper. (FRE 902(10))

7) Testimony by Subscribing Witness Not Usually Required

If writings are authenticated by a subscribing witness no testimony by the witness is necessary unless required by the laws of the jurisdiction that govern the validity of the writing. (FRE 903; CEC 1411)

---o0o---

C. Authenticating a Writing, Recording, Photograph, Map, Diagram or Illustration

Except where documents are self-authenticating as explained above, writings, recordings, photographs, maps, diagrams, illustrations, etc. are generally authenticated by presenting them for identification by a witness that has personal knowledge as illustrated in FRE 901(b)(1) (CEC 1400, 1413). The witness must claim personal knowledge what the exhibit depicts and **state that it is an accurate depiction of what it is purported to be.**

> **For Example:** Bevis calls Doofus as a witness to an accident. He says, "Your honor, I have a photograph here marked for identification purposes only as plaintiff's Exhibit 1. May I approach the witness?" Judge Judy responds, "You may approach the witness." Bevis hands the photograph to Doofus and asks, "What is this?" Doofus responds, "It is a photo of the intersection where the accident took place." Bevis asks, "**Is it an accurate photograph of the way the intersection looked on the day of the accident?**" Doofus says, "Yes." Bevis then says, "Your honor, I ask that this photograph be admitted into evidence as plaintiff's Exhibit 1."

---o0o---

D. The Best Evidence Rule for Content of Writings, Recordings and Photographs

Generally, under the federal rules **the contents of a writing, recording or photograph can only be proven** by presenting the **original** into evidence. (FRE 1002) This is called the **"Best Evidence Rule"** and it confuses most law students.

> **FRE 1002: "To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by Act of Congress."**

A "writing" or "recording" consists of letters, words or numbers set down by handwriting, typewriting, printing, photographing, magnetic impulse, mechanical or electronic recording or some other form of data compilation. (FRE 1001(1); CEC 1410.5)

An "original" of a writing or recording is the writing or recording itself. (FRE 1001(3); CEC 1520)

In **civil cases**, only, the California rule is not as strict as federal rules. (CEC 1521) It allows the content of a writing to be proven by **otherwise admissible secondary evidence** (i.e. copies of the original document) unless the Court determines:

> a) **a genuine dispute exists** over the contents of the writing; or
> b) **admission of secondary evidence would be unfair**.

This is called the **secondary evidence rule**.

But in **criminal cases** the California rule is essentially the same as the federal **best evidence rule**. (CEC 1522)

1) Proving the Contents of a Writing Means What the Writing Said

Proving the "contents" of a writing means to prove WHAT the writing SAID, NOT whether what the writing said was TRUE or FALSE. This is often a major source of law student confusion. In the case of photographs the proof of the "contents" is WHAT the photo SHOWS. In the case of a recording the proof of the "contents" is WHAT sounds or words were recorded.

2) Admission of Duplicates and Copies

A **duplicate** of an original writing is admissible unless a genuine question is raised about the authenticity of the original or it would otherwise be unfair under the circumstances to admit the duplicate in lieu of the original. (FRE 1003; CEC 1521, 1522) A "duplicate" is a photograph printed from the same negative, even if enlarged or reduced in size, an exact copy produced from the same impression, a mechanical or electronic re-recording, a chemical reproduction, or any other virtually identical reproduction of an original. (FRE 1001(4)) The California rules provide for admission of copies of business and government records, recorded documents, photographs, computer printouts and numerous other duplicated or reproduced documents. (CEC 1530-1567)

> **For Example:** Britney sues USA Today for defamation after they publish an article about her. She says they called her a bad mother in the article. USA Today says it did not call her a bad mother, and agrees she is not a bad mother. The issue is NOT whether she is a bad mother or not. The issue is what did USA Today say? Since the issue is "what did they say" rather than "is what they said true", USA Today cannot offer a photocopy or "transcription" of the new article into evidence to prove it did not defame her. Under the Best Evidence Rule it has to present a copy of an actual printed USA Today newspaper into evidence. But any **duplicate** printed copy of that edition of the paper is sufficient.

