Magicsheets

Condensed Outlines – Samples

California Bar Exam / Uniform Bar Exam

MBE

Essays

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Magicsheets sample content

Click to jump to sample:

- ☞ Welcome + How to Use (orientation document included with full Magicsheets CA version, UBE version will be similar)

- ☞ Contracts UCC vs. common law supplement
- ☞ Constitutional Law
- ☞ Evidence (CA version, FRE version available)
- ☞ CA Professional Responsibility ABA/CA distinction table

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Thank you for choosing Magicsheets!

- Benefits of condensed outlines
- How to use
- Benchmark goals for you
- Additional supplemental resources (and promo codes)
- Abbreviations

Key insights highlighted

The amount of law to know for the bar exam is overwhelming.

Don't worry. You won't get everything right even if you "know the rules." No one will.

But if you remember these points, you will get more things right:

1. There's a lot they'll throw at you. You will forget 99% of it unless you DO something with it.
2. Knowing the law isn't enough. You also need to know how to use it! "Knowing" the law conceptually is very different from knowing how to apply it.
3. Big box outlines are a good reference (like Wikipedia is) but WAY TOO LONG AND WORDY for you to efficiently memorize or practice with. You don't read all of Wikipedia, just the parts that are relevant to you.

You're not doing bar prep just to transcribe expensive lectures into subtitles, or to be a tool collector cobbling together the information yourself. Your one job is to *learn* so you can pass the bar, not feel drained from "studying" passively. Your time is worth more than flipping through a box of books just to be able to practice and memorize.

Benefits of Magicsheets:

- Save precious time and energy. Grasp the tested material in a few pages per subject so you can avoid busy work and optimize for learning, not "studying."
- See the big picture and hone in on smaller details with a nested structure. Use the big books as a reference to go deeper, like Wikipedia.
- See the issues more easily. If I had to pick between rules and issues, I'd rather know the issues cold and have a general understanding of the rules than to memorize the rules but not know how to bring them up... at least on essays.

If all you did was memorize some words on a page, your body has no clue what it needs to do.

Some ways to incorporate these condensed outlines into your bar prep:

- Get an overview of a subject. Read through an outline and get a gist of the subject in an hour or so. What most bar takers consider studying (passive activities such as reading outlines, filling in lecture notes, or making flashcards to get their "ducks in a row first") is 10% of the equation. Spend most of your time doing the below...
- Attempt a practice MBE question.
    - Did you get it right? Check the explanation and the outline to see if your understanding matches up. Just because you were correct doesn't mean you were right.
    - Did you get it wrong? Check the explanation.
        - Did you not know the correct rule? Review the outline to update your understanding of the rule.
        - Did you not know the correct issue? Review the outline to update your understanding of the issue.

Each question gives you a *lesson* or *validation*. Study the delta between your work and the reference answer.

- Attempt to write or outline (AKA "cook") a practice essay question.
    - Which rules did you get? Review the sample answers and the outline to see if your understanding matches up with them.
    - Which issues did you get? Review the sample answers and the outline to see if your understanding matches up with them. If you have blank-page syndrome and trouble starting an essay or even setting up the issues, check out Approsheets.
- Repeat the same practice questions. Redoing the same question is an underrated strategy to solidify your understanding.
- Review at the end of your studies to consolidate what you learned that day.
- Memorize the issues and rules by understanding the concepts, rote memorizing, and using them repeatedly. Use it or lose it. The real test is being able to *recall* and *recite* the rule statements. That means you must *use* what you think you've memorized. Keep testing yourself.
- Quick last-minute review. Review the outlines as a refresher right before the exam (or a mock exam).

Benchmark goals for you:

- **At least 1 month away from the exam:** It's OK to answer questions open book at first (with Magicsheets or other reference outlines). But at least *attempt* to answer without looking. Memorization is all about attempts to recall.
- **By the final month:** Wean yourself away from the outlines. Answer questions using issues and rules that you've used before on similar problems and now remember. By seeing the concepts in action used in examples, you'll develop a "bar intuition" and naturally understand and remember the concepts. (Also do some rote memorizing.)

Additional supplemental resources (and promo codes):

MBE

- UWorld MBE QBank, an online platform for MBE questions with over 2,000+ practice questions, with visual explanations
- AdaptiBar, an online platform for MBE questions with over 1,600+ practice questions that adapt to your skill level. Popular add-on lectures available
    - Compare UWorld and AdaptiBar
- *Strategies & Tactics for the MBE* (Volume 1), a workbook with primers for each MBE subject including Civ Pro, questions selected from a broad range of testable issues, a full-length practice exam, and question sets not available from the NCBE. Add Vol. 2 if you need more questions and pointed practice

Essays

- Past essays and PTs for the California Bar Exam, going back to 2001
- BarEssays, a bank of California essay and PT answers with real grader scores
    - See my Essay Answer Bank for more actual essay and PT answers with real grader scores that are exclusive to MTYLT (not found on BarEssays)
- California essay subject frequency and issue charts (editable)
- Approsheets checklists and flowcharts, companion tools for attacking issues and approaching essays (from blank page to finished essay)

You can find promo codes kept up to date here.

Abbreviations

Although abbreviations may be defined within the Magicsheets, the following are brought to attention here. They are interchangeable with the meaning as provided.

Generally

- Π = plaintiff Δ = defendant
- # = number / #+ = # or more
- 3P = third party
- #A or A# = #st/nd/rd/th Amendment
- BF = bad faith
- b/c = because
- C&C = clear & convincing [evidence]
- cf. (confer) = compare
- CL = common law
- COI = conflict of interest
- EE = extrinsic evidence
- FMV = fair-market value
- GF = good faith
- IC = independent contractor
- LSK = land-sale contract
- K = contract
- N/A = not applicable
- p/f = prima facie
- PER = parol evidence rule
- pt = party
- jx = jurisdiction
- QOF = question of fact
- QOL = question of law
- SOF = statute of frauds
- SOL = statute of limitations
- tx = transaction
- V = victim
- w/r/t = with respect to

Business Associations

- A = agent
- AOI = articles of incorporation
- BOD = board of directors
- D&O = directors and officers
- LP = limited partner/partnership
- P = principal
- RMBCA = Revised Model Business Corporation Act
- s/h = shareholder

Civil Procedure

- AIC = amount in controversy
- FRCP = Federal Rules of Civil Procedure
- MTD = motion to dismiss
- NMP = nonmoving party
- w/in # = within # days

Community Property

- (Q)CP = (quasi-)community property
- SP = separate property

Constitutional Law
- None

Contracts
- None

Criminal Law
- MPC = Model Penal Code

Criminal Procedure
- PO = police officer
- TOTC = totality of the circumstances
- W = warrant

Evidence
- CEC = California Evidence Code
- FRE = Federal Rules of Evidence
- x-exam = cross-examination
- W = witness

Professional Responsibility
- A or L = attorney or lawyer
- ABA MR = American Bar Association Model Rules
- C = client

Real Property
- BFP = bona-fide purchaser
- LT = life tenant
- O = owner

Remedies
- CT = constructive trust
- EL = equitable lien
- TRO = temporary restraining order

Torts
- APer = adverse possessor

Wills & Trusts
- (Q)CP = (quasi-)community property
- SP = separate property
- SS = surviving spouse
- T = testator
- UI = undue influence

I. GOVERNING LAW: GOODS OR NOT?

- **UCC** applies to contracts involving the sale of goods (movable, tangible things). The **common law** applies to contracts in all other transactions (e.g., services, sale of real estate, employment, intangibles).
    - If mixed transaction, go with its predominant purpose. Does the transaction primarily involve goods or something else?
- **Merchant status** may trigger UCC-specific rules. A merchant regularly deals in particular goods, or holds out as having relevant skill or knowledge. Assume merchant on facts showing regular, high-volume dealing.

