

LOGICAL RELEVANCE

STEP 1 - Evidence must be **logically relevant** in order for it to be admitted.

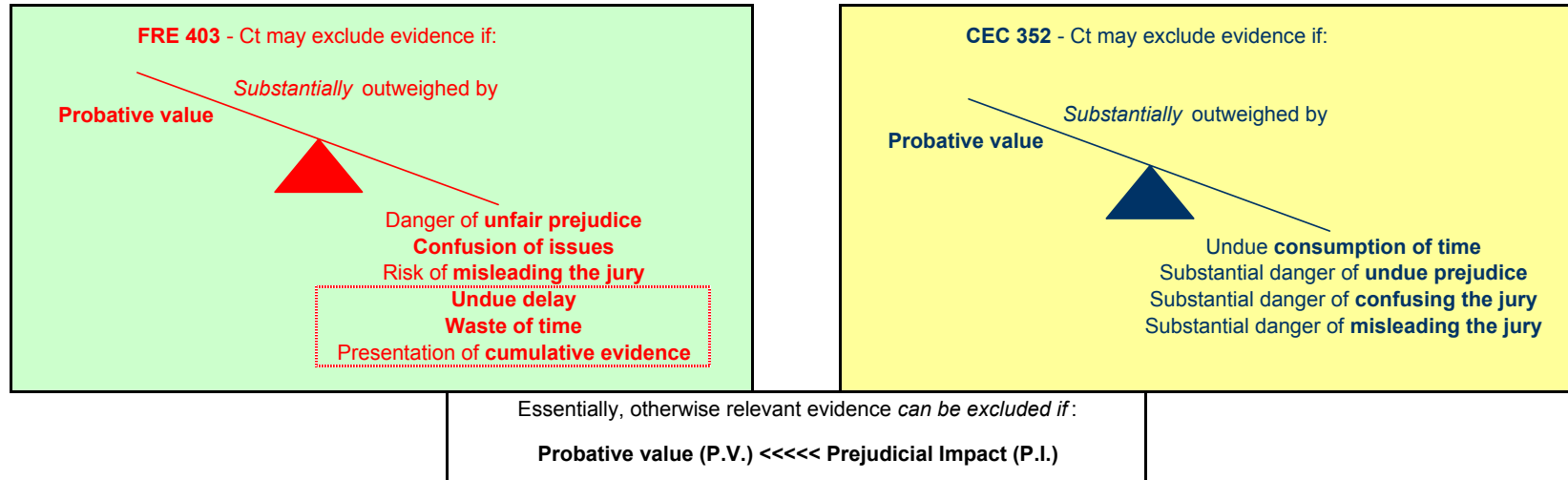
Logical relevance - Any tendency in reason to prove or disprove the disputed fact

<p>Δ is charged with killing a cop but argues self-defense because he claims he heard a story that the cop had previously beat someone to death so Δ was afraid he'd get beaten to death</p> <div style="text-align: center;"> </div> <p>Disputed Fact: Did Δ really hear a story that the officer had previously beaten someone to death?</p> <p>Evidence: State wants to tell jury that person died of other causes and was not beaten to death by officer</p> <div style="text-align: center;"> </div> <p>Logical Relevance: The evidence has <u>some tendency in reason</u> to prove or disprove the disputed fact</p>	<p style="text-align: center;">Solomon is trying to determine which of 2 women is a child's real mother</p> <div style="text-align: center;"> </div> <p>Evidence: Solomon wants to cut the baby in half to determine who is the real mother based on who would stop him</p> <div style="display: flex; justify-content: space-around;"> <div style="width: 45%;"> <p>Disputed Fact: Who is the REAL mother</p> <div style="text-align: center;"> </div> <p>Logical Relevance: Arguably NONE.</p> </div> <div style="width: 45%;"> <p>Disputed Fact: Who would be the BETTER mother</p> <div style="text-align: center;"> </div> <p>Logical Relevance: The evidence would have <u>some tendency in reason</u> to prove or disprove the disputed fact</p> </div> </div> <p>Limiting Instruction (Limited admissibility of evidence): The judge would instruct the jury - "The evidence that Helen would rather give the baby to Heidi rather than cut the baby in half is admitted as evidence tending to prove who would be the <i>better</i> mother. The evidence is NOT being admitted as tending to prove who is in fact the <i>actual</i> mother. Therefore, you should NOT use this evidence as proof of who the <i>actual</i> mother of this child is.</p>
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LEGAL RELEVANCE

STEP 2 - Evidence must be **legally relevant** in order for it to be admitted.

Legal relevance - Determined by **FRE 403 (Federal)** or **CEC 352 (State)**



Witness to robbery gives officers descriptions of suspects. Prosecutors get a stats nerd to come up with a probability of all the descriptions. Nerd comes up with probability of 1 in 12 million based on the product rule. Implies that Δs must be guilty based on this figures

Probative value: Spoke to the exact issue of the case
Whether Δs were guilty

EXCLUDED

Unfair/Undue Prejudice: The jurors could take the figure and think that there was only a 1 in 12 million chance that the Δs were not guilty. This would essentially decide the case, irrespective of anything else presented at trial

A kid is hit and killed on RR tracks by a train that was moving. Π's attorneys introduce evidence from demonstrative experiment where a kid would stand on the tracks and others would stand at various distances to determine the distance at which they could see the kid.

Probative value: Speaks to the possible distance at which the RR conductor might have been able to see the kid

ADMITTED

Prejudicial impact: Jurors would not be likely to rely too heavily on this evidence because they would know (Δ attorney would point out) that the train was moving whereas the people in the experiment were standing still - This is within a juror's experience and understanding

NOTE: Here, there is both P.V. and P.I. However, the evidence is admitted because the P.I. does not substantially outweigh the P.V.

The jurors here would be able to tell what the differences were

THE OPINION RULE

General Rule: A lay witness should testify to facts that are **rationally based on the witness' perception** and are **helpful to an understanding of the testimony** and NOT to any extrapolations based on those facts

Collectivizing of Facts EXCEPTION: A witness can put facts together if the conclusion is based on *common sense or common experience*

Scenario 1:

P: Did you witness the accident in question?
W: Yes I did
P: Please describe what you saw.
W: The Π was walking down the street holding a bundle with a child in it when a piece of wood came tumbling down and smacked her.

D (x-exam): How do you know there was a child in the bundle?
W: I believe her kid was in the bundle.
D: Defense moves to strike the witness' testimony as to the content of the bundle.
C: And why is that?
D: The testimony is not based on the witness' perception
C: Sustained. The testimony about the bundle is stricken

Scenario 2:

P: What did the defendant do then?
W: The defendant winked, which meant he wanted me to come up with an alibi for him.
D: Objection. It is the witness' opinion that the defendant winked.
C: What should the witness testify then?
D: That the defendant rapidly closed and opened one eye while keeping the other eye open
C: Technically maybe, but I'm going to allow it
D: Objection #2. The witness cannot testify that defendant meant for the witness to come up with an alibi. That would be an extrapolation and therefore violates the opinion rule.
C: Sustained

Scenario 3:

P: When you saw the defendant, what condition was the defendant in?
W: He was drunk.
D: Objection. This is an extrapolation of the facts and therefore a violation of the opinion rule.
C: Overruled. The testimony falls under the collectivizing of the facts exception.
D: But it is not based on common sense or common experience.
C: It is in the common experience of the jury to know when a person is intoxicated.

Scenario 4:

P: When you saw the defendant, what condition was the defendant in?
W: He was high on marijuana
D: Objection. Violation of the opinion rule. The extrapolation is not based on either common sense or on common experiences.
C: Sustained. Please answer the question with facts
W: The defendant's eyes were bloodshot. He had an odor that smelled very much like a skunk. He was chomping on Cheetos. His speech was slurred. And every time he started a sentence, he would stop in the middle of it and then forget what he was talking about.

Scenario 5:

W: The Δ was going about 80 mph when he passed
D: Objection. Violation of the opinion rule.
C: Driving 80 mph is within common experience. This falls under collectivizing of facts.

Scenario 6:

W: It was about 105 degrees that day.
D: Objection. This is a violation of the opinion rule.
C: I think it falls within the collectivizing of facts exception.
D: It would your honor if it was common experience to be in 105 degree weather.
C (to W): Do you have experience with 105 degrees?
W: Yes I do. I grew up in the San Fernando Valley where the temperature tops 105 degrees at least a dozen times every summer.
P: The witness is stating an approximate temp. based on his experience. Furthermore, being in extremely hot conditions is a common experience. The testimony is not to prove that it was 105 degrees on the day in question, but rather, it is to help the jury understand the witness' testimony.
C: The witness is collectivizing the facts. His testimony is proper.

EXPERT TESTIMONY

General Rule: An expert CAN give testimony based on OPINION but only if (1) expert is qualified by **special knowledge, skill, experience, training, or education**, (2) testimony is **based on facts that would reasonably be relied on** by other experts in the field.