The term "photograph" includes X-rays, videotape and motion pictures. (FRE 1001(2)). An "original" of a photograph includes the negative or any positive printed from the negative. (FRE 1001(3); CEC 1551)

Where data is stored in a computer any printout reflecting the data stored in the computer is generally acceptable as an "original" writing. (FRE 1001(3); CEC 1552)

3) Exceptions When Original Writing Not Required

a. Originals Lost or Destroyed. An original writing, recording or photograph does not have to be produced to prove the contents if **the originals are lost or destroyed,** unless it was done in bad faith by the party that wants to admit a copy of the original.

b. Originals Not Obtainable. An original writing, recording or photograph does not have to be produced to prove the contents if **the originals are not obtainable by judicial process or procedure**.

c. Originals Possessed by Opponent. An original writing, recording or photograph does not have to be produced to prove the contents if 1) the opposing party was **put on notice** the contents would be subject to proof at the hearing, and 2) at that time **the originals were possessed by the opposing party,** and 3) the **party does not produce the original** at the hearing or trial.

d. Collateral Matters. An original writing, recording or photograph does not have to be produced to prove the contents if the contents concern **a collateral matter** and not the controlling issues.

e. Public Records. An original writing, recording or photograph does not have to be produced to prove the contents **of a public record, official record or recorded document** if a **certified copy** is produced.

f. Voluminous Records. An original writing, recording or photograph does not have to be produced to prove the contents of **voluminous writings, recordings, or photographs** and may instead present the contents in the form of a **calculation, graph or summary.** But the originals or duplicates must be made available for examination or copying by other parties at a reasonable time and place. The court may order originals to be produced in court.

g. Contents Admitted by Opposing Party. An original writing, recording or photograph does not have to be produced to prove the contents that have been **admitted by the opposing party**.

h. Roles of Judge and Jury in Application of Best Evidence Rule. In a jury trial the jury generally decides all issues of fact. But the Court (i.e. the judge) decides whether conditions of fact have been satisfied where they are necessary for the admission of writings, recordings or photographs that are not the originals.

Chapter 10: Conclusion

This outline provides a summarized explanation of the black letter law and bright line rules of **EVIDENCE** with more discussion of the differences between California and federal rules than you need to know.

Black letter law means statutes and basic rules of broad theoretical application. And **bright line rules** are those decisional rules or logical guidelines created by the courts for the determination of close cases. **Evidence** rules are almost entirely a matter of black letter law.

To make the explanation here simple and avoid unnecessary confusion some of the details have been ignored in this outline. But the foregoing reflects ninety percent or more of everything you should know about the federal and California rules of evidence to succeed in law school to answer evidence questions on the Multi State Bar Exam the California Bar examination.

Each professor of law, in every subject, holds a keen interest in narrow areas of the law of personal interest. Frequently this interest is based on their own legal education or their experiences in the courts. When your professor expounds on an area of law given summary treatment in this outline it will be necessary for you to consult authoritative reference materials such as hornbooks to gain a greater understanding.

If your professor is adamant about some theoretical concept note that proclivity and modify your explanation of the law as necessary to humor those proclivities. But, you will find the bar examiners far less interested in such marginal issues and much more concerned with the breadth of your knowledge of the rules of law set forth herein.

Other than those cases where a professor demands further knowledge of **State evidence rules** other than California rules, the foregoing should be entirely sufficient to impart an adequate **understanding** of **evidence rules**. However, mere **understanding is NOT ENOUGH** for you to succeed. Law school and the bar examinations require **both understanding** and ability to **explain the application** of the **law to the facts and facts to the law**.

This outline is NOT written for the purpose of explaining to you how you should explain the evidence rules on your examinations. You is urged to consult Nailing the Bar's **"How to Write Evidence, Remedies, Corporations and Professional Responsibility Law School Exams"**. Information about that publication is available inside the back cover of this outline.