II. UCC VS. COMMON LAW

Issue	Common Law	UCC	Requires a Merchant?
Offer definite terms	Subject matter + essential terms must be stated (Land-sale K: price. Service K: nature of work).	Quantity must be stated (except in output or requirements K).	No
Firm offer	N/A	Merchant's signed writing to hold offer open is irrevocable for stated time (or, if not stated, reasonable time up to 3 months).	**Yes (at least offeror)**
Acceptance with new terms	Mirror image rule: Any change = rejection + counteroffer.	Battle of the forms (§ 2-207): A contract can be formed even though terms of acceptance do not match terms of offer, unless acceptance is expressly conditional on assent to additional or different terms (which turns the acceptance into a rejection and counteroffer). Additional or different terms are mere proposals and not part of the K, unless offeror agrees to them. Different terms are not part of K	No
Acceptance with new terms (both merchants)	N/A	**Additional terms** become part of K, UNLESS offer limits acceptance to its terms, new terms materially alter the K, or offeror objects within reasonable time. **Different terms** use knockout rule: Conflicting terms are omitted from K, and gaps filled by UCC default terms.	**Yes (both parties)**
Accepting by shipping nonconforming goods	N/A	Accommodation shipment (§ 2-206): Shipping nonconforming goods = acceptance + breach, UNLESS seller seasonably notifies buyer that substitutes are sent as an accommodation (then it's a counteroffer).	No
Statute of frauds	Certain agreements (MY LEGS) require signed writing with essential terms above.		
	Multiple writings can combine into one sufficient writing.	Sale of goods ≥ $500. Writing not required for sale of goods if one of SWAP applies: specially manufactured goods, written confirmation by merchant, admission, or performance.	**Possibly (written confirmation)**
Modification	Needs new consideration under preexisting duty rule.	Needs only good faith (usually there). K as modified for sale of goods ≥ $500 must be in writing.	No
Imperfect performance	Non-breaching party receiving substantial performance (minor breach) still owes performance.	Perfect tender rule: Any nonconformity lets buyer reject, subject to seller's right to cure.	No
Impracticability	Discharges duty to perform.	Seller must allocate production and deliveries fairly and reasonably among customers.	No
Missing terms (gap fillers)	Price: reasonable value. Duration: within reasonable time, or at will for employment.	Price: reasonable price as of delivery. Time of delivery: within reasonable time. Time of payment: due at time and place of receipt by buyer. Place of delivery: seller's place of business. Quantity is never gap filled EXCEPT in output or requirements Ks.	No
Warranties	N/A	Implied warranties of title, merchantability (merchant sellers only), fitness for a particular purpose.	**Possibly (merchantability)**
Risk of loss	N/A	Shipment K (default / "FOB seller"): Risk passes to buyer at carrier. Destination K ("FOB buyer"): Risk passes to buyer at delivery. If no carrier and seller is a merchant, risk passes at buyer's *possession*.	**Possibly (seller not using a carrier)**
Money damages	Expectation, reliance, consequential, incidental damages.	Seller damages = K price minus resale price or FMV. Lost volume sellers recover profits on lost sale + incidental damages. Buyer damages = K price minus cover price or FMV.	No
Remedies for merchant buyer	N/A	If the buyer is a merchant and rightfully rejects goods, buyer must make reasonable efforts to sell on seller's behalf. Reimbursed for reasonable expenses and commission of up to 10% of gross proceeds.	**Yes (at least buyer)**

Sample

I. JUSTICIABLE CASE OR CONTROVERSY
- a. Federal courts may hear based on…
  - i. Law-based federal jurisdiction from Constitution, federal laws and treaties, admiralty and maritime laws
  - ii. Party-based federal jurisdiction where U.S. gov't is a party, State v. State, State v. other State citizen, citizens from different states (diversity jurisdiction), foreign diplomats
- b. Art. III limits fed court jurisdiction to "cases" and "controversies." To avoid dismissal in court, go up **RAAAMPS**:
  - i. Standing: Π must show "personal stake." 1) Π's actual or imminent injury, 2) causation, 3) redressability
    1. There is no "injury" to taxpayers (unless litigating tax bill or fed taxpayer challenging spending on 1A religious grounds), legislators, Constitution lovers (abstract desire to see gov't comply)
    2. Organizational standing requires that 1) individual members have standing + 2) interest asserted is related to organization's purpose + 3) individual member participation in the suit is not required (there is no individualized injury, remedy would be the same to all members, or injunction would solve everyone's problems) (no *damages* because each member would have to show damages)
  - ii. Ripeness (whether suing too soon): Π must show harm or imminent threat of harm. *Proposed law* or *action not yet taken* are not real cases or controversies
  - iii. Mootness (whether suing too late): A case is moot if the dispute has been resolved (i.e., there is no redressability), unless "capable of repetition, yet evading review" (e.g., pregnancy can recur)
  - iv. Political Q: Fed court will not take issues involving a matter for another branch of gov't that the judicial process is inherently incapable of resolving and enforcing
    1. Textually demonstrable constitutional commitment to other branches (Senate's sole power to impeach), lack of judicial standards (partisan but not racial gerrymandering, foreign affairs)
  - v. Abstention: Fed court will abstain (defer to state courts) if claim is based on an undecided issue of state law
  - vi. Adequate and independent state grounds: *SCOTUS* will not hear a case from a *state high court* if its decision can be supported on state law grounds alone (even if federal Q involved), unless it was unclear whether based on state law alone, or state follows federal constitution (treat as federal law)
  - vii. (No) advisory opinions: Advisory opinions lack an actual dispute b/w pts or any legally binding effect. Matter must be a real and substantive *present* (or specific future) controversy capable of specific relief
- c. 11th Amendment (sovereign immunity): Private pts cannot sue state gov't in fed court for damages (injunctions OK)
  - i. Allowed if v. state officials (incl. for damages), state expressly consents, or based on 13A-15A powers

II. CONGRESSIONAL POWERS (for *federal law* to be constitutional, *enumerated congressional powers* must justify it)
- a. Congress does NOT have regulatory (police) power to promote health, safety, and welfare of residents except in DC
- b. Commerce clause: Broad power to regulate interstate commerce (ISC), i.e., regulate channels, instrumentalities, activities that have a substantial effect on ISC (even *intrastate*, *economic* activity under cumulative effect doctrine)
  - i. Shared with state and local gov't through dormant commerce clause (see § IV-e for tests)
  - ii. Cumulative effects doctrine: To determine "substantial effect," consider aggregate effect of similar actions
  - iii. Cannot regulate *intrastate non-economic* activity (e.g., guns near school) unless economic effect on ISC
    1. Comprehensive scheme EXCEPTION: If Congress enacts a program that aims at interstate or economic activity, it can sweep up isolated instances of *intrastate non-economic* activity if those are necessary to make the program effective and have a substantial national economic effect
- c. Taxing power: Impose and collect taxes to pay debts and spend *for the general welfare* w/ *purpose* to raise revenue
- d. Spending power: Spend for any public purpose to provide for general welfare (e.g., education, roads, space program)
  - i. Congress cannot *regulate* for the general welfare except in non-state federal territories
- e. Delegation power: Congress can delegate powers it possesses and create an agency with legislative power to make rules. Intelligible guidelines for carrying out concrete objectives are required (loose standard—think **RB**)
- f. Property power: Regulate (pass any law) and dispose of federal property, including Indian property and wild animals
- g. Speech and debate clause: A member of Congress (+ aides) cannot be punished for anything said on legislative floor
- h. Impeachment power: Congress can remove the president, federal judges, and federal officials through impeachment
- i. Appropriations power: Congress can pass a bill to direct how the president must spend money
  - i. Earmarking funds: Executive branch *must* spend the funds, or obtain Congress approval to refuse spending

III. EXECUTIVE POWERS (partly shared with Congress)
- a. **Congressional authorization 3-prong test**: Where the president acts with Congress's express/implied authority, his power is at its apex, and his action is likely valid. Where Congress is silent, the president's action is upheld as long as the act does not take over another branch's powers or prevent another branch from performing its tasks. Where the president acts against Congress's express will, he has little authority, and his action is likely invalid
- b. Chief executive domestic powers (**EAR PVPs**)
  - i. Enforcement of laws, not making them. May delegate to other executive officers. Attorney general is chief law-enforcement official. May direct federal executive agencies (executive orders) but *not private parties* outside the executive branch unless authorized by Congress. May set up presidential advisory commissions
  - ii. Appointment power: President can appoint officers and high-level officials with consent of Senate
  - iii. Removal power: President can remove high-level, purely executive officials without cause. President may be able to remove other executive officials for good cause based on statute (e.g., corruption, incompetence)
  - iv. Pardon power (plenary): President may grant pardons before charge or after conviction to *federal criminals*

v. Veto power: Proposed legislation becomes law unless wholly vetoed within 10 days of passing legislation
    1. Line-item veto is unconstitutional. President may only approve/reject a bill in toto
    2. Legislative veto (Congress changes law by majority vote after president signs) is unconstitutional
vi. Privileges: Absolute privilege to refuse to disclose national security secrets. Qualified privilege to confidential comm'n between president and advisors (balance confidentiality vs. purpose to reveal or not)

c. Commander-in-chief (military) powers (**BREW**): Respond to attacks (only Congress has power to initiate war), emergency power (broad discretion to send troops abroad w/o declaration of war, whether or not Congress is in session), wartime power (seize private property in wartime unless Congress denies it), battlefield tactical decisions
d. International affairs: Treaty power (make agreements between countries with 2/3 Senate consent), executive agreements with foreign nations (Congress ratification not needed)
e. Hierarchy of laws: U.S. Constitution > treaty / federal statute (last in time prevails) > executive agreement (foreign) / executive order > state constitution > state law