Hearsay & inadmissible evidence: An expert CAN use otherwise inadmissible evidence as basis for opinion

<p>Scenario 1:</p> <p>D: What is your field of expertise? W: Forensic pathology. D: What is the basis for your expertise in this field? W: I studied medicine at XYZ University, after which I started my career at the LA coroner's officer, where I worked for 25 years. There, I received excellent training and also personally conducted over 3,000 autopsies and supervised 3,000 more.</p> <p><<Testimony about the manner of death>></p> <p>P (x-exam): Did you review either the autopsy report or photos from the autopsy? W: No, I did not. P: Then what is your opinion testimony based on? W: I spoke at length with one of the officers who was at the scene and he told me the victim was stabbed in the chest and it looked to him that the knife was probably in a downward direction. Also, the victim's mother told me the victim lost a great deal of blood, which indicates to me that the ABC vein was severed in the attack. P: Objection to the testimony, the opinion is based on hearsay. C: Overruled. An expert can base her opinion on otherwise inadmissible evidence. However, the witness can not reveal the contents of that evidence to the jury. P: Well then, objection #2. A reasonable expert in the field of forensic pathology would rely on the autopsy report and autopsy photos. Not on statements by those who were not trained or otherwise qualified to make findings as to the manner of death. C: Sustained.</p>	<p style="color: green;">← The party introducing an expert must establish the expert's qualifications before opinion testimony</p> <p style="color: green;">← An expert can base opinion on otherwise inadmissible evidence. Can also be crossed on this evidence</p> <p style="color: green;">← An expert's opinion must be based on what other experts would reasonably use to come to an opinion</p>	<p>NOTE Re: Tests used as basis of expert testimony: There are 2 standards: Frye Standard (used in CA) and Daubert (FRE) NOTE: Admissibility under either standard determined by the JUDGE</p> <p style="background-color: yellow;">Frye Standard (adopted by CEC) - ALSO the Common Law Standard</p> <p><<Δ experts wants to rely on lie detector test results>> P: The defense should not be permitted to call a wit who will rely on lie detector evidence. It would violate the Frye Standard because there is no general acceptance as to the test's reliability. D: Although it is not yet generally accepted, it is an emerging technology that some find reliable. C: Defense expert cannot rely on the test.</p> <p style="background-color: #e0ffe0;">Daubert Standard (adopted by FRE)</p> <p><<Π wants to call expert to rely on "Visual Inspection" test>> C (to Π): Has this "Visual Inspection Method" (VIM) been tested? P: No it has not, but our expert swears by it. C: Has VIM been published? P: No it has not. C: So, it has not been subjected to peer review? P: No it has not. C: What is the error rate? P: That has not yet been determined. C: Are there any standards for this so-called VIM? P: Not at this point, your Honor. C: Is there at least any degree of acceptance in the inspection community? P: No, there is not at this time. C: Based on Daubert, you cannot rely on VIM</p> <p style="background-color: #e0ffe0;">DAUBERT FACTORS (Not elements)</p> <p style="color: red;">← Tested?</p> <p style="color: red;">← Published?</p> <p style="color: red;">← Subject to peer review?</p> <p style="color: red;">← Determined error rate?</p> <p style="color: red;">← Standards for the test?</p> <p style="color: red;">← Degree of acceptance?</p> <p style="color: red;">More evidence is EXCLUDED under Daubert (IE, fingerprint temporarily b/c no peer rev. and no standard)</p> <p style="background-color: yellow;">General acceptance of reliability</p> <p style="color: blue;"><i>Problems - once evidence in, can call rebuttal to refute and there are no standard. New technology lags in trials</i></p>
<p>Demonstrative Evidence: Admissibility is determined based on 403/352 review</p>		

SIMILAR HAPPENINGS

Elements:

(All evidence must be **relevant** - Always consider 352/403)

Substantial identity of material circumstances

Re: Prior Non-Occurrences

There must be a **significant number of non-occurrences**

Must show that **party would have known if there had been occurrence**

Scenario 1:

*Π sues after falling down stairs, claiming Δ was negligent & stair was in disrepair
Π seeks to introduce evidence that 2 other girls had previously fallen down same steps*

P: The evidence is clearly relevant as it shows Δ was on notice and that carpet could have been loose or defective

D: But, there is not substantial identity. Who knows if the other girls were wearing the same type of shoes, or were drunk. There are a lot of reasons they could have fallen.

P: The defense is arguing for identical circumstances. However, the test is substantial identity of material circumstances.

D: Objection, 352/403. The prejudicial impact is significant here and substantially outweighs any probative value. If the jury hears about past accidents, they might feel compelled to rule in favor of the defendant to punish for these past events. In the alternative, the jury might feel compelled to give more weight to the Π's testimony.

C: The Πs can introduce the evidence. While there is some prejudicial impact, there is also clearly probative value. Furthermore, the probative value is not *substantially outweighed* by the prejudicial impact.

NOTE: The ct in Robitaille seemed to call for identical circumstances

Scenario 2:

Π injured by low-hanging branch on roller-coaster. Δ seeks to introduce evidence that 5,000 people had previously been on the ride without being injured.

D: The evidence is relevant because it tends to show that the Δ was not negligent.

C: 5,000 people have ridden without injury, what time period are we talking?

D: About 500 people ride per day, so that's 10 days.

C: How can we be sure that it didn't happen in the past but the injured party chose not to report it. Maybe she just went to the hospital. Or perhaps the branch did not hang as low and someone scraped it only requiring a band-aid.

D: We can't be certain that it would have been reported.

P: The evidence is extremely prejudicial to the plaintiff. The jury, hearing that 5,000 people have been on the ride without incident might assume that to be the case even though we just heard that it may in fact not be the case since we don't know that it would have been reported.

C: You cannot introduce the evidence. This is a non-occurrence, so the standard is greater. Here, there is no substantial identity of material circumstances because we don't know for sure that it did not happen in the past.

PLEAS AND PLEA NEGOTIATIONS

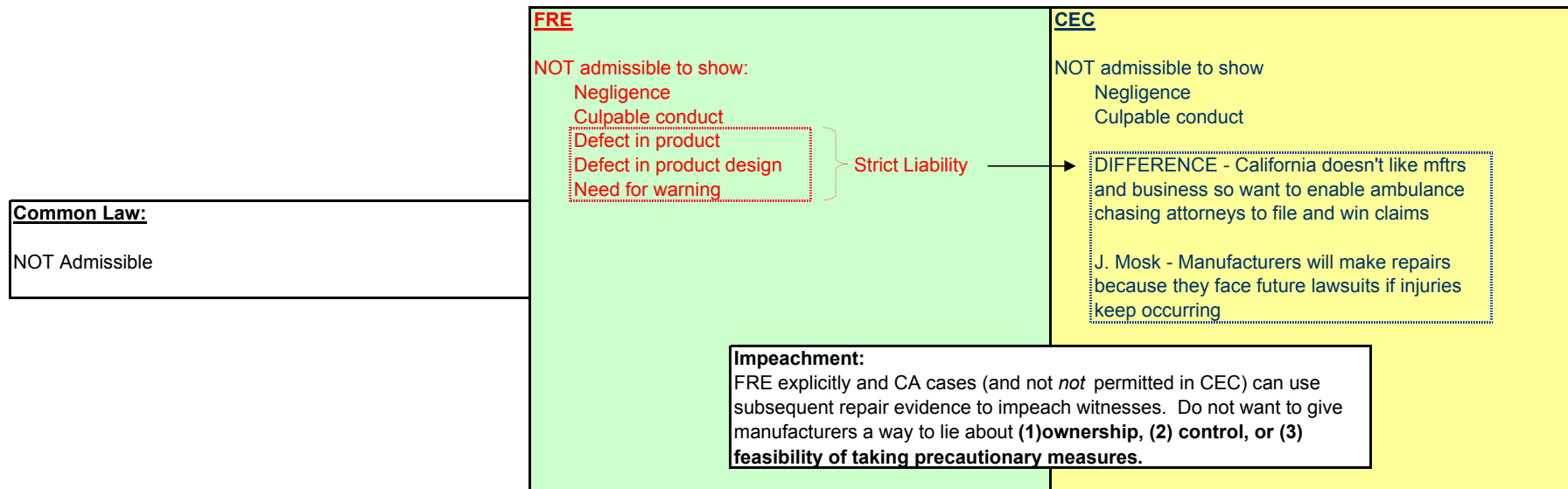
* NOTE - Guilty pleas in a criminal trial ARE admissible against the Δ in a subsequent civil trial. Not all states have no-contest pleas... But CA does

Common Law:	<p><u>FRE</u></p> <p>NOT admissible in any future civil or criminal proceeding</p> <div style="border: 1px solid black; text-align: center; margin: 5px 0;"> <p>Subsequently <u>withdrawn</u> guilty plea No-Contest (<i>nolo contendere</i>) plea</p> </div> <p>Statements made in (1) any proceeding involving a guilty or no-contest plea or (2) course of plea discussion which results in guilty plea or subsequently withdrawn guilty plea.</p> <p>Admissible</p> <p>In perjury action, statements made <u>under oath, on the record, with counsel</u> Proceeding where <u>another stmt</u> from plea or discussion is introduced</p>	<p><u>CEC</u></p> <p>NOT admissible in ANY future action or proceeding</p> <p>Offer to plead guilty</p>
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SUBSEQUENT REPAIRS

EXTRINSIC Rationale: Pertains to subsequent repairs that **would have made an injury or harm less likely to occur** had they been performed before an accident. Society wants to encourage people, companies, etc. to make repairs that might reduce the risk of *future* harm. However, if these repairs could be used against the person, company, etc., they might choose to wait until litigation is over for the previous injury before making any of the needed repairs.

General Rule: Evidence of **measures taken SUBSEQUENT** to an injury or harm that **would have made injury or harm less likely to occur** -



<<Federal case... W is manufacturer who recently changed the material used in one of his products. If the material had been changed before the injury in question, the injury was substantially less likely to occur. W testified on direct that the product was manufactured in such a way that there was no way to change the material used in the product. P's attorneys on x-exam...>>>

- P:** The accident occurred on November 1 of last year, correct? (Note: Leading questions are permitted on x-exam)
- W:** Yes, November 1st.
- P:** Isn't it true that on February 20th of this year, you changed the material used in manufacturing the product?
- D:** Objection. The common law, FRE, and CEC all prohibit evidence of subsequent repairs. This line of questioning is not permitted.
- P (Side-bar):** Subsequent repair evidence is permissible in strict liability cases.
- D:** That might be true in CA, where plaintiff's attorney went to law school, but in federal courts, such evidence is not permitted for strict liability. Not everyone thinks like they do in CA - Not everyone thinks big business is the spawn of the devil and the enemy of the people. We protect business in federal courts!
- C:** Subsequent repair evidence is not permitted in strict liability cases in this federal court. Come up with another argument or stop this line of questioning.
- P:** I believe even in federal courts, subsequent repair evidence is permitted to impeach a witness. The witness previously testified that he *could not* change the material used in manufacturing the product. But in fact, he *did* change the material. Therefore, he has misrepresented the feasibility of making such change to this jury.
- C (before the jury):** You may proceed. (To the jury, **limiting instructions**) The evidence of subsequent repairs is being admitted but only to dispute the witness' previous testimony as to the feasibility of using another material in the product. It is not being admitted to show culpability or negligence. You may only use this evidence to weigh the credibility you will give to this witness' testimony and you may not use it as showing negligence or culpability.