Tim Tyler, Ph.D.
Attorney at Law
Sacramento, California

Appendix A: California Bar Statement of Scope of Evidence Law Examination

The California Bar has posted the following statement concerning the scope of subject matter that may be tested on the California General Bar Exam:

"The scope of the subject matter in the following outline includes the applicable provisions of the Federal Rules of Evidence and the California Evidence Code with emphasis on the areas the Federal Rules and the California Code where comparisons and contrasts can be made between the Federal Rules and the California Code, especially those rules of California evidence that have no specific counterparts in the Federal Rules.

I. Presentation of evidence
    A. General provisions
        1. Roles of judge and jury
        2. Objections and offers of proof
        3. Determination of preliminary or foundational fact
        4. Burden of production
        5. Burden of proof
        6. Presumptions and inferences
        7. Judicial Notice
        8. Best and Secondary Evidence Rules
        9. Standard for reversible error
    B. Mode and order of examination of witnesses
        1. Control by court
        2. Order and stages of examination
        3. Form and scope of questions and answers
        4. Confrontation of trial witnesses
        5. Exclusion of witnesses
II. Principles of relevance and admissibility
    A. Definition of relevant evidence
    B. Admissibility of relevant evidence
    C. Limited admissibility
    D. Probative value
    E. Real, demonstrative and experimental evidence
    F. Authentication and identification
    G. Remainder of related writings or recorded statements
    H. Character, habit and custom
        1. General rule and exceptions
        2. Forms of admissible character evidence
        3. Cross-examination and rebuttal of character witnesses
        4. Prior bad acts offered for non-character purposes
    I. Discretion to exclude evidence
III. Witnesses
    A. Competence (including preparation and hypnosis of witnesses)
    B. Oath
    C. Personal knowledge
    D. Judge or juror as witness

- E. Examinations concerning writings
- F. Refreshing recollection
- G. Impeachment and rehabilitation of witnesses
    1. Character
    2. Bias
    3. Prior statements
    4. Contradiction
    5. Perceptual and mental capacity
- H. Opinion testimony by lay witnesses
- I. Scientific Evidence
- J. Expert witness testimony
- K. Opinion testimony on ultimate issue

IV. Evidentiary and testimonial Privileges

- A. Sources of privileges
- B. Scope of privileges
- C. Assertion and waiver of privileges
- D. Exceptions to privileges
- E. Particular privileges
    1. Spousal immunity and marital communications
    2. Parent and child
    3. Physician and patient
    4. Psychotherapist and patient
    5. Counselor and victim
    6. Attorney and client
    7. Attorney work-product
    8. Accountant and client
    9. Clergy and persons who consult clergy
    10. Trade secrets
    11. Compelled self-incrimination
    12. Governmental secrets
    13. Vote disclosure
    14. Newspersons

V. Hearsay and exceptions to the hearsay rule

- A. Hearsay rule
- B. Definition of hearsay
- C. Conduct as hearsay
- D. Multiple hearsay
- E. Unavailability of declarant
- F. Exceptions to, and exclusions from, the hearsay rule
    1. Admissions
    2. Business records
    3. Prior inconsistent and consistent statements
    4. Prior identification
    5. Present sense impressions and excited utterances
    6. Statements of mental, emotional or physical conditions
    7. Past recollection recorded
    8. Public records and reports
    9. Learned treatises
    10. Ancient documents

11. Commercial publications
12. Former testimony
13. Statements against interest
14. Dying declaration
15. Prior judgments

VI. Evidence affected or excluded by extrinsic policies
- A. Subsequent repairs or remedial conduct
- B. Compromise and offers to compromise, and related statements
- C. Pleas, plea discussions, and related statements
- D. Mediation
- E. Liability insurance
- F. Payment of medical expenses
- G. Health care reports, recordings and proceedings
- H. Expressions of sympathy or benevolence"

