**Evidence**

**Logical relevance** – Evidence is logically relevant if it tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. California requires that the evidence goes to a disputed fact.

**Legal relevance** – Even if evidence is logically relevant, a trial judge has discretion to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or waste of time. In California, under Proposition 8, all relevant evidence is admissible in criminal cases subject to balancing and other exceptions.

**Liability insurance** - Evidence of liability insurance is not admissible to prove negligence or ability to pay but is admissible to prove ownership or control or to impeach a witness.

**Subsequent remedial measures or repairs** – Evidence of safety measures or repairs after an accident is inadmissible to prove negligence or to prove defective design in a products liability case, but it is admissible to prove ownership or control, to rebut a claim of no feasible precaution, or to prove destruction of evidence. California does not apply in products liability cases.

**Settlements, offers to settle, and pleas** – Evidence of offers to settle are inadmissible to prove the validity or amount of a disputed claim. Statements made during settlement discussions are also inadmissible. California also applies to discussions during mediation proceedings. Evidence of withdrawn pleas, offers to plea, and related statements are inadmissible.

**Payments or offers to pay medical expenses** – Evidence of payments or offers to pay medical expenses is inadmissible to prove liability for the injuries in question. Accompanying admissions of fact, however, are admissible. In California, accompanying admissions of fact are also inadmissible.

**Habit** - Habit evidence describes a person's regular response to a specific set of circumstances and conveys no moral judgment.

**Character evidence** - Character evidence goes to the general character of a person and conveys a moral judgment.

**Character evidence in civil case to prove defendant’s conduct** – Character evidence in a civil case to prove the defendant's conduct is inadmissible unless character is at issue (e.g. defamation) or if it is independently relevant for a purpose other than character such as MIMIC. Evidence of prior sexual assault or child molestation when offered in a civil case arising out of sexual assault of child molestation is admissible. In California there is no exception for sexual assault of child molestation evidence in civil cases.

**Character evidence in criminal to prove defendant’s conduct** – Inadmissible unless (1) defendant opens the door by offering evidence of his good character. Opinion and reputation on direct, specific instances or acts on cross, (2) evidence of prior sexual assault or child molestation when offered in a criminal case arising out of sexual assault or child molestation, (3) character is at issue (entrapment), or (4) if independently relevant to prove something other than character such as MIMIC. If the court has admitted evidence of victim's character offered by defendant, prosecution can offer evidence that defendant has same character trait. In California, specific acts not allowed on cross. Victim's violent character admissible by defendant and can be rebutted by prosecution. Proposition 8 does not apply to evidence defendant's character to prove conduct.

**Character evidence in criminal case to prove victim’s conduct** - Inadmissible unless defendant opens the door by offering evidence of victim's bad character. Opinion and reputation on direct. Specific acts on cross. In California, specific acts admissible on both direct and cross. Proposition 8 does not apply.

**Character evidence in criminal case to prove victim’s peaceful character** - Evidence of victim's peaceful character offered by prosecution in a homicide case is admissible to rebut defendant's evidence that victim was the aggressor. Opinion and reputation on direct. Specific acts on cross. There is NO California counterpart to this rule and proposition 8 does not apply.

**Rape shield** - Opinion and reputation are always inadmissible. Specific instances of conduct or specific acts admissible only (1) to prove someone other than defendant was the source of semen or injury, (2) to prove prior acts of consensual sex between victim and defendant, and (3) to avoid violation of defendant's constitutional rights. In California, defendant cannot offer any evidence of victim's prior sexual conduct or manner of dress to prove victim's behavior unless victim's prior sexual conduct was with the defendant. Proposition 8 does not apply.

**Competency** – Witnesses must have the capacity to observe, recollect, communicate, and swear or affirm to tell the truth. In California, witness must understand duty to tell the truth. Presiding judge and jurors are incompetent to testify at trial but may do so if there is no objection.