IV. FEDERALISM

a. Supremacy clause: Constitution, federal laws, and treaties are supreme law
    i. Express preemption: Federal statute says federal law is exclusive in an area
    ii. Implied preemption: If state law conflicts with fed law, Congress shows clear intent to occupy the field, or state law impedes federal objectives
    iii. If no conflict or no impedance of federal objectives, state law may be broader (e.g., higher minimum wage)
b. Federal function immunity: Federal instrumentalities (gov't and agencies) are immune from…
    i. State taxation where the "legal incidence" of the tax is on the U.S. without consent of Congress
        1. Nondiscriminatory, indirect taxes OK if no unreasonable burden, e.g., state tax on fed employees
    ii. State regulation that would interfere with fed functions (fed law would control, per supremacy clause)
c. Sovereign immunity: Fed gov't (U.S.) cannot be sued w/o consent. U.S. or another state may sue a state w/o consent
d. 10th Amendment police power: States have broad power to regulate areas traditionally w/in power of states (involving health, safety, welfare, morals), limited by contrary fed power (laws, tax immunity, enumerated powers, foreign affairs, exclusive jx)
    i. Anti-commandeering doctrine: Under case law, Congress (and likely executive orders) cannot make state legislatures pass a law or require state executive officials (e.g., police) to enforce federal law. However…
        1. Mere prohibitions are not commandeering
        2. Spending power can indirectly regulate state if condition for money is clear + not unduly coercive
e. Dormant commerce clause (DCC): State may not regulate ISC in a way that is discriminatory or unduly burdensome
    i. If Congress hasn't enacted legislation, states may regulate local transactions affecting ISC, only if the regulation does not discriminate against out-of-state actors to benefit local economic interests ("economic protectionism") and does not unduly burden interstate commerce (burden < state's interest in the action)
        1. If a state law **does discriminate on its face** against OOS actors, invalid unless it serves important noneconomic state interest + no reasonable nondiscriminatory alternatives (usually invalid)
            a. EXCEPTION: State may function as a market participant (buy, sell, hire, etc.)
        2. If a state law is **facially neutral** and merely incidentally burdens ISC, use balancing test: Law is invalid only if burden on ISC > promotion of legitimate local interests (i.e., undue burden on ISC)

V. STATE ACTION REQUIREMENT: The Constitution generally protects against governmental action at any level (federal, state, local), not actions of private individuals (except 13A), UNLESS…

a. Significant state involvement: Private action is closely encouraged and supported by the state (state hand in private glove); e.g., court seeks to enforce a racially restrictive covenant, or statute requires segregated public toilets
b. Public function theory: Private actor is delegated a function traditionally reserved to states (company town, not mall)
c. Mutually beneficial relation derived from unconstitutional behavior; e.g., state gets increased revenues and rents from privately owned restaurant that discriminates

VI. STANDARDS OF SCRUTINY: Levels of strictness when a court reviews the legitimacy of governmental acts

a. **Strict scrutiny** (**SS**): ***Gov't*** **must prove its classification is necessary to achieve a compelling gov't interest**
    i. Law must discriminate on its face or have actual motive (if facially neutral)
    ii. Classification is necessary if it is the **least-restrictive means** (no alternative to lessen the burden) or is **narrowly tailored** to serve the compelling gov't interest (difficult test to meet—gov't almost always loses)
b. **Intermediate scrutiny** (**IS**): ***Gov't*** **must prove its classification is substantially related to an important gov't interest.** Law must discriminate on its face or have actual motive (if facially neutral)
c. **Rational basis** (**RB**): ***Plaintiff*** **must prove classification is not rationally related to any legitimate gov't interest**

VII. DUE PROCESS CLAUSE (DPC: 5A applies to fed gov't; 14A applies to state and local gov't)

a. **Procedural DPC** protects persons against *intentional* deprivation of life, liberty or property w/o due process of law
    i. Persons: All people including aliens and corporations, not just citizens
    ii. Liberty: Freedom of action (e.g., bodily restraint), constitutional freedom Life: Threat to life
    iii. Property: More than belongings. Equal protection rights, constitutional freedom, e.g., public education, public employment (no property interest if "at will"), benefit under state law (welfare), licenses
    iv. If life, liberty, or property entitlement taken, what adequate process is due? *Mathews* balancing factors: (1) importance of interest to the person (more important → more process needed), (2) gov't interest/burden in

efficiency (more burdensome to get protection → less process needed), (3) value of procedural safeguards (more likely that gov't will make a mistake without procedural protection → more process needed)
v. Due process rights may be waived if voluntary and made knowingly

b. **Substantive DPC** (sDPC) is a source of fundamental individual rights not spelled elsewhere in the Constitution. Gov't may not infringe on fundamental rights ("CAMPERD STOVF"). Standard of review is **SS unless noted**:
i. Contraception (privacy): State cannot prohibit distribution of contraceptives, whether single or married
ii. Abortion (privacy): No longer fundamental right (*Dobbs*). Regulation passed onto states. **SS not applicable**
1. Previously (but no longer), state reg was unconstitutional if it imposed undue burden on choice to abort, up to fetus viability. Example of undue burden: requiring spousal notice about abortion. Not undue burden: parental consent w/ judicial bypass, 24-hour waiting period, ban unsafe method
2. Any abortion restriction, even post-viability, must have exception to protect mother's life or health
iii. Marriage (privacy): Right to enter into (and likely, to dissolve) marriage is deemed fundamental
iv. Parentage/Procreation (privacy): Reproductive rights, and child rearing, care, custody, control
v. Education (Private): Parents have a right to privately educate children outside of the public school system
vi. Relatives (family relations)
1. Gov't cannot prohibit members of an extended family from living in a single household
2. Gov't can ban unrelated persons from living together in a single-family residence
vii. Death: Right to refuse medical procedures, even if life-extending. No right to suicide or assisted suicide
viii. Sexual orientation (**strict RB**): Gov't cannot criminalize same-sex sexual activity (no legitimate interest)
ix. Travel: Right to travel interstate and to set up residency in a new state, subject to reasonable restrictions
x. Obscene material: Right to possess in one's home. No right to buy, sell, transport. No right to child porn
xi. Vote: 15A (no race discrimination in voting), 19A (no sex discrimination in voting), 24A (no poll taxes)
1. Total ban (on *picking/voting for* a candidate) via, e.g., redistricting primarily based on race? **SS**
2. Regulation of process that makes voting harder? **Undue burden balancing** (gov't interest/burden)
3. Reasonable restriction (on *being* a candidate: age, residency, filing fee, voting districts)? **RB**
a. Traditional one-person one-vote principle does not apply to special, limited-purpose voting districts, such as a water-storage district where voting is limited to landowners
xii. Free association (1st Amendment): Right to belong to political groups

Before 2022, standard was SS. In an essay, could consider individual state regulations.

c. Takings clause (provided by 5A, applicable to states via 14A)
i. **Gov't cannot take private property for public use without just compensation**
1. Public use means "public purpose." Burden on gov't to show the action is rationally related to any legitimate purpose (such as health, welfare, safety, aesthetic reasons)
2. "Just compensation": ***loss of FMV to owner***, not gain to taker (not comped if worthless property)
ii. If the action is a "taking," just compensation is required; mere "regulation" does not require compensation
1. Examples of reg: zoning ordinance, ordering destruction of diseased trees, landmark ordinance
iii. Actual/physical taking: If gov't takes one's property by actual or physical appropriation, it is a taking
1. Includes permanent, physical invasion no matter how minor (e.g., running cable lines)
2. Temporary taking: Not a *per se* taking. Balance the circumstances (e.g., planners' good faith, reasonable expectations of owners, length of delay, actual economic impact) to determine whether fairness and justice require just compensation
iv. Regulatory taking: A regulation that decreases the value of property. Per *Lucas*, it is not a taking unless it **deprives *all* economically beneficial use of land** (e.g., disallowing land development).
1. Partial taking occurs when only a portion of the property owner's land is rendered economically useless through an intrusion or regulation. ***Penn Central* balancing test**: 1) regulation's economic impact on the claimant, 2) extent to which the regulation interferes with distinct investment-backed expectations (purpose of property?), 3) character of the government action (for welfare?)

