

EVIDENCE
CALIFORNIA DISTINCTIONS
Bar Exam Outline

Law applying to both FRE & CEC is in black
Law applying to FRE only is in blue
Law applying to CEC only is in red

WHEN TO APPLY CALIFORNIA LAW

- only on an essay, and only if the essay question so directs
- not on the MBE

CRIMINAL CASES: “TRUTH IN EVIDENCE” AMENDMENT TO THE CALIFORNIA CONSTITUTION (PROP 8)

- All relevant evidence is admissible in a criminal case, even if objectionable under the CEC
- **Exceptions**
 - o Exclusionary rules under the US Constitution (e.g., Confrontation Clause)
 - o Hearsay law
 - o Privilege law
 - o Limits on character evidence about the victim in a rape case
 - o Prohibition on gov’t offering character evidence before Δ does
 - o Secondary Evidence rule (Best Evidence)
 - o CEC 352 (unfair prejudice vs. probative value)

APPLYING CALIFORNIA LAW ON AN ESSAY—THREE STEPS

- 1. Raise all objections under CEC
- 2. Mention whether Prop 8 overrules the objection
 - o Is the evidence relevant?
 - o Does Prop 8 apply?
- 3. If admissible under Prop 8, balance under CEC 352

RELEVANCE

- **FRE & CEC:** Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence
- **CEC only:** the fact of consequence *must be in dispute*
- **Exclusion of relevant evidence for policy reasons**
 - o SRMs or repairs

- **FRE & CEC:** evidence of safety measures or repairs after an accident is inadmissible to prove negligence
 - **CEC only:** Can't use to prove defective design in a products liability action based on a theory of strict liability
- **Settlements, offers to settle, related statements**
 - **FRE & CEC:** inadmissible to prove liability or fault
 - **CEC only:** discussions during mediation proceedings also inadmissible
- **Payment or offers to pay medical expenses**
 - **FRE & CEC:** inadmissible when offered to prove liability for the injuries in question
 - **CEC only:** admissions of fact made in the course of making such payments or offers = inadmissible
 - *cf. FRE: excluded only if part of a settlement offer*
- **Expressions of sympathy**
 - **CEC only:** inadmissible if relating to suffering or death of accident victim
 - statements of fault made in connection with expressions of sympathy = admissible
- **Pleas later withdrawn, offers to plea, related statements**
 - **FRE & CEC:** inadmissible
 - **Prop 8: ?**
 - on an essay, raise the issue; mention that even if Prop 8 does apply, court may still exclude for unfair prejudice

CHARACTER EVIDENCE

- Civil cases
 - Inadmissible to prove conduct
 - **CEC:** no exceptions
 - **FRE:** admissible when claim based on sexual assault/child molestation
- Criminal cases
 - **Two major issues**
 - Character of defendant and character of victim
 - Usually only the defendant can open the door to each, and the doors are opened separately
 - **Defendant's character**
 - **FRE & CEC:** defendant may open the door
 - *Prop 8 doesn't change this rule*
 - **Exceptions**

- (1) **FRE & CEC**: sexual assault/child molestation cases
 - prosecution may offer evidence that Δ committed other acts of sexual assault or child molestation
- (2) **FRE only**: when the court has admitted evidence of the victim's character offered by accused, prosecution may offer evidence that accused has the same character trait
- (3) **CEC only**: in prosecution for domestic violence, prosecution may offer evidence that Δ has committed other acts of domestic violence
- (4) **CEC only**: when court has admitted evidence of victim's character for violence offered by accused, prosecution may offer evidence that accused has violent character
 - narrower version of #2
- **Direct**
 - reputation and opinion are OK
 - not specific instances
- **Cross**
 - **FRE**: all admissible
 - **CEC**: only reputation and opinion
 - **Prop 8**: all admissible subject to 352
- **Victim's character**
 - **FRE & CEC**: prosecution cannot be first to offer evidence of character to prove conduct
 - **Exceptions**
 - **FRE**: in a homicide case, prosecution can be first to offer evidence of victim's peaceful character if Δ offers evidence that victim attacked first
 - **Prop 8**: if evidence of victim's character is relevant, it is admissible subject to 352 . Δ can be first to offer character of victim to prove conduct; then prosecution may rebut
 - **Direct**
 - **FRE**: reputation and opinion; no specific instances
 - **Prop 8**: all admissible
 - **Cross**
 - **FRE**: all admissible
 - **Prop 8**: all admissible
 - **Rape shield**
 - **FRE & CEC**: limits defense evidence of alleged victim's character when offered to support defense of consent