Appendix B: Comparative Table – Federal Rules vs. California Rules

	FRE	CRE
Relevance of evidence and admissibility:	401,402	210,350
Determination of relevance and admissibility:	104	400-406
Court discretion to exclude Evidence	403	352
Effect of erroneous admission or exclusion of evidence	103	353, 354
Discussion of admissibility of criminal confessions	104	402
Evidence privileges	501	911, et seq.
Holder and waiver of privilege		912
Privilege of criminal defendant to not testify no self-incrimination		930, 940
Attorney-Client privilege		950-962
Attorney work-product privilege		CCP 2018.010-2018.080
Marital communication privilege		980-987
Spousal testimony privilege		970-973
Patient-physician privilege		990-1007
Patient-psychotherapist privilege		1010-1027

Priest – penitent privilege		1030-1034
Sexual assault counselor – victim privilege		1035-1036.2
Domestic violence counselor – victim privilege		1037-1037.8
Human trafficking caseworker – victim privilege		1038-1038.2
News reporters privilege		1070
Government secrets privilege		1040-1047
Secret informants privilege		1040-1047
National security privilege		1040-1047
Remedial measures privilege	407	1151
Compromises and compromise offers privilege	408	1152, 1154
Medical expense payments privilege	409	1152, 1154
Pleas and plea discussion privilege	410	1153, 1153.5
Liability insurance privilege	411	

Index

I

J

L

M

N

O

P

R

S

T

U

W

Note: Prices, ISBN numbers and details are subject to change as various volumes are updated.

NAILING THE BAR publications by Practical Step Press – www.PracticalStepPress.com

EXAM GUIDES:

These Exam Guides identify the most commonly tested legal issues and explain WHAT to Say and HOW to Say It on Law School and Bar Exams:

1. **How to Write Essays for Contracts, UCC, Torts and Crimes Law School and Bar Exams (ABC).** The 140 most commonly tested law school and bar exam issues, 217 rules & definitions to answer them, 160 issue spotting hints, how to NAIL THE ELEMENTS, and 20 practice questions with sample answers. $29.95. ISBN 978-1-936160-00-6. © 2009, 2012.

2. **How to Write Essays for Contracts & UCC Law School and Bar Exams (A).** The 51 most commonly tested law school and bar exam Contracts and UCC issues, 79 rules & definitions to answer them, 71 issue spotting tips, and 7 practice questions with sample answers and explanations. $19.95. ISBN 978-1-936160-01-3. © 2009, 2012.

3. **How to Write Essays for Torts Law School and Bar Exams (B).** The 52 most commonly tested law school and bar exam Torts issues, 91 rules & definitions to answer them, 39 issue spotting tips, and 7 practice questions with sample answers and explanations. $19.95. ISBN 978-1-936160-02-0. © 2009, 2012

4. **How to Write Essays for Crimes Law School and Bar Exams (C).** The 37 most commonly tested law school and bar exam Crimes issues, 76 rules & definitions to answer them, 50 issue spotting tips, and 6 practice questions with sample answers and explanations. $19.95. ISBN 978-1-936160-03-7. © 2009.

5. **Nailing the BABY Bar: How to Write Essays for the California First Year Law Student Exam (BB).** This book has the same materials as the book "How to Write Contracts, UCC, Torts and Crimes Law School and Bar Exams" PLUS explanation of the California First Year Law Student Exam format. $29.95. ISBN 978-1-936160-04-4. © 2010, 2011, 2012

6. **How to Write Essays for Constitutional Law, Criminal Procedure and Civil Procedure Law School Exams (DEF).** The top 33 issues, 104 rules & definitions, 111 issue spotting hints, and 18 practice questions with answers and explanations. $29.95. ISBN 978-1-936160-09-9. © 2011, 2012.