**Personal knowledge** - A witness must have personal knowledge of the matter about which she is called to testify.

**Lay opinion** - Inadmissible unless (1) rationally based on the witness's perception, (2) helpful to a clear understanding of his testimony, and (3) not based on scientific, technical or other specialized knowledge (STSK). In California, there is no requirement that lay opinion not be based on STSK.

**Expert opinion** – Admissible if (1) subject matter is appropriate for expert testimony and opinion is helpful the jury, (2) witness is qualified as expert, (3) witness believes in opinion to a reasonable degree of certainty, and (4) opinion is reliable and supported by proper factual basis. Reliability of scientific opinion judged under Daubert factors: (1) publication and peer review, low error rate, results are tested and there is the ability to retest, and there is a reasonable level of acceptance among scientists. In California, reliability of scientific opinion based on Kelly-Frye factors: only if based on scientific principles that are generally accepted in the relevant scientific field.

**Impeachment by prior inconsistent statement** - Admissible but limited to impeachment purpose (cannot be used as substantive evidence) unless made under oath in prior legal proceeding, in which case it is admissible nonhearsay. In California, hearsay admissible under exception even if not made under oath in prior proceeding.

**Impeachment with felony conviction** - Convictions for felonies involving dishonesty or false statements (perjury, forgery, fraud) are admissible and court has no discretion to balance, no balancing, unless conviction is more than 10 years old. Convictions for felonies not involving dishonest or false statements are admissible subject to court's discretion. If criminal defendant, inadmissible unless probative value outweighs unfair prejudice (reverse balancing). If another witness being impeached, conviction is admissible unless unfair prejudice outweighs probative value. In California, felony convictions involving moral turpitude are admissible subject to balancing probative value against prejudice. Moral turpitude includes, lying, violent, theft, extreme recklessness, or sexual misconduct.

**Impeachment with misdemeanor conviction** - Misdemeanor convictions involving dishonest or false statements are admissible and the court has no discretion to balance unless conviction is more than 10 years old. Convictions for misdemeanors not involving dishonesty or false statements are inadmissible to impeach. In California, in civil cases misdemeanor convictions are inadmissible to impeach. In criminal cases, admissible if the crime involves moral turpitude subject to balancing.

**Impeachment with specific bad acts (not felony or misdemeanor)** - Witness can be asked on cross about specific bad acts that bear on character for truthfulness subject to court's discretion to balance. No extrinsic evidence. In California, in civil case, evidence of witness's character for truthfulness is inadmissible. In criminal cases, Proposition 8 makes acts of moral turpitude admissible by both cross-examination and extrinsic evidence.

**Impeachment with character for untruthfulness** - Opinion and reputation testimony that bears on the witness's truthfulness or untruthfulness are admissible.

**Hearsay** – Hearsay is an out of court statement by a declarant offered to prove the truth of the matter asserted, and is inadmissible unless it falls within an exception to the rule. Hearsay within hearsay will be admissible only if both the outer and inner layers fall within a hearsay exception.

**Opposing party statement** – A statement by a party or by someone whose statement is attributable to a party, when offered by a party opponent, is admissible non-hearsay.

**Vicarious party admission** – Statement of person authorized by party to speak on its behalf or statement by agent concerning any matter within scope of agency made while employment relationship exists is admissible against principal. Admissible non-hearsay. In California, there is no equivalent provision except in respondeat superior civil cases..

**Adoptive admission** - Party expressly or impliedly adopts or acquiesces to statement of another. Admissible non-hearsay.

**Vicarious admission by co-conspirator** - Statement of one conspirator made in furtherance of conspiracy to commit crime or civil wrong and made during the conspiracy, admissible against co-conspirators

**Prior inconsistent statement** - Not hearsay if made under oath at a prior proceeding or deposition. Admissible for impeachment purposes and as substantive evidence. In California, admissible for impeachment purposes and as substantive evidence even if not made under oath at a prior proceeding or deposition

**Prior consistent statement to rebut charge of recent fabrication** - Not hearsay if offered to rebut attack on witness's credibility and if made before motive to lie arose.