- *Prop 8 does not apply*

TESTIMONIAL EVIDENCE

- **Competency**
 - **FRE & CEC: requirements**
 - (1) personal knowledge
 - (2) ability to communicate
 - (3) claim to recall what witness perceived
 - **CEC: witness must understand legal duty to tell the truth**
 - **Grounds for disqualification**
 - **FRE & CEC: all witnesses competent except judges and jurors**
 - **CEC: witnesses who have been hypnotized to help refresh recollection**
 - OK if in criminal case and witness hypnotized by police using procedures that protect against suggestion
- **Expert opinions**
 - **FRE & CEC: 5 reqmts for admissibility.**
 - (1) opinion must be **helpful to the jury**
 - (2) witness must be **qualified**
 - (3) witness must believe in opinion to **rsbl degree of certainty**
 - (4) opinion must be supported by a **proper factual basis**
 - (5) opinion must be based on **reliable principles reliably applied** to the facts
 - **Reliability (reqmt #5)**
 - **FRE**
 - **Scientific opinions: four factors**
 - (i) publication/peer review
 - (ii) error rate
 - (iii) results tested; ability to retest
 - (iv) reasonable level of acceptance
 - **Nonscientific:**
 - Ad hoc looking at facts and circumstances of the case
 - **CEC**
 - **Scientific opinions**
 - Opinion must be based on principles generally accepted by experts in the field
 - **Nonscientific opinions**
 - Ad hoc looking at facts and circumstances of the case
 - **Learned treatise hearsay exception**

- **FRE:** Admissible to prove anything if treatise is accepted authority in field
 - **CEC:** Only admissible to show matters of general notoriety or interest
 - *very narrow; almost never applicable*
- **Evidence of witness credibility: impeachment**
 - **Prior inconsistent statement, witness now testifying**
 - **FRE & CEC:** not hearsay if offered only to impeach
 - **FRE:** if given under oath at prior proceeding, admissible nonhearsay.
 - **CEC:** hearsay admissible under exception:
 - **all inconsistent statements of witness**, whether or not under oath
 - **Prior felony convictions**
 - **FRE:** crimen falsi (automatic); felonies < 10 years old (discretionary)
 - > 10 years since conviction or release from prison (whichever is later) → inadmissible unless probative value outweighs prejudice
 - *no specific California counterpart; but under 352, CA courts can consider any factor bearing on probative value, include the age of a conviction, in judging probativity*
 - **CEC:** all felonies involving **moral turpitude** subject to 352
 - **Prop 8 does not change this rule**
 - crimes must involve moral turpitude to be relevant
 - **“moral turpitude”**
 - crimes of lying, violence, theft, extreme recklessness, sexual misconduct
 - *not unintentional crimes/crimes of negligence*
 - **Prior misdemeanor convictions**
 - **FRE:** *only* crimen falsi (automatic)
 - **CEC:** inadmissible to impeach
 - **Prop 8:** admissible if involving moral turpitude (subject to 352)
 - *Prop 8 applies to criminal cases only → misdemeanor convictions inadmissible in civil cases*
 - **Nonconviction misconduct bearing on truthfulness**
 - **FRE:**
 - Admissible in civil & criminal subject to 403; must be act of lying
 - Extrinsic evidence *inadmissible*; may only ask on cross
 - **CEC:**
 - Inadmissible
 - **Prop 8:** if moral turpitude → x-exam & extrinsic ev subj to 352
 - *again, only applies in criminal cases*

HEARSAY

- **Exempt from Prop 8**
- **Exceptions and exemptions to the hearsay rule**
 - FRE has both exemptions and exceptions
 - CEC has only exceptions
- **Admission of party opponent**
 - **FRE & CEC:** Admission = statement by party, or someone whose statement is attributable to a party, offered by a party opponent
 - **FRE:** *Exempt* → nonhearsay
 - **CEC:** *Exception* → is hearsay but admissible

 - **Vicarious party admissions**
 - **FRE & CEC:** Statement of authorized spokesperson for party is treated as admission of that party

 - **FRE:** Statement must **concern a matter within the scope of employment** and be made **during the employment relationship**

 - **CEC:** Only when **negligent conduct of employee** is basis for employer's liability in the case under **respondeat superior**.
- **Prior inconsistent statement of witness**
 - **FRE & CEC:** not hearsay if offered to impeach
 - **FRE:** if given under oath at prior proceeding → can use substantively
 - **CEC:** is hearsay but substantively admissible
 - applies to *all* prior inconsistent statements, whether or not under oath
- **Prior consistent statement of witness now testifying**
 - **FRE & CEC:** admissible if made before bribe or inconsistent statement
 - **FRE:** *Exempt*
 - **CEC:** *Exception*
- **Declaration against interest** (*requires unavailability*)
 - **FRE & CEC:** Admissible if, at time it was made, it was against financial interest of declarant or would have subjected declarant to criminal liability
 - **CEC:** includes statements against social interest: risks making declarant an object of hatred, ridicule, or social disgrace in the community