7. **How to Write Essays for Criminal Procedure Law School and Bar Exams (D).** Issues, rules, questions and answers for Criminal Procedure. $19.95. ISBN 978-1-936160-10-5. © 2010., 2011, 2012

8. **How to Write Essays for Civil Procedure Law School and Bar Exams (E).** Issues, rules, issue spotting, questions and answers for Civil Procedure. $19.95. ISBN 978-1-936160-11-2. © 2010., 2012

9. **How to Write Essays for Constitutional Law Law School and Bar Exams (F).** Issues, rules, issue spotting, questions and answers for Constitutional Law. $19.95. ISBN 978-1-936160-12-9. © 2010, 2012, 2013.

10. **How to Write Essays for Real Property, Wills, Trusts and California Community Property Law School and Bar Exams (GHIJ).** The 93 top issues, 213 rules & definitions, 165 issue spotting hints, and 20 practice questions with answers and explanations. $29.95. ISBN 978-1-936160-13-6. © 2010, 2011, 2013.

11. **How to Write Essays for Real Property Law School and Bar Exams (G).** Issues, rules, issue spotting, questions and answers for Real Property. $19.95. ISBN 978-1-936160-14-3. © 2010, 2013.

12. **How to Write Essays for Wills and Trusts Law School and Bar Exams (HI).** Issues, rules, issue spotting, questions and answers, Wills and Trusts. $19.95. ISBN 978-1-936160-15-0. © 2010.

13. **How to Write Essays for California Community Property Law School and Bar Exams (J).** Issues, rules, issue spotting, questions and answers for Community Property. $19.95. ISBN 978-1-936160-16-7. © 2010.

14. **How to Write Essays for Evidence, Remedies, Business Organization and Professional Responsibility Law School and Bar Exams (KLMN).** The top 103 issues, 142 rules & definitions, 223 issue spotting hints, and 20 practice questions with answers and explanations. $29.95. ISBN 978-1-936160-17-4. © 2011, 2012.

15. **How to Write Essays for Evidence Law School and Bar Exams (K).** Issues, rules, issue spotting hints, questions and answers for Evidence. $19.95. ISBN 978-1-936160-18-1. © 2010.

16. **How to Write Essays for Remedies Law School and Bar Exams (L).** Issues, rules, issue spotting hints, questions and answers for Remedies. $19.95. ISBN 978-1-936160-19-8. © 2011.

17. **How to Write Essays for Business Organization Law School and Bar Exams (M).** Issues, rules, issue spotting hints, questions and answers for Corporations and Business Organization. $19.95. ISBN 978-1-936160-20-4. © 2011.

18. **How to Write Essays for Professional Responsibility Law School and Bar Exams (N).** Issues, rules, issue spotting hints, questions and answers for Professional Responsibility. $19.95. ISBN 978-1-936160-21-1. © 2011.

19. **Rules and Definitions for Law Students (O).** Over 800 rules and definitions for Torts, Contracts, UCC, Criminal Law, Civil Procedure, Criminal Procedure, Constitutional Law, Real Property, Wills, Trusts, Community Property, Evidence, Remedies, Business Organization and Professional Responsibility. $24.95. ISBN 978-1-936160-22-8. © 2014

20. **How to Write Essay Answers for Law School and Bar Exams; The Essential Guide to California Bar Exam Preparation (PR).** The top 380 issues tested on law school and bar exams in these 14 areas of law tested on the California Bar Exam. 565 issue spotting hints, how to NAIL THE ELEMENTS, and 48 uniquely different practice questions with sample answers and explanations. $64.95. ISBN 978-1-936160-05-1. © 2014.

21. **How to Write Performance Tests for Bar Exams (Q).** A guide for writing Performance Tests for Bar Exams. Formatted specifically for the California State Bar Exam with examples of letters, memorandums, pleadings and other required documents. $19.95. ISBN 978-1-936160-23-5. © 2014.

22. **333 Multiple-Choice Questions for First-Year Law Students (MQ1).** 333 multiple-choice questions on contracts, UCC (Articles 1 & 2), torts, crimes, and criminal procedure arranged into 10 practice exams as tested on California's First-Year Law Student Exam ("Baby Bar") and the General Bar Exam (GBX). $29.95. ISBN 978-1-936160-34-1. © 2014.

