



**ESSAY DNA™  
EVIDENCE  
MODULES 1 – 2**

Module 1: Relevance • Character • Impeachment  
Module 2: Hearsay

**10 SECOND CHECKLIST**

<p>Form Objections Purpose</p> <ul style="list-style-type: none"> <li>• Relevance</li> <li>• Impeachment</li> <li>• Character</li> </ul> <p>Presentation Objections</p> <ul style="list-style-type: none"> <li>• W/Person</li> <li>• W/Document &amp; Other Evidence</li> <li>• Judicial Notice</li> </ul> <p>Hearsay</p> <ul style="list-style-type: none"> <li>• Not Hearsay</li> <li>• Non-Hearsay</li> <li>• Exceptions</li> </ul> <p>Privilege</p>	<p>Form Purp</p> <ul style="list-style-type: none"> <li>• Rel</li> <li>• Imp</li> <li>• Ch</li> </ul> <p>Pres</p> <ul style="list-style-type: none"> <li>• W/Person</li> <li>• W/Doc/Evid</li> <li>• JN</li> </ul> <p>Hsy</p> <ul style="list-style-type: none"> <li>• Not</li> <li>• Non</li> <li>• Excep</li> </ul> <p>Priv</p>
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*\*The issues in the checklists and throughout the handout represent the more frequently tested topics for essay purposes and do not represent every issue you are responsible for on your bar exam.*



## THE SKINNY

### I. Form (*list not exhaustive*)

- Leading
- Nonresponsive
- Calls for a Narrative
- Assumes Facts Not in Evidence
- Compound
- Speculation

### II. Purpose

- Logical Relevance
- Legal Relevance
- Public Policy Exclusions
  - Subsequent Remedial Measures
  - Offers to Settle
  - Offers to Pay Medical Expenses
  - Liability Insurance
  - Withdrawn Guilty Pleas
  - CA only: Expressions of Sympathy
- Character
- Impeachment

### III. Presentation

- Person (Testimony)
  - Personal Knowledge
  - Competency
  - Lay Opinion
  - Expert Opinion
  - Present Recollection Refreshed
- Document & Other Evidence
  - Best Evidence Rule
  - Authentication
  - Chain of Custody
- Judicial Notice
  - Notorious Fact
  - Manifest Fact

### IV. Hearsay

- **Not Hearsay/Not Offered for Its Truth**
  - Verbal Acts or Legally Operative Facts
  - Effect on the Hearer or Reader
  - Circumstantial Evidence of Declarant's State of Mind
  - Nonhuman Declarations

- **Non-Hearsay (Per FRE)**

#### Prior Statements by Witness

- Prior Inconsistent Statement
- Prior Consistent Statement
- Prior Identification

#### Admissions

- Admission by Party Opponent/Opposing Party Statement
- Vicarious Admission
- Adoptive Admission
- Co-Conspirator Admission
- Admission by Authorized Agent

- **Exceptions (*List is not exhaustive*)**

#### Reliability Exceptions

- Excited Utterance (CA: Spontaneous Statement)
- FRE only: Present Sense Impression
- CA only: Contemporaneous Statement
- Past Bodily Condition
- Present State of Mind & Physical Condition
- Federal Catch-All


(CONTINUE TO NEXT PAGE)

<p><b>IV. Hearsay (Continued)</b></p> <p><u>Documentary Exceptions</u></p> <ul style="list-style-type: none"> <li>▪ Business Records</li> <li>▪ Past Recollection Recorded</li> <li>▪ Learned Treatise</li> <li>▪ Ancient Documents</li> <li>▪ Official Record</li> <li>▪ Vital Statistics</li> <li>▪ Family Records</li> <li>▪ Market Reports</li> </ul> <p><u>Unavailability Exceptions</u></p> <ul style="list-style-type: none"> <li>▪ Former Testimony</li> <li>▪ Dying Declaration</li> <li>▪ Statement Against Interest</li> <li>▪ Statement of Personal or Family History</li> <li>▪ Statement Offered Against Party Procuring Declarant's Unavailability</li> <li>▪ CA only: Statement Describing Infliction or Threat of Bodily Harm</li> </ul>	<p><b>V. Privilege</b></p> <ul style="list-style-type: none"> <li>• Spousal Immunity</li> <li>• Confidential Marital Communications</li> <li>• Physician-Patient Privilege</li> <li>• Attorney- Client Privilege</li> <li>• Psychotherapist/Social Worker- Client Privilege</li> <li>• Clergy Privilege</li> <li>• Accountant Privilege</li> <li>• Privilege Against Self Incrimination (5<sup>th</sup> Amendment)</li> <li>• Governmental Privileges</li> </ul>
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 **Evidence Writing Approach**

Apply the following writing approach for EVERY call in a narrative (standard) essay or every relevant numbered line in a transcript essay!

- ✓ **Step 1:** Begin by identifying FORM of the question and answer objections. Raise them first, one at a time. If none, move on to Step 2.
- ✓ **Step 2:** Are there any PURPOSE issues? WHY admit or exclude otherwise relevant evidence?
- ✓ **Step 3:** Are there any PRESENTATION issues? Are there any issues with HOW the evidence is being presented, i.e. with the witness's testimony or other evidence, or with admission of a judicially noted fact?
- ✓ **Step 4:** Are there any HEARSAY issues? Single, double, or multiple hearsay? Any exemptions or exceptions that may apply?
- ✓ **Step 5:** Finally, are there any PRIVILEGE issues that need to be raised?

 **Tip:** Evidence is a rule driven and race horse exam. Thus, time management is essential to passing an evidence essay, and drilling down succinct rule statements will not only help with time but with your overall analysis and score.

## MODULE 1

### PURPOSE

👉 = Bar favorite issue!

#### A. Logical Relevance 👉

📁 Rule: Evidence is logically relevant if it has a tendency to make a fact of consequence more or less probable than it would be without the evidence. [In CA, it must also be a fact in dispute.]

👉 **Issue Spotting Tip:** Raise with every interrogatory!

#### B. Legal Relevance 👉

📁 Rule: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. (Tip: For essay purposes, unless confusion of issues, misleading the jury, undue delay, waste of time, or cumulative evidence is at issue, just focus on the probative value versus the prejudicial effect).

👉 **Issue Spotting Tip:** Raise with almost every interrogatory! Definitely raise when there is character evidence, convictions, or egregious evidence.

#### C. Public Policy Exclusions

*\*Relevant FRE and CEC distinctions are noted in the chart below*

1. Subsequent Remedial Measures 👉
2. Offers to Settle 👉
3. Offers to Pay Medical Expenses 👉
4. Liability Insurance 👉
5. Withdrawn Guilty Pleas
6. CEC only: Expressions of Sympathy

 **Writing Approach:**

- ✓ Step 1: Head note the specific issue (ex.: Offers to Settle)
- ✓ Step 2: In the 1<sup>st</sup> sentence state the rule.
- ✓ Step 3: In the 2<sup>nd</sup> sentence state the rationale behind the policy (any reason will do).
- ✓ Step 4: Use the facts to analyze whether the evidence is admissible.
- ✓ Step 5: Next raise and analyze any exceptions that may apply.
- ✓ Step 6: Conclude.