 - **FRE:** In criminal case, evidence offered to exculpate Δ requires “corroborating circumstances” showing trustworthiness of statement

 - **Unavailability**
 - **FRE & CEC:**

- if court exempts declarant from testifying due to privilege
 - declarant is dead or sick
 - proponent of statement cannot procure declarant's attendance by process or other reasonable means
 - **FRE:**
 - refusal to testify despite court order
 - declarant's memory fails on the subject of the statement
 - **CEC:**
 - declarant suffers total memory loss
 - refusal to testify out of fear
- **Former testimony exception** (*requires unavailability*)
 - Party against whom testimony is now offered:
 - **FRE & CEC**
 - was a party in the earlier proceeding had opportunity to examine witness motive to conduct that exam was similar to current motive; *or*
 - In a *civil* case, party against whom testimony is now offered:
 - **FRE**
 - was *not* a party in the earlier proceeding is in a privity-type relationship (predecessor in interest) opportunity and similar interest; *or*
 - **CEC**
 - was *not* a party in the earlier proceeding (*no predecessor-in-interest requirement*) opportunity and similar interest; *or*
 - **CEC:** the former testimony is offered *against*:
 - the person who offered it in evidence at the earlier proceeding *or*
 - a successor in interest to that person
 - **CEC***: deposition testimony given in the same *civil* action admissible if:
 - deponent is unavailable *or*
 - lives more than 150 miles from the courthouse
- **Dying declarations** (*requires unavailability*)
 - **FRE:** civil actions and homicide prosecutions
 - declaration by person who **believes he is about to die** describing the **cause or circumstances** leading to his death
 - declarant need not actually die
 - **CEC:** all civil and criminal cases

* Related but distinct exception

- declarant must be dead
- **Present sense impressions**
 - **FRE:** Statement describing or explaining an event or condition made while declarant was perceiving the event or condition or immediately thereafter
 - **CEC:** Statement explaining conduct of the declarant made while the declarant was engaged in that conduct
 - *narrower*
 - **Statements describing infliction or threat of physical abuse***
 - Statements made at or near time of injury or threat, by **unavailable declarant**, describing or explaining infliction or threat, in writing or recorded or made to *police* or medical professional, under trustworthy circumstances
 - *watch out for Confrontation issue*
- **Excited utterances**
 - **FRE & CEC:** statements relating to startling event or condition, when made while declarant was still under stress of excitement caused by event or condition
- **Then-existing physical or mental condition**
 - **FRE & CEC:** statement of declarant's then-existing physical/mental condition or state of mind = admissible to show the condition or state of mind
 - *but a statement describing a memory or belief is not admissible to prove the fact remembered or believed*
- **Statement of past/present mental/physical condition made for diagnosis/treatment**
 - **FRE:** Admissible if made for and pertinent to medical diagnosis or treatment
 - **CEC:** also, declarant must be a minor describing an act of child abuse or neglect
 - **Also:*** Statement of **unavailable** declarant's past physical or mental condition, including a statement of intention, is admissible to prove that condition if it is an issue in the case
 - Statement need not have been made for medical purposes
- **Business records**
 - **FRE:**
 - Record of events, conditions, opinions, or diagnoses kept in course of regularly conducted business activity made at or near time of matters described by person with knowledge of the facts

* Related but distinct exception

regular practice to keep such records

- **CEC:**
 - *Does not refer to opinions or diagnoses; courts will admit “simple” opinions and diagnoses (e.g., “pt has a broken leg”)*
 - Record of events or conditions kept in course of regularly conducted business activity made at or near time of matters described by person with knowledge of the facts record is trustworthy
- **Public records**
 - **FRE:** admissible if any of the three:
 - (1) record describes activities of the office
 - (2) record describes matters observed pursuant to a duty imposed by law
 - (3) record contains factual findings resulting from an investigation made pursuant to authority granted by law, unless untrustworthy
 - In a criminal case, prosecution cannot use (2) or (3)
 - *CEC does not impose this restriction*
 - **CEC:**
 - Record made by a public employee with scope of duties made at or near time of matters described circumstances indicate trustworthiness
- **Judgments of conviction**
 - **FRE:**
 - Felony conviction admissible in civil *and* criminal cases to prove any fact essential to the judgment
 - When offered by prosecution for purposes other than impeachment, judgments against persons other than the accused are inadmissible
 - **CEC:** Applies only in civil cases
 - **Prop 8:** Prosecutor *or* Δ in criminal case may use criminal convictions (felony or misdemeanor) if it involves moral turpitude
 - *Certified copy of a judgment of conviction is admissible under the CA public-records exception in both civil and criminal cases*