VIII. EQUAL PROTECTION CLAUSE (EPC: applicable to states via 14A and to fed via 5A DPC for gross discrimination)
a. Applies where a statute or gov't action treats similarly situated people in a dissimilar manner or singles out one *class of persons* (i.e., classifies people). Compare sDPC protection of fundamental rights of *everyone*
b. Race discrimination – suspect classification subject to **SS**
i. *De jure* (by law) segregation almost always unconst'l, e.g., school segregation, banning interracial marriage
ii. *De facto* OK (happens through private choice and social factors, e.g., different races live in different areas)
iii. Affirmative action: Overt classifications may pass **SS** review in affirmative action
1. Compelling interests: Remedy state's own (not general societal) past discrimination w/ narrow tailoring of benefits to those actually affected, or diversity in higher education (post-secondary)
c. Alienage discrimination (treating citizens & non-citizens differently) – suspect classification subject to **SS**
i. Public function EXCEPTION: State may require citizenship for state jobs that directly affect politics – **RB**
ii. Illegal (undocumented) aliens not a protected classification – **RB** Illegal alien children – **IS**
1. *Fed law* may adopt immigration policy (e.g., 5yr residency req for fed Medicare benefits) – **RB**
d. Gender discrimination – **IS** (gov't must show "exceedingly persuasive justification," closer to **SS**)
i. Affirmative action: Remedial (even for past, societal reasons) or benign discrimination satisfies **IS**
e. Illegitimacy (treating illegitimate children differently) – **IS**

IX. PRIVILEGES & IMMUNITIES CLAUSES (applies to **out-of-state discrimination** against ***citizens* only**)

a. Article IV comity clause (basic rights): State gov't cannot discriminate against *non-residents* of the state if *economic* discrimination affects "fundamental rights" or "important economic activities," unless the discrimination is closely related (no less discriminatory alternative could be achieved) to a substantial gov't interest (**IS**)

i. Non-resident discrimination cannot affect rights including civil liberties and right to work and pursue livelihood, e.g., higher license fees or taxes for out-of-staters, abortions or employment for locals only

b. 14th Amendment (narrow scope, rarely used): State cannot deny citizen rights of national citizenship, e.g., to travel state lines and establish residency in a new state

c. N/A to aliens and corporations ("persons"). But can protect from discrimination via DCC, 14A DPC, or 14A EPC

X. RETROACTIVE LEGISLATION

a. Contracts clause: Prohibits *state* or *local* legislation from retroactively impairing obligation of existing contract rights. Does not apply to federal gov't

i. State or local regulation that substantially impairs a party's rights under an existing **private** K is invalid, UNLESS reasonably and narrowly tailored to promote important and legitimate public interest

ii. Regulation of **public** K receives strict scrutiny

b. Ex post facto law: State/fed may not retroactively alter criminal offense or punishment that puts Δ in worse position

c. Bill of attainder: State/fed may not pass a legislative act that inflicts punitive punishment without a trial on named individuals or an easily ascertainable group for past conduct

Strict Scrutiny (SS)	**Intermediate Scrutiny (IS)**	**Rational Basis Review (RB)**
Race, alienage (state), national origin, voting, domestic travel, most sDPC rights, DCC (discriminate on face)	Gender, illegitimacy, undocumented alien children, P&I under Article IV	Age, alienage (federal), disability, sexual orientation, social, economic, all else (non-suspect classifications (EPC) or non-fundamental rights (DPC))
Content-based regulation of speech	Commercial speech	Content-neutral TPM regulation of speech in limited/non-public forums
TPM regulation in public forums		
Free exercise clause (interfere with religion), establishment clause (discriminate on religion)		Free exercise clause (neutral regulation)

FIRST AMENDMENT NEXT PAGE

Sample

XI. FIRST AMENDMENT (1A also applicable to states through 14A)

a. Free speech clause (speech = words, symbols, expressive conduct intended and reas. likely perceived as a message)

i. Restricts gov't regulation of *private* speech. Does not constrain gov't from voicing its opinions or funding only certain private speech, subject to other constitutional limitations

ii. Facial attacks—analyze these first when expression is being regulated

1. Prior restraint: Gov't action restricting speech before it occurs (rather than punishing after) is disfavored. Such restriction must be narrowly drawn and show special societal harm will result
2. Overbreadth: Ordinance invalid as overbroad if it prohibits activities that may be constitutionally forbidden and also those that may be protected under 1A (allowable under another standard)
3. Vagueness: Regulation is void as vague if ordinance is so unclear that reasonably intelligent persons would have to guess at its meaning and would differ as to its application
4. Unfettered discretion: A regulation cannot give officials unfettered discretion over determining speech issues (e.g., power to raise permit fee, or require review); there must be defined standards

iii. Content-based regulation: **Strict scrutiny** triggered if gov't regulates content- or viewpoint-based speech. That is, there are few restrictions on *content* of speech. But there are unprotected speech EXCEPTIONS:

1. Obscenity: Regulation valid only if the work 1) appeals to prurient (sexual) interests based on local community standards, 2) depiction or description is patently offensive per local standards, 3) as a whole lacks serious literary, artistic, political, scientific (LAPS) value to a reasonable person
2. Defamation: See *Defamation* in Torts Magicsheets. Additional constitutional issues apply for public matters: falsity and fault. Public info may be protected if newsworthy and not offensive
3. Unlawful advocacy: May prohibit if the speaker (subjectively) intends to produce "imminent, unlawful action" + speech is (objectively) likely in fact to produce "imminent, unlawful action"

Regulation likely invalid for being overbroad or vague

4. Hostile audience: Speech eliciting imminent, violent reaction from the crowd. But police must make reasonable efforts to protect the speaker
5. Fighting words: Likely to incite ordinary citizen to acts of immediate, violent retaliation to speaker
6. True threats: Intended to convey serious threat of bodily harm (e.g., cross burning to intimidate)

iv. Content-neutral regulation: In public forums (historically open to speech-related activities, e.g., sidewalk, park) and designated public forums (not historically open to speech but designated for it, e.g., classroom for after-school civic activities), speech can be restricted with reasonable time, place, manner (TPM) regulation if **content- and viewpoint-neutral + narrowly tailored (no total bans) to serve an important interest + leaves open alternative channels of communication** (most legitimate interests meet importance standard)

1. Limited public forums (not historically linked to speech but open for a purpose, e.g., school gym for town debate) and non-public forums (not open to public, e.g., military base, school in session) may be reasonably regulated for intended use if **viewpoint-neutral + reasonably related to a legitimate interest**

v. Quasi-protected speech: Commercial speech is protected if it 1) is not false or deceptive and 2) does not relate to unlawful activity. But gov't can still regulate if it 1) serves a substantial gov't interest + 2) directly advances that interest + 3) narrowly tailored to achieve that interest (reasonable fit b/w goals and means)

b. Freedom of religion

i. Establishment clause: Prohibits gov't from preferring one religion over another or establishing a religion

1. If regulation on its face discriminates or prefers a religion, or prefers religion generally over non-religion → **SS**
   a. If speech is involved, can also raise viewpoint discrimination under the free speech clause
2. If law or program is facially neutral (no sect preference), the coercion test is a factor (2022 *Kennedy* decision): Gov't cannot coerce support or participation in religion against one's will (e.g., broadcasting prayer during school graduation or football game, expectation to participate). There are no formal criteria. Consider extent of supervision and *social pressures* to participate
   a. Previously, valid under *Lemon* test if it has 1) secular (nonreligious) purpose, 2) primary effect that does not advance or inhibit religion, 3) no excessive gov't entanglement with religion. *Kennedy* "abandoned" *Lemon* but did not explicitly overrule. Consider both tests
   b. Gov't financial assistance to defined class of persons is valid if the class is defined w/o reference to religion or religious criteria (even if recipients use to attend religious school)

In an essay, could compare the level of coercion in the facts to that of prior cases.

ii. Free exercise clause: Gov't may not prohibit the free exercise of any religion

1. Genuine belief (threshold issue)? Sincere religious beliefs are absolutely protected. The belief must parallel orthodox religious beliefs; it cannot be a purely political or philosophical view
2. Generally applicable? Gov't may regulate (under **RB**) an activity if the regulation is neutral w/r/t religion and is of general applicability, even if it incidentally burdens religious conduct
   a. EXCEPTION: If person quits job for sincere religious reason, gov't cannot refuse unemployment benefits
3. If law is not generally applicable and was motivated by intent to interfere with religion → **SS**
   a. EXCEPTIONS: Sabbath observance unemployment benefits, start Amish schooling at 16

Sample

I. RELEVANCE (*Small hurdle but check for each item of evidence*)
- a. Logical relevance: **Evidence must be relevant for it to be admissible. It is relevant if it tends to prove/disprove a material fact** ([**CA**] "**a material fact *in dispute***")
- b. Legal relevance: **FRE 403** [**CEC 352**] applies to balance probative value (PV) with risk of prejudice. Judge has broad discretion to exclude evidence if its PV is substantially outweighed by danger of unfair prejudice (UP) (e.g., graphic imagery, drug use), confusion of issues, waste of time (e.g., speculative answer), or misleading the jury
- c. Exclusion for public policy: Relevant evidence may be excluded for public policy reasons below. It may still be admissible for other purposes, e.g., prove ownership/control, impeachment, admission, rebutting non-feasibility, bias
  - i. Subsequent remedial measure: Evidence of repair or precautions inadmissible to show culpability. Can use to show ownership or control or destruction of evidence, or to rebut claim that precautions were impossible
  - ii. Settlement offers or negotiation (**FRE 408**): Inadmissible to prove liability for, or invalidity of, a claim at *actual dispute* as to validity or amount of liability. Must exclude all contextual statements attached to offer
  - iii. Offers to pay medical expenses (**FRE 409**) are inadmissible. Accompanying admissions may be admissible
  - iv. Withdrawn guilty pleas: Inadmissible as too prejudicial, minimal PV (but can waive inadmissibility)
  - v. Liability insurance ("I have insurance") or lack of: Can't use to show culpability. Can use to show ownership or control, to impeach, or as part of admission
  - vi. [**CA**] Expression of sympathy relating to accident inadmissible in civil cases, fault statements admissible
  - vii. [**CA**] Mediation statements and writings inadmissible in discovery or proceedings (can waive)

