

EVIDENCE

I. RELEVANCE

a. Definition

- i. Evidence is relevant if it has any tendency to make the existence of any fact that is *of consequence* to the determination of the action more or less probable than it would be without the evidence.
 - ii. CA: the fact of consequence must also be *in dispute*.
 - iii. CA: In a criminal case, mention the Truth in Evidence amendment to CA Constitution (Prop 8). It makes all relevant evidence admissible in a criminal case, even if it is objectionable under the CEC.
 1. Exceptions to Prop 8
 - a. Exclusionary rules under US Constitution such as the CC
 - b. Hearsay law
 - c. Privilege law
 - d. Limit on character evidence about the victim in a rape case
 - e. The rule prohibiting prosecution from offering evidence of D's character before D opens the door
 - f. The secondary evidence rule
 - g. CEC 352 (ct's power to exclude if unfair prejudice substantially outweighs probative value)
 - iv. Three-step approach to applying CA law on essays:
 1. Raise all objections under CEC;
 2. For each objection, mention if Prop 8 overrules the objection;
 3. If evidence seems admissible under Prop 8, balance under CEC 352.
- b. Discretion to exclude relevant evidence
- i. Ct has discretion to exclude if probative value is *substantially* outweighed by unfair prejudice, confusion, or waste of time.
- c. Exclusion of relevant evidence for policy reasons
- i. Liability insurance
 1. Inadmissible to prove culpable conduct like negligence or D's ability to pay a judgment.
 2. Evidence of insurance is admissible to prove anything else.
 3. Whenever you have evidence admissible for 1 purpose but inadmissible for another, there is an unfair prejudice argument: balance probative value against unfair prejudice.
 - ii. Subsequent remedial measures or repairs
 1. Inadmissible to prove culpable conduct or, in a products liability action, defective product design.

- a. CA only excludes repair evidence if offered to prove negligence; does NOT extend to strict liability (repair evidence admissible in strict liability cases).
 - 2. Remedial measures evidence is admissible to prove anything else.
 - 3. Admissible to rebut defense of no feasible precaution.
- iii. Settlements, offers to settle and pleas
 - 1. Civil case
 - a. Evidence of settlements, offers to settle, and related statements are inadmissible to prove liability or fault.
 - 2. Criminal case
 - a. Pleas, offers to plea and related statements are inadmissible to prove guilt. This includes pleas of nolo contendere.
 - 3. Exception to settlement rule where no claim yet asserted
 - a. Settlement rule applies only where *claim has been asserted*
 - 4. Exception to settlement rule where no dispute as to liability or damages
 - a. Settlement rule does not apply if no dispute as to liability or damages.
 - 5. CA law
 - a. Discussions during mediation proceedings also inadmissible
- iv. Payment or offers to pay medical expenses
 - 1. Inadmissible when offered to prove liability for the injuries in question.
 - 2. But related statements are still admissible.
 - 3. CA also makes inadmissible admissions of fact made in the course of making such payments or offers.
- v. Expressions of sympathy
 - 1. CA makes inadmissible in civil actions expressions of sympathy relating to suffering or death of an accident victim. But statements of fault made in connection with such an expression are not excluded. No comparable federal rule.
- vi. Pleas later withdrawn, offers to plea, and related statements
 - 1. Inadmissible under both FRE and CEC. BUT the law is unclear whether Prop 8 makes this admissible in CA. *On an essay, raise the issue and mention that, even if Prop 8 applies to such evidence, the ct still may exclude for unfair prejudice.*
- d. Similar occurrences
 - i. Sometimes admissible to prove causation
 - ii. Prior accidents or claims are usually irrelevant, but 2 exceptions:
 - 1. Exception for pattern of fraudulent claims
 - 2. Exception for preexisting condition
 - iii. Previous similar acts relevant to prove intent
 - iv. Comparable sales relevant to establish value
 - v. Habit evidence admissible
 - 1. Conduct must be frequent and repeated
 - vi. Routine practice evidence
 - vii. Industrial custom evidence relevant to prove standard of care in negligence case.