ISSUE	FRE	CEC
Liability Insurance	<p>Evidence that a person was or was not insured against liability is not admissible to prove negligence or that the person acted wrongfully.</p> <p>Exceptions: when used to prove ownership or control; impeach; or as part of an admission.</p> <p>Also, D cannot use his lack of liability insurance as evidence that he was especially careful.</p>	Same <i>but does not include the <b>lack of liability insurance rule.</b></i>
Subsequent Remedial Measures	<p>Evidence of safety measures or repairs after an accident is inadmissible to prove negligence, culpable conduct, a defect in a product or its design, or a need for warning or instruction.</p> <p>Exceptions: when used to prove ownership or control (if disputed); rebut a claim that the precaution was no feasible; or to show opposing party has destroyed evidence.</p>	Same <i>but without the PL rule.</i>

ISSUE	FRE	CEC
Settlement Offers	Evidence of settlements offers and related statements of a disputed claim as to validity or amount are inadmissible to prove liability or fault. Accompanying admissions of fault are also inadmissible.	Same but add <i>discussions during mediation proceedings are also inadmissible in any non-criminal proceedings.</i>
Offers to Pay Medical Expenses	Evidence of payments or offers to pay medical, hospital, or similar expenses is inadmissible when offered to prove liability for the injuries in question. Accompanying admissions are admissible, however.	Same but CA also makes <i>inadmissible admissions of fact made in the course of making the payments or offers to pay to prove liability.</i>
Withdrawn Guilty Pleas	Evidence of withdrawn pleas, nolo contendere plea, offers to plea, and related statements are inadmissible.	Same but <i>whether or not Prop 8 would make such evidence in a criminal case admissible is unclear.</i>
Expressions of Sympathy	No Rule Exists	In civil actions expressions of sympathy relating to suffering or death of accident victim are inadmissible. However, statements of fault made in connection with it are admissible.

### Issue Spotting Drill

Paula also testified that, as she and Dan were waiting for an ambulance immediately following the accident, Dan said, "I have plenty of insurance to cover your injuries."

Are there any public policy exclusions that would apply?

- ⇒ The word "insurance" flags the issue of Liability Insurance
- ⇒ The words "to cover your injuries" flags the issue of Offer to Pay Medical Expenses
- ⇒ The fact it is an auto accident arguably gives rise to an Offer to Settle, although given the facts, the issue is likely extra, and not necessary for a high passing score.

## D. Character Evidence 🖐️



📁 Rule: Character evidence is evidence of one's propensity pertaining to one's character traits. Absent an exception, it is inadmissible to prove that the person acted in accordance with that character on a particular occasion.

### 1. 3 Types of Character Evidence

1. Reputation (R)
2. Opinion (O)
3. Specific Instances of Conduct (SIC)
  - 📌 **Tip:** (1) On direct examination R/O is ok, but **no** SIC ; (2) On cross examination, can ask about R/O and SIC, but **no** prove up
  - 📌 **Explanation:** No prove up means "beware if you go there" because if the witness lies, the attorney may **not** prove up the lie with extrinsic evidence, which includes physical extrinsic evidence and other witness testimony.

### 2. Exceptions:

📌 **Explanation:** Exceptions exist that allow character evidence of the defendant and sometimes of the victim to be admissible substantively. If no exception applies, the evidence remains inadmissible for substantive purposes.

D = Exception applies to Defendant

V = Exception applies to Victim

**a. Civil Cases**

- FRE
  1. (D) Character at issue
  2. (D) MIMIC (motive, intent, mistake or absence of, identity, common scheme or plan) 🖐
  3. (D) Past acts of child molestation (in a child molestation case)
  4. (D) Past acts of sexual assault (in a sexual assault case)
- CEC
  1. (D) Character at issue
  2. (D) MIMIC 🖐
  3. (V) Sexual harassment, assault & battery cases: 1) V's sexual conduct when V alleges loss of consortium; 2) Past sexual conduct with the D unless V was a minor and D was an adult; 3) when V opens the door to his/her sexual conduct, D may rebut.

**b. Criminal Cases**

- FRE
  1. (D) Character at issue
  2. (D) MIMIC 🖐
  3. (D) Past acts of child molestation (in a child molestation case)
  4. (D) Past acts of sexual assault (in a sexual assault case)
  5. (D) D opens the door 🖐
  6. (D) Self-defense claim by D (to show D has same trait as V)
  7. (V) Rape: SIC ok to show Consent and Other source of semen
  8. (V) Self-defense claim by D (to show V was 1<sup>st</sup> aggressor)
- CEC
  1. (D) MIMIC 🖐
  2. (D) Prior acts of domestic violence (in a DV case)
  3. (D) Prior acts of child abuse (in child abuse case)
  4. (D) Prior acts of elder abuse (in elder abuse case)
  5. (D) Prior acts of sex crimes (in a sex crimes case)
  6. (D) D opens the door
  7. (D) Self-defense claim by D (to show D has same trait as V)
  8. (V) Rape case to prove consent
  9. (V) Self-defense claim by D (to show V was 1<sup>st</sup> aggressor)



### FRE vs CEC IN CIVIL CASES

CIVIL CASE – FRE EXCEPTIONS	CIVIL CASE – CEC EXCEPTIONS
<ol style="list-style-type: none"> <li>1. (D) Character at issue (when part and parcel of an element of a claim or defense)</li> <li>2. (D) MIMIC (motive, intent, mistake, identity, common plan)</li> <li>3. (D) Past acts of child molestation (in a child molestation case)</li> <li>4. (D) Past acts of sexual assault (in a sexual assault case)</li> </ol>	<ol style="list-style-type: none"> <li>1. (D) Character at issue</li> <li>2. (D) MIMIC</li> <li>3. (V) Sexual harassment, assault, and battery cases: 1) V's sexual conduct when V alleges loss of consortium; 2) Past sexual conduct with the D unless V was a minor and D was an adult; 3) when V opens the door to his/her sexual conduct, the D may rebut</li> </ol>

### FRE vs CEC IN CRIMINAL CASES

CRIMINAL CASE – FRE EXCEPTIONS	CRIMINAL CASE – CEC EXCEPTIONS
<p><i>Defendant</i></p> <ol style="list-style-type: none"> <li>1. (D) Character at issue</li> <li>2. (D) MIMIC</li> <li>3. (D) Past acts of child molestation (in a sexual misconduct case)</li> <li>4. (D) Past acts of sexual assault (in a sexual misconduct case)</li> <li>5. (D) D opens the door</li> <li>6. (D) Self-defense claim by D (to show D has same trait as V)</li> </ol> <p><i>Victim</i></p> <ol style="list-style-type: none"> <li>1. (V) Rape: 2 exceptions:               <ol style="list-style-type: none"> <li>a. Consent</li> <li>b. To show other source of semen</li> </ol> </li> <li>2. (V) Self-defense claim by D (to show V was 1<sup>st</sup> aggressor)</li> </ol>	<p><i>Defendant</i></p> <ol style="list-style-type: none"> <li>1. (D) MIMIC</li> <li>2. (D) Prior acts of domestic violence (in a DV case)</li> <li>3. (D) Prior acts of child abuse (in child abuse case)</li> <li>4. (D) Prior acts of elder abuse (in elder abuse case)</li> <li>5. (D) Prior acts of sex crimes (in a sex crimes case)</li> <li>6. (D) D opens the door</li> <li>7. (D) Self-defense claim by D (to show D has same trait as V)</li> </ol> <p><i>Victim</i></p> <ol style="list-style-type: none"> <li>1. (V) Rape case to prove consent</li> <li>2. (V) Self-defense claim by D (to show V was 1<sup>st</sup> aggressor)</li> </ol>

