This outline was created for the February 2008 California bar exam. The law changes over time, so use with caution. Just ignore the California Evidence notations if you are using this outline for the MBE only. If you would like an **updated** and editable version of this topic outline, go to http://www.barexammind.com/california-bar-exam-outlines/.

Evidence Notes

I. Essay Tips
   a. Make as many arguments as possible for admissibility *OR*
   b. Raise as many objections as possible for excluding evidence
   c. In other words, coverage on the essay need to be broad but shallow
II. CA Essay Approach
   a. Apply FRE first, then apply CEC if any difference
   b. *Criminal* case in CA court: Proposition 8 approach
      i. Did Pros or Def offer a piece of evidence that would be excluded by the ordinary rules of evidence (FRE or CEC)?
         1. note this and go to step ii.
      ii. Does this evidence fall within one of the seven exempted categories under Prop 8?
         1. Yes: Prop 8 is inapplicable, proceed to apply ordinary exclusionary rule
         2. No: Evidence is admissible b/c of Prop 8
            a. However, judge would still exclude b/c dangers substantially outweigh probative value
   c. *Federal CIVIL case*
      i. If CA law governs a claim, then federal judges must apply CEC in three kinds of evidence questions:
         1. questions of privilege
         2. questions of competency of a witness
         3. questions of the effect of a presumption
III. CA: Proposition 8
   a. RULE: In California criminal cases, *all relevant evidence is admissible*, **unless** exempted in one of seven areas.
   b. Exemptions:
      i. Exclusionary rules based on the US Const
      ii. Exclusionary rules adopted by CA legislature with at least a 2/3 vote after 1982
      iii. Privileges that existed in 1982 (basically all of them)
      iv. No contempt for member of media refusing to reveal a confidential news source OR unpublished notes, out-takes, etc
      v. Hearsay and hearsay exceptions
      vi. CEC 352: permitting judicial discretion to exclude evidence where the probative value is substantially outweighed by dangers
      vii. Rape shield statutes
IV. RELEVANCE

a. Essay questions: talk about relevance of every item of evidence. This is the starting point of analysis
b. Definitions:
    i. **Logical relevance**: if evidence has *any tendency* to make the existence of any fact that is of consequence to the determination of the action *more or less probable* than it would be without the evidence
        1. what is relevant depends on substantive law applicable
        2. CEC: must be material to a *disputed* fact
    ii. **Legal relevance**: if logically relevant, court still has discretion to exclude if *probative value* is *substantially outweighed by*
        1. unfair prejudice,
            a. u.p. = arises most often where evidence causes an emotional reaction [NB: surprise evidence not u.p.]
        2. confusion/mislead jury, or
        3. waste of time
    iii. Relevant evidence is admissible if it is competent
        1. competent: does not violate any exclusionary rule
c. Preliminary fact determinations:
    i. FRE: judge not bound by rules of evidence
    ii. CEC: judge bound by rules of evidence and thus can not rely on inadmissible hearsay when making her decision
d. Exclusions of relevant evidence by POLICY:
    i. *Liability insurance* is inadmissible to prove culpable conduct or ability to pay
        1. admissible to prove anything else that is relevant, BUT court may balance against the u.p. of the improper purpose for which the evidence might be used and exclude
    ii. *Subsequent remedial measures or repairs* are inadmissible to prove culpable conduct, negligence.
        1. also extends to products liability actions (ie, subsequent redesign of product can't be used to show original design was defective)
        2. admissible to prove anything else
        3. CEC: admissible in strict products liability case to show D changed to a safer design
    iii. *Settlements, offers to settle, and pleas* are inadmissible to prove liability or fault (civil) or guilt (in criminal: pleas of guilty or nolo contendere).
        1. excludes not only the offer/plea, but also *anything said* in the negotiation for settlement/plea.
        2. EXCEPTIONS:
            a. Settlement offer admissible if claim not yet asserted (or not yet threatened, implied)
            b. Settlement offer admissible if claim is undisputed
        3. CEC: **guilty plea admissible under Prop 8**
    iv. *Payment or offers to pay medical expenses* are inadmissible when offered to prove liability for the injuries in question.
        1. NB: look for severable statements

2. CEC: statement NOT severable; ie, everything exluded

v. CEC **only**: *Statements made in mediation proceedings*

1. CA policy is to encourage mediation of disputes, so protects statements from discovery or use in non-criminal proceedings

a. Parties can waive proctection by mutual agreement

e. **Similar Occurrences Evidence**

i. Similar occurrences *sometimes admissible to prove causation* or *knowledge of dangerous condition*