23. **Nailing the MBE (MQ2).** 600 multiple-choice questions arranged in 6 practice exams as tested on the MBE with answers, explanations and proven exam strategies. $74.95. ISBN 978-1-936160-38-8. © 2014.

CONDENSED OUTLINES:

These condensed Simple Outlines give "90 Percent of the Law in 90 Pages" to quickly and easily explain the generally adopted Black Letter Law and Bright Line Rules without excessive discussion of historical development or odd holdings that have little or no modern application:

24. **SIMPLE CONTRACTS & UCC OUTLINE (O-1)** © 2010, 2011, 2013 ISBN 978-1-936160-06-8....$19.95

25. **SIMPLE TORTS OUTLINE (O-2)** © 2010, 2011, 2013 ISBN 978-1-936160-07-5....$19.95

26. **SIMPLE CRIMES OUTLINE (O-3)** © 2010, 2011, 2012 ISBN 978-1-936160-08-2....$19.95

27. **SIMPLE CRIMINAL PROCEDURE OUTLINE (O-4)** © 2011 ISBN 978-1-936160-24-2....$19.95

28. **SIMPLE CIVIL PROCEDURE OUTLINE (O-5)** © 2012 ISBN 978-1-936160-25-9....$19.95

29. **SIMPLE CONSTITUTIONAL LAW OUTLINE (O-6)** © 2012 ISBN 978-1-936160-26-6....$19.95

30. **SIMPLE EVIDENCE OUTLINE (Fed. & Cal. rules) (O-7)** © 2012 ISBN 978-1-936160-27-3....$19.95

31. **SIMPLE REAL PROPERTY OUTLINE (O-8)** © 2012 ISBN 978-1-936160--28-0. ..$19.95

32. **SIMPLE CALIFORNIA COMMUNITY PROPERTY (O-9)** © 2012 ISBN 978-1-936160-29-7....$19.95

33. **SIMPLE REMEDIES OUTLINE (O-10)** © 2010, 2012 ISBN 978-1-936160--30-3 ..$19.95

34. **SIMPLE CALIFORNIA WILLS & TRUSTS OUTLINE (O-11)** © 2012 ISBN 978-1-936160--31-0 ..$19.95

All of these books are available as "**eBooks**". For more information visit our website at

www.PracticalStepPress.com

2/14

What LAW STUDENTS say about SIMPLE OUTLINES —

Got your "simple outline"… read it in just ONE day the first week of my class. Think I was about the only student who even understood where the professor was going with the class all semester — Michael M.

Love the Bevis and Butthead examples! — Kim R. Purchased your outline set :-) -- Great stuff! — Rueben

The focus on basic rules really helped me. Reading case law had me all screwed up — Michelle R.

Great time-saver! I could review it before exams — Jason D.

NINETY PERCENT of the LAW in NINETY PAGES®

HOW this book is different and WHY TO BUY IT—

This book **COMPLETELY EXPLAINS THE FEDERAL RULES OF EVIDENCE** as tested on the MBE plus an explanation of the CALIFORNIA RULE differences tested on the California Bar Exam.

TIME IS PRECIOUS. You can read this SIMPLE OUTLINE **QUICKLY** and immediately get a **GENERAL UNDERSTANDING** of the subject matter at the **BEGINNING OF YOUR CLASS** when it really helps.

SIMPLE IS BETTER. As your class progresses, this SIMPLE OUTLINE explains the broadly adopted **BLACK LETTER LAW** and **BRIGHT LINE RULES** of law **AS THEY NOW EXIST** using **EXAMPLES.**

EXAMS ARE WHAT COUNTS. This SIMPLE OUTLINE is so **COMPACT** you can **QUICKLY REVIEW IT BEFORE EXAMS.** You can't do that with a hornbook or "commercial outline" that is hundreds of pages long because there **SIMPLY ISN'T ENOUGH TIME**.

Published by

Practical Step Press

www.PracticalStepPress.com

O-7

ISBN 978-1-936160-27-3