## FRE ONLY CIVIL vs CRIMINAL CASES

### Approach to Choosing the On-Point FRE Character Exception

- Step 1: Civil or Criminal Case?
- Step 2: If Civil, do any of the exceptions apply for Defendant (D)?
- Step 3: If Criminal, whose character is at issue, D's or Victim's (V)?
- Step 4a: If Criminal + D's character at issue, do any of the exceptions apply?
- Step 4b: If Criminal + V's character at issue, do any of the exceptions apply?

CIVIL – FRE EXCEPTIONS	CRIMINAL – FRE EXCEPTIONS
<p><b>D: Character is at issue</b>                      When character is part and parcel of proving an element of a claim or defense, e.g. defamation, negligent entrustment, negligent hiring, child-custody suits  <i>*SIC allowed</i></p>	<p><b>D: Character is at issue</b>                      When character is part and parcel of proving an element of a claim or defense, e.g. entrapment  <i>*SIC allowed</i></p>
<p><b>D: MIMIC</b> (quasi-exception)                      Motive                      Intent                      (Absence of) Mistake                      Identity                      Common Scheme  <i>*SIC allowed</i></p>	<p><b>D: MIMIC</b> (quasi-exception)                      Motive                      Intent                      (Absence of) Mistake                      Identity                      Common Scheme  <i>*SIC allowed</i></p>
<p><b>D: Child Molestation</b>                      Evidence of child molestation in a child molestation case  <i>*SIC allowed</i></p>	<p><b>D: Child Molestation</b>                      Prosecution can offer 1<sup>st</sup> in child molestation cases to show D committed other acts of child molestation  <i>*SIC allowed</i></p>
<p><b>D: Sexual Assault</b>                      Evidence of D's prior sexual assault in a sexual assault case  <i>*SIC allowed</i></p>	<p><b>D: Sexual Assault</b>                      Prosecution can offer 1<sup>st</sup> in sexual assault cases to show D committed other acts of sexual assault  <i>*SIC allowed</i></p>


CIVIL – FRE EXCEPTIONS	CRIMINAL – FRE EXCEPTIONS
	<p><b>D: D Opens the Door</b></p> <p>D opens the door as to his good character 1<sup>st</sup>, then prosecution can rebut with the same.</p> <p><u>D may open the door →</u></p> <p>(i) with ONLY R/O (NO SIC) and (ii) it MUST relate to the innocence of the charge (ex: murder → R/O of D’s non-violent/ peacefulness.)</p> <p><u>Prosecution can rebut with the same →</u></p> <p>(1) May ask about SIC if cross-examining D’s character witness, but no extrinsic evidence to prove up the SIC AND</p> <p>(2) May call a rebuttal witness and ask about R/O of the D.</p>
	<p><b>D: Self-defense Claim by D</b></p> <p>Where the court has admitted evidence of V’s character offered by D to show V was initial aggressor, prosecution can then offer evidence that the D has same character trait, i.e. prosecution can rebut with the same.</p> <p>R/O on direct &amp; SIC on cross (no prove up).</p>
	<p><b>V: Rape Case</b></p> <p>To prove the victim’s conduct with evidence of V’s sexual history</p> <p>Rape Cases: No R/O evidence is allowed! Can only introduce SIC if:</p> <ol style="list-style-type: none"> <li>1.) D can introduce past sexual acts of the victim that she had with the D to show consent</li> <li>2.) D can introduce past sexual conduct with other men to show D is not the source of the semen.</li> </ol>
	<p><b>V: Self Defense Claim by D</b></p> <p>D can open the door with R/O of the V in a self-defense claim. Prosecution can rebut with the same by introducing evidence that D has same character trait AND prosecution can introduce evidence of V’s good character.</p>

### 3. Writing Approach:

- Step 1: Head note the issue – Character (and then skip a line)
- Step 2: State the rule for character evidence without the applicable exception.
- Step 3: Analyze & determine if it is character evidence by definition.
- Step 4: Conclude.
- Step 5: Exceptions. IRAC each applicable exception, one at a time.

## Character Writing Approach

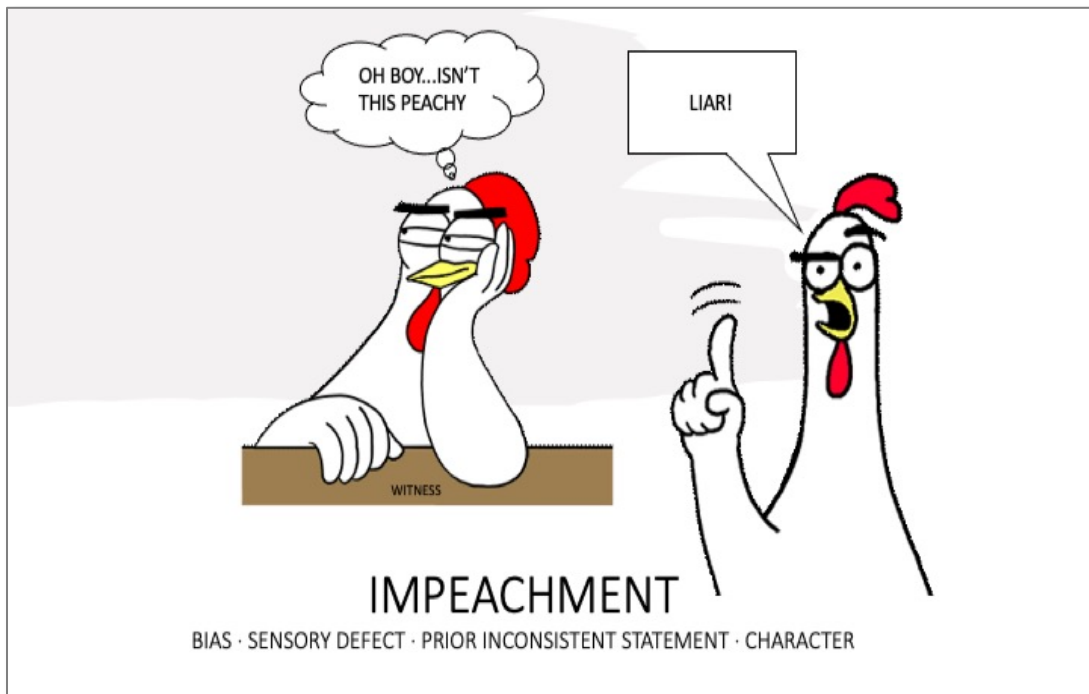
- Step 1: Head note Character
- Step 2: State the rule w/o the exception
- Step 3: Character evidence by definition?
- Step 4: Conclude
- Step 5: Exceptions? IRAC each one.