COMPROMISE, SETTLEMENT & OFFERS TO COMPROMISE OR SETTLE

EXTRINSIC Rationale: We want to encourage people to compromise or settle disputes without turning to litigation. However, if the compromises, settlements, or offers to compromise or settle could later be used against a party if things didn't work out, then most people would likely avoid compromising or settling. Trying to encourage compromises and settlements

**Admissibility or non-admissibility is to prove liability. FRE says admissible for other purposes (proving bias, arguing against undue delay, proving obstruction). CEC is silent*

Common Law:	FRE	CEC - California, the "touchy-feely" state									
(1) Compromises / Settlements, or (2) Offers to compromise or settle are: NOT Admissible											
Admissions, payments, offers to pay are: ADMISSIBLE	Admissions made during compromise/settlement or offers of such are: NOT Admissible										
	<div style="border: 1px dashed red; padding: 5px; margin-bottom: 10px;"> <i>A person can make or offer to make medical payments for an accident even if she does not feel responsible - A rich guy fender bender with a poor person might offer to pay for minor medical expenses without admitting fault. BUT, if she does admit fault or make any sort of admission while offering to pay or paying for medical expenses, the ADMISSION is ADMISSIBLE while the PAYMENT or OFFER to pay is NOT admissible</i> </div> <p>Payments of Offers to pay for medical expenses are: NOT Admissible</p> <p>Admissions made when offering to pay med. expenses: ADMISSIBLE</p> <p>Non-medical pmts or offers & Admissions durings: ADMISSIBLE</p>	<div style="border: 1px dashed black; padding: 5px; margin-bottom: 10px;"> <i>CEC wants to encourage people to act out of humanitarian concerns. Therefore, while the CEC does not speak explicitly to payments or offers to pay for medical expenses, the CEC does speak to STATEMENTS, ADMISSIONS or CONDUCT that is done out of HUMANITARIAN MOTIVES. Therefore, if a person acts with humanitarian motives, the acts and any statements or admissions accompanying those acts are NOT admissible</i> </div> <table border="1" style="width: 100%; border-collapse: collapse; text-align: center;"> <tr> <td style="width: 50%;">Humanitarian motives NOT Admissible</td> <td style="width: 50%;">Non-Humanitarian motives Admissible</td> </tr> <tr> <td style="border-right: 1px dashed black;">Payments or offers to pay</td> <td>medical expenses</td> </tr> <tr> <td style="border-right: 1px dashed black;">Admissions during pmts</td> <td>or offers to pay med exp.</td> </tr> <tr> <td style="border-right: 1px dashed black;">Non-medical payments</td> <td>or offers to pay</td> </tr> <tr> <td style="border-right: 1px dashed black;">Admissions during non-med</td> <td>payments or offers to pay</td> </tr> </table> <div style="border: 1px dashed black; padding: 5px; margin-top: 10px;"> <i>A non-humanitarian motive would be making the payment or offering to make payment in order to avoid a lawsuit. Burden is on the party seeking to exclude statements or offer to prove humanitarian motive</i> </div>	Humanitarian motives NOT Admissible	Non-Humanitarian motives Admissible	Payments or offers to pay	medical expenses	Admissions during pmts	or offers to pay med exp.	Non-medical payments	or offers to pay	Admissions during non-med
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Scenario 1: Medical payments & statements in federal court.

P: We would like to introduce evidence that Δ paid Π's medical expenses

C: That evidence is inadmissible.

P: But the Δ admitted at the hospital following the accident that he should have fixed the broken staircase months prior to the accident. Furthermore, he said he knew someone would get hurt eventually.

C: You cannot discuss the fact that Δ paid Π's medical expenses. BUT, you can introduce evidence that the Δ made certain statements when he offered to pay for those medical expenses.

Scenario 2: Medical payments & statements in CA state court.

P: We would like to introduce evidence that Δ paid for Π's medical expenses and that Δ said the staircase should have been fixed "a long time ago."

D: While the Δ did pay for Π's medical expenses, he did so because he felt badly b/c Π was injured while babysitting Δ's son. The Δ has known the Π's father for over 20 years. Δ never imagined he would be sued by one of his closest friends. Moreover, we have evidence that Δ called Π's father every night for over 2 weeks to ensure Π was healing. He was genuinely concerned about Δ's health.

C: The court is satisfied that the payment was made with humanitarian. Thus, evidence of the statement and payment are both excluded.

JUDICIAL NOTICE

Generally: There are certain facts that the court can establish without requiring each or both parties to present evidence. A time saving mechanism that makes sense.

Common Law	<p><u>FRE</u></p> <p>Facts NOT subject to reasonable dispute:</p> <p>(1) Generally known facts within jxn of the court</p> <p>(2) Capable of accurate and ready determination by accurate source</p> <p><u>Discretionary</u> - Whether requested or not</p> <p><u>Mandatory</u> - If (1) requested by a party & (2) supplied nec. Info.</p> <p>Jury Instructions:</p> <p>Civil - Jury to accept judicially noticed fact as conclusive</p> <p>Criminal - Jury may or may not accept judicially noticed fact as conclusive</p>	<p><u>CEC</u></p> <p><u>Discretionary</u> -</p> <p>(1) Generally known facts in jxn that cannot reasonably be disputed</p> <p>(2) Facts capable of immediate and acc. determination by accurate source</p> <p><u>Mandatory</u> -</p> <p>(1) Meaning of English words, phrases and legal expressions</p> <p>(2) Facts of generalized, universally known knowledge that can't dispute</p> <p>(3) If 1) requested, 2) other party given sufficient notice, 3) nec. Info.</p>
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Essentially the same. Mandatory in CEC is basic facts

- Generally known fact in jxn of the court (Los Angeles)** - The 10 Freeway is not a toll road.
- Capable of determination by accurate source** - The Bears and Patriots played in Super Bowl XX (Sports Almanac). Properly cooking pork kills certain bacteria.
- English words, phrases, and legal expressions** - The word "subsequent" means "after"
- Generalized, unverisally known knowledge** - A human being uses her eyes to see and her nose to smell. Fatigue can adversely affect driving.

BURDENS & PRESUMPTIONS

Burden of {

- Production:** The party who bears this burden loses if it does not produce some evidence on it
Opponent is entitled to a directed verdict if the party with this burden does not produce some evidence on the issue
- Persuasion:** The party who bears this burden on an issue loses if it does not persuade the jury that the proposition has been established by the applicable standard
(Burden of proof) Opponent is entitled to a directed verdict if the party with this burden fails to produce evidence to support a jury verdict on the issue

Presumptions - If (the underlying fact(s)) is/are true, *then* the (presumed fact) is true... Example - If there is a date written on a letter, *then* that date is presumed to be accurate

- Conclusive** - If the jury finds the underlying fact to be true, then it **MUST** find the presumed fact to be true (Opposing party can challenge the underlying fact)
- Rebuttable** - If the jury finds the underlying fact to be true, then it **MIGHT** find the presumed fact to be true (Opposing party can challenge either the underlying or presumed fact)

Common Law	<p><u>FRE</u></p>	<p><u>CEC</u></p>
	<div style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <p style="text-align: center;">Thayer (Bursting Bubble) Theory - Shifts the burden of production.</p> <p>When proponent of presumption proves the underlying fact of a rebuttable presumption, the burden of production shifts to the opponent. If the opponent introduces <i>any</i> contradictory evidence, then the "bubble bursts" and there is no presumption. Jury decides the issue as it would any other issue.</p> </div>	<p>Applies when presumption based purely on logic</p> <p>Applies when there is a policy based rationale for presumption.</p> <p>Morgan (Lingering on) Theory - Shifts burden of persuasion. Even after opponent of presumption introduces contradictory evidence, presumption lingers on. Jury is to find the presumed fact true unless persuaded by the opponent that the presumed fact does not exist. Opponent must prove by preponderance of the evidence.</p>

**Rebuttable presumption must be more likely than not true.*

HEARSAY (Pg 1 - General Rules)

DEFINITION - An out of court statement offered to prove the truth of the matter asserted

Out of court: When a witness testifies at *the* hearing, the opposing party has a chance to x-examine the witness. The witness is under oath, subject to perjury. Out of court, there's nothing

Statement: Hearsay only applies to assertive statements
A statement can be:

Oral (speaker)	}	(1) <u>intended</u> to have a meaning
Written (writer)		(2) Attempting to <u>deliver</u> the meaning
Conduct (actor)		by words or conduct

Examples:

"It's cold in here"	}	<i>intended</i> to mean it was cold and attempting to <i>deliver</i> the message that it was cold
"This place would be perfect for polar bears."		The assertion can be figured out without further inquiry.

"I need to put on a jacket" → Not assertive. Could have meant he was going outside, wanted to hide a stinky shirt, he felt he was getting sick, or it was cold. You would want to ask some questions.

Offered to prove the truth of the matter asserted: If the statement is not offered for the truth of the matter, there is no real concern with admitting statement. chance to cross examine.