II. CHARACTER EVIDENCE

- a. Four question approach:
 - i. What is the purpose for which the character evidence is offered?
 - 1. To prove character because character is an issue in the case
 - 2. To prove character as circumstantial evidence of a person's conduct on the occasion in question

3. Offered to impeach or support the credibility of a witness
- ii. What method or technique is used to prove character?
 1. Specific acts of conduct
 2. Opinion
 3. Reputation
- iii. Is it a civil or criminal case?
- iv. Does the evidence prove a pertinent character trait?

b. Character evidence in civil cases

- i. CE inadmissible to prove **conduct** except where civil claim is based on sexual assault or child molestation. **No sexual assault/child molestation exception in CA & S, in CA, no character evidence to prove conduct in a civil case.**
- ii. CE admissible where **character in issue** (all 3 methods allowed, specific instances of conduct, opinion, and reputation):
 1. Defamation
 2. Negligent entrustment
 3. Child custody disputes

c. Character evidence in criminal cases

i. Admissibility of evidence of D's character to prove **conduct**

1. Prosecution cannot be first to offer such evidence unless:
 - a. In cases of sexual assault or child molestation, prosecution can be first to offer evidence that D committed other acts of sexual assault or child molestation;
 - i. **CA only: in prosecution for crime of domestic violence, prosecution may offer evidence that D committed other acts of domestic violence.**
 - b. Where court has admitted evidence of V's character offered by D, prosecution can be first to offer evidence that D has SAME character trait.
 - i. **CA only (narrower than above): where ct has admitted evidence of V's character for violence offered by accused, prosecution may offer evidence that accused has violent character (MUST BE VIOLENCE, NO OTHER CHARACTER TRAIT).**
2. D can open the door. Once door has been opened, prosecution can offer **pertinent** character evidence to rebut.
3. On direct exam by any party, reputation and opinion evidence are admissible, but not specific instances evidence.
4. On cross exam by any party, reputation, opinion, and specific instances are all admissible.
5. **CA admits only reputation and opinion to prove D's character, whether on direct or cross. But Prop 8 makes it all admissible, subject to 352 balancing.**

ii. Admissibility of evidence of V's character to prove **conduct**

1. Prosecution cannot be the first to offer CE to prove conduct. There are 2 ways D can open the door:
 - a. If D offers evidence of V's character, prosecution may rebut.
 - b. In a HOMICIDE case, if D offers evidence V attacked first, prosecution may offer evidence of V's character for PEACEFULNESS.

- i. **CA does not have this exception.**
 - 2. On direct, only reputation and opinion evidence.
 - 3. On cross, all 3.
 - 4. Only situation where opening one door opens the other door: after ct admits evidence of V's violent character, prosecution offers evidence of D's violent character (must be SAME character trait).
 - 5. **In CA, reputation, opinion, and specific instances permitted on both direct and cross.**
- d. Rape shield statute
 - i. Criminal rules
 - 1. Reputation and opinion evidence inadmissible.
 - 2. Specific instances of alleged V's conduct admissible only to prove:
 - a. Third party is source of sex or injury; or
 - b. Prior acts of consensual intercourse between D and alleged V.
 - ii. Civil rules
 - 1. Reputation, opinion, and specific instances evidence admissible if probative value substantially outweighs unfair prejudice and, in the case of reputation evidence, P put her reputation in issue.
- e. MIMIC
 - i. Specific instances of D's bad conduct may be admitted to prove anything other than character that is relevant:
 - 1. Motive
 - 2. Intent
 - 3. Mistake
 - 4. Identity
 - a. Similarity and uniqueness required.
 - 5. Common plan or scheme.

III. TESTIMONIAL EVIDENCE

- a. Competence
 - i. Four requirements
 - 1. Personal knowledge
 - a. Distinguish between PK and hearsay objections: is the fact perceived the fact testified to? if not, PK is the objection.
 - b. Perception may be limited.
 - 2. Present recollection
 - 3. Communication
 - 4. Sincerity
 - ii. **CA: witness must also understand legal duty to tell the truth.**
 - iii. **Federal and CA: all witnesses are competent except for judge and jurors. CA also disqualifies witnesses who have been hypnotized to help refresh recollection except, in a criminal case, witness hypnotized by police using procedures that protect against suggestions.**
- b. Objections
 - i. Calls for narrative
 - ii. Unresponsive

- iii. Usually no leading on direct
- iv. Leading OK on cross
 - 1. Cross must stay within scope of direct.
- v. Leading OK on direct if adverse witness, hostile witness, witness needing help
- vi. Assumes facts not in evidence
- vii. Argumentative
- viii. Compound

c. Witness use of documents during testimony. WATCH FOR HEARSAY ISSUES.