### 4. Extra Tips

- If you are running out of time, combine the rule with the exception and jump straight to the analysis of the exception.
- Do not confuse Habit with Character.
  - Habit → “always”; “every day”; a regular response to same situation
  - Character → “often”; “frequently”; tendency to act in a certain manner

## E. Impeachment 🖐️



1. Definition: Impeachment is the process of casting doubt on a witness's credibility, attacking a witness's veracity.
2. 🖐️ **MBE Terminology Tips:**
  - a. "Testimony is admissible for impeachment purposes only": The evidence may only be used to challenge a witness's credibility and cannot be used to determine innocence, guilt, or liability. Instead, in practical terms, the trier of fact is allowed to disregard or discount the testimony of an impeached witness. If that party whose witness was impeached did not present any other evidence to support his claim or defense, then that person may lose at trial since the trier of fact can base his decision on all the other unimpeached and credible evidence.
  - b. "Testimony is admissible for substantive purposes only": The evidence may be used to determine innocence, guilt, or liability. In practical terms, it means that the evidence was able to overcome all other evidentiary objections, whether it be relevance, character, hearsay, or privilege objections, for example.
  - c. "For both impeachment and substantive purposes": The evidence may be used to challenge a witness's credibility and to base a finding of innocence, guilt, or liability.

## FRE

### 3. 4 Primary Ways to Impeach (FRE)

1. Bias, Motive, Interest in Outcome
2. Sensory Defect
3. Prior Inconsistent Statement 🖐
4. Character (4 must-know rules) 🖐

*\*See the abbreviations key below*

- a. R/O → Truth → Admissible
- b. SIC → Truth → Admissible UNLESS PV/PE. Cross only, no prove up!
- c. Conviction → Serious crime other than truth/honesty\* →
  - i. Witness < 10 y/o → Admissible UNLESS PV/PE
  - ii. D < 10 y/o → Admissible ONLY IF PV O PE
  - iii. Either > 10 y/o Inadmissible UNLESS PV-PE + Notice
- d. Conviction → Truth/Honesty (misdemeanor and felony)
  - i. < 10 y/o → ALWAYS ADMISSIBLE
  - ii. > 10 y/o Inadmissible UNLESS PV-PE + Notice

### Abbreviations Key

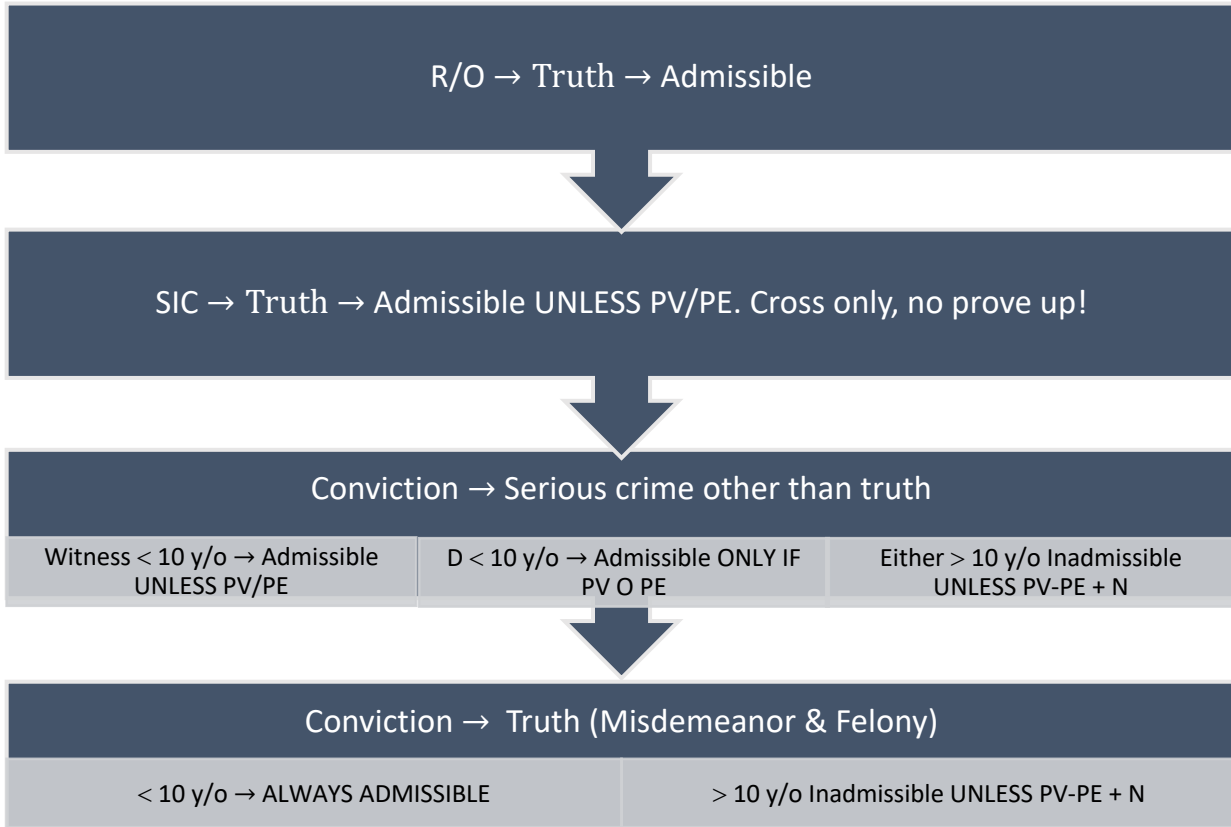
- \*Serious crime not involving dishonesty = punishable by death or imprisonment for more than one year 609(a)(1)
- **R/O** = Reputation or opinion evidence
- **SIC** = Specific instances of conduct
- **PV O PE** = Only if “PV outweighs PE” = Only if the probative value outweighs the prejudicial effect (tougher test than standard 403)
- **PV/PE** = Unless the probative value is substantially outweighed by the prejudicial effect. (standard FRE 403)
- **UNLESS PV-PE + Notice** = May be admissible if it can be shown that the probative value substantially outweighs its prejudicial effect and written notice of intent to use it is given so that other party has a fair opportunity to contest its use.