Non-Hearsay

*NOTE - Always remember to consider relevancy

<p>In-court statements Opposing party can x-examine and jury can determine credibility</p> <p>Non-assertive statements Declarant's <i>intent</i> is to accomplish something, <i>not</i> to make assertion</p> <div style="border: 1px dashed black; padding: 5px; margin: 5px 0;"> <p>Not offered to prove the truth of the matter asserted It doesn't matter what the declarant said, only that he said it Opposing party can x-examine the witness as to whether he actually heard the declarant make the statement (which would be the issue). The credibility issue pertains to the witness, not the declarant</p> </div> <p>State of mind of the listener, reader, etc. It doesn't matter if the out of court statement were true. The issue here is that the declarant made the statement and <i>what effect that statement would have on the person who heard, read, etc. the statement.</i></p> <p>State of mind of the speaker It doesn't matter if the out of court statement were true. The issue is that the statement goes to the state of mind of the declarant.</p>	<p style="text-align: center;"><i>A statement can tend to show both the truth of the matter asserted AND state of mind of the speaker. <u>Limited admissibility would not apply</u> b/c stmt is either hearsay or it is not.</i></p> <p>McCormick Rule: Such statements are NOT hearsay if offered to show the declarant had <i>knowledge</i> of the subject (goes to state of mind) and not to show that the statement itself is true. Illogical in a way because in order to show declarant did in fact have knowledge, the statement itself must generally be true.</p> <p>Morgan Rule: Such statements ARE hearsay. Stmt's assume something about the declarant.</p> <p style="text-align: center;"><i>Independent legal significance</i></p> <div style="border: 1px dashed black; padding: 5px; margin: 5px 0;"> <p>Operative fact (K terms) Statements made in connection with a K are not offered to prove the truth of the matter but rather to show the terms of the contract, which has legal relevancy apart from the truth of the statement</p> </div>
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Respondents to a survey asking for the brand of a lighter shown, responded "a Zippo" Case, Zippo saying another mfr is causing confusion.

Statement Oriented: The stmt is asserting that the lighter was Zippo, but was not being offered to show that the lighter was Zippo, rather, offered to show declarant's state of mind as to the lighter. Therefore, NOT hearsay

Declarant Oriented: The ct says stmt was not asserting that lighter was Zippo but that declarant was asserting "I believe" to be Zippo & offered to prove declarant's belief so IS hearsay

NOTE: Declarant oriented vs. Statement oriented approach
All of the non-hearsay rules here are Statement Oriented
CEC, FRE & Majority apply Statement oriented
Declarant Oriented looks to see what the declarant was actually saying

HEARSAY (Pg 2 - General Rules Examples)

In-court statements

- W:** I thought the car was in good condition.
P: Objection. Hearsay.
C: Are you saying here in court that you thought the car was in good condition or is your testimony that you asserted on some previous day that the car was fine?
W: Today. I thought the car was in good condition.
C: That is not hearsay. The statement is in.

Non-assertive statements

- W:** Helen, a master mechanic, told Cathy that the car was fine. Then Helen inspected the car and drove off in it.
P: Objection. Hearsay.
C: The statement by Helen to Cathy is rank hearsay. It is very possible that Helen would say the car was in good condition even if she did not really believe that it was.
D: But the fact that Helen inspected the car and drove off in it is non-assertive conduct. She probably would not have driven off in the car if she thought the car was unsafe. The truthfulness is not much in doubt.
C: The conduct is not hearsay and is not inadmissible under the hearsay rules.

- W:** Heidi received a letter from Alice in which Alice talked about plans to go party on New Year's Eve.
P: Objection. Hearsay.
D: The issue here is not whether Alice in fact made plans to party with Heidi. The issue is whether Heidi is nuts. If the letter had said, "Heidi, I don't think you're nuts", then it would in fact be hearsay. But here, Alice was making plans to party with Heidi. The implication is that Alice did not believe Heidi was nuts. Truthfulness is not a great concern because how likely is it that Alice wrote the letter in order to imply that Heidi was not nuts?
C: It does not appear that Alice was asserting in the letter that Heidi was not nuts. Although this assertion is implicit, the letter is non-assertive in itself.

Not offered to prove the truth of the matter asserted

- W:** When we got to the car after the accident, we heard Gunther Tuna mumble, "I'm alive"
P: Objection. Hearsay. The issue here is whether Mr. Tuna survived the accident or died on impact. The statement speaks directly to the issue. If the jurors believe this wit. then they might assume the issue has been decided on this single testimony.
D: The issue is in fact whether Gunther survived the accident. In fact, if he had told the officers "there are burning rabbits flying out of my ass", that statement would not be hearsay and would be admissible. We are offering the statement to prove that he said *something*, which would indicate that he was still alive. We should not be precluded from introducing this statement because Gunther happened to say that he was alive. Moreover, since it is only the witness' credibility at stake, the P's attorney could x-examine the witness to try to disprove he heard what he claims he heard.
C: The statement is not being offered for the truth of the matter asserted. Thus, it's in.
P: Objection. 352 (403). The testimony is highly prejudicial since the statement here does speak directly to the issue at hand.
C: While the statement might have some prejudicial impact, it is also highly probative. I don't think the probative value here is substantially outweighed. Stmt is in.

State of mind of the listener, reader, etc.

- W:** I heard Crazy Cathy tell the Matt that if the he did not run naked across campus, she would kill him.
P: Objection, hearsay. We would want the opportunity to x-examine Crazy Cathy to determine if she would really have killed Matt.
D: Although the statement would be hearsay if it were offered to show that Cathy would have killed Matt, it is being offered here to show the state of mind of the listener. It does not matter whether or not the statement were in fact true. What matters is that Matt heard the statement and the effect on it. P's therefore can x-examine this witness to try to undermine his credibility as to whether he heard the statement or not.
C: The statement is in with a limiting instruction to the jury that the statement is to show the effect of the statement on Matt, and not in any way speaking to Cathy.

State of mind of the speaker

- W:** That night, Ann told me she was a Cupid Queen from Venus.
P: Objection. Hearsay.
C: The statement is clearly not being offered to prove Ann was really from Venus. The issue here is Ann's sanity. The statement is indirect evidence of state of mind. You can x-examine the witness later as to whether she heard the statement.

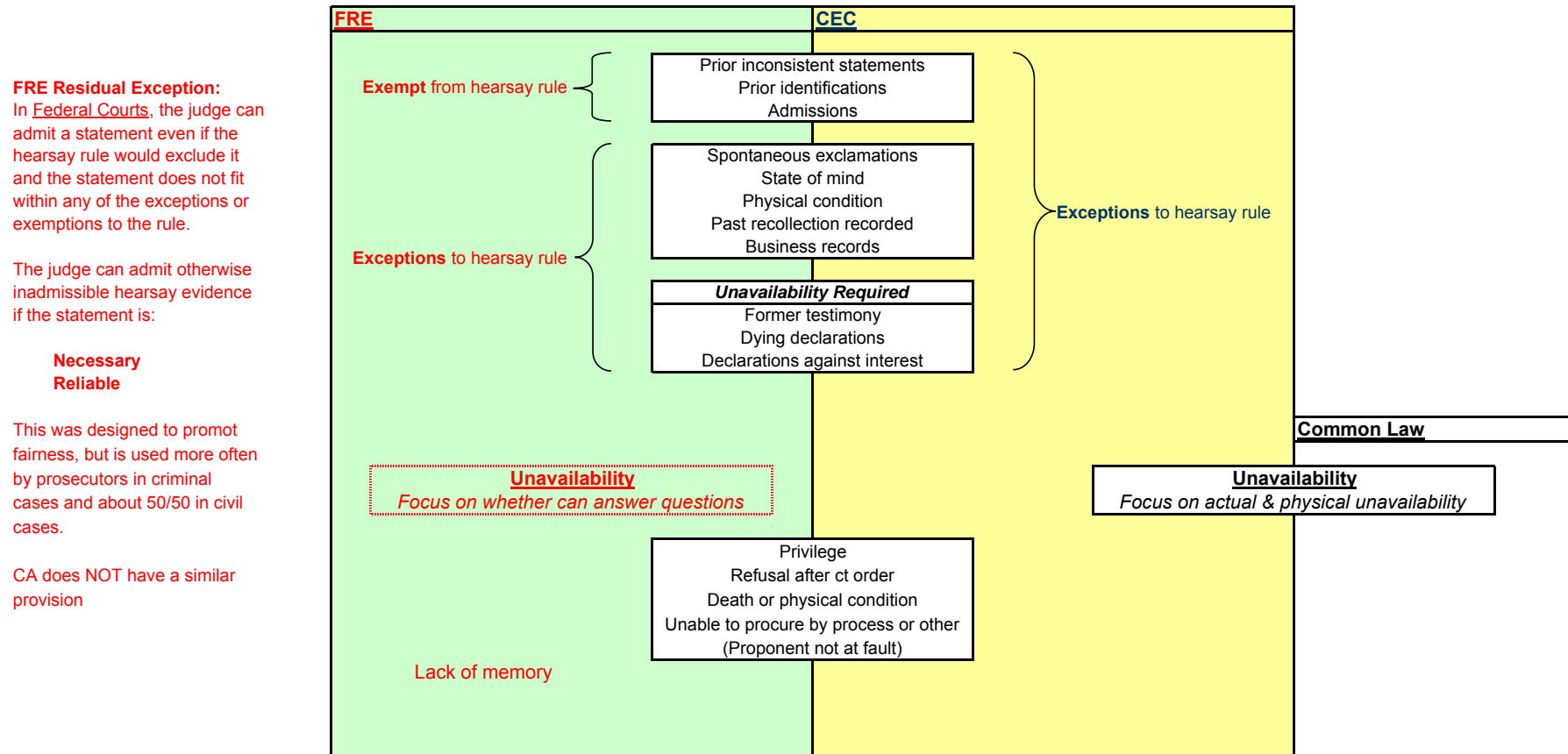
Operative fact (K terms)

- W:** Barry Babcock told Dimwit that Dimwit could keep the car as a gift.
P: Objection. Hearsay.
D: The issue is not whether Barry actually intended to give Dimwit the car as a gift. The issue is that Barry told Dimwit he would. The statement is an operative fact because it defines the terms of the contract between the 2 geeks. If Barry said what the witness claims he said, there is relevance apart from the truth.