i. Refreshing recollection

- 1. Anything can be used to refresh recollection.
- 2. The opponent may inspect and offer in to evidence anything used to refresh.

ii. Recorded recollection exception to the hearsay rule:

- 1. W had personal knowledge of the facts
- 2. The document was made by the W or under the W's direction or was adopted by the W
- 3. The document was written or adopted at a time when the facts were fresh in the W's memory
- 4. The document was accurate when made
- 5. The W now has insufficient recollection to testify as to matters contained in the document

d. Opinion testimony

i. Lay opinion

- 1. Admissible if rationally based on W's perceptions and helpful to the trier of fact.
 - a. Helpful if the lay opinion gives MORE info than would testimony limited to describing W's perceptions.
 - b. Lay opinion permitted as to:
 - i. Speed of auto
 - ii. Sanity
 - iii. Intoxication
 - iv. Emotion
 - v. Value of W's property
- 2. Legal conclusions are not helpful because they give the jury LESS info than testimony describing W's perceptions.

ii. Expert opinion

- 1. 5 requirements:
 - a. Opinion must be helpful to the jury
 - b. W must be qualified
 - c. W must believe in opinion to reasonable degree of certainty
 - d. Opinion must be supported by a proper factual basis
 - i. Opinion must be based on the following:
 - 1. Admitted evidence;
 - 2. PK; or
 - 3. Inadmissible evidence reasonably relied upon.
 - e. Opinion must be based on reliable principles that were reliably applied
 - i. Daubert/Kumho standard:
 - 1. Peer reviewed and published

2. Tested and subject to retesting
3. Low error rate
4. Reasonable level of acceptance
- ii. **CA: Kelley/Frye General Acceptance Standard**
 1. **Reliability of scientific opinions determined by ONE factor: the opinion must be based on principles generally accepted by experts in the field.**
2. Helpful → expert uses specialized knowledge to reach conclusion the average juror could not figure out for herself.
- e. Evidence of Witness Credibility. WATCH FOR HIDDEN HEARSAY ISSUES WHEN A PRIOR STATEMENT OF A WITNESS IS OFFERED TO ATTACK OR SUPPORT CREDIBILITY.
 - i. Evidence to *support* credibility
 1. Inadmissible unless credibility attacked first
 2. Prior consistent statement is admissible for ALL purposes if made BEFORE bribe or inconsistent statement. Otherwise, inadmissible for any purpose.
 - ii. **Impeachment**
 1. Three step approach to admissibility of impeachment evidence:
 - a. Is source of impeachment extrinsic evidence or testimony of this proceeding or witness being impeached?
 - i. Extrinsic evidence = any evidence other than testimony given at this proceeding by the W being impeached
 - b. If extrinsic, is it admissible given impeachment technique?
 - c. Any other foundation requirements?
 2. Impeachment by contradiction
 - Extrinsic evidence inadmissible to impeach on a collateral matter** (a fact not material to the issues in the case that says nothing about W's credibility other than to contradict the W).
 3. Impeachment by PIS
 - a. PIS of witness who testifies at trial – NOT hearsay if given under oath at trial or deposition. Otherwise – hearsay and inadmissible if offered to prove truth; but admissible if offered solely to impeach.
 - CA: hearsay if offered to prove the truth of matter asserted, but admissible under exception, WHETHER OR NOT UNDER OATH.**
 - b. **Extrinsic evidence of PIS inadmissible to impeach on a collateral matter**
 - c. Foundation requirement
 - Extrinsic evidence admissible only if W given opportunity to explain or deny.**
 4. Impeachment with evidence of bias, interest, motive
 - a. Foundation requirement
 - i. **Extrinsic evidence admissible if W given opportunity to explain or deny.**
 5. Impeachment with conviction for crime involving false statement
 - a. All convictions (felonies and misdemeanors) for crimes of false statement are admissible.
 - b. No balancing of unfair prejudice against probative value except for convictions more than 10 years old.