#### 4. Impeachment with Character Evidence (FRE) in Steps

- Step 1: What type of character is being used to impeach the witness?
- Step 2: If with R/O, does it bear on one's ability to be honest?
  - If yes, it is **ADMISSIBLE** to impeach
  - If no, it is inadmissible to impeach
- Step 3a: If with SIC, does it bear on one's ability to be honest?
  - Step 3b: If yes, is it being asked about on cross examination?
    - If yes, it is **ADMISSIBLE** to impeach
    - If no, impeachment is improper; SIC only allowed on cross
  - Step 3c: Is extrinsic evidence being used to prove up the W's statement?
    - If yes, impeachment is improper (if witness lies, no proving he/she lied with extrinsic evidence)
    - If no, impeachment is proper!
- If with a Conviction, does it bear on honesty?
  - If no, (1) then is it a serious crime (e.g. a felony)? (2) who is on the stand; and (3) is it less than or greater than 10 years old?
    - If a Witness is being impeached and the conviction is < 10 y/o → then it is **ADMISSIBLE UNLESS** the probative value is substantially outweighed by the prejudicial effect (PV/PE)
    - If it's the Defendant that is being impeached and it is < 10 y/o → then it is **ADMISSIBLE ONLY IF** the probative value outweighs the prejudicial effect (**ONLY IF PV > PE**)
    - Regardless of who, if conviction is > 10 y/o, then it is **INADMISSIBLE UNLESS** it can be shown that the probative value substantially outweighs its prejudicial effect and written notice of the intent to use it is given so that other party has a fair opportunity to contest its use (**UNLESS PV > PE + Notice**)
  - If yes, it is a conviction that bears on one's ability to be honest, then it can be misdemeanor or a felony.
    - If < 10 y/o → it is **ALWAYS ADMISSIBLE**. No court discretion
    - If > 10 y/o → it is **INADMISSIBLE UNLESS** it can be shown that the probative value substantially outweighs its prejudicial effect and written notice of the intent to use it is given so that other party has a fair opportunity to contest its use (**UNLESS PV > PE + Notice**)

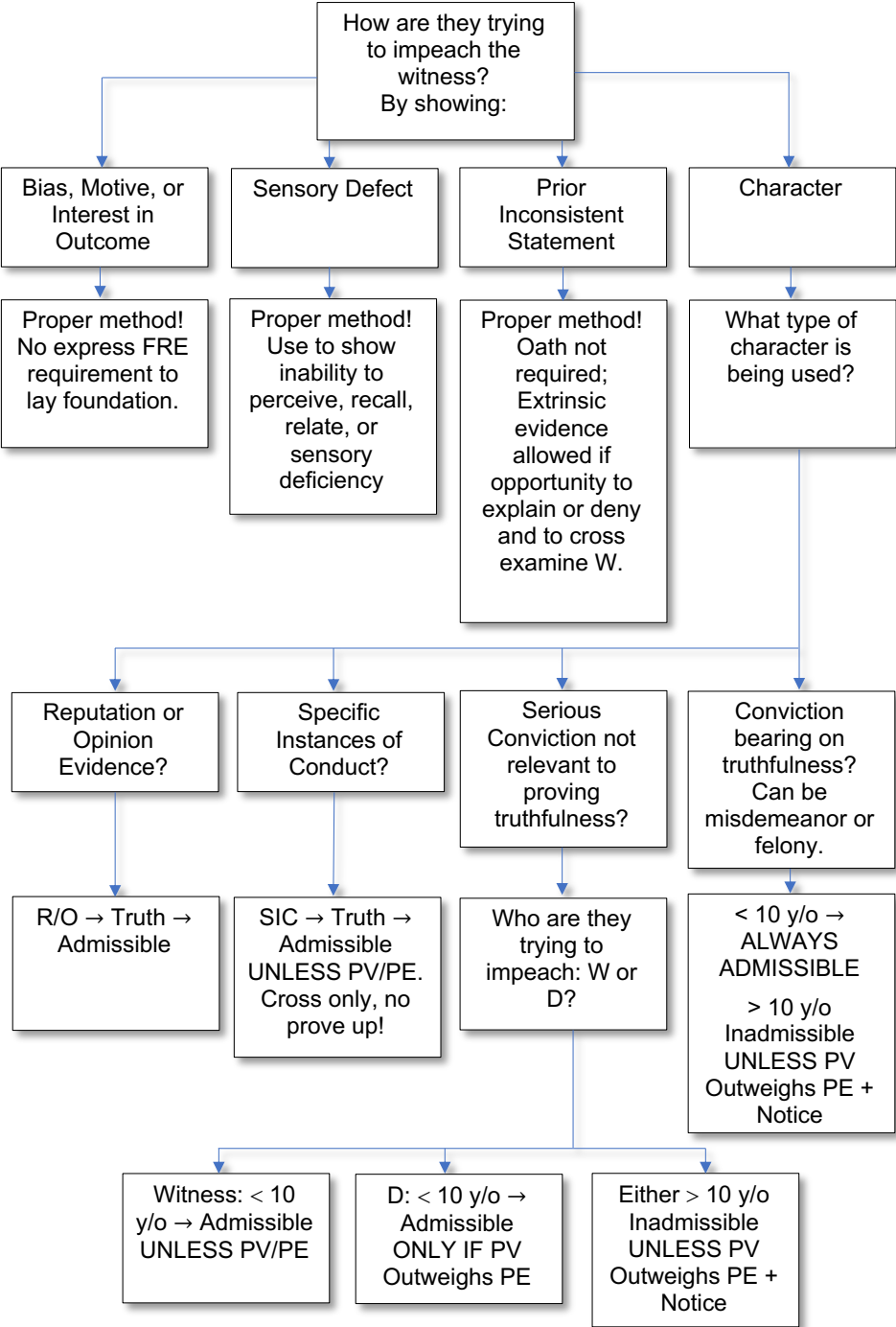
THE SKINNY

(Just another way to drill down the rules)





**FRE IMPEACHMENT FLOW CHART**  
*A guide to knowing if impeachment is proper?*



**PV/PE** = Unless the probative value is substantially outweighed by the prejudicial effect. (standard FRE 403)

**UNLESS PV-PE + Notice** = Admissible if PV substantially outweighs PE and written notice of intent to use it is given so that other party has a fair opportunity to contest its use.



## CEC

### 5. Primary Methods of Impeachment (CEC)

*(List not exhaustive; CEC 780-791)*

1. **Sensory Defect**, including Ability to Perceive, Recollect, and Communicate
2. **(Sincerity) Bias, Prejudice, Interest in the Outcome, Corruption**
3. **Prior Inconsistent Statement**
  - It must be proven that the prior statement is inconsistent with witness's express or implied testimony. The witness must be given an opportunity to explain or deny the statement.
4. **Character**
  - Felony Conviction: A litigant in both civil and criminal cases may impeach a witness with any felony conviction **whether or not it involves dishonesty** subject to 3 things: (i) conviction has not been expunged, nor witness pardoned; (ii) felony must involve **moral turpitude** (meaning general readiness to do evil); (iii) even after Prop. 8 the trial court has discretion under CEC 352 to prohibit use of the conviction.
  - Misdemeanor Conviction:
    - Civil cases: No, a misdemeanor conviction cannot be used to impeach a witness.
    - Criminal cases: Yes, a misdemeanor conviction can be used if it involves a crime of moral turpitude.
  - Specific Instances of Conduct
    - Civil cases: No, inquiring into SIC to impeach the witness on cross examination is not allowed.
    - Criminal cases: Yes, Prop. 8 permits inquiry into prior bad acts of dishonesty or moral turpitude relevant to impeachment on cross examination and extrinsic evidence to prove it up.