II. PRELIMINARY FACTS
- a. Judge is not limited by evidence rules when determining preliminary facts (e.g., competency) except privileges
- b. Authentication: Real or written evidence requires proof to support a jury finding that it is what the proponent claims
  - i. Authentication generally requires witness's first-hand knowledge or familiarity. Preponderance not needed
  - ii. Self-authenticating docs: *certified* public and business records, trade inscriptions ([**CA**] N/A), official pubs
- c. Best evidence rule ([**CA**] secondary evidence rule): To prove the *content* of a writing or other tangible collection of data relevant to proving some *material fact*, the original must be introduced if available. Can still be hearsay
  - i. Applies where content is to be proven or testimony depends on the document (e.g., K, will, deed, X-ray)
  - ii. Duplicates ([**CA**] handwriting included) are admissible to the same extent, unless 1) genuineness is at issue (one party contests authenticity), or 2) would be unfair in the circumstances to admit the duplicate in lieu
  - iii. Original NOT required if: lost or destroyed (unless by opponent bad faith), opponent fails to produce, collateral matter, subpoena ineffective, independent source (personal knowledge), inscribed chattel
- d. Competency of witness: W must 1) have personal knowledge of the matter and 2) affirm/swear to testify truthfully
  - i. Judge and jurors are not considered competent to testify at trial
  - ii. [**CA**] W must also understand the duty to tell the truth. Judge and jurors may testify if no objection
- e. Conditional relevancy: If relevance depends on a particular fact finding by the jury, the court will admit the evidence after the judge first makes a threshold (and final) determination that a reasonably jury could find the necessary fact
- f. Judicial notice is a court's recognition of fact (or law) as true w/o presentation of evidence. Court may take notice of *commonly known* or *readily verifiable* facts, on its own or if a party requests it and supplies necessary information
  - i. Noticed facts are conclusive in *civil* cases ([**CA**] civil and crim). Jury may or may not accept in *crim* cases
- g. Rule of completeness: If a party introduces part of a writing or recorded statement (even if inadmissible hearsay), the other party may require introduction of any other part in fairness (as long as not barred by, e.g., double hearsay)

III. CHARACTER EVIDENCE (*This is still susceptible to balance of probative value vs. unfair prejudice*)
- a. **Character describes one's disposition with respect to general traits** (e.g., trustworthy, good driver). **Character evidence is generally inadmissible to prove conduct in conformity therewith.** (Just because Δ did [specific bad things showing similar character] before does not mean he did [the charged act] in this case.)
- b. Ways to prove: **rep**utation, **op**inion (can test basis by asking whether W knows of a particular conduct), **sp**ecific acts

Π = prosecution / plaintiff
Δ = defense / defendant

- c. EXCEPTION [**crim** only]: Δ "opens the door" (introduce good character evidence relevant to crime) or Δ alleges self-defense in homicide → Π may rebut w/ **rep/op testimony on direct exam, or inquire into sp on x-exam** ([**CA**] **rep/op/sp on direct or x-exam**)
  - i. Δ opens the door to say Δ is of good *pertinent* character (where W's testimony puts Δ character in issue)
  - ii. Δ opens the door to say V is of bad *pertinent* character (except sexual in rape cases) to show Δ's innocence
    1. [**CA**] Π can rebut only after Δ's evidence of V's violent character (narrower than FRE)
  - iii. Only then may Π rebut w/ Δ's bad char (of same trait) or V's good char w/ **sp** (x-exam) or **rep/op** (own W)
    1. [**CA**] Domestic or elder cases: Π can initiate showing Δ's acts of domestic violence or elder abuse

MIMIC:
Motive
Intent
Mistake
(absence of)
Identity
(signature m.o.)
Common plan

- d. EXCEPTION: Other purposes – Δ's "MIMIC" (**FRE 404(b)**) or prior act of sexual assault (**FRE 413–415**) – **sp**
- e. EXCEPTION: Defense or cause of action where character is an element at issue – **rep/op/sp**
  - i. Defamation (B said A is a thief). DEFENSES: reputation testimony, truth (A is indeed a thief)
  - ii. Negligent hiring (bring up all traffic offenses of employee)
  - iii. Negligent entrustment (loan car to someone, should have known not a good idea to lend it)
  - iv. Child custody (fitness as parent) v. Self-defense: Survivor's reasonable belief of imminent deadly harm
  - vi. Entrapment: Δ had no predisposition commit the crime – but raises predisposition element for Π to rebut
- f. EXCEPTION: Habit evidence is freely admissible as character evidence – **op/sp**. A habit is a semi-automatic response to a specific and frequent situation. For an organization, a habit is a routine practice of the organization

IV. HEARSAY **is an out-of-court statement [out of *this* court] made by the declarant offered to prove the truth of the matter asserted. It is inadmissible upon proper objection unless an exemption/exception applies.**

i. Out-of-court (OOC) statement may be oral or written, includes assertive conduct, excludes depositions
ii. Multiple hearsay (double hearsay) (X said Y said Z): Admissible only if each level of hearsay is admissible
iii. **The statement is not hearsay where the OOC statement is introduced for other purposes, to show**: legally operative facts of independent legal significance (e.g., K terms, defamatory words), effect on listener (e.g., notice, knowledge, motive), knowledge of speaker, or state of mind (e.g., insanity, belief)

a. Non-hearsay exemptions ([**CA**] fall under "exceptions") (**"prior" statements need declarant's availability**)

i. Prior inconsistent statements: To admit a prior statement inconsistent with declarant's in-court testimony, declarant must be *available*, and the prior statement must have been *given under oath* ([**CA**] oath N/A)
ii. Prior consistent statements offered to rebut a charge that W has motive to lie/exaggerate. Declarant must *testify at trial* + be subject to x-exam + statement made *before* the alleged motive to lie or exaggerate arose
iii. Prior statements identifying a person after perceiving him – must be *available to testify* at trial
iv. Admissions by party: Statements by *opponent* (*cannot bring own*) acknowledging a *fact relevant* to the case. Statement need not be against declarant's interest when made, may be opinion or based on hearsay (no personal knowledge needed). Cf. statements against interest (§ IV-b-i-1)

1. Adoptive admissions (conduct, or silence where the party understood the accusatory statement + capable of denying + reasonable person would have, if untrue, denied under the same circumstances, e.g., not in police presence—suspect in custody has no duty to speak)
2. Vicarious admissions
   a. Co-parties: Party admissions are NOT admissible against co-Π/Δ
   b. Authorized: Statement of a person expressly/impliedly authorized by party to speak on its behalf is admissible against the party
   c. Agents: Statement by an agent (e.g., employee) within scope of agency, *made during existence of relationship*, is admissible against principal
   d. Co-conspirators: Statement of any conspirator is admissible against all members of the conspiracy if it was *in furtherance of the conspiracy* (look for confrontation clause issue)

b. Hearsay exceptions (hearsay but admissible)

i. **If declarant unavailable** (via PRISM: privilege, refusal, incapacity, someplace else, memory lacking)

1. Statements against interest (pecuniary, penal, proprietary, [**CA**] social) *when made*. The declarant must have had personal knowledge of the facts and awareness that it was against his interest
   a. Collateral matter (evidence solely affecting the credibility of a witness) is admissible
   b. [**FRE**] Against criminal liability, need corroborating circumstances of trustworthiness
2. Former testimony: Testimony that is now offered against a former party in former action, or a predecessor in interest (civil cases), who had an opportunity to x-exam W at prior/preliminary hearing (including deposition but *not* grand jury) + similar motive to develop W's testimony
3. Dying declarations (**FRE**: homicide or civil actions only. **CA**: all civil or criminal cases)
   a. Declarant must have believed death was imminent (actual death not needed) + statement concerns cause or circumstances of what he believed to be his imminent death
   b. [**CA**] Declarant must actually be dead + statement concerns what *did* cause the death
4. Pedigree/family: Statements concerning personal or family relationship closely associated with W
5. Forfeiture by wrongdoing: Statements offered against a party who deliberately caused a declarant's unavailability (e.g., Δ arranged for a key witness to be murdered)
   a. [**CA**] Applicable only where declarant was *killed or kidnapped* by person statement is offered against. Requires C&C evidence (more than standard FRE preponderance)
6. [**CA**] Past physical or mental condition (including statement of intention) at issue if it is at issue
7. [**CA**] Threat of physical harm: Statement that describes or explains infliction or threat of physical injury on declarant is admissible if 1) made at or near time of infliction or threat, 2) circumstances indicate trustworthiness, 3) in writing, recorded, made to police or medical personnel