McCormick vs. Morgan Rule (WILL BE TESTED... FROM BRIDGES V STATE)

- W:** The girl told me, 1 month before we apprehended the suspect, that she was taken to a house with christmas lights still on it, brown trim, with old newspapers all over the house, and the room she was locked in had N'Sync posters everywhere
D: Objection. This is rank hearsay. This is an out of court stmt asserting facts about the house that is being introduced to prove the truth of those facts. If the jury believes this testimony and the State later shows pictures of the Δ's house and the descriptions match, that would tell them that the girl was in Δ's house. We would want to x-examine the declarant to ensure her truthfulness and credibility.
P: We're not trying to prove the Δ is a slob who somehow likes N'Sync. We don't care about that. The statement tends to show that 1 month before any suspect was arrested, the victim had *KNOWLEDGE* about as to articles and descriptive features which were in fact in or about the room and house. The issue is not whether or not the statements were true, but that she was able to make them 1 month before the suspect's arrest. The credibility issue, then, is as to the wit. who is subject to x-examination.
C: The Δ would be accurate if this jxn applied the Morgan Rule. However, this jxn has adopted the McCormick Rule. Therefore, the stmt is not hearsay and is in

HEARSAY (Pg 3 - Exceptions/Exemptions, General Rules)



Confrontation Clause & Due Process Considerations:

Exceptions/exemptions to hearsay rule are used to admit out of court statements offered to prove the truth of the matter asserted *against a party to the action*.
However, criminal Δs have confrontation clause & due process rights.

Confrontation clause - Criminal Δs have the right to be *confronted* with witnesses against them

Due process - Criminal Δs have *due process* right to fair opportunity to defend against a state's accusations

Confrontation Clause:

- Testimonial out of court stmts must be excluded
- Exceptions: (1) Witness is available at trial for x-examination or
- (2) Declarant unavailable & Δ had earlier opp. to x-examine
- Testimonial: Prelims, grand jury, former trial testimony, cop interrogations, &:
- (1) Objectively **no emergency**
- (2) Primary purpose to **gather info for criminal prosecution**

Example - 911 call case, non-testimonial so admissible under exceptions

Due Process:

Hearsay rules cannot be mechanically applied if result is a miscarriage of justice
Example - Chambers v Mississippi: Per state hearsay rules, criminal Δ could not introduce evidence that someone else had confessed to the crime and recanted but had also confessed to 3 others and there was additional corroborating evidence that he was the real killer. This is a violation of due process. Stmt should have been admitted in spite of hearsay rules.

HEARSAY (Prior Inconsistent Statements)

NOTE: This is the one hearsay exception that flies in the face of the underlying rationale for the hearsay rule and accompanying exceptions. Most exceptions were carved out because there was some feeling that the statement was inherently reliable. Here, however, the declarant is saying one thing in the past and another at the trial. He is clearly not being truthful about one of the statements. There is no real way to know which is the truth. But it should still be admissible as impeachment regardless

Common Law	<p>FRE - EXEMPTION</p> <p style="text-align: center;">Declarant testifies at trial or hearing</p> <p>Declarant is subject to x-examination concerning the statement</p> <p style="text-align: center;">Stmnt is inconsistent with declarant's testimony</p> <p>Statement was given under oath at a trial, hearing, proceeding, or depo</p> <p style="color: red; font-size: small;">The federal court wants to keep out statements where the truth is questionable. Therefore, it requires that the prior stmnt be given under oath. Also, x-exam gives other party chance to flush out testimony</p>	<p>CEC - EXCEPTION</p> <p>Extrinsic evidence of inconsistent statement is EXCLUDED UNLESS <i>Extrinsic evidence includes calling other wits re: stmnt</i></p> <p>Either: Witness has a chance to explain or deny the statement Witness has not been excused</p> <p style="color: blue; font-size: small;">Apparently, CA does not like sleezy witnesses. There is no requirement that the prior stmnt be made under oath. Although allowed for the truth of the matter, the jury in the end will see that the witness is essentially a liar - either lied before or is lying now</p>
<p>Impeachment is NOT hearsay because it is NOT offered for the truth of the matter (limiting instruction)</p>		

HEARSAY (Prior Identification)

Common Law	<p>FRE - EXEMPTION</p> <p style="text-align: center;">Declarant testifies at trial or hearing</p> <p>Declarant is subject to x-examination concerning the statement</p> <p style="text-align: center;">Stmnt is of identification of person</p> <p>Declarant made statement after perceiving the person identified</p>	<p>CEC - EXCEPTION</p> <p>Statement made when occurrence was fresh in wit's memory Statement would be admissible if made while testifying Statement is offered after Witness testifies she made identification Witness testifies that ID was true reflection of opinion</p>
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Strangeness: FRE requires x-examination, but does not require that witness testify that ID was true reflection of her opinion (IE, she forgot). That would be a weird x-examination.

BUT, this would permit use of stmnt in those cases where wit makes stmnt then criminal threatens wit and she suddently doesn't remember. Can use the stmnt.

CEC does not require x-examination but does require that wit testify that ID was true reflection of opinion. So, if she forgot and can't make ID in ct, then can't use the stmnt.

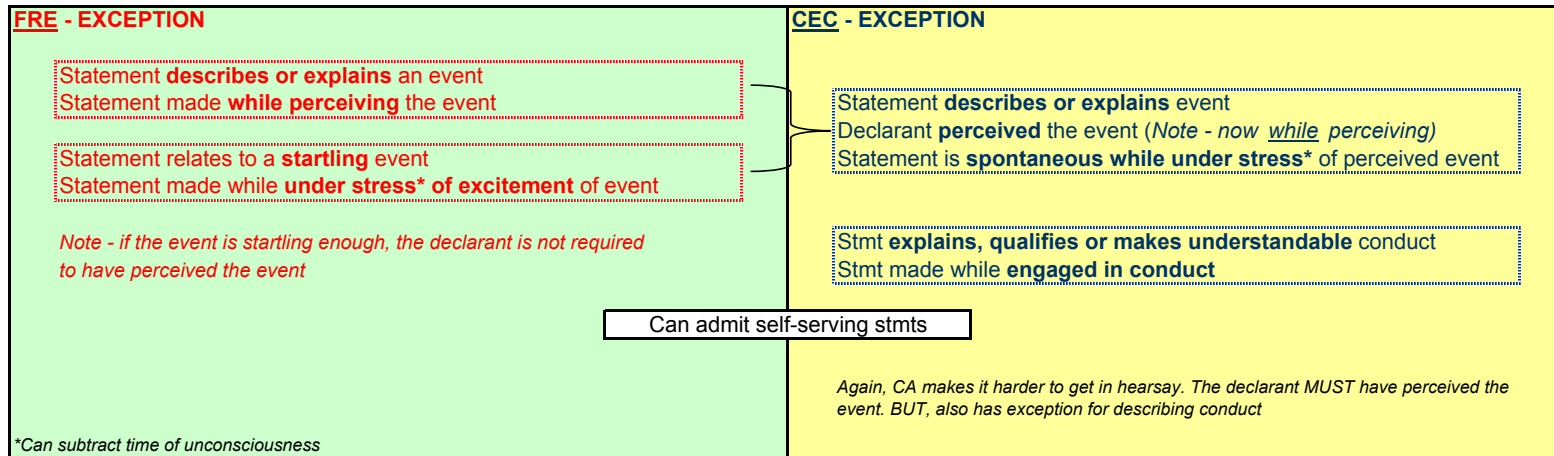
BUT, again comes down to distrust of hearsay stmnts. Want to do everything to ensure that untrue statements are not admitted at trial

HEARSAY (Admissions)

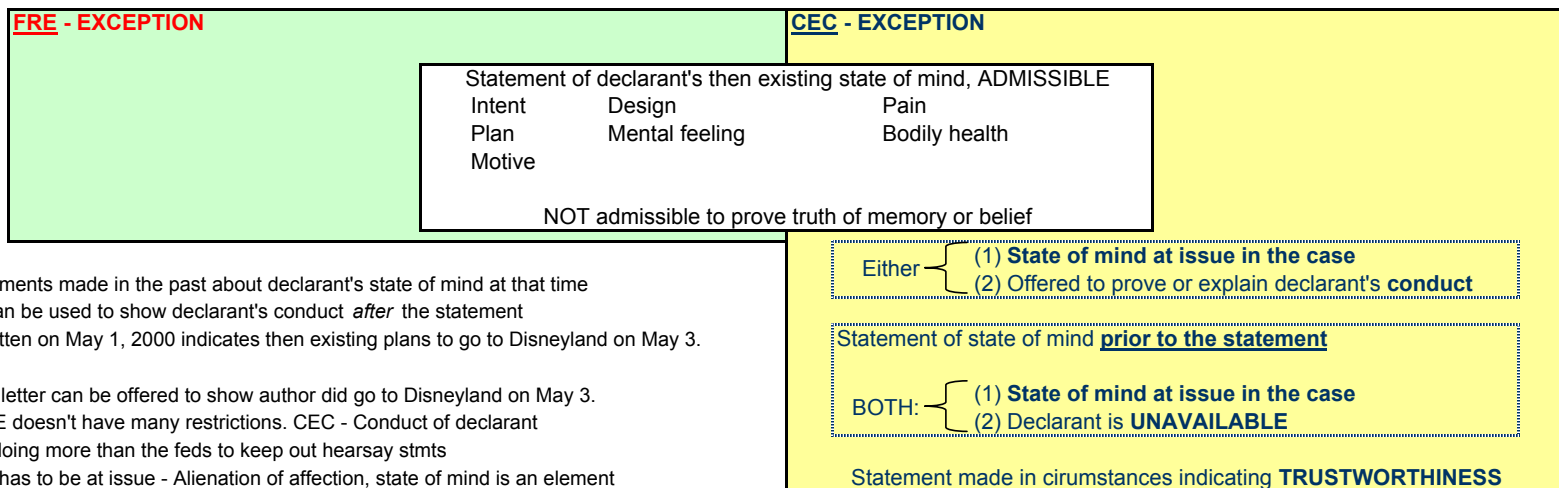
General Rule: The underlying reason for having a hearsay rule is to try to limit untrue or potentially untrue statements. It comes down to credibility. BUT, if the hearsay stmt is made by a party to the litigation, there is no real issue of credibility - the party can always take the stand to clarify what he meant. Based on estoppel - party is estopped from objecting to hearsay statements (because that would be like objecting based on your own credibility)