## MODULE 2

### HEARSAY

## HEARSAY

- STEP 1: IS IT HEARSAY?
- STEP 2: HOW MANY LEVELS?
- STEP 3: ANY EXEMPTIONS OR EXCEPTIONS FOR EACH LEVEL?



#### 3 Step Approach to Tackling Hearsay:

- ✓ Step 1: Is hearsay signaled? Look for a past tense spoken/written verb (e.g. yelled, screamed, said, told, wrote, jotted) followed by a statement.
- ✓ Step 2: How many levels? To determine the number of levels, start with the source of the statement, and ask did this person tell anyone or write it down, and keep moving down the line until the statement is no longer being repeated. Take it **one level at a time**. (See sample template below).
- ✓ Step 3: For each level, are there any exemptions, exclusions, or exceptions? Start by asking yourself if there are any “nots” (i.e. not offered for it truth), “nons” (i.e. admissions and prior statements that are excluded under the rules), and/or exceptions (i.e. exceptions listed under the FRE or CEC)? IRAC **one exemption and/or exception at a time**.

### Issue Spotting Drill

(1) Mechanic **commented** to Helper, “Dave had better get these brakes fixed. They look bad to me.”

Step 1: Is hearsay signaled? Past tense spoken/written verb followed by a statement?

Yes because “commented” is a past tense spoken verb and it is followed by a statement by Mechanic. Thus, hearsay is at issue!

Step 2: How many levels?

Just 1! Mechanic → Helper

Step 3: For each level, any exemptions or exceptions?

Example: Present Sense Impression

(2) Mechanic **instructed** Helper (who did not himself observe the brakes) to write on the work order: “Inspected brakes — repair?”, which Helper then **wrote** on the work order. However, Helper currently does not remember what words he wrote on the work order.

Step 1: Is hearsay signaled? Past tense spoken/written verb followed by a statement?

Yes because “instructed” is a past tense spoken verb and it is followed by a statement by Mechanic. Thus, hearsay is at issue!

Step 2: How many levels?

Level 1: Mechanic → Helper

Level 2: Helper → Helper’s Work Order

(Since Helper “does not remember” what he wrote, the work order becomes its own level of hearsay)

Step 3: For each level, any exemptions or exceptions?

Level 1: Mechanic → Helper

Present Sense Impression

Effect on the Listener

Level 2: Helper → Helper’s Work Order

Past Recollection Recorded

Business Records Exception

**SAMPLE TEMPLATE**

**SINGLE HEARSAY**

**Hearsay**

Hearsay is an out of court statement offered for the truth of the matter asserted.  
[Sample analysis: Here, the statement was made out of court at the scene of the accident. It is also being offered to prove that Dan ran the red light and is at fault for the accident which is the truth of the matter asserted.] Thus, the statement is inadmissible hearsay unless an exemption or exception applies.

**Effect on the Listener**

(State rule, analyze, and conclude)

**Excited Utterance**

(State rule, analyze, and conclude)

**Present Sense Impression**

(State rule, analyze, and conclude)

**SAMPLE TEMPLATE**  
**MULTIPLE HEARSAY**

**Multiple Hearsay**

Multiple hearsay is hearsay within hearsay. For the entire statement to come in, all levels of hearsay must be admissible.

Level 1: Al to Bob

Hearsay is an out of court statement offered for the truth of the matter asserted. [Here, the statement was made by Al to Bob out of court at the scene of the accident. It is also being offered to prove that Dan ran the red light and is at fault for the accident which is the truth of the matter asserted.] Thus, the statement is hearsay and will be inadmissible unless an exception applies.

Opposing Party Statement

[Insert rule, analysis, and conclusion]

Excited Utterance

[Insert rule, analysis, and conclusion]

Present Sense Impression

[Insert rule, analysis, and conclusion]

Level 2: Bob to Officer Owen

See rule above. [Here, the statement by Bob to Officer Owen was made out of court at the scene of the accident. It is also being offered to prove that Dan ran the red light and is at fault for the accident which is the truth of the matter asserted.]

Excited Utterance

[Insert rule, analysis, and conclusion]

Present Sense Impression

[Insert rule, analysis, and conclusion]

Level 3: Officer Owen's Report

See rule above. [Officer Owen made the report out of court prior to trial and is being offered to prove that Dan ran the red light and is at fault for the accident which is the truth of the matter asserted.]

Business Records Exception

[Insert rule, analysis, and conclusion]

Past Recollection Recorded

[Insert rule, analysis, and conclusion]

## Exemptions & Exceptions

👉 = Bar favorite issue!

### A. Not Hearsay/Not Offered for Its Truth

#### 1. Verbal Acts or Legally Operative Facts

📁 Rule (FRE): Words of contract, defamatory words and other legally operative facts are not hearsay because it is not being offered for the truth but rather to prove the existence of a contract or a claim such as defamation, for example.

#### 2. Effect on the Hearer/Listener or Reader 👉

📁 Rule: Statements offered to show their effect on the listener or reader is considered not hearsay because it is not being offered for the truth but rather to prove something else such as to show notice in a negligence case.

- 📌 **Issue Spotting Tip:** This issue is popular with fact patterns involving negligence, such as a car accident, because it can be used to show that the person was on notice that the car's brakes needed repair, for example.

#### 3. Circumstantial Evidence of Declarant's State of Mind 👉

📁 Rule: Statements offered as circumstantial evidence of the declarant's state of mind is considered not hearsay because it is not being offered for the truth but rather to prove something else such as evidence of insanity or knowledge.

- 📌 **Explanation:** Do not confuse this issue for the hearsay exception Present State of Mind. Example: Betty slams on her brakes at an intersection causing Vicky to crash into Betty's bumper. Vicky gets out of the car and asks Betty why she slammed on her brakes, and Betty replies by saying "I did not want to hit the three blue martians in the intersection." Betty's statement is not being admitted for its truth – that there were three blue martians in the intersection. Rather it is being admitted to show what her state of mind was at the time – that she was perhaps suffering from delusions or not of sound mind.
- Whereas Present State of Mind has more to do with establishing what a declarant's intent, motive, or plan was at the time the statement was made, which can be used to prove conduct in conformity with that statement.

#### 4. Nonhuman Declarations

📁 Rule: Evidence generated by an animal or machine is not hearsay. Evidence that is automatically generated by a machine such as an auto time stamp or raw data by a forensics lab diagnostics machine are not hearsay.

## B. Nonhearsay (Per the FRE)

### 1. Prior Statements by Witness


*\*Relevant FRE and CEC distinctions are noted in the chart below*

#### a. Prior Inconsistent Statement (PIS)

- 👉 MBE Tip: If declarant's PIS was **not** made under oath: 1. The statement may be admitted for impeachment purposes. 2. Since it qualifies as hearsay, you need an exemption or exception for it to come in substantively. If this exemption is unavailable due to the prior statement not being made under oath, do not forget about all the other exemptions and exceptions! Many students forget and go with the incorrect answer choice, "impeachment only". However, there are other exemptions and exceptions you can look at, and a good one to consider is the exception Present State of Mind.