- c. CA: all FELONIES involving moral turpitude are admissible, but ct must balance; felonies not involving moral turpitude are inadmissible. Prop 8 does NOT make such felonies admissible because convictions must involve a crime of moral turpitude to be relevant for impeachment.
 - i. Moral turpitude: crimes of lying, violence, theft, extreme recklessness, and sexual misconduct, but not crimes for merely negligent or unintentional acts.
 - d. The CEC makes misdemeanor convictions inadmissible to impeach. But because of Prop 8, misdemeanors can be admitted in a criminal case if involving a crime of moral turpitude, subject to balancing. This means misdemeanors are inadmissible in CA to impeach in a CIVIL case.
6. Impeachment with conviction for a crime NOT involving false statement
 - a. Felonies that do not involve false statement may be admissible to impeach, but ct may exclude for unfair prejudice.
 - b. Misdemeanors that do not involve false statement are inadmissible to impeach.
 7. Final points on conviction impeachment
 - a. If conviction otherwise admissible under these rules, **conviction may be proved with extrinsic evidence.**
 - b. If conviction more than 10 years old since the date of conviction or release from prison (whichever is later) it is inadmissible unless probative value outweighs unfair prejudice.
 - i. No such specific rule in CA. But under above rules, CA cts may balance, which permits consideration of any factor bearing on probative value, including age of conviction.
 8. Impeachment with non-conviction misconduct evidence bearing on truthfulness
 - a. Acts of misconduct that did NOT result in a conviction are **admissible** to impeach in both civil and criminal cases **if the acts involved lying.**
 - b. **Extrinsic evidence to prove the acts is inadmissible.**
 - c. Impeacher only may cross-examine w about her misconduct.
 - d. CA inadmissible under CEC but Prop 8 makes it admissible in criminal cases if relevant; to be relevant misconduct must be act of moral turpitude. Both cross-exam and extrinsic evidence permitted, subject to balancing.
 9. Impeachment with reputation and opinion regarding truthfulness
 - a. **Extrinsic evidence is admissible.**

IV. HEARSAY

- a. Definition
 - i. Out of court statement offered to prove the truth of the matter asserted.
 - ii. Statement = verbal or written expression of a person or conduct by a person intended to communicate (assertive conduct).
- b. Is it offered to prove the truth of the matter asserted?
 - i. Three step approach:
 1. Find the statement
 2. Ask what it is offered to prove
 3. Given what it's offered to prove, will jury be misled if the out of court speaker was lying or mistaken? If yes, hearsay. If no, not hearsay.
 - ii. Not hearsay because statement has independent legal significance.
 1. I accept your offer

2. Defamation action
3. That is my land
4. I am giving you this car as a gift
- iii. Not hearsay because statement offered to show effect on listener.
- iv. Not hearsay because statement offered to show speaker's knowledge of facts stated.
- v. Not hearsay because statement is circumstantial evidence of state of mind.

c. Hearsay exemptions

- i. Admission of party opponent
 1. Party admission = statement by party, or by someone whose statement is attributable to a party, offered by a party opponent.
 2. Need not be against the interest of party that made the statement.
 3. Party admission not subject to PK requirement or opinion rule.
 4. **Hearsay, but admissible under EXCEP TION (CA law has only exceptions to hearsay rule).**
- ii. Vicarious party admissions
 1. Statements by authorized spokesperson of party or employee of party concerning matter within scope of employment and made during employment relationship.
 2. **CA: statement by employee of party is party admission of employer only where negligent conduct of that employee is basis for employer's liability in the case under respondeat superior. In other words, employer is responsible for employee's words only if also responsible because of that employee's conduct.**
- iii. Adoptive admissions
 1. Nonparty makes statement and party indicates belief in its truth.
- iv. Co-conspirator statements
 1. Made during course and in furtherance of conspiracy.
- v. The following exemptions apply to an out of court statement from a declarant who now testified at trial:
 1. PIS given under oath
 - a. PIS not hearsay if offered just to impeach. If given under oath, exemption to usual hearsay definition and not hearsay even if offered to prove truth of matter asserted; otherwise, hearsay and inadmissible to prove those facts.
 - b. **CA: hearsay if offered to prove the truth of matter asserted, but admissible under exception, which extends to ALL inconsistent statements of witness, WHETHER OR NOT UNDER OATH.**
 2. PCS offered to rebut charge of recent fabrication or improper influence or motive
 - a. Admissible under both federal and CA law if made before bribe or inconsistent statement.
 - b. Not hearsay under FRE exemption to hearsay definition.
 - c. **CA: hearsay but within exception under CEC.**
 3. Statement of identification of a person made after perceiving the person

d. Hearsay exceptions

- i. Former testimony exception (requires UNAVAILABILITY)
 1. Testimony given by a person in earlier proceeding or deposition is admissible if:
 - a. The party against whom the testimony is now offered had, during the earlier proceeding, an opportunity to examine that person and the motive to conduct that exam was similar to the motive the party has now, OR