Look for…
Emotional state →
Timing →

ii. **If declarant is available or unavailable** (availability is immaterial)

1. Excited utterance ([**CA**] spontaneous statement): Statement made w/o reflection which relates to ([**CA**] narrates, describes, or explains) a startling event while under excitement of startling event
2. Present sense impression: Statement of what was perceived at time of event or immediately after
   a. [**CA**] Contemporaneous statement explains own conduct made while engaged in conduct
3. Then-existing state of mind (forward-looking intent), emotion, sensation, physical condition
   a. When state of mind is directly at issue or to infer subsequent acts carrying out intent
   b. Statements of memory or belief inadmissible to prove its truth (except declarant's will)
4. Declarations of physical condition: Portion of statement imputing fault not admissible if unrelated
   a. *Present* bodily condition made spontaneously admissible even if not made to a physician
   b. *Past* bodily condition admissible only if made to medical personnel for diagnosis, treatment, or testimony. [**CA**] Admissible only by child-abuse or child-neglect victim under 12 made to medical personnel for medical diagnosis or treatment

Sample

5. Business records: Records of acts, conditions, events, transactions, opinions, or diagnoses made *at or near the time of event* with *personal knowledge* of matters *during regular course of business*. Entrant must have had a business duty to make the entry (e.g., not crime witnesses)
    a. [**CA**] CEC does not cover opinions or diagnoses (but courts admit them if simple)
    b. Requires authentication of record via custodian testimony or written certification
    c. Excludes reports prepared for litigation, or by outsider (unless via a different exception)
    d. Absence of entry in records: Negative purposes allowed to prove nonoccurrence of matter if it was regular practice to record all such matters, if witness is familiar + diligent search
    e. Discretion to exclude if source of information or circumstances indicate lack of trustworthiness (those prepared in anticipation of litigation)
6. Present recollection revived: Testifying witness can refresh memory by looking at any item of evidence (no hearsay problem because the item itself is not necessarily offered into evidence)
7. Past recollection recorded: A record that is on a matter that 1) a testifying W once had personal knowledge of but now cannot recall well enough (refreshing attempted and fails), 2) was made or adopted by W when the matter was fresh in memory, and 3) accurately reflects W's knowledge
8. Public records: A record of public office made w/in scope of duty of public employee, admissible if it sets out 1) activities of office, 2) matter observed pursuant to duty (NOT if police observations in crim case), *or* 3) factual findings from investigation (in civil case or against gov't in crim case)
    a. [**CA**] Admissible if made within scope of duty of public employee, made at or near time of event, *and* trustworthy source of information
    b. A police record not qualifying as a business record may be admitted under this exception
    c. Absence of public records: Custodian may testify that diligent search failed to find a record to show that the matter was not recorded or did not occur
    d. Prior judgments: Prior felony judgment admissible to prove a fact essential to judgment

iii. Ancient documents: Statements in 20YO+ document are admissible and self-authenticating ([**CA**] 30YO+)
iv. Family records: Statements of fact concerning personal or family history found in family keepsakes
v. Learned treatises: Statements from reliable authorities ([**CA**] only facts of general notoriety and interest)
vi. Catch-all: Trustworthy + necessary in interests of justice (probative, material) + notice to adversary

V. TESTIMONIAL EVIDENCE & IMPEACHMENT (*Used for attacking credibility or truthfulness*)

a. Lay witness testimony: Opinion testimony or inferences by lay witness is admissible only if 1) rationally based on W's perception (personal knowledge, 5 senses), 2) helpful for clear understanding of W's testimony or [**FRE**] determining a fact in issue, and 3) [**FRE**] not based on scientific, technical, or other specialized knowledge (unless grossly apparent)
b. Expert witness testimony: Opinion or conclusion is admissible only if 1) specialized knowledge helpful to jury, 2) qualified as expert, 3) reasonable certainty of opinion, 4) based on proper facts or data, 5) based on *reliable* principles and methods. Reliability factors: 1) Generally accepted in relevant scientific community, 2) peer reviewed (capable of retesting), 3) published, 4) low error rate, 5) generally accepted in relevant field ([**CA**] only consider (5))
    i. Expert witness may testify as to an ultimate issue. May not state an opinion as to criminal Δ's mental state that is an element of crime or defense, or conclusory legal opinions
c. **Impeachment refers to the casting of an adverse reflection of the truthfulness of a witness to discredit him**

Impeachment method	Intrinsic (W's own testimony)	Extrinsic (other W's testimony) – may be hearsay
Prior inconsistent statements (PIS)	Anything (including x-exam or direct exam, collateral and non-collateral matters)	Admissible if W is given opportunity to explain/deny statement + adverse pt is given opportunity to examine W. Non-collateral only
Prior bad acts (**sp**) re: truthfulness (act of lying or deceit)—cross-examiner must inquire in good faith	Cross-exam (ct has discretion to allow)	Never admissible (must take W's answer)
	[**CA**] Not admissible, except in **criminal** cases (**Prop 8**) for acts of **moral turpitude**, via cross-examination and extrinsic evidence, subject to balancing of PV and UP	
Poor **reputation** or **opinion** for truthfulness—call a witness	–	Anything (usually testimony)
Prior convictions - Felonies (if PV > UP) - Any crime involving dishonesty - Other crimes within judge's discretion	- [**FRE**] Evidence of criminal Δ's conviction, up to 10 yrs old unless PV >> UP (**FRE 609**) - [**FRE**] Evidence of a previous judgment of felony conviction is also a hearsay exception to prove any fact essential to the judgment (**FRE 803(22)(C)**, see Prior judgments above) - [**CA**] Only **felonies** and **criminal misdemeanors** involving **moral turpitude** are admissible under **Prop 8**, subject to PV/UP balancing	
Bias, motive to lie, defective senses	Anything (involving, e.g., friend; parent; revenge; lack of perception, memory, knowledge)	

i. Rehabilitation: Show of W's truthfulness. Impeached W may be rehabilitated on redirect or by EE: W may explain original response; another W may testify to **rep** or **op** for truthfulness; pt may show prior consistent statement (only to defeat charge of fabrication) made before time of alleged motive to lie or exaggerate
ii. Impeachment need not positively controvert prior testimony (W2 can say he doesn't recall what W1 saw)
iii. A witness may be impeached by any party, including his own
iv. [**CA**] "**Moral turpitude**": Defined by a broad "readiness to do evil" standard, e.g., lying, violence, sex crimes, extreme recklessness. NOT: simple assault, drug possession, negligence, unintentional acts

d. Examination of witnesses: The judge (the court) may reasonably control the examination of witnesses and presentation of evidence to effectively ascertain the truth, avoid waste of time, and prevent harassment of witnesses
   i. Leading questions (suggesting the answer, e.g., "Isn't that correct?") are not allowed on direct examination
      1. EXCEPT to 1) hostile (antagonistic, unwilling) witnesses, 2) opposing witnesses, 3) child witnesses, 4) solicit background information ("You're licensed, right?"), or 5) refresh recollection
      2. Allowed on x-exam, BUT x-exams are limited to 1) matters brought out on direct exam and inferences naturally drawn therefrom and 2) matters affecting the credibility of the witness
      3. Showing W a document to refresh recollection is not "leading"
      4. Adverse W generally cannot be asked a leading question *by his own attorney* on x-exam
   ii. Other bases for objection to form of question: nonresponsive (answer to different Q or no answer, may be stricken by motion to strike), Q/A requiring speculation, compound question (more than 1 at a time), loaded question (assumes facts—answer requires unintended admission: "Have you stopped beating your wife?"), argumentative (prompts W to draw legal conclusion), calling for a narrative (asks for story, not facts)
   iii. The judge may call W upon his own initiative and interrogate any W who testify, as long as no partisanship