1. eg, 2 people eating same food and both get food poisoning

ii. *Prior accidents* or *claims* usually *inadmissible*

1. inadmissible b/c prior accident usually tell us nothing about what caused THIS accident
2. EXCEPTIONS:

a. Prior claims show a <u>pattern of fraud</u>

b. Prior claim shows a <u>preexisting condition</u>

iii. *Previous similar acts* admissible to *prove intent*

1. eg, all 100 other qualified women not offered jobs tends to prove gender discrimination ("pattern of conduct")

iv. Similar occurrence evidence *admissible to rebut a defense of impossibility*

1. D must FIRST assert impossibility

v. *Comparable sales* admissible to *establish value*

1. similar property, sold at same time

vi. *Habit* admissible to show the person acted in accordance with the habit on the occasion in question [must happen a lot: "always"]

1. *PROBLEM:* distinguish from <u>character evidence</u>

a. **Character evidence**: tends to be generalized statement and conveys a moral judgment (eg, he is a careful driver)

b. **Habit evidence**: tends to be more detailed and specific as to conduct in a specific situation (eg, he always stops behind the line and uses his blinker)

vii. *Routine business practice* is admissible to show *conduct of the entity was in conformity* with that practice on the occasion

viii. *Industrial custom evidence* admissible to prove *standard of care*

V. CHARACTER EVIDENCE

a. Use a 4 question approach:

i. What is the purpose for which the character evidence is offered? 3 possibilities:

1. evidence is offered to prove character b/c *character is an issue in the case* [rare]
2. evidence is offered to prove character as *circumstantial evidence of person's* <u>*conduct*</u> on the occasion in question [often]
3. evidence is offered to *impeach or support* the credibility of a <u>witness</u> [often]

ii. What method or technique is used to prove character?

1. specific acts of conduct?
2. opinion

        3. reputation
    iii. Is it a civil or criminal case?
    iv. Does the evidence prove a pertinent character trait?
b. Character evidence offered in **civil cases**
    i. RULE: inadmissible to prove conduct
        1. EXCEPTIONS:
            a. FRE only: case arises out of sex assault, prior acts of sex assault or child molestation admissible
            b. CEC: No propensity evidence permitted
    ii. RULE: character evidence is admissible where *character itself is an issue*
        1. eg, defamation case where D claims P is dishonest; therefore, dishonesty is at issue
        2. actions: defamation (character of P); fitness for child custody (character of parent); negligent entrustment (character of entrustee)
c. Character evidence offered in **criminal cases**
    i. Can only be offered to prove **Defendant's** conduct
        1. RULE: Evidence of D's character: prosecution cannot be the first to offer such evidence, EXCEPT
            a. cases of sex assault or child molestation [FRE]; or
                i. CEC: No propensity evidence permitted
            b. where court has admitted evidence of victim's character by accused, prosecution evidence that accused has *same character trait* is admissible [FRE]
        2. RULE: Defense can be first to offer character evidence to prove a *pertinent* trait [CEC permits *general* character trait].
            a. THEN, Prosecution can offer pertinent character evidence to rebut
        3. RULE: On direct examination, D's witnesses can testify to
            a. reputation and witness' personal opinion,
            b. but NOT specific instances
        4. RULE: On cross examination, Prosecution can ask about
            a. specific instances, reputation and opinion
    ii. Admissibility of evidence to prove **victim's** character.
        1. the 4 rules above apply, (replace D with victim)
        2. CEC:
            a. D can also use specific act evidence when proving a victim's character
    iii. OVERRIDING RULE: if evidence could be used for something other than to prove character, it can come in if relevant and not excluded by some other rule
    iv. Special Rules:
        1. Rape or Sexual Assault *criminal* case:
            a. Victim's alleged conduct can only be admissible to prove:
                i. 3rd party is source of semen or injury; or
                ii. prior acts of consuensual intercourse between D and alleged victim

2. Specific instances of D's bad conduct may be admitted to prove *anything other than character* that is relevant.
    a. MIMIC: motive, intent, mistake (absence of), identity, common plan or scheme
        i. Identity must have: similarity and uniqueness
        ii. Common plan or scheme: prior act is part of single plan (conspiracy) to commit the crime
    b. NB: judge always retains discretion to exclude on the probative vs. u.p. balancing test