**Prior statement of identification** - Admissible non-hearsay. In California, witness must have made identification while memory of event was fresh and must confirm in court that she made prior identification and that it truly reflected opinion at the time.

**Former testimony** - Testimony given under oath in earlier proceeding or deposition by unavailable witness is admissible if (1) similarity of parties, (2) similarity of issues, (3) party against whom testimony is offered had opportunity to examine witness and motive to conduct that exam was similar to current motive. Alternatively, if not a party in earlier proceeding but was predecessor in interest and had opportunity and interest to conduct that exam similar to the interests of the party against whom the testimony is now offered. In California, there is no requirement that the party's predecessor in interest be party to the earlier civil proceeding. It is sufficient that party in prior action had interest similar to that of party against whom former testimony now offered.

**Statement against interest** – A statement by an unavailable declarant is admissible if, at the time the statement was made, it was against the declarant’s financial interest or would have subjected declarant to criminal liability. In a criminal case, if such evidence is offered to exculpate a defendant (e.g. a confession of an unavailable declarant to the crime), the defendant must offer corroborating circumstances showing that the declarant’s statement is trustworthy.

**Unavailability** – A declarant is unavailable if the court exempts the declarant from testifying due to a privilege, the declarant is dead or sick, the proponent of the statement cannot procure declarant’s attendance by process or other reasonable means, the declarant refuses to testify despite a court order, or the declarant’s memory fails on the subject of her statement.

**Dying declaration** – In a civil or homicide case, statement is admissible if declarant believed death was imminent and statement concerned cause or circumstance of what he believed to be his impending death. Declarant need not be dead but must be unavailable. In California, statement admissible in any case, civil or criminal, declarant must be dead, and statement must concern what killed him.

**Excited utterance** – A statement made while under the stress of excitement of a startling event is admissible. In California, called spontaneous statement.

**Present sense impression** – A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter is admissible hearsay under the exception for present sense impressions. There is no need to show that the declarant is unavailable. California exception is much narrower, covering only a statement by a declarant explaining his conduct made while declarant engaged in that conduct. In California this is called a contemporaneous statement.

**State of mind/then-existing condition** - Statement of declarant's then-existing physical or mental condition or state of mind is admissible to show the condition or state of mind. Statement describing memory or belief is not admissible to prove the fact remembered or believed. Statement need not be made to get medical diagnosis or treatment.

**Statement of past physical or mental condition for medical diagnosis or treatment** – A statement of past physical or mental condition is admissible only if made for purpose of medical diagnosis or treatment. In California, admissible only if made by child-abuse victim under age 12 for purpose of obtaining diagnosis or treatment.

**Business records** – Records of events, conditions, opinions, or diagnoses made in regular course of business, consisting of matters within personal knowledge of one with business duty to transmit. Lack of such writing may be used to show nonoccurrence of event.

**Public records** – Record of public office is admissible if it (1) describes activities or policies of the office, (2) describes matters observed pursuant to duty imposed by law (excluding police reports in criminal cases), or (3) contains factual findings from investigation made pursuant to authority granted by law, unless untrustworthy. California allows records of police observation in criminal cases.

**Expressions of sympathy (CA)** - In California, expressions of sympathy relating to the pain, suffering, or death of an accident victim are inadmissible in civil cases. However, accompanying statements of fault are admissible.

**Statement describing infliction or threat of physical injury** - In California, statement by unavailable declarant that describes, narrates, or explains infliction or threat of physical injury on declarant is admissible if the statement was made at or near the time of infliction or threat, made under circumstances that indicate trustworthiness, and is in writing, recorded or made to law enforcement personnel.

**Judgment of previous conviction** – A felony conviction is admissible in both civil and criminal cases to prove any fact essential to the judgment, but when offered by the prosecution for purposes other than impeachment, judgments against persons other than the accused are inadmissible.