- b. In a CIVIL case, the party against whom the testimony is now offered was not present in the earlier proceeding, but has a close privity-type relationship with someone who was a party to that earlier proceeding (a predecessor in interest) and who had an opportunity and a similar motive to examine the witness in that earlier proceeding.
- i. **Not in CA.**
- c. **CA only: in a CIVIL case, party against whom testimony is now offered was not a party in the earlier proceeding, but a party in that earlier proceeding had an opportunity to examine the witness and an interest to conduct that exam similar to the interests of the party against whom the testimony is now offered, or the FT is offered *against* the person who offered it in evidence in her own behalf in the earlier proceeding, or against a successor in interest of such person.**
2. **Related CA law: deposition testimony given in the same civil action in which the hearsay is offered at trial is admissible for all purposes if deponent is unavailable at trial or lives more than 150 miles from the courthouse. Otherwise, the FT exception does not apply to deposition testimony given in the same case in which the hearsay is offered at trial.**
3. Declarant is unavailable if:
- Ct exempts declarant from testifying due to privilege;
 - Declarant is dead or sick;
 - Proponent of statement cannot procure declarant's attendance by process or other reasonable means;
 - Declarant refuses to testify despite court order, or
 - Not in CA.**
Declarant's memory fails on the subject of her statement.
 - Not in CA.**
4. **CA only: if declarant suffers total memory loss or refuses to testify out of fear, CA regards declarant as unavailable.**
- ii. Declaration against interest exception (requires UNAVAILABILITY)
- Hearsay statement is admissible if, at time it was made, it was against the financial interest of the declarant or would have subjected declarant to criminal liability.
 - If the statement is offered to exculpate accused, there must be corroborating evidence to admit the statement.
 - CA does not have this.**
 - Can be made by anybody (need not be a party); **MUST** be against interest.
 - CA only: also within exception is a statement against social interest because it risks making declarant an object of hatred, ridicule, or social disgrace in the community.**
- iii. Dying declaration exception (requires UNAVAILABILITY)
- Hearsay statement by one believing he is about to die and describing cause or circumstances leading to impending death is admissible in civil action and in HOMICIDE prosecution. Declarant need not die, but must be unavailable.
 - CA: exception applies in all civil and criminal cases and declarant MUST be dead.**
- iv. Excited utterance exception
- Hearsay statement relating to startling event or condition is admissible when made while declarant was still under stress of excitement caused by event or condition.

- v. Present sense impression exception
1. Hearsay statement is admissible if describing or explaining an event or condition made while declarant was perceiving the event or condition or immediately thereafter.
 2. CA exception is narrower: a statement explaining conduct of the DECLARANT made while the declarant was engaged in that conduct.
 3. Related CA exception: Statement describing infliction or threat of physical abuse (the OJ exception). WATCH OUT FOR CONFRONTATION ISSUE.
 - a. Statement made at or near time of injury or threat, by unavailable declarant, describing or explaining infliction or threat, in writing or recorded or made to police or medical professional, under trustworthy circumstances.
- vi. Exception for declaration of then existing physical or mental condition (statements must be in PRESENT TENSE)
1. Hearsay statement of declarant's then existing physical or mental condition or state of mind is admissible to show the condition or state of mind.
 2. Admissible to show action in accordance with that state of mind.
 3. But a statement describing a memory or belief is not admissible to prove the fact remembered or believed.
- vii. Exception for statement of past or present mental or physical condition made for medical diagnosis or treatment
1. Hearsay statement by one person concerning the past or present mental or physical condition, or its cause, of that person or any other person, is admissible if made for and pertinent to medical diagnosis or treatment.
 2. CA exception is narrower: a statement of past or present mental or physical condition is admissible if made for medical diagnosis or treatment, but only if the declarant is a minor describing an act of child abuse or neglect.
 3. Related CA exception: a statement of declarant's past physical or mental condition, including a statement of intention, is admissible to prove that condition if it is an issue in the case – no requirement that statement be made for medical purposes. Declarant must be unavailable.
- viii. Business records exception
1. Hearsay is admissible if it is:
 - a. A record of events, conditions, opinions or diagnoses
 - b. Kept in course of regularly conducted business activity
 - c. Made at or near time of matters described
 - d. By person with knowledge of the facts in that record
 - e. It was regular practice of business to make such record.
 2. Ct may exclude if untrustworthy.
 3. CA exception does not refer to opinions or diagnoses, but cts will admit simple opinion and diagnoses.
- ix. Public records exception
1. Hearsay record of a public office is admissible if within one of the following categories:
 - a. Record describes activities of the office;
 - b. Record describes matters observed pursuant to duty imposed by law; or
 - c. Record contains factual findings resulting from investigation made pursuant to authority granted by law, unless untrustworthy.
 2. In a criminal case, prosecution cannot use (b) and (c).