VI. TESTIMONIAL EVIDENCE: regulate evidence coming from witness' mouth

a. <u>Competency: Four requirements</u>:
    i. **Personal knowledge**: ie, testimony based on perceptions (can be limited or defective, but problems also admissible and go to *weight* of testimony)
        1. <u>**MBE**: personal knowledge vs. hearsay</u>
            a. Lack of personal knowledge: if D did not perceive fact with her own senses, then this is proper objection
            b. Hearsay: if D says "He told me that," then person has personal knowledge of what was told, but the statement is hearsay
    ii. **Present recollection**: must testify from present recollection (see below)
    iii. **Communication**: witness must be able to communicate perception
    iv. **Sincerity**: must recognize obligation to tell truth
    v. Other info:
        1. Dead Man Act (generally abolished; abolished in CA)
            a. Disqualifies party/interested person from testifying to a convo with deceased when that testimony is offered in a civil cases against interests of deceased's estate or successors in interest (fed court will follow statute of forum state)

b. <u>Form of testimony and questions: **timely** and **specific**, or else WAIVED</u>
    i. Types of objections:
        1. "calls for a narrative": ie, not specific enough
        2. "answers must be responsive": move to strike
        3. Leading questions:
            a. Def: a question that suggests the answer
            b. Not permitted on direct examination, UNLESS
                i. Adverse witness (ie, D); witness closely connected to D; hostile witness; witness needs help (child, oldster)
            c. Permitted on cross-examination
        4. Assuming facts not in evidence
        5. Argumentative: ie, not really a question at all
        6. compound: ie, two questions in one

c. <u>Witness use of documents during testimony</u>
    i. **Refreshing recollection**: hand document (or *anything*) to witness, reads it silently, and then testifies to what they recall

1. must then show item to opponent who MAY offer it into evidence if he wishes
2. CEC: includes writings used to refresh memory *before* trial
    a. If can't produce writing, then testimony stricken!!

ii. **Past recollection recorded exception to hearsay**: recollection cannot be refreshed, so need to meet FIVE elements:
1. witness once had personal knowledge of facts
2. document was made by the witness or under the witness' direction or was adopted by witness
3. document was written or adopted at a time when facts were fresh in witness' memory
4. document was accurate when made
5. witness now has insufficient recollection to testify as to the matters contained in the document

d. Opinion testimony
i. General RULE: normally inadmissible b/c personal knowledge requirement
ii. EXCEPTIONS:
1. **Lay opinion** RULE: to be admissible, must be *rationally based* on witness' *perceptions* and helpful to trier of fact
    a. FRE: can't be based on scientific or other specialized knowledge
        i. CEC: no such restriction
    b. "helpful" gives more info than perception alone
2. **Expert opinion** RULE: to be admissible, must meet FIVE elements:
    a. Helpful to jury
        i. Helpful = helps jury figure out something they couldn't do on their own
    b. Witness must be qualified
        i. Academic or life experience
    c. Witness must believe in opinion to a reasonable degree of certainty
    d. Opinion must be supported by a proper factual basis:
        i. Admitted evidence
            1. *hypothetical question*: all facts must be in evidence
        ii. Expert's own personal knowledge
        iii. Inadmissible evidence reasonably/customarily relied upon by experts in the particular field
    e. Opinion must be based on reliable principles that were reliably applied to the facts
        i. Published, low error rate, subject to retesting, and has a reasonable level of acceptance

ii. CEC: more strict -- theory and instruments must be "generally accepted as valid and reliable in the relevant scientific field"
1. CEC N/A to nonscientific experts or medical experts

3. **Learned treatise** exception to expert opinion:
a. FRE only: read from book when examining expert witness and get expert to admit book is an accepted authority; comes in as substantive evidence
b. CEC: limited to "facts of general notoriety and interest" and therefore, basically useless

4. **Ultimate issue**
a. FRE: expert may render opinion as to ultimate issue, but not re: state of mind of D where the state of mind is an element of criminal charge

e. Attacking and Supporting Credibility
i. Sources:
1. cross-examination of the witness
2. ANYTHING else (ie, extrinsic evidence)

ii. **Cross-examination**
1. party has absolute right to cross-examine witnesses against party
a. if failure of this opportunity: move to strike, dismiss
b. must stay within scope of direct examination, or else need to ask court, "may I take witness on direct?"

iii. **Evidence supporting credibility inadmissible UNLESS credibility attacked first**
1. however, prior consistent statement admissible if made *before* bribe or inconsistent statement
a. ie, prior consistent statement not considered hearsay
b. ie, we receive the statement into evidence ONLY where statement logically *rehabilitates* witness

iv. **Impeachment**
1. checklist:
a. is source extrinsic evidence or cross of witness being impeached?
b. If extrinsic, is it admissible given the technique of impeachment being used?
c. Any other foundation requirements?