Common Law	FRE - EXEMPTION	CEC - EXCEPTION
	<p style="text-align: center;">Admissions by party opponents</p> <p style="text-align: center;">Admissions or statements by party opponents (provided hearsay is the only remaining objection) Personal knowledge is not required Admissions or statements includes self-serving admissions or statements</p>	
	<p style="text-align: center;">Adoptive Admissions</p> <p style="text-align: center;">Party manifested an adoption or belief in the truth of the statement Adoption made with sufficient specificity Silence CAN lead to an adoptive admission <i>IF a rational person would have spoken and witness heard statement that party failed to respond to</i></p>	<p>→ Party had knowledge of contents of statement</p>
	<p style="text-align: center;">Authorized Admissions</p> <p style="text-align: center;">Admissions or statements made by a declarant who was authorized by the party</p>	
	<p style="text-align: center;">Agency Admissions</p> <p style="text-align: center;">Statements made by agents or employees of the party</p> <p style="color: red; font-size: small;">Statement made during the course of employment Statement was in the scope of employment Agent or employee does NOT need to also be liable</p>	<p>→ Agent or employee was also liable <i>Course of employment not required BUT based on the only 2 cases on issue, interpreted to require employment</i></p>
	<p style="text-align: center;">Co-Conspirator Admissions</p> <p style="text-align: center;">Declarant was in conspiracy with the party Statement made during and in furtherance of the conspiracy</p>	
	<p style="color: red; font-size: small;"><i>The judge can consider BOTH the statement AND other evidence to determine if the declarant was authorized by party, an agent of party, or in a conspiracy with the party. Federal cts allow the judges to review and consider the stmt itself.</i></p>	<p style="color: red; font-size: small;"><i>CA state ct judges CANNOT consider the statement before FIRST determining whether the declarant was properly authorized, an agent of the party, or in a conspiracy with the party (I guess we do NOT trust judges in this state). Such facts must first be proved with other evidence before stmt is admissible</i></p>

HEARSAY (Spontaneous Exclamations)



HEARSAY (State of Mind)



HEARSAY (Physical Condition)

Common Law	FRE - EXCEPTION
Only stmts made to a treating physician for purposes of treatment	<p>Purpose of stmt was for medical diagnosis or treatment Stmt pertinent to medical diagnosis or treatment Stmt of (1) symptoms, (2) cause, OR (3) history Doctor not required</p>

NOTE: CA does not have this exception. BUT, it does have **prior state of mind** exception, which would cover these.

However, while the FRE does NOT require unavailability, CEC prior state of mind exception DOES require unavailability - otherwise, CEC exception is much broader than the FRE physical condition exception

HEARSAY (Past Recollection Recorded)

FRE - EXCEPTION	CEC - EXCEPTION		
<table border="1" style="margin: auto;"> <tr> <td style="padding: 10px;"> <p>Memorandum or Document Witness does not remember Stmt made or adopted by witness Stmt was accurate reflection of memory when made Stmt made immediately or shortly after Stmt can be READ into evidence but NOT received</p> </td> <td style="padding: 10px; vertical-align: middle;"> <p>→ Wit testifies that stmt was factually true Writing must be authenticated</p> </td> </tr> </table>		<p>Memorandum or Document Witness does not remember Stmt made or adopted by witness Stmt was accurate reflection of memory when made Stmt made immediately or shortly after Stmt can be READ into evidence but NOT received</p>	<p>→ Wit testifies that stmt was factually true Writing must be authenticated</p>
<p>Memorandum or Document Witness does not remember Stmt made or adopted by witness Stmt was accurate reflection of memory when made Stmt made immediately or shortly after Stmt can be READ into evidence but NOT received</p>	<p>→ Wit testifies that stmt was factually true Writing must be authenticated</p>		

*NOTE - Distinguish **past recollection refreshed** which can be by anything - song, smell, picture, document, etc. Past Recollection REFRESHED is where something triggers a present memory of the witness. For Past Recollection RECORDED, the witness doesn't remember so the document is used instead of present recollection.*

HEARSAY (Business Records)

FRE - EXCEPTION	CEC - EXCEPTION		
<table border="1" style="margin: auto;"> <tr> <td style="padding: 10px;"> <p>Business is defined <u>BROADLY</u> Expert testimony ok if would be able to testify in court Entry made in the regular course of business Stmt made before facts giving rise to litigation Record must be recorded Entry made at or near the time of the event Entry made by someone with duty to observe & report Source and method indicate trustworthiness</p> </td> </tr> <tr> <td style="padding: 10px;"> <p>Absence of Entry It was regular course of business to keep records Absent entry to show non-occurrence of event Source and method indicate trustworthiness</p> </td> </tr> </table>		<p>Business is defined <u>BROADLY</u> Expert testimony ok if would be able to testify in court Entry made in the regular course of business Stmt made before facts giving rise to litigation Record must be recorded Entry made at or near the time of the event Entry made by someone with duty to observe & report Source and method indicate trustworthiness</p>	<p>Absence of Entry It was regular course of business to keep records Absent entry to show non-occurrence of event Source and method indicate trustworthiness</p>
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<p>Absence of Entry It was regular course of business to keep records Absent entry to show non-occurrence of event Source and method indicate trustworthiness</p>			
<p>Police reports NOT permitted in <u>criminal cases</u></p>			

HEARSAY (Former Testimony)

<u>Common Law</u>	FRE - EXCEPTION	CEC - EXCEPTION
Only permitted where the parties in the former and current proceedings were the same	<div data-bbox="827 250 1463 391" style="border: 1px solid black; padding: 5px; text-align: center;"> Declarant is UNAVAILABLE Statement made in a former proceeding Witness was placed under oath Party with a similar motive had opportunity to x-examine Former & currenct proceedings basically same issues </div> <p data-bbox="422 418 1087 500"><i>(Civil cases) Former testimony can only be used against a non-party to former proceeding if the party in that former proceeding was a predecessor in interest to the current party</i></p> <div data-bbox="827 516 1463 571" style="border: 1px solid black; padding: 5px; text-align: center;"> (Criminal cases) CANNOT use former testimony against a non-party to the former proceeding (Confrontation Clause) </div>	<div data-bbox="1192 418 1858 500" style="border: 1px solid black; padding: 5px; text-align: center;"> (Civil case) Former testimony can be used against a non-party to the former proceeding so long as the party in the former proceeding had the opportunity and a similar motive to x-examine </div>

HEARSAY (Dying Declarations)

<u>Common Law</u>	FRE - EXCEPTION	CEC - EXCEPTION
Only permitted in <u>homicide</u> cases where the declarant <u>actually died</u> and was the <u>victim</u> in the case	<div data-bbox="827 729 1463 842" style="border: 1px solid black; padding: 5px; text-align: center;"> Declarant is UNAVAILABLE Statement made under sense of impending death Stmt pertains to the cause and circumstances of death Applicable to both criminal and civil cases </div>	<p data-bbox="1192 870 1455 893" style="text-align: center;">Declarant must have died</p>

HEARSAY (Declarations Against Interest)

<u>Common Law</u>	FRE - EXCEPTION	CEC - EXCEPTION
Stmnt subjects declarant to civil liability	<div data-bbox="917 1053 1554 1170" style="border: 1px solid black; padding: 5px; text-align: center;"> Declarant is UNAVAILABLE A rational person would NOT have made stmnt Stmnt would invalidate a claim by declarant OR stmnt would subject declarant to criminal or civil liability </div> <div data-bbox="327 1198 1554 1226" style="border: 1px solid black; padding: 5px; text-align: center;"> OR Stmnt was against pecuniary or proprietary interests of the declarant </div> <p data-bbox="604 1365 1146 1443" style="text-align: center;">If statement offered to exculpate accused and subject declarant to liability, THEN MUST be with corroborating circumstances</p>	<p data-bbox="1283 1255 1850 1333" style="text-align: center;">OR stmnt would subject declarant to hatred, ridicule, or social disgrace Declarant must have sufficient knowledge of the subject</p>

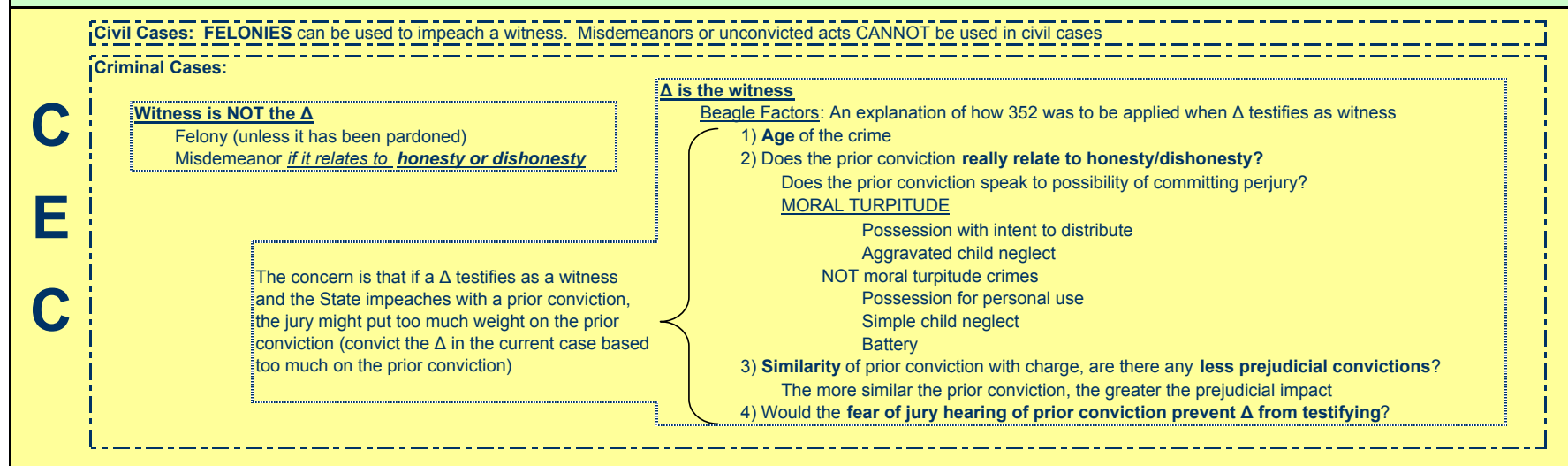
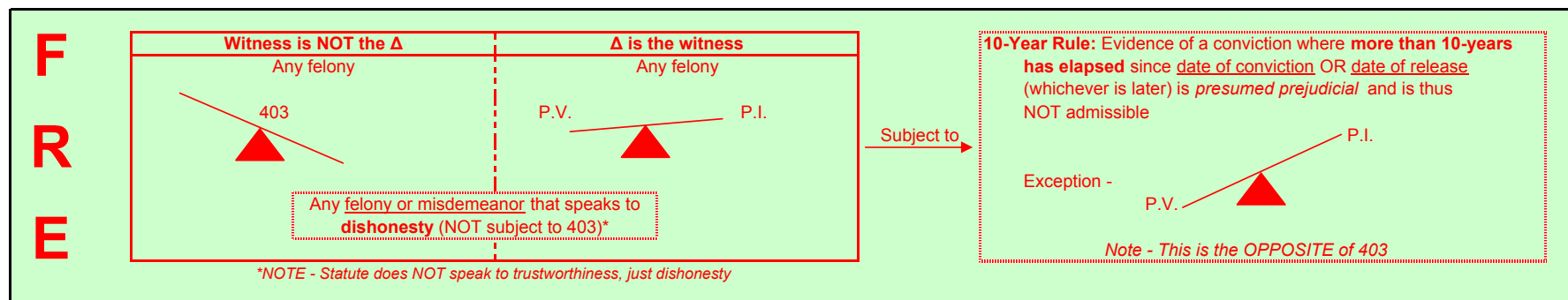
CHARACTER EVIDENCE