VI. PRIVILEGES (*Not provided by FRE but governed by common law. In CA, statutory and exempt from Prop 8*)
a. Attorney-client privilege: Communication between client and atty (or representative assisting w legal services, e.g., physician examining client) intended by client to be confidential and with purpose to seek legal advice is privileged (may refuse to disclose) *indefinitely*, even after death, unless waived by *client* ([**CA**] ends when estate distributed). Atty may invoke privilege on client's behalf. Voluntary disclosure waives privilege to disclosed material
   i. EXCEPTIONS: Comm furthers what client should have known was a crime or fraud, between former joint clients, dispute between atty and client, [**CA**] reasonably necessary to prevent death or serious bodily harm
b. Spousal testimonial privilege: Privilege not to testify against spouse in *criminal* cases ([**CA**] applies to civil/crim)
   i. Held by witness. Must be married *at time of testimony*. Covers observations and communications
c. Marital communications privilege: Privilege not to disclose private communication between spouses (civil/crim)
   i. Held by both. Covers confidential spousal comm'n from *during* marriage. Waived by known eavesdroppers
d. EXCEPTIONS to both spousal testimonial and marital communication privileges: suits against each other, crime against a spouse or either spouse's child, joint furtherance of future crime or fraud (spouses are co-Δ)
e. Psychotherapist-patient privilege: Confidential medical comm'n between professional and patient made w/ purpose of diagnosis or treatment. Patient holds privilege, but doctor may claim privilege on patient's behalf if patient cannot
   i. EXCEPTIONS: patient puts his condition at issue (e.g., personal injury suit), important to prevent injury to a person, sought to aid planning of crime or tort
   ii. Physician-patient privilege: Same as above. This is state created, so presume not applicable on MBE

VII. 6TH AMENDMENT CONFRONTATION CLAUSE (*Overrides hearsay exceptions, check co-conspirator admissions*)
a. **Any prior out-of-court testimonial statements by an unavailable declarant are inadmissible against CRIMINAL Δ, unless Δ has had prior opportunity to cross-examine the declarant at the time of statement**, absent forfeiture caused by Δ's wrongful act intended to keep the witness from testifying
   i. Testimonial statement: Solicited by the state for the primary purpose of statement during police interrogation was to prove *past* events potentially relevant to later criminal prosecution
   ii. Non-testimonial statement: Primary purpose of statement during police interrogation was to aid police during ongoing emergency
      1. However, the emergency can abate during the call, turning the statement testimonial

VIII. [**CA**] PROPOSITION 8
a. **Proposition 8 is part of the CA Constitution. Prop 8 makes all relevant evidence in a CRIMINAL case ADMISSIBLE, even if objectionable under the CEC, UNLESS it falls under certain EXCEPTIONS:**

In other words, this evidence is NOT admissible (**CHOP SUR**)

   i. Constitution: Exclusionary rules under the U.S. Constitution, e.g., confrontation clause, Miranda violation
   ii. Hearsay: Hearsay evidence remains inadmissible, but exceptions to the hearsay rule are still admissible
   iii. Open the door: Prosecution is still prohibited from offering evidence of Δ's or V's character before Δ opens
   iv. Privilege: Attorney-client privilege, spousal witness and marital communications privileges, physician-patient privilege, and all other privileges in existence since 1982 apply
   v. Secondary evidence rule: CA's version of best evidence rule still applies
   vi. Unfair prejudice: Prop 8 preserves **CEC 352**, giving judge discretion to exclude evidence if PV << UP
   vii. Rape-shield statutes prevent Δ from offering evidence of V's sexual conduct to prove behavior, unless V's prior sexual conduct was with Δ. If Π asks V about prior sexual conduct, Δ may cross-examine and rebut

b. In CA criminal cases, relevant evidence below may be admissible, subject to **CEC 352** balancing of PV and UP
   i. Impeachment of character for untruthfulness, admissible by **rep** or **op** testimony (same as under FRE)
   ii. Impeachment by prior convictions (felonies and criminal misdemeanors involving moral turpitude) and impeachment by prior bad acts involving moral turpitude, both admissible by x-exam or extrinsic evidence
c. **Approach**: CA court or law → state whether Prop 8 applies (crim) or not (civil). If yes, for each item of evidence:
   i. If an exception applies (likely) → analyze admissibility of evidence under CA rules (mostly similar to FRE but see below comparison table)
   ii. If an exception does not apply → evidence is admissible under Prop 8 → analyze judge's **CEC 352** discretion to exclude if PV << danger of unfair prejudice

Issue	Federal Rules of Evidence (FRE)/General Law	California Evidence Code (CEC)/CA Law
Proposition 8 (criminal cases)	N/A	Proposition 8 makes all relevant evidence in a CRIMINAL case ADMISSIBLE, even if objectionable under the CEC, UNLESS it falls under certain EXCEPTIONS
Relevance – Logical relevance	Evidence must be relevant for it to be admissible. It is relevant if it tends to prove/disprove a material fact	Evidence must be relevant for it to be admissible. It is relevant if it tends to prove/disprove a material fact in dispute
Relevance – Exclusions based on public policy	Subsequent remedial measure, settlement offers or negotiation, offers to pay medical expenses, withdrawn guilty pleas, liability insurance	
	N/A (but there are other exclusions)	Expression of sympathy Mediation statements and writings
Best evidence rule	"Best evidence rule" Duplicates (exact copy made mechanically) are admissible unless genuineness at issue or unfair	"Secondary evidence rule" Duplicates may be reconstructed by hand, admissible unless genuineness at issue or unfair
Witnesses – Competency	W must 1) have personal knowledge of the matter and 2) affirm/swear to testify truthfully	Same, and W must also understand the duty to tell the truth
Judicial notice	Judicially noticed facts are conclusive in civil cases, but jury may disregard in crim cases	Judicially noticed facts are conclusive in civil cases, but jury may disregard in civil or crim cases
Character evidence – Types of admissible evidence in criminal case where • **Δ opens the door or** • **Δ alleges self-defense in homicide**	Reputation or opinion evidence on direct exam Specific acts on cross-examination	Reputation evidence, opinion evidence, or specific acts on direct exam or cross-examination
	Π can rebut Δ's character evidence after Δ opens the door to say V is of bad *pertinent* character to show Δ's innocence	Π can rebut Δ's character evidence after Δ opens the door with V's *violent* character to show Δ's innocence (narrower than FRE) Domestic or elder cases: Π can initiate showing Δ's acts of domestic violence or elder abuse
Hearsay – Exemptions	Non-hearsay "exemptions"	Hearsay "exceptions"
• Prior inconsistent statements	Prior statement must have been given under oath	N/A – admissible even if not made under oath
Hearsay – Exceptions	**Where declarant is unavailable**	
• Statements against interest	Statements are against pecuniary, penal, or proprietary interest when made Against criminal liability, need corroborating circumstances of trustworthiness	Statements are against pecuniary, penal, proprietary, or social interest when made
• Dying declarations	Applies in homicide or civil actions only Declarant must have believed death was imminent (actual death not needed) + statement concerns what was believed to be imminent death	Applies in all civil or criminal cases Declarant must actually be dead + statement concerns what *did* cause the death
• Forfeiture by wrongdoing	Statements offered against a party who deliberately caused a declarant's unavailability	Applicable only where declarant was *killed or kidnapped* by person statement is offered against
• Others	N/A	Past physical or mental condition Threat of physical harm
	Where declarant is available or unavailable (availability immaterial)	
• Excited utterance	"Excited utterance" made w/o reflection which relates to a startling event while under excitement of startling event	"Spontaneous statement" made w/o reflection which relates to, narrates, describes, or explains a startling event while under excitement of event
• Present sense impression	"Present sense impressions" of what was perceived at time of event or immediately after	"Contemporaneous statements" explains own conduct made while engaged in conduct
• Past bodily condition	Admissible only if made to medical personnel for diagnosis, treatment, or testimony	Admissible only by child-abuse or child-neglect victim under 12 made to medical personnel for medical diagnosis or treatment
• Business records	Records of acts, conditions, events, transactions, opinions, or diagnoses	Conclusions, opinions, and diagnoses are not admissible as a business record
• Public records	1) Activities of office, 2) matter observed under duty to report (NOT if police observations in crim case), *or* 3) factual findings from investigation (in civil case or against gov't in crim case)	Admissible if made within scope of duty of public employee, made at or near time of event, *and* trustworthy source of information ← Not restricted to these FRE categories
• Learned treatises	Statements from authorities established as reliable by expert testimony or judicial notice	Only facts of general notoriety and interest

Testimonial evidence – Lay witness testimony	Opinion testimony or inferences by lay witness admissible only if 1) rationally based on W's perception (personal knowledge, 5 senses), 2) helpful to clear understanding W's testimony or to determining a fact in issue, and 3) not based on scientific, technical, or other specialized knowledge (unless grossly apparent)	Opinion testimony or inferences by lay witness admissible only if 1) rationally based on W's perception (personal knowledge, 5 senses), and 2) helpful to clear understanding W's testimony
Testimonial evidence – Expert witness testimony	Factors for reliability of expert opinion: 1) Generally accepted in relevant scientific community, 2) peer reviewed (capable of retesting), 3) published, 4) low error rate, 5) generally accepted in relevant field	Factor for reliability of expert opinion: Generally accepted in relevant field
Testimonial evidence – Impeachment – Prior bad acts, specific instances	W may be asked on cross-examination about specific act of misconduct probative of truthfulness (act of lying or deceit), subject to court discretion	Not admissible, except in criminal cases under Prop 8 for acts of moral turpitude, via cross-examination and extrinsic evidence, subject to balancing PV and UP
Testimonial evidence – Impeachment – Prior convictions	Admissible: Evidence of criminal Δ's conviction for felonies and crimes involving dishonesty, up to 10 years old unless its probative value substantially outweighs prejudicial effect	Admissible: Evidence of felonies involving moral turpitude, subject to PV/UP balancing. Evidence of criminal misdemeanors involving moral turpitude
Moral turpitude	N/A	Defined by a broad "readiness to do evil" standard, e.g., lying, violence, sex crimes, extreme recklessness. NOT: simple assault, drug possession, negligence, unintentional acts
Privileges – Attorney-client privilege	Client holds privilege to refuse to disclose communication indefinitely, even after death	Privilege ends when deceased client's estate has been distributed
• EXCEPTIONS	N/A (but there are other exceptions)	Disclosure is reasonably necessary to prevent death or serious bodily harm
Privileges – Spousal testimonial privilege	Applies to criminal cases only	Applies to civil or criminal cases