2. **Contradiction**
a. Extrinsic evidence *inadmissible* to contradict a witness on a collateral matter
i. Collateral matter = fact not material to issues & says nothing re: credibility other than contradiction

3. **Prior inconsistent statement**
a. Prior statement offered is always hearsay [EXAM], but
b. Prior statements are not hearsay if given under oath

        i. CEC: ANY prior statement, whether under oath or not, can be used for impeach and substantive evid
    c. Extrinsic evidence inadmissible to impeach on a collateral matter
    d. Foundation requirement: extrinsic evidence is admissible if witness has opportunity to *explain or deny* the prior inconsistent statement
4. **Bias, interest, motive**
    a. Foundation requirement: extrinsic evidence admissible if opportunity to *explain or deny* before evidence admitted
5. **Prior Convictions** (a form of character evidence: not admissible to prove conduct)
    a. All convictions for crimes of *false statement* are admissible
        i. FRE: balancing test for old conviction
    b. Crimes of *non-false statement*:
        i. Misdemeanor: inadmissible
        ii. Felony: admissible, but FRE may exclude for u.p.
    c. *Extrinsic evidence of convictions* admissible
        i. FRE: any extrinsic evidence
    d. *Age of conviction* matters:
        i. FRE: over 10 years, inadmissible unless probative value outweighs prejudice
    e. CEC is very different from Federal law:
        i. Felony convictions:
            1. can impeach any witness in a civil or criminal case with *any felony* conviction if:
                a. conviction not expunged, pardoned, etc;
                b. must involve moral turpitude (almost anything, except battery); and
                c. probative value not outweighed by dangers
        ii. Misdemeanor convictions:
            1. civil cases: inadmissible
            2. criminal cases: admissible if misdemeanor involving moral turpitude
6. **Misconduct evidence** (form of character evidence)
    a. Admissible only under FRE if probative of truthfulness
        i. Eg, lying on license application
        ii. Arrests: NO, this is evidence of police conduct, not witness conduct
    b. *Extrinsic evidence* is inadmissible.
    c. CEC:
        i. Civil cases: no initial cross-examination and no extrinsic evidence

ii. Criminal cases: Prop 8 permits initial cross and extrinsic evidence

7. **Reputation and Opinion evidence regarding truthfulness**
    a. Always admissible and
    b. NO LIMIT on *extrinsic evidence*

VII. HEARSAY

a. Def: out of court statement offered in court for the truth of the matter asserted
    i. Policy: the reason to exclude hearsay is that the adverse party was denied the opportunity to cross-examine declarant

b. Analytical approach:
    i. Find the statement
        1. statement is oral or written assertion OR nonverbal conduct intended as an assertion
    ii. Ask what it is offered to prove:
        1. given in question; who is offering it and what relevant purpose would it serve?
    iii. Given what it is offered to prove, will jury be misled if speaker lying or mistaken? If yes = hearsay

c. Statements that are NOT HEARSAY:
    i. Independent legal significance (legally operative language)
        1. eg, I heard Bob say, "I accept your offer"; P offers in a defamation action, "D said 'P fucks parrots.'"
    ii. Shows effect on the listener
        1. IIED: "You are pregnant!", to show distress
        2. Negligence: sign says "bridge out," to show notice of condition
        3. Threats
    iii. Shows knowledge
        1. facts offered to show D knew someone or something, not whether the facts are true
    iv. *Circumstantial* evidence of state of mind
        1. eg, "I am Dracula," offered to prove insanity, but "I feel like killing someone," offered in a homicide prosecution is hearsay

d. Exceptions and Exemptions from Hearsay Rule
    i. Admission of Party Opponent = Not Hearsay (CEC: "exceptions to hearsay"
        1. admission = statement by party, or someone whose statement is attributable to a party, offered by a party opponent
        2. party admissions *not subject to*
            a. personal knowledge requirement or
            b. legal opinion rule
        3. vicarious party admissions admissible where
            a. concerns matter within scope of employment or agency; and
            b. made during employment or scope of agency relationship (eg, partners during business)
            c. includes:

            i. adoptive admission
            ii. co-conspirator statement
                1. BUT NOT co-party statements
        d. CEC
            i. Does NOT have vicarious admission rule, BUT in a respondeat superior civil case, will be admissible

ii. Not hearsay if **declarant testifies at trial**:
    1. <u>prior inconsistent statements under oath</u>;
    2. <u>prior consistent statements offered to rebut charge of recent fabrication, improper influence, or motive;</u>
    3. <u>statement of identification of a person made after perceiving the person</u>
        a. CEC: two add'l req's for statement of ID:
            i. Witness must have identified while memory of event was fresh; and
            ii. Must confirm in court the prior ID and that it reflected her opinion at the time

iii. <u>Former testimony exception</u> = hearsay, but excepted
    1. testimony given *under oath* in earlier proceeding by person now *unavailable* is admissible if:
        a. party **against whom** is offered had, during earlier proceeding, *opportunity* to examine that person and *motive* to conduct exam similar to motive it has now; OR
        b. in **civil case**, party against whom testimony is offered is *successor in interest* to party in earlier proceeding who had opportunity and similar motive to examine
            i. eg, negligence P is 2nd case against same D as 1st case for same reasons
            ii. CEC: no privity required in civil case; just need to show party has same motive and interest as party against whom previously offered
    2. Unavailable =
        a. Court exempts from testimony (eg, has a privilege)
        b. Declarant refuses to testify [not under CEC]
        c. Memory fails [not under CEC]
        d. Dead or sick
        e. Can't procure declarant's presence by process of other reasonable means

iv. <u>Declaration against interest</u> = hearsay, but excepted
    1. unavailable declarant's statement is admissible if:
        a. it was against pecuniary or proprietary interest of declarant; or
        b. would have subjected declarant to criminal liability
        c. CEC adds: against "social interest"
    2. cf. party admission:
        a. PA need not be against interest

        b. PA must be made by party only; DAI made by anyone

v. Dying Declaration = hearsay, but excepted
    1. thinks he's about to die, **and** *describes circumstances of his death*
    2. civil action = admissible if declarant is unavailable
    3. homicide case = admissible if declarant is unavailable
    4. CEC:
        a. Admissible in ANY case
        b. Declarant must actually be dead

vi. State of Mind Exceptions = hearsay, but excepted
    1. no need to show unavailability for all
    2. excited utterance
        a. statement relating to startling event or condition
        b. made while declarant still under stress of excitement caused by event or condition
        c. NB: timing not crucial issue, excitement is
    3. present sense impression [not in CEC]
        a. describing or explaining an event or condition *while*
        b. declarant was perceiving the event or condition or immediately thereafter
        c. NB: timing is critical issue
    4. declaration of then existing physical or mental condition
        a. is admissible to show the condition or state of mind,
        b. BUT, a statement of memory or belief is not admissible to prove the *(external)* fact remembered or believed
            i. NB: we can *infer* an ACT logically flowing from an *intention* in declarant's state of mind
        c. CEC
            i. Judge may exclude "present state of mind/body" statements made in suspicious circumstances
    5. statement of *past or present* mental or physical condition
        a. admissible if made for medical diagnosis or treatment
        b. NB: statements of "present condition" not limited to doctor-patient statements (eg, parent could speak symptoms of child)
        c. CEC
            i. Admissible for statements made to anyone, BUT
            ii. Only if declarant is *unavailable* AND
            iii. Declarant's state of mind or body is at issue

vii. Business records exception = hearsay, but excepted
    1. kept in course of regularly conducted business activity
    2. admissible if
        a. made at or near time of event described
        b. by a person with knowledge; and
        c. was regular practice of business to make such record
        d. authenticated by custodian