**Past recollection recorded** - At trial, if a witness states that he does not have sufficient recollection of an event to be able to testify fully and accurately even after consulting a writing provided to him on the stand, the writing itself may be read into evidence. The document itself is not admitted as an exhibit unless it is offered by the adverse party. To qualify as a past recollection recorded, a foundation must be laid showing (1) the witness at one time had personal knowledge of the facts in the writing, (2) the writing was made by the witness or made under his direction, (3) the writing was made while the matter was fresh in the mind of the witness, (4) the writing is accurate, and (5) the witness has insufficient recollection to testify fully and accurately.

**Authentication** - Prior to being admitted, a writing or other physical evidence must be authenticated by proof showing it is what the proponent claims it to be. Oral statements must be authenticated in cases where the identity of the speaker is important. Statements made during a telephone call may be authenticated by testimony as to (1) the witness recognizes the speakers voice, (2) the speaker has knowledge of certain facts that only a particular person would have or (3) the speaker has identified himself.

**Best evidence rule** - Applies only when evidence offered to prove material terms of writing, defined broadly to include any collection of data in tangible form. Original writing must be produced. Duplicates are admissible as originals. Handwritten copies are not duplicates. In California, called secondary evidence rule. Proposition 8 does not apply. Handwritten notes are admissible as duplicates.

**Attorney-client privilege** - A communication between an attorney and client or their representatives intended by the client to be confidential and made to facilitate rendition of professional legal services is privileged unless waived by the client. The privilege applies to communications from employees/agents of a corporation to the corporation’s attorney if the agent/employee was authorized by the corporation to make the communication to the lawyer on behalf of the corporation. However, the privilege does not apply where (1) professional services were sought to further a crime or fraud, (2) two or more parties consult an attorney on a matter of common interest and the communication is offered by one of these parties against another, or (3) communication relates to an alleged breach of duty between the lawyer and client. In California, one additional exception to privilege if lawyer reasonably believes disclosure of communication is necessary to prevent crime likely to result in death or substantial bodily harm.

**Doctor-patient/therapist-patient privilege** - Under the FRE, there is no doctor-patient privilege. Majority of states say patient has privilege to prevent disclosure of confidential information conveyed to physician for the purpose of medical treatment. Even assuming the existence of a such a privilege, the privilege does not apply where (1) the patient puts his physical or mental condition in issue, as in a personal injury suit, (2) where professional services were sought to aid in crime or fraud or to escape capture after a crime or tort, (3) in a case alleging breach of duty between patient and doctor or therapist, as in a malpractice action. In California, applies only to licensed physician and for purpose of medical diagnosis or treatment, and privilege does not apply in criminal cases.

**Spousal immunity** – One spouse cannot be compelled to testify against other spouse in a criminal proceeding. Only witness-spouse can invoke privilege. Can be claimed only during the marriage, but covers information learned before and during marriage. In California, spousal immunity applies to civil and criminal proceedings.

**Confidential marital communications** - In civil and criminal cases, protects confidential spousal communications made during marriage. Both spouses can claim privilege not to disclose and to prevent other spouse from disclosing. Privilege applies after the marriage.

**Leading question** - A question is leading, and therefore objectionable on direct examination, when it suggests the answer to the witness. The court may allow a leading question on direct when (1) used to elicit preliminary or introductory matter, (2) witness had a loss of memory, or (3) witness is hostile or an adverse party.

**Speculation** - An examining attorney may not ask a witness to speculate or hypothesize as to the existence or meaning of a fact. Testimony must be based upon the witness's personal knowledge rather than on conjecture.

**Nonresponsive** - A witness's response may be stricken as nonresponsive if it goes beyond the scope of the specific question that was asked. When a question calls for a yes or no answer, any additional testimony is subject to being excluded as nonresponsive. In California, a motion to strike a nonresponsive answer can be made by counsel for any party.

**Proposition 8 exceptions** - In California, Proposition 8 does not apply to: Privileges Constitutional / Confrontation Clause Hearsay Best evidence / Secondary evidence Rape shield Open the door - substantive character evidence when defendant has not opened the door.