	Common Law	FRE	CEC
CIVIL Trials - Character evidence to show propensity		NOT admissible	
CRIMINAL Trials - In the <u>State's case-in-chief</u> , evidence of EITHER Δ's or V's character based propensities		NOT admissible Exceptions - Δ's... Prior sex crimes in sex crimes case Prior child molestation in similar case	Exceptions - Δ's... Prior domestic assault in similar case
ANY Trial where character itself is an issue			Reputation Opinion
Civil Negligent entrustment Defamation Child custody	Specific Acts		
Criminal Entrapment			
ANY Trial - Character evidence to show habit or routine practice		Specific Acts	
MERCY RULE - Evidence of Δ's character based propensities in the <u>Δ's case-in-chief</u> OR in <u>State to rebut</u>		Reputation Specific Acts - State, on x-examination of character witness for Δ , can use specific acts to attack the witness' credibility as to the Δ's character	Opinion Prosecution can attack Δ's character with specific evidence if Δ opens the door by first attacking V's character
Evidence of the Victim's character based propensities in the <u>Δ's case-in-chief</u> OR <u>State to rebut</u>		Reputation Specific Acts - State, on x-examination of character witness , can use specific acts to attack the witness' credibility as to the Victim's character	Opinion Specific acts in Δ's case-in-chief
Everything above deals with propensities based on character. Evidence of character where relevant to prove the following:		Specific Acts	
Identity (Modus Operandi) Motive Plan Opportunity Knowledge Intent Not a mistake Preparation	Identity (Modus operandi) was the only one discussed in class. Consider it like a "signature," something distinct and unique	MURDER Case - State can use evidence of V's peacefulness to rebut Δ's claims that the V was the aggressor	CEC - Includes 1 more allowable use for character based evidence: Character evidence to show that <u>Δ in unlawful sexual act OR attempted unlawful sexual act</u> case did NOT reasonably & in good faith believe the Victim consented

IMPEACHMENT (Based on Character Evidence)

	Common Law	FRE	CEC
Evidence of a witness' character for veracity/honesty OR its opposite to attack or support wit's credibility		Reputation (after truthful character attacked)	Opinion (after truthful character attacked)
UNCONVICTED Prior Bad Acts	All prior bad acts (even if unrelated to truthfulness)	On <u>x-examination</u> : Specific instances of untruthfulness only CANNOT resort to extrinsic evidence (Take the wit's answer) Must be asked in good faith Subject to 403	Generally (per statute) evidence of prior unconvicted specific acts is NOT admissible. HOWEVER, per <u>Harris</u> , seems like evidence of specific acts that <i>speaks to a wit's credibility</i> CAN be used in CRIMINAL cases only .

Prior CONVICTIONS (NOTE - There are significant differences between FRE & CEC in this area of evidence)



IMPEACHMENT (Specific Unrelated Error)

	Common Law	FRE	CEC
Collateral matters (matters that are not issues in the trial but are introduced by the witness)		Must take the witness' answers	Governed by 352
		NO extrinsic evidence	

IMPEACHMENT (Defective Capacity)

	Common Law	FRE	CEC
Evidence as to a psychological, physical, educational, etc. defect of the witness		Attorney can resort to extrinsic evidence to attack a witness' capacity to testify	

IMPEACHMENT (Bias)

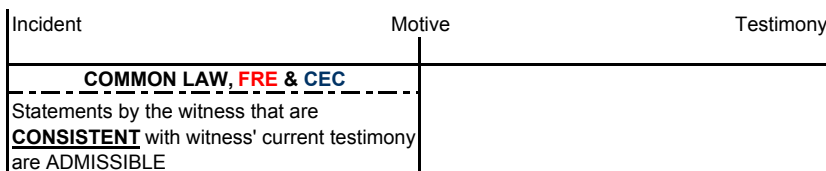
	Common Law	FRE	CEC
Evidence that the witness <i>could</i> have a reason to give less than truthful testimony (paid by party, family or financial ties, etc.)	Attorney x-examining the wit must first lay proper foundation while witness is still on the stand	Always considered material May resort to extrinsic evidence Subject to 403 / 352	

IMPEACHMENT (Prior Inconsistent Statement)

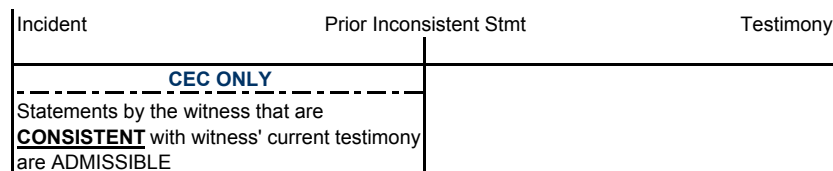
	Common Law	FRE	CEC
Evidence of a prior statement that is inconsistent with the witness' testimony at trial (offered NOT for the truth but to show jury that wit has said at least 2 inconsistent things about the issue to which she testified)		Both { Chance for wit to explain or deny Other party has chance to question wit on stmt	Either { Chance for wit to explain or deny Wit has not been excused
		Lay Foundation (time, place, person) while witness is still on the stand	OR
		Not req'd to show doc to wit (but must show to opposing counsel)	

Prior CONSISTENT Statements

Opposing party argues **witness recently fabricated story**
Opposing party presents **motive** for witness to lie



Opposing party introduces **prior inconsistent stmt** attributed to witness



DOCUMENTARY EVIDENCE (Best Evidence Rule)

General Rule: IF a witness is going to testify as to the **CONTENTS of a writing**, THEN the witness has made the contents of the writing an issue in the case.

THEREFORE, the party must EITHER:
 { Produce the **original**
 Have a valid **excuse**

	Common Law	FRE	CEC
Permissibility of using duplicates	Admissible as originals	Unless either: { Dispute re: authenticity of original Circumstance, would be unfair	CEC doesn't speak to duplicates, instead relying on the Secondary Evidence Rule
Secondary evidence	Burden on the proponent to prove reliability of secondary evidence	Either: { Originals lost or destroyed (not in bad faith) Can't get original by judicial process Opposing party has but will not produce Writing is not closely related to issue	<u>Written secondary evidence</u> ADMISSIBLE UNLESS: Genuine dispute concerning material term and justice requires exclusion -OR- Admission would be unfair <u>Oral secondary evidence</u> Party does not have a copy -AND- Original lost or destroyed (not party's fault)

DOCUMENTARY EVIDENCE (Authentication)

General Rule: The proponent of the writing must show that the writing is what the proponent claims it to be

Common Law	FRE	CEC
Mere recitation of a name is a writing is NOT sufficient to authenticate the writing	<p><u>Authentication</u> Knowledgeable testimony Expert comparison Voice ID Handwriting comparison Distinctive characteristics etc.</p> <p><u>Self-Authentication</u> Newspapers & publications Trade inscriptions Public documents under seal Official publications Acknowledged documents etc.</p>	<p>In order to introduce 2ndary evidence, original must also be authenticated</p> <p>Writing contains information only the alleged author would know Writing was received in response to a letter to the alleged author</p>

PRIVILEGES (Pg 1 - Attorney-Client Privilege)

General Rule: Once attorney-client privilege exists, it is **impenetrable** (distinguish work-product privilege, which CAN be penetrated)

<p>Scenario 1:</p> <p>Attorney (A) to Officer (O): You will find a shotgun in this brown bag. O: Where did you get this shotgun? A: I cannot answer that question. O: Who did you get this shotgun from? A: I cannot answer that question.</p>
<p>Scenario 2:</p> <p>C: Why did you not provide the officer with the name of the person who gave you the shotgun? A: That information is protected by privilege. C: A suspect cannot invoke the privilege to shield evidence from law enforcement. A: My client did not shield evidence from officers. I turned it over immediately after receiving it. However, all confidential communications are protected. My client's identity is protected.</p>
<p>Scenario 3:</p> <p>W: I was listening through a hole in the wall when I heard Cathy tell her attorney that she robbed the bank. D: Objection, that conversation is protected by privilege. P: The privilege only applies to communications that are not revealed to 3rd parties. The wit is such a party. D: The privilege is pierced only if the client <i>knew or should have known</i> that the communication was being disclosed to a 3rd party. C: The conversation is privileged, testimony is struck</p>
<p>Scenario 4:</p> <p>P: The witness was a translator for the attorney, a 3rd party. Helen knew the wit was in the room D: Helen speaks Chinese, gibberish to me. Without a translator, I couldn't talk to my client. C: That falls under the <i>translator/interpreter exception</i>. It is privileged communications. Nice try Mr. Prosecutor.</p>