3. NB: if non-employee contributes info, then not admissible under this exception

viii. Official Records
1. records showing duties of agency or recording of matters admissible in all cases (except police observations in criminal case); and
a. CEC: does not automatically reject police observations, but test for trustworthiness
2. records of factual findings resulting from an authorized investigation are admissible in all civil and in criminal cases *against the govt*
a. CEC: permits facts to be used for or against govt

ix. Ancient Doc and Docs affecting property interests
1. ancient: 20 years old or more *and* authenticated
2. any doc affecting property interest regardless of age

x. Catchall exception = hearsay, but excepted
1. where no other exception works. Need:
a. evidence possesses circumstantial guarantees of trustworthiness
b. goes to material fact and is strictly necessary
c. more probative on that fact than other available evidence
d. notice given to the adversary as to nature of the statement
2. Constitutional Issues: confrontation clause
a. Criminal case: inadmissible unless
i. declarant is unavailable; AND
ii. D had opportunity to cross-examine the declarant at time statement made

VIII. WRITINGS

a. Authentication: every item of non-testimonial (ie, tangible) evidence must be authenticated (but could still be other objections like hearsay)
i. Def: proving that the evidence is what the proponent of the evidence claims it to be
ii. Signatures
1. admission
2. eyewitness testimony
3. expert opinion
4. lay opinion: seen D sign name elsewhere
5. circumstantial evidence
a. also, ancient documents rule:
i. doc is 20+ years old;
ii. regular on its face; and
iii. found in a place of natural custody
b. CEC: additional ancient documents rule:
i. Over 30 years old;
ii. Has been treated as authentic by people who have a reason to care

6. a genuine exemplar (and jury decides)
7. NB: if authentication made, but still disputed, evidence comes in, because BOP on authentication is "sufficient to support a finding," which is lower than POE

iii. Self-authenticating writings
1. certified copies of public documents
2. acknowledged documents (notarized)
3. official publications
4. trade inscriptions
   a. def: tag or label which purports to have been attached in course of business and indicates ownership, control or origin
5. newspapers and periodicals
6. (FRE only) business records

iv. Photos [often on MBE]
1. KEY: look at question asked of what the photograph is supposed to depict.
2. "fair and accurate depiction" = witness can authenticate
3. "a photo of intersection" = photographer must authenticate

v. X-rays, electrocardiograms, etc
1. must show:
   a. process used was accurate
   b. machine was in working order
   c. operator qualified to use machine
   d. custodial chain, if necessary, to ensure no tampering

vi. Non-unique items [often o MBE]
1. items that are **facially indistinguishable** from other like items
2. to authenticate, must lay *chain of custody* demonstrating that this is *THE* item proponent claims it to be
3. When chain is broken:
   a. Small break, still admissible since BOP is low
   b. Big break, not admissible
4. Facially indistinguishable items
   a. Can be rendered unique by putting a mark on it, therefore, no need for chain of custody

b. Best Evidence Rule

i. Applies where evidence offered to prove the *contents of a writing*

ii. Writing = any tangible collection of data (CD, computer disk, x-ray, etc)

iii. When is evidence being offered to prove contents of writing? Examples:
1. case turns on contents of legal document
2. knowledge testified to is really obtained from writing
3. EXCEPTION:
   a. *voluminous documents*: when docs are so numerous that not practical to offer originals into evidence, then a witness may *summarize* the contents

iv. Assuming BE applies, *how* may contents of writing be proven?

1. offer originals or certified copy of public documents
2. duplicates usually also admissible
    a. duplicate = copy made by a machine or same impression that created original (eg, carbon copy or photocopy)
    b. not admissible where *genuine question as to authenticity of original*
3. Testimony may be admissible where original lost or destroyed,
    a. UNLESS bad faith by proponent

v. CEC: "secondary evidence rule"
1. where no question as to authenticity, permits introduction of
    a. duplicates of original writing; AND
    b. other written evidence (eg, sketch of graffiti in a defamation case)[1]
2. Oral testimony inadmissible to prove contents of a writing unless:
    a. Original is lost or destroyed without bad faith by proponent
    b. Voluminous documents
    c. Proponent can't obtain document by reasonable means
    d. Writing not important enough to make it worthwhile to track down
3. Prop 8 NOT applicable because rule adopted after 1982 by 2/3 vote

IX. PRIVILEGES

a. Attorney-client privilege

i. Communication between atty and client OR their representatives;
ii. Intended [objective std] by client to be confidential; and
iii. Made *to facilitate rendition of legal services*
iv. Is privileged UNLESS waived by client
v. DURATION:
1. FRE: forever, even after death
2. CEC: ends when dead client's estate is fully distributed and personal rep has been discharged

vi. Corporation: privileged *if* employees *authorized* by corp to make communication to lawyer or speaking with officer/director
1. CEC: corporation privilege attaches in 2 situations:
    a. Officer or employee is the natural person to speak to lawyer about the matter; or
    b. Officer or employee did something for which corp may be held liable and corp instructed person to discuss issue with lawyer

vii. EXCEPTIONS:
1. does not apply where services sought to
    a. further *crime or fraud* OR
    b. where two or more parties consult an atty on *a matter of common interest* AND communication offered by one party against another