3. CA does not place same restrictions on prosecution: record made by a public employee is admissible if making record was within scope of her duties, record was made at or near the time of the matters described, and circumstances indicate trustworthiness.
- x. Judgment of previous conviction
 1. Hearsay statement describing felony conviction is admissible in both civil and criminal cases to prove any fact essential to the judgment, but when offered by prosecution for purposes other than impeachment, judgments against persons other than the accused are inadmissible.
 2. CA: the specific exception for convictions applies only in civil cases. But Prop 8 permits the prosecutor or D in a criminal case to impeach a witness using a criminal conviction (felony or misdemeanor) if it involves moral turpitude. Further, a certified copy of a judgment of conviction is admissible under the CA public records exception in both civil and criminal cases.
- e. Confrontation Clause
 - i. Only an issue in criminal cases.
 - ii. CC excludes an out of court statement if declarant does not testify at the trial, is now unavailable, the statement is testimonial, and D had no chance to cross-examine declarant about the statement when it was made.
 - iii. Statements to police to deal with an *ongoing emergency* are non-testimonial and their admission does not violate the CC.

V. WRITINGS AND OTHER PHYSICAL EVIDENCE

a. Authentication

- i. Burden of proof is low, *sufficient to sustain a finding*
- ii. Signatures
 1. Admission
 2. Eyewitness testimony
 3. Handwriting expert compares disputed signature with a genuine example and declares the signatures were made by the same person.
 4. Lay opinion
 5. Circumstantial evidence
 6. A genuine exemplar
- iii. Ancient documents rule
 1. Authenticity is established if:
 - a. Document is 20 years old or more
 1. 30 years in CA
 - b. Does not on its face present any irregularities
 - c. Was found in a place of natural custody

b. Self-authenticating writings

- i. Certified copies of public docs (deeds)
- ii. Acknowledged docs
- iii. Official publications
- iv. Newspapers
- v. Periodicals
- vi. Business records
 1. Not in CA.
- vii. Trade inscriptions

1. **Not in CA.**
 2. Tag or label that purports to have been attached in course of business and indicates ownership, control or origin.
- c. Photos
- i. Watch for personal knowledge problem
 - ii. Look at the question posed to witness:
 1. If asking whether the photo is a picture of a specific thing (the intersection at time of accident), need the photographer.
 2. If just asking whether the photo fairly and accurately depicts what the intersection looked like at the time of the accident, you just need someone with the PK necessary to answer that question.
- d. Authentication for non-unique items
- i. Proponent must lay chain of custody demonstrating that this is the specific item proponent claims it to be.
- e. Best evidence rule
- i. Applies only where evidence offered to prove the contents of a writing (any tangible collection of data). This happens when:
 1. Case turns on contents of legal instrument
 2. Knowledge obtained from writing
 - ii. **CA: called secondary evidence rule. Exempt from Prop 8.**
 - iii. Voluminous document exception
 1. Can be summarized if originals available for inspection
 - iv. Type of evidence admissible to prove contents of a writing
 1. Originals
 - a. Includes certified copies
 2. Duplicates
 - a. Duplicate = a copy of original produced by same impression that produced the original or by a machine
 - b. Includes handwritten copies.
 - c. **CA admits duplicates and other written evidence of contents of original, such as handwritten notes.**
 3. Exception to admissibility of duplicates or other written evidence that is not the original
 - a. This evidence is NOT admissible where there is a genuine question as to authenticity of original.
 4. Testimony regarding contents of writing may be admissible where original lost or destroyed, unless bad faith by proponent of testimony.