An attorney can, and in some cases must, keep client's IDENTITY confidential (if it can give gov't last link in chain of evidence)

If evidence could be seized from client, it can also be seized from attorney. However, conversations regarding the evidence are covered

*Privilege protects **conf. comm. that is not disclosed to 3rd parties***

Translator Exception is designed to encourage efficient communications between attorney & client

<p>Scenario 5:</p> <p>P: The witness is an engineer who the attorney called. D: I called the engineer because otherwise I could not understand the documents involved in this case. P: Conversation between the attorney and the wit is not confidential client communications. D: The only reason I contacted the wit was to help me properly prepare to put on a defense in this case. C: The witness helped "translate" the evidence and his sole purpose was to help with litigation. Thus, it is within the <i>translator exception</i>.</p>
<p>Scenario 6:</p> <p>P: The witness is an attorney whom the Δ never hired. Therefore, they never had any conf comm. C: The privilege extends to the circumstances of hiring an attorney P: The Δ was not hiring this attorney for himself. Rather, he was hiring this attorney for the co-Δ. C: If you can prove that, the privilege does not apply.</p>
<p>Scenario 7:</p> <p>D: The wit is expected to testify about discussions she overheard between Mimi and the Δ in this case. That is privileged material. P: The wit heard the Diana meet with her attorney, Mimi, and she told Mimi that she had made over \$100 K in a heroin deal. Then Mimi suggested that Diana contact one of Mimi's other clients who could help launder the money. Privilege does not extend when a client seeks a lawyer to help plan or commit a crime. D: In that case we object, hearsay. P: The stmt is not offered for the truth of the matter. It does not matter whether Mimi was really going to help launder the money, what matters is that Mimi <i>said</i> she was going to help. The Δ can x-examine the wit whether she actually heard it or not. D: Objection, 352. C: While the matter might be prejudicial, it is also highly probative. Overruled on all grounds. Wit is in.</p>

The translator exception applies even if the client is not involved in the conv. so long as the sole purpose was to assist in the litigation

*Privilege protects the **process of hiring a lawyer**, but does NOT extend to the process of hiring a lawyer for someone else*

*Crime of fraud exception
The privilege does not extend to discussions where client seeks lawyer to help **plan or commit a crime***

PRIVILEGES (Pg 2 - Attorney-Client Privilege)

Work-Product Privilege

Scenario 1:

D: The People have requested copies of records we have made of interviews and statements that our investigators have made or taken in conjunction with our preparation for this trial. That information is protected by *work-product privilege*. Therefore, we do not feel we should have to turn them over.

C: That is clearly covered by work-product privilege. You know that. Why are you requesting these items?

P: Defense investigators have apparently spoken with witnesses who were at the scene of the crime...

D: *Alleged* crime....

P: Whatever... Our investigators were scheduled to speak with one of these witnesses, but we found out that this witness has since passed away. Unlike attorney-client privilege, which is impenetrable, work-product privilege can be pierced by **showing a strong need for the materials**. I believe the People have shown the need for these materials.

C: You can have the statement from this one wit. What else?

P: The People request photographs that defense investigators took at the crime scene.

D: First of all, that's *ALLEGED* crime scene, you bastard. Secondly, those photos are tangible items that we prepared in preparation for this trial, which is also protected by work-product privilege.

P: Defense investigators rented a crane and took pics from a higher elevation. We feel we should have these photos available to us.

C: You people really are cheap, aren't you? That is not a strong need. Those items are privileged and work-product privilege is not *that* easy to pierce.

Work-product privilege protects from discovery items collected in connection with serving the client

Unlike Attorney-client privilege, work-product privilege can be pierced by demonstrating a strong need for the materials

Scenario 2:

P: The Π is seeking records of interviews with employees of Δ corporation.

D: Δ feels those materials are covered by att-client privilege

P: The material we seek are from interviews with low-level employees. For instance, one of the interviews is with a receptionist. He has *no control over the decision making process of the Δ corporation*.

D: However, he is deeply involved with the subject matter of the litigation. Π s contend that Δ was negligent when they made certain hiring decisions. Even though he's a receptionist, he knew about each of the hiring decisions. In fact, he provided his personal opinions on a number of the people who were eventually hired and are subject of this suit. Moreover, he was also instructed by Mr. Dobalina, Mr. Bob Dobalina, the CEO to speak with our attorneys.

C: The control group theory no longer applies. The receptionist's statements are covered by att client privilege.

P: He is no longer employed...

C: Don't cut me off... That is not even a factor anymore. Go check Westlaw before you argue law with me.

P: Whatever... We would also like records of stmnts with Ginger, who works at the deli in the basement of the building in which Δ is located.

C: Okay, employees of another company are not protected by this privilege. But are covered by work-product privilege. Can you demonstrate a strong need for this information?

P: Yes your honor. She left her pantyhose at my place the other night and I would like her information so I could give them back to her.

C: That is NOT a strong need, you dimwit. Get your stupid ass outta my courtroom.

An interesting question arises when a party to a lawsuit is a corporation - What would be protected by attorney-client or by work-product privilege?

Attorney-Client Privilege
1) Control group
 -OR-
2) Ppl involved in subject matter of litigation
AND -
Were directed to speak with attorneys

PRIVILEGES (Patient-Physician Privilege)

Scenario 1:

D: The defendant objects to this witness. She is the Δ's doctor. The Δ invokes patient-physician privilege.

C: Your client is no trial for murder, which is a crime. There is NO patient-physician privilege in criminal cases. Sit down and shut up.

NO patient-physician privilege in criminal cases

Scenario 2:

P: The Π objects to this witness. She is the Π's doctor. The Π invokes patient-physician privilege

D: The Π went to see the doctor after the alleged accident. The doctor will testify re: Π's back. Π is suing based on his bad back. Π has waived the privilege in this case.

***Patient-Litigant Exception**
Patient who sues for a physical condition has waived privilege as to that condition*

PRIVILEGES (Patient-Psychotherapist Privilege)

Scenario 1:

D: The Δ objects to this witness. She is the Δ's shrink. The Δ invoked patient-psychotherapist privilege. Unlike patient-physician privilege, this does extend to criminal cases.

C: Even though you are the defense. You're right.

DOES apply in criminal cases

Scenario 2:

D: The Π objects to this witness. She is the Π's shrink. The Π invokes patient-psychotherapist privilege.

P: This is a civil case. The patient-litigant exception applies.

C: No, it does not. This is a case for damages from an auto accident. Emotional distress is not a principal or significant claim. The patient-litigant exception does not apply here.

***Patient-Litigant Exception**
Applies ONLY if emotional distress is a principal or significant claim in the case*

Scenario 3:

D: The Δ objects to this witness. She is the Δ's shrink. The Δ invoked patient-psychotherapist privilege. Unlike patient-physician privilege, this does extend to criminal cases.

P: The scope of questioning will be limited to those conversations where Heidi discussed her thoughts of bringing death or serious bodily injury to the victim in this case. Therefore the dangerous patient exception applies.

D: The shrink did not reveal those conversations to anyone.

P: That is not dispositive. It doesn't matter if the statements were previously revealed - they are still no longer covered by privilege.

C: The privilege does NOT apply here.

***Dangerous Patient Exception**
If the psychotherapist feels the patient is a danger to herself or to others, conversations relating to that danger are not protected. All other conversations remain protected.*

PRIVILEGES (Reporter Privilege)

Scenario 1:

C: The Δ reporter has refused to reveal her source. While there is no 1st Amendment protection about revealing a source and while I cannot hold her in contempt for refusing to reveal her source, I can and will shift the burden of proof to the Δ reporter in this case. She will have the burden to prove the truthfulness of her story, or else I will direct a verdict against her in this libel suit.

Federal courts CAN hold a reporter in contempt for refusing to reveal her source.

NOTE: There was a case in this section about blindly applying the rules. The court should not blindly apply the privilege if there is any implication as to the separation of powers.

PRIVILEGES (Marital Privilege)

TIMELINE				DISABLING Privilege	COMMUNICATION Privilege
→					
Marriage	Communication	Testimony		YES	YES
Communication	Marriage	Testimony		YES	NO
Marriage	Communication	Divorce	Testimony	NO	YES
Communication	Marriage	Divorce	Testimony	NO	NO

Marital DISABLING Privilege

- Husband & Wife are married as of the date of testimony
- **CEC & FRE:** Only the WITNESS spouse holds the privilege
Common Law: BOTH spouses held the privilege
- **Victim Exception** - Witness spouse CANNOT invoke privilege
Criminal case where:
 - ◆ Witness spouse is the victim
 - ◆ Child of either spouse is the victim
 - ◆ Third party victim injured while party spouse committing a crime against witness spouse
- **Crime or Fraud Exception** - Privilege does NOT apply if communication was made to enable or aid anyone in committing a crime or fraud

Marital COMMUNICATION Privilege

- (Retrospective privilege) Communication made while married
- Technically held by both parties BUT if party spouse wants witness spouse to testify, witness spouse CANNOT refuse
- Communication must be **confidential** (IE, no 3rd parties)
- **Victim Exception** - Witness spouse CANNOT invoke privilege
Criminal case where:
 - ◆ Witness spouse is the victim
 - ◆ Child of either spouse is the victim
 - ◆ Third party victim injured while party spouse committing a crime against witness spouse
- **Crime or Fraud Exception** - Privilege does NOT apply if communication was made to enable or aid anyone in committing a crime or fraud

PRIVILEGES (Governmental Privilege)

Civil Cases:

If a CIVILIAN Π brings a case against the GOVERNMENT Δ

- **High Ranking Official** can invoke the privilege not to divulge sensitive information
- If the evidence is deemed **necessary**, then the court can shift the burden of proof to the government Δ
 - ◆ Necessary evidence - If the Π does not have this evidence, the Π would essentially have no case