#### b. Prior Consistent Statement

#### c. Prior Statement Identification


EXEMPTION	FRE RULE	CEC RULE
<b>Prior Inconsistent Statements</b> 	A prior statement that is inconsistent with the declarant's in court testimony and was given under oath in a prior proceeding is admissible.	CA does not require that the prior statement be made under oath.
<b>Prior Consistent Statements</b>	A prior statement is consistent with the declarant's in-court testimony and is offered to rebut that the witness is lying or exaggerating because of some motive and the statement was made before any motive to lie or exaggerate arose is admissible.	In CA the statement must have been made before an alleged inconsistent statement, or an alleged fabrication, or an alleged recently arisen bias.
<b>Prior Identification</b>	A prior statement of identification of a person made after perceiving him is admissible.	CA imposes 2 requirements not in FRE: <ol style="list-style-type: none"> <li>(1) The witness must have identified the person while her memory of event was fresh</li> <li>(2) Witness must confirm in court that she made the prior ID &amp; that it truly reflected her opinion at the time</li> </ol>




## 2. Admissions

*\*Relevant FRE and CEC distinctions are noted in the chart below*


### a. Admission by Party Opponent/Opposing Party Statement

-  **Tip:** Don't fall for the MBE trap – Remember the declarant cannot use this exemption to admit his own statement.

### b. Vicarious Admission



-  **Tip:** Anytime an employer or a business is a party to the lawsuit, be on the lookout for a vicarious admission by an employee. Remember that it does not matter if the declarant is not currently employed by the business so long as the declarant was employed at the time the statement was made.

### c. Adoptive Admission

-  **Tip:** Admission by Silence has been tested a number of times on bar essays. Thus, be on the lookout for this issue if the other party wants to admit the declarant's silence as evidence of an admission.

### d. Co-Conspirator Admission

### e. Admission by Authorized Agent

EXEMPTION	FRE RULE	CEC RULE
<b>Admission by Party Opponent</b> 	An admission is a statement made or act that amounts to a prior acknowledgment by one of the parties of a relevant fact and is admissible. It need not be against the declarant's interest.	CA considers the statement hearsay but provides an exception for it.
<b>Vicarious Admission</b> 	Statements by an agent concerning any matter within the scope of her agency made while the employment relationship exists are not hearsay and are admissible against the principal.	CA has no specific counterpart but CA judges in respondeat superior civil cases typically stretch other hearsay exceptions so that the effect is the same as the FRE rule allowing the admission. A similar rule is CEC 1224 but it can only be used where negligent conduct of that employee is the basis for employer's liability in the case under respondeat superior.

EXEMPTION	FRE RULE	CEC RULE
<b>Adoptive Admission</b>	<p>A party may make an admission by expressly or impliedly adopting or acquiescing in the statement of another. This statement is considered nonhearsay and is admissible.</p> <p>Silence is treated as an admission if (i) the party heard and understood the statement, (ii) party was physically and mentally capable of denying the statements, and (iii) a reasonable person would have denied the accusation.</p>	Evidence of a statement offered against the party is admissible if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.
<b>Co-Conspirator Admission</b>	Admissions of one conspirator, made to a 3 <sup>rd</sup> party in furtherance of a conspiracy to commit a crime or civil wrong at a time when the declarant was participating in the conspiracy, are admissible against co-conspirators.	Same rule.
<b>Admission by Authorized Spokesperson</b>	The statement of a person authorized by a party to speak on its behalf (e.g. statement by a company's press agent) can be admitted against the party as an admission.	CA rule is similar – agent may have either express or implied authority to speak based on position.

### C. Exceptions (*List is not exhaustive*)

#### 1. Reliability Exceptions

*\*Relevant FRE and CEC rules and distinctions are noted in the chart below*

##### a. Excited Utterance (CA: Spontaneous Statement) 🙌

- 📌 **Issue Spotting Tip:** Anytime you raise Excited Utterance, you should raise Present Sense Impression.
- 📌 **Issue Spotting Tip:** If there is a statement of time, including both exact measures (e.g. 30 minutes) and descriptions of time (e.g. immediately after), indicating the amount of time that has passed in between the statement being made by the declarant and the

statement being repeated, the issues of Excited Utterance and Present Sense Impression are triggered.

**b. FRE only: Present Sense Impression** 🖐️

- 🖐️ **Issue Spotting Tip:** Anytime you raise Excited Utterance, you should raise Present Sense Impression.
- 🖐️ **Issue Spotting Tip:** If there is a statement of time, including both exact measures (e.g. 30 minutes) and descriptions of time (e.g. immediately after), indicating the amount of time that has passed in between the statement being made by the declarant and the statement being repeated, the issues of Excited Utterance and Present Sense Impression are triggered.

**c. CA only: Contemporaneous Statement** 🖐️

**d. Past Bodily Condition (to treat or diagnose)** 🖐️

**e. Present State of Mind and Bodily Condition** 🖐️

**f. Federal Catch-All**

EXCEPTION	FRE RULE	CEC RULE
<b>Excited Utterance</b> 🖐️	A statement made while under the stress or excitement of startling event is admissible.	Same rule but called “Spontaneous Statement” in CA.
<b>Present Sense Impression</b> 🖐️	A statement made concurrently with the perception of event described is admissible.	No exact counterpart but a close version is (see below) “Contemporaneous Statement”
<b>Contemporaneous Statement</b> 🖐️	No exact counterpart but a close version is Present Sense Impression (see above)	A statement a declarant makes to explain, qualify, or make understandable something the declarant <i>himself is doing</i> at the very time he makes the statement is admissible.


EXCEPTION	FRE RULE	CEC RULE
<p><b>Past Bodily Condition</b> 🖐️</p>	<p>Generally, statements of past bodily condition are inadmissible unless made to medical personnel to assist in diagnosing or treating the condition. If made to a medical personnel, even statements about the cause or source of the condition, are admissible if pertinent to diagnosis or treatment.</p>	<p>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.</p> <p>Also, a statement of declarant’s past physical or mental condition, including 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 and the declarant must be unavailable.</p>
<p><b>Present State of Mind, or Emotion, or Physical Condition</b> 🖐️</p>	<p><u>Statement of Then-Existing State of Mind</u>: A statement of the declarant then-existing state of mind (such as motive, intent, or plan) or emotional or sensory feeling (such as a mental feeling), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms that a clearance will is admissible.</p> <p><u>Present State of Present Bodily Condition</u>: A spontaneous declaration of present bodily condition (such as of pain or bodily health) is admissible even though not made to a physician.</p>	<p>Same rule but CA law authorizes the trial judge to exclude statements of mind or body that are made in suspicious circumstances.</p>

EXCEPTION	FRE RULE	CEC RULE
<b>Federal Catch-All</b>	For a hearsay statement that is not covered by a specific exception to be admitted, the FRE provides a catch-all which requires (1) that the hsy statement possess circumstantial guarantees of trustworthiness, (2) that the statement be strictly necessary, and (3) that notice be given to the adversary as to the nature of the statement.	No counterpart. But judges can create new exceptions by “decisional law”.