[1] no need for original to be lost, destroyed, unavailable as with FRE

2. CEC:
    a. Atty *may* disclose in order to prevent a crime that lawyer reasonably believes will result in death or substantial bodily injury

b. Doctor-patient; psychotherapist/social worker-patient privilege
    i. Patient has privilege to prevent disclosure of
        1. information *confidentially* conveyed to Dr for
        2. purpose of *obtaining treatment*
            a. ie, only communications *pertinent* to medical treatment are protected
        3. EXCEPTION: Does not apply in
            a. Criminal cases
            b. Malpractice suits
            c. Patient puts physical condition at issue (eg, personal injury suit)
    ii. CEC
        1. physician-patient
            a. applies only to a licensed physician (or his agent, e.g., a nurse)
            b. applies to communications for treatment AND diagnosis (thus protects getting 2d opinion)
            c. Does not apply in;
                i. Criminal cases
                ii. Where physician is a mandatory reporter (gunshot)
                iii. Commitment proceedings
                iv. Competency proceedings
                v. Proceedings to revoke or suspend a license
        2. psychotherapist/social worker-client
            a. covers just about anyone who could be called a mental health worker or counselor
            b. Applies in criminal cases
                i. But N/A to court-appointed pyschotherapist
            c. Does not apply:
                i. Where therapist has reasonable cause to believe patient is a danger to himself or others AND disclosure is necessary to end the danger
                ii. Patient is under 16 and therapist has reasonable cause to believe child is a victim of a crime AND disclosure is in child's best interest

c. Spousal privilege
    i. A *testimonial privilege* applies only in criminal cases and permits witness to refuse to testify against spouse as to anything
        1. Witness spouse holds the privilege and may waive over objections of defendant spouse
        2. Must have a valid marriage:
            a. under FRE, subsequent-to-event-marriage creates privilege

3. CEC:
    a. Applies in both civil and criminal cases
    b. Privilege to not even be called to the witness stand by adverse party
4. Does not apply where:
    a. spouse suing each other
    b. in criminal case where spouse accused of crime against spouse of their children

ii. Spousal *communication privilege* may apply in any case and protects confidential spousal communications *during marriage*
1. Divorce does NOT destroy
2. Both parties hold privilege, so either one can stop disclosure

d. CA only privileges
i. An atty MUST claim a privilege on a client's behalf if client is not there to make the claim
ii. Eavesdroppers: holder of privilege can stop an eavesdropper from revealing the information
iii. Privileges:
1. Clergy-Penitent
    a. Confidential if:
        i. Made to a cleric who routinely receives such communications; and
        ii. Whose religion requires them to be kept secret
    b. Each party holds the privilege
2. Professional Journalist contempt shield
    a. Still can impose discovery sanctions
    b. Judge can force journalist to disclose if info needed for a criminal D to get a fair trial
3. Misc privileges:
    a. Voter's ballot is secret
    b. Trade secrets
    c. Personnel records of police and prison guards

X. JUDICIAL NOTICE
a. Def.: establishing facts without presenting evidence
b. Two issues:
i. What facts appropriate for judicial notice?
1. fact not subject to reasonable dispute b/c
2. either *generally known* within territorial jurisdiction; or
3. capable of *accurate and ready determination* by resort to sources whose accuracy cannot reasonably be questioned

ii. What is procedure for taking JN?
1. party must request to compel judicial notice
2. court also has discretion to take notice
    a. civil case: jury must accept fact
    b. criminal case: jury may accept fact

c. CEC: jury must accept a judicially noticed fact in both criminal and civil proceedings

3. JN can occur on appeal

XI. PRESUMPTIONS & INFERENCES

a. A presumption is a rule requiring that a particular inference be drawn from an ascertained set of facts.

b. Effect:

i. Shifts burden of production to party against whom the presumption operates [NB: does NOT shift burden of persuasion]

ii. Criminal case: judge must instruct jury that they **may** find the presumption as sufficient evidence

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