Sample

DIVERGENT ISSUES	ABA	CA
Duty of competence Rule 1.1	L must have legal knowledge, skill, thoroughness, and preparation reasonably necessary to represent a client	L may not intentionally, recklessly, or repeatedly fail to perform legal services with competence Competency includes the duty to supervise the work of subordinate L and non-L employees
Duty of diligence Rule 1.3	L must act with reasonable diligence and promptness in representing C	L may not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing C
Duty of loyalty – conflict of interest (COI) Rule 1.7	L may not accept or continue representation of C, without informed written consent (IWC) from C, if (1) the representation is directly adverse to another C or (2) there is a significant risk that representation of C will be materially limited by L's responsibilities to another C, former C, or personal interest of L, UNLESS L obtains informed written consent (IWC) from Cs + L reasonably believes he can competently and diligently represent each C	
		Or (3) L has legal, business, financial, professional, or personal relationship w/ party in same matter
Duty of loyalty – COI Sexual relations with C Rule 1.8 / Rule 1.8.10	L may not engage in sexual relation with C (even consensual), unless it preceded AC relationship	Same, or unless C is L's spouse or registered domestic partner
Duty of loyalty – COI Loans to client Rule 1.8 / Rule 1.8.5	L cannot provide financial assistance to C in connection with litigation, except for… - Advancing litigation expenses (repayment may be contingent on outcome) - Paying litigation expenses for an indigent C	
	–	L may lend money to C for any purpose based on C's written promise to repay
Duty of loyalty – COI Interest in subject matter Rule 1.8(i) / Rule 1.8.1	Proprietary interest in cause of action or subject matter of litigation is allowed only to acquire lien to secure fees, or reasonable contingency fee	Not explicitly prohibited to secure proprietary interest. But see interests listed under business transactions (§ I-c-iii)
Fees Standards Rule 1.5	Fees cannot be "unreasonable" Factors include: novelty and difficulty of legal issues, time limitation, nature of relationship w/ client, experience, contingency	Fees cannot be "illegal or unconscionable" CA also factors in: amount in proportion to value of services, relative sophistication of attorney and client, client's informed consent to fee
Fees Agreements Rule 1.5 / Cal. Bus. & Prof. Code § 6147	Fee agreement is *preferably* in writing, except for regularly represented clients w/ same basis or rate	For *non-contingency cases*, written agreement required only if reasonably foreseeable will > $1k
	Contingency fee agreement *must* be in writing	
Fees Third-party compensation Rule 1.5 / Rule 1.8.6	May accept compensation from someone other than C only if 1) C gives *informed consent*, 2) there is *no interference* with L's independence of professional judgment or with AC relationship, and 3) C info is *kept confidential*	May accept compensation from someone other than C only if 1) C gives *informed written consent (IWC)*, 2) there is *no interference* with L's independence of professional judgment or with AC relationship, and 3) C info is *kept confidential*
Fees Referral fees Rule 7.2 / Rule 1.5.1	Referral fees are generally prohibited (except nominal gifts)	"Pure referral fee" permitted. L may be compensated without involvement in the matter
Fees Fee splitting Rule 1.5 / Rule 1.5.1	1) Division is proportional to work done by each lawyer, 2) C agrees in writing, and 3) total fee is reasonable	1) Ls enter into written agreement, 2) C gives written consent, 3) total fee not increased
Fees "True retainer" Rule 1.5	–	L and C may agree in writing to *non-refundable* fee to ensure L's availability
Fees Arbitration	–	C may elect arbitration of dispute of L's fees, unless agreed in writing to mandatory arbitration
Safekeeping property Rule 1.15	Depositing L's funds in C trust account permitted to extent reasonably necessary to pay bank charges	
	–	EXCEPTION: Advance flat fee w/ written notice
Duty of confidentiality Rule 1.6	L must not reveal information relating to the representation of C w/o informed consent of C, EXCEPT:	
	L may reveal to the extent L reasonably believes necessary to prevent reasonably certain death or substantial bodily harm, to prevent crime/fraud likely to cause substantial *financial* harm, to get ethics advice. Suit against client (including to collect fees). Compelled by law or court order	L may reveal to the extent L reasonably believes necessary to prevent a *criminal act* that L reasonably believes is likely to result in death or substantial bodily harm, after dissuading C and informing C that info can be revealed

Sample

Organization as client (potential Business Associations crossover) Rule 1.13	When L knows that action of (rogue) officer or employee is likely to result in substantial injury to the org, L must proceed as is reasonably necessary in the best interest of the org	
	–	L must not violate duty of confidentiality (except to prevent death or substantial bodily harm). If this fails, L has a right or duty to withdraw
Termination of representation (mandatory) Rule 1.16	Termination is mandatory if representation will result in violation of the rules or other law, L's physical or mental condition materially impairs ability to represent client, or L is discharged by C	Termination is mandatory if L knows or should know that representation will result in violation of rules, L's physical or mental condition renders it unreasonably difficult to carry out representation effectively, L is discharged, or frivolous litigation
Withdrawal of representation (permissive) Rule 1.16	C insists on action L considers repugnant, crime or fraud, unreasonably difficult. C agrees to termination. Other good cause	← Any of these rules except repugnant action, or C insists on action not warranted under existing law, or continued representation is likely to result in violation of these rules
Malpractice suit v. L	C needs written notice and reasonable opportunity to seek independent counsel before settling	
	–	Criminal Δ who sues a lawyer for malpractice must make a colorable claim of actual innocence Will or trust: Intended beneficiary known to L may also hold L liable for malpractice
Duty of candor False evidence Rule 3.3	If L *reasonably believes* testimony will be false, *must* still allow Δ to testify If L *knows* Δ's testimony will be false: Try to dissuade C, ask court to withdraw, or testify in narrative	
	If this fails, disclose false evidence to tribunal as reasonably necessary	Same, unless confidential (except to prevent death or substantial bodily harm)
Lawyer as witness Rule 3.7	L may not advocate at a trial where L is likely to be a witness, UNLESS testimony relates to uncontested issue, nature and value of legal services, or substantial hardship on C	L may not advocate at a trial where L is likely to be a witness, UNLESS testimony relates to uncontested issue, nature and value of legal services, or L obtained client IWC
"Threat rule" Rule 3.10	–	L may not threaten *criminal*, administrative, disciplinary charges to gain advantage in *civil* case
Solicitation (generally prohibited) Rule 7.3	–	Runner/capper: Cannot give anything of value to a person for recommending the lawyer or services, or reward a person for a recommendation made that resulted in employment, except for reasonable media cost
Sale of practice Rule 1.17	*Entire* practice must be sold, must cease practicing law in the geographic area	Sale of *substantially* all of practice allowed
Grounds for discipline after admission Rule 8.4	L may not violate the rules or knowingly assist or induce others, or commit a criminal act or engage in conduct that reflects dishonesty	Same, and L may not commit felony, crime, or act involving "moral turpitude, dishonesty, or corruption"
Duty to report misconduct Rule 8.3 / Rule 8.3 (in effect August 2023) and Cal. Bus. & Prof. Code § 6068(o)	If L *knows* (suspicion or speculation insufficient) of another L's violation of rules that raises a substantial question as to the honesty, trustworthiness, or fitness as a lawyer, L has ongoing obligation to report to an authority	If L knows (credible evidence) of another L's criminal act under CA law or conduct involving dishonesty, fraud, deceit, reckless/intentional misrepresentation, or misappropriation of funds that raises a substantial question as to honesty, trustworthiness, or fitness as a lawyer, L must report to State Bar Self-reporting required if sanctions > $1k, 3 suits were filed v. L within 1 year, or facing felony charges
Unauthorized practice of law (UPL) Rule 5.5	L cannot engage or aid in the unauthorized practice of law	
	–	L may hire and properly supervise a disbarred, suspended, resigned, or involuntarily inactive member to do non-attorney work

Sample