VI. PRIVILEGES

- a. In civil actions under diversity jdx, state privileges apply in federal ct
 - b. **CA: most privilege law is exempt from coverage of Truth in Evidence Amendment to CA Constitution.**
 - i. **If on essay they say fed ct in CA and civil case brought under diversity jdx, apply CA privilege law.**
- c. Attorney-client privilege

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- i. A communication between attorney and client or their representatives intended by client to be confidential and made to facilitate legal services is privileged in all civil and criminal proceedings unless waived by the client.
 1. Objective standard of intent.
 - ii. The privilege applies to communications from employees/agents if the corp authorized the employee/agent to communicate to the lawyer.
 - iii. **CA: privilege applies to communications from employee/agent if she is the natural person to speak to the lawyer on behalf of the corp in the matter, or employee/agent did something for which the corp may be held liable, and the corp instructed her to tell its lawyer what happened. As applied, there is no significant difference in the scope of these standards.**
 - iv. The privilege survives.
 - v. Exceptions
 1. Privilege does not apply where:
 - a. Professional services sought to further what client knew or should have known to be a crime or fraud; or
 - b. Communication relates to alleged breach of duty between lawyer and client; or
 - c. 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.
 2. **Additional exception in CA only:**
 - a. **Privilege does not apply where lawyer reasonably believes disclosure of communication is necessary to prevent crime that is likely to result in death or substantial bodily harm**
- d. Psychotherapist-patient and social worker-client privileges
- i. A communication between psychotherapist and patient, or licensed social worker and client, intended by patient/client to be confidential and made to facilitate rendition of professional psychological services is privileged in all civil and criminal proceedings unless waived by the patient/client.
- e. Doctor-patient privilege
- i. No such privilege under the FRE.
 - ii. **This privilege exists in CA.**
 - iii. A patient has a privilege to prevent disclosure of info confidentially conveyed to a physician where the patient conveyed the info for the purpose of obtaining diagnosis or treatment and the info was pertinent to diagnosis or treatment.
 - i. Exceptions
 1. Privilege does not apply:
 - a. Where patient puts his physical condition in issue;
 - b. Where physician's services sought to aid in crime or fraud or to escape capture after a crime or tort;
 - c. In case alleging breach of duty arising out of physician-patient relationship.
 2. **CA only:**
 - a. **Psychotherapist privilege does not apply if the psychotherapist has reasonable cause to believe that the patient is a danger to himself or others, and that disclosure is necessary to end the danger;**

- b. Doctor-patient privilege does not apply in criminal cases or to info that doctor is required to report to a public office (e.g., gun-shot wounds and some communicable diseases).
- f. Spousal testimonial privilege
 - i. Permits W to refuse to testify against spouse as to anything.
 - ii. Applies only in criminal cases.
 - 1. CA: applies in civil and criminal cases and spouse of party is privileged not even to be called to witness stand.
 - iii. Applies whenever D and spouse married AT TIME OF TRIAL.
 - iv. W owns the privilege.
- g. Spousal confidential communication privilege
 - i. Protects confidential spousal communications during marriage.
 - ii. Applies in both criminal and civil cases.
 - iii. Applies as long as married AT TIME COMMUNICATION WAS MADE.
- h. **Other CA privileges:**
 - i. Privilege for confidential communications between a counselor and a victim of sexual assault or domestic violence;
 - ii. Privilege for penitential communications between penitent and clergy; and
 - iii. Immunity from contempt of court for news reporter who refuses to disclose sources.

VII. JUDICIAL NOTICE

- a. Facts appropriate for judicial notice
 - i. Ct can take judicial notice of facts not subject to reasonable dispute because they are either
 - 1. Generally known within the jdx, or
 - a. CA exception: whether requested or not, ct MUST take judicial notice of matters generally known within jdx.
 - 2. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- b. Procedure for taking judicial notice
 - i. Party must request judicial notice to compel judicial notice and, if not requested, ct has discretion to take it.
 - ii. If requested in a CIVIL case, ct instructs jury it MUST accept noticed fact as conclusive.
 - iii. If requested in a CRIMINAL case, ct instructs jury it MAY, but is not required to accept judicially noticed fact.
 - iv. CA: ct instructs jury that it MUST accept judicially noticed fact in both civil and criminal cases.
 - v. Judicial notice may occur at any time, even on appeal.