WRITINGS AND OTHER PHYSICAL EVIDENCE

- **Authentication**
 - **Ancient documents**
 - If document is

- **FRE: > 20 years old**
 - **CEC: > 30 years old**

does not on its face present irregularities (e.g., erasures)
was found in a place of natural custody
→ authenticated
- **Self-authenticating writings**
 - certified copies of public documents (deeds), acknowledged documents (original signature attested before a notary), official publications (government pamphlets), newspapers, periodicals
 - **FRE: business records, trade inscriptions**
- **Best Evidence Rule (called Secondary Evidence Rule in CA)**
 - **Exempt from Prop 8 in CA**
 - Applies only where evidence is offered to prove the contents of a writing
 - **Exceptions**
 - **FRE**
 - Duplicates usually admissible
 - copy produced by same impression that produced original (e.g., carbon copy)
 - or by machine (photocopier, camera)
 - Handwritten ≠ duplicate
 - **CEC**
 - Duplicates **and handwritten notes** and other written evidence
 - **When testimony is admissible to prove contents of writing**
 - **FRE & CEC:** original lost or destroyed, unless bad faith by proponent

PRIVILEGES

- **Mostly exempt from Prop 8 in CA**
- **FRE: In a diversity action brought in federal court, state privilege law applies**
- **Attorney–client privilege**
 - **FRE & CEC:** Communication made between attorney and client (or their representatives), intended by client to be confidential, made to facilitate rendition of professional legal services
 - may be waived by client
 - **When attaches to corporate employee–attorney communications**
 - **FRE:**

- If employee/agent authorized by corporation to the lawyer on behalf of the corporation
 - **CEC:**
 - If employee is that natural person to speak to the lawyer on behalf of the corporation in the matter (e.g., in-house counsel or CEO), or
 - employee/agent did something for which the corporation may be held liable *and* the corporation instructed her to tell its lawyer what happened
 - *As applied, no significant difference in the scope of these standards*
 - *No privilege for witness who merely happens to be employee*
 - **Exceptions**
 - **FRE & CEC:**
 - (1) crime/fraud
 - (2) two or more parties consult on a matter of common interest and the communication is offered by one of these parties against another
 - (3) communication relates to alleged breach of atty–client duty
 - **CEC:**
 - (4) no privilege if atty rsbly believes disclosure is necessary to prevent a crime that is likely to result in death or substantial bodily harm
- **Doctor–patient and psychotherapist–patient privileges**
 - **FRE:**
 - psychotherapist–patient privilege exists
 - doctor–patient privilege does not
 - *MBE questions sometimes assume existence*
 - **CEC:**
 - recognizes both privileges
 - **Exceptions**
 - **FRE & CEC:**
 - (1) pt puts physical/mental condition in issue (e.g., P.I. suit)
 - (2) professional services sought to aid in crime/fraud or escape after crime/tort
 - (3) cases alleging breach of duty (e.g., malpractice)
 - **CEC:**
 - (4) no psychotherapist–patient privilege if psychotherapist has rsbl cause to believe that the patient is a danger to himself or others, and disclosure necessary to end the danger

- (5) no doctor–patient privilege in criminal cases or for information that the doctor is required to report to a public office (e.g., gunshot wounds; some communicable diseases)
- **Spousal privileges**
 - **Spousal testimonial privilege**
 - Permits witness to refuse to testify against spouse as to anything (privilege attaches to witness, not defendant/party)
 - **FRE:** applies only in criminal cases
 - **CEC:** applies to civil and criminal; spouse privileged to not even be called to witness stand
 - **Spousal confidential communications privilege**
 - **FRE & CEC:** may apply in any case; protects confidential spousal communications during marriage
- **Other California privileges**
 - (1) Counselor–sexual-assault/domestic-violence victim
 - (2) Penitent–clergy
 - (3) Immunity from contempt for news reporter who refuses to disclose sources

JUDICIAL NOTICE

- **Procedure**
 - Party must request judicial notice to compel; otherwise court has discretion.
CEC: court must take notice of matters generally known within jurisdiction
- **FRE:** civil cases → jury *must* accept; criminal cases → jury *may* accept
- **CEC:** civil and criminal cases → jury must accept a judicially noticed fact