## 2. Documentary Exceptions

### a. Business Records

### b. Past Recollection Recorded

-  **Tip:** If the author is on the stand and cannot recall what he wrote in the document, the first issue is Present Recollection Refreshed, which should be raised before Hearsay. Then for Hearsay, raise Past Recollection Recorded as an exception.

### c. Learned Treatise


### d. Ancient Documents


### e. Official Record

### f. Vital Statistics

### g. Family Records

### h. Market Reports

EXCEPTION	FRE RULE	CEC RULE
<b>Business Records or absence thereof</b> 	Records of events, conditions, opinions or diagnoses made in the regular course of business, consisting of matters within the personal knowledge of one with a business duty to transmit are admissible. Lack of such writing may be used to show nonoccurrence of event.	CA exception is same but does not refer to opinions or diagnosis, but courts still will admit simple opinions and diagnosis.

EXCEPTION	FRE RULE	CEC RULE
<b>Past Recollection Recorded</b> 	And writing is admissible if the witness once knew about it but now cannot recall well enough to testify fully and accurately, was made or adopted by the witness when the matter was fresh in the witness' memory, and it accurately reflects the witness' knowledge. If admitted, the record may be read into evidence, but may be received as an exhibit only if offered by an adverse party.	Same rule.
<b>Learned Treatise</b>	Statements from authoritative works are admitted if called to the attention of an expert witness and established as reliable authority. If admitted, the statement may be read into evidence but cannot be received as an exhibit.	Much more narrow: it applies to facts of general notoriety and interest that are found in published maps or charts, or books of history, science, or art. CA judges read "art" to cover little beyond the exact sciences.
<b>Ancient Document</b>	Statements in a document that were prepared 20 years or more and whose authenticity can be established are admissible.	Documents 30 years or more.
<b>Official/Public Record</b>	Records and reports of public agencies regarding their activities; recordings of matters observed pursuant to a duty imposed by law (except police observations in criminal cases); OR in civil cases and against the government in criminal cases – records of factual findings resulting from a investigation authorized by law are admissible.	2 distinctions: (1) CA allows the fact finding in a government investigation report to be used for the govt as well as against it if report is trustworthy (2) CA does not automatically reject police observations in criminal cases. Rather, CA judges use the trustworthiness requirement to reject police reports that seem unreliable.

EXCEPTION	FRE RULE	CEC RULE
<b>Vital Statistics</b>	Records of vital statistics (birth, death, and marriage) are admissible if the report was made to a public office pursuant to requirements of law.	Evidence of a writing made as a record of a birth, fetal death, death, or marriage is admissible if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law.
<b>Family Records</b>	Statements of fact found in family Bibles, jewelry engravings, tombstones, etc.	Similar.
<b>Market Reports</b>	Market quotations, lists, directories, or public compilations generally relied on by the public or persons of a particular occupations are admissible.	No exact counterpart but a close exception includes: Published Tabulations (see below)
<b>Published Tabulations</b>	No exact counterpart but a close exception includes: Market Reports (see above)	The rule allows the introduction of published tabulations, lists, directories, or registers. The only requirement is that the evidence contained in the compilation is generally used and relied upon as accurate in the course of business.

### 3. Unavailability Exceptions

a. Former Testimony 🖐️

b. Dying Declaration 🖐️

- **Tip:** If the declarant is dead, raise Dying Declaration, even if the statement is not related to the cause of death. The mere fact the declarant is dead is what gives rise to the issue, and you should raise it even if you know it will not succeed.

c. Statement Against Interest 🖐️

- **Tip:** If you raise Statement Against Interest, then you should also raise Admission by Party Opponent. (However, the reverse is not true. Since an Admission by Party Opponent does not have to be against the party's interest, you do not need to raise Dying Declaration every time Admission by Party Opponent is at issue.)

d. Statement of Personal or Family History

e. Statement Offered Against Party Procuring Declarant's Unavailability

f. CA only: Statement Describing Infliction or Threat of Bodily Harm

EXCEPTION	FRE RULE	CEC RULE
<b>Former Testimony</b> (unavailability required) 🖐️	The testimony of a now-unavailable witness, given at another hearing or deposition is admissible if made under oath, the party against whom the testimony is offered or the party's predecessor in interest was a party in the former action, the party against whom it is offered had motive and opportunity to cross develop testimony (direct, cross, redirect).	Same rule except in civil cases CA does not require that the party against whom the testimony was offered in the prior proceeding be a predecessor in interest of the party against whom it is now offered. All that is necessary is that the prior party have had an opportunity and similar motive to cross-examine the witness.



EXCEPTION	FRE RULE	CEC RULE
<p><b>Dying Declaration</b> (unavailability required) ✎</p>	<p>In a homicide prosecution or a civil action, a statement made by a now unavailable declarant is admissible if the declarant believed his death was imminent and the statement concerned the cause or circumstance of what he believed to be his impending death.</p>	<p>Same rule except:</p> <ul style="list-style-type: none"> <li>(1) Can be used in civil &amp; criminal (FRE only civil and homicide cases)</li> <li>(2) Declarant must be dead (unavailable in FRE means refusal to testify, lack of memory, claims a privilege so can't testify, death, etc.)</li> </ul>
<p><b>Statement Against Interest</b> (unavailability required) ✎</p>	<p>The statement of a person, now unavailable as a witness, against the person's pecuniary, proprietary, or penal interest when made, as well as collateral facts contained in the statement is admissible.</p>	<p>Same rule except:</p> <ul style="list-style-type: none"> <li>(1) CA recognizes statements against social interest while FRE does not. (against social risk it subjects person to hatred, ridicule, or social disgrace)</li> <li>(2) CA doesn't require corroboration when a criminal D tries to exculpate himself by using some unavailable declarant's self-incriminating statement.</li> </ul>
<p><b>Statement of Personal or Family History</b> (unavailability required)</p>	<p>Statement of personal or family history (e.g. birth, death, marriage) made by family member or one intimately associated with the family by a now unavailable witness is admissible.</p>	<p>Similar rule.</p>

EXCEPTION	FRE RULE	CEC RULE
<p><b>Statement Offered Against Party Procuring Declarant's Unavailability</b> (unavailability req'd)</p>	<p>Statement of unavailable declarant offered against party who procured declarant's unavailability.</p>	<p>CA rule is similar but more restrictive:</p> <ul style="list-style-type: none"> <li>(1) Only for serious felony</li> <li>(2) Unavailable only if killed or kidnapped</li> <li>(3) Stmt must have been recorded by a law enforcement official before the declarant was killed or kidnapped</li> <li>(4) Need clear and convincing evidence that declarant's killing or kidnapping was procured by the person against whom stmt is offered. (FRE= preponderance)</li> </ul>
<p><b>Statement Describing Infliction or Threat of Physical Injury</b></p>	<p>No Counterpart.</p>	<p>A hsy statement made by an unavailable declarant that describes, narrates, or explains the infliction of threat of physical injury on the declarant is admissible if the statement (i) was made at or near the time of the infliction or threat, (ii) was made under circumstances that indicate its trustworthiness and (iii) is in writing, recorded, or made to a law enforcement.</p>