

MAGICSHEETS | EVIDENCE 1/4

- I. RELEVANCE (small hurdle but check for *each* item of evidence)
- 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*”)
 - Legal relevance: FRE 403 (CEC 352)** applies to balance probative value (PV) w/ risk of prejudice. A judge has broad discretion to exclude relevant evidence if its PV is substantially outweighed by the danger of unfair prejudice (UP) (e.g., gore, heroin), confusion of the issues, waste of time (e.g., speculative answer), or misleading the jury
 - 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
 - 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
 - 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
 - Offers to pay medical expenses (FRE 409)** are inadmissible. Accompanying admissions may be admissible
 - Withdrawn guilty pleas:** Inadmissible as too prejudicial, minimal PV (but can waive inadmissibility)
 - 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
 - [CA] **Expression of sympathy** relating to accident V inadmissible in civil cases, other admissions severable
 - [CA] **Mediation statements and writings** inadmissible in discovery or proceedings (can waive)
- II. PRELIMINARY FACTS
- Judge is not limited by evidence rules when determining preliminary facts (e.g., competency) except w/r/t privileges
 - Authentication:** Real or written evidence requires proof to support a jury finding that it is what the proponent claims
 - Authentication generally requires witness’s first-hand knowledge or familiarity. Preponderance not needed
 - Self-authenticating docs:** *certified* public and business records, trade inscriptions ([CA] N/A), official pubs
 - 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
 - Only applies if content is in dispute (K, will, defamation) or where the testimony depends on the writing
 - 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
 - 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
 - Competency of witness:** W must 1) have personal knowledge of the matter and 2) affirm/swear to testify truthfully
 - Judge and jurors are incompetent to testify at trial. No need to object if judge testifies
 - [CA] W must understand duty to tell the truth. Judge and jurors incompetent but may testify if no objection
 - 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
 - Judicial notice** allows a party to “prove” an adjudicative (non-collateral) fact by the court’s recognition
 - Judge *must* take judicial notice if a party requests and supplies necessary information
 - Judicially noticed facts are conclusive in civil cases, but jury may disregard in crim cases ([CA] civil/crim)
 - 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 (susceptible to probative value v. unfair prejudice balance)
- Character describes one’s disposition with respect to general traits** (good driver, trustworthy, etc.). **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 [charged act] in this case.)
 - Ways to prove: **reputation**, **opinion** (can test basis by asking whether W knows of a particular conduct), **specific acts**
 - EXCEPTION [crim only]: Δ opens the door or Δ alleges self-defense in homicide – rep/op on direct exam + sp on x-exam** ([CA] **rep/op/sp on direct and x-exam**)
 - Δ opens the door** to say Δ is of good *pertinent* character (W testimony puts Δ character in issue)
 - Δ opens the door** to say V is of bad *pertinent* character (except sexual in rape cases) to show Δ’s innocence
 - [CA] Π can rebut only after Δ’s evidence of V’s violent character (narrower than FRE)
 - Only then may Π rebut Δ/V’s character w/ **rep/op** (call own W), or **x-exam W** on specific instances only
 - [CA] Domestic or elder cases: Π can initiate showing Δ’s acts of domestic violence or elder abuse
 - EXCEPTION: Other purposes – Δ’s MIMIC (FRE 404(b)) or prior act of sexual assault (413–415) – sp**
 - EXCEPTION: Defense or cause of action where character is an element at issue – rep/op/sp**
 - Defamation (B said A is a thief). Defenses: reputation testimony, truth (A is indeed a thief)
 - Negligent hiring (bring up all traffic offenses of employee)
 - Negligent entrustment (loan car to someone, should have known not a good idea to lend it)
 - Child custody (fitness as parent)
 - Self-defense: Survivor’s reasonable belief of imminent deadly harm
 - Entrapment: Δ had no predisposition commit the crime – but raises predisposition element for Π to rebut
 - 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 org. Look for 2+ occurrences, “always,” “every day,” “frequently,” “instinctively”

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

MAGICSHEETS | EVIDENCE 2/4

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. **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 (notice, knowledge, motive), knowledge of speaker, state of mind (evidence of insanity, belief)
- a. Non-hearsay exemptions ([CA] fall under “exceptions”) (“**prior**” statements need declarant’s availability)
 - i. Prior inconsistent statement: To admit a prior statement inconsistent with declarant’s in-court testimony, declarant must be *available* [FRE] and the prior statement must have been *given under oath*
 - ii. Prior consistent statement 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 statement 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-II/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/criminal]
 - 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* kill him
 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 might arrange 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
 - ii. **If declarant is available or unavailable** (availability is immaterial)
 1. Excited utterances ([CA] spontaneous statement): While under excitement of startling event, a statement made w/o reflection which relates to ([CA] narrates, describes, or explains) the event
 2. Present sense impression: Statement of what was perceived at time of event or immediately after
 - a. [CA] Contemporaneous statement explaining conduct made while engaged in the 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
 - i. [CA] Only by child-abuse or child-neglect victim under 12 made to medical personnel for diagnosis or treatment

Look for...

Emotional state →

Timing →

MAGICSHEETS | EVIDENCE 3/4

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] Conclusions, opinions, and diagnoses are not admissible as a business record
 - 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 evidence (no hearsay problem because evidence itself is offered into evidence)
7. **Past recollection recorded:** A record that is on a matter 1) testifying witness 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:** Records made within scope of duty of a public employee, entered at or near time of event. Records setting forth the following are admissible: activities of the office or agency, description of matters observed pursuant to duty (inadmissible if untrustworthy or [FRE] police observations in criminal case), factual findings from investigation by authority (only in civil cases or [FRE] if used against gov't in criminal cases)
 - a. A police record not qualifying as a **business record** may be admitted under this exception
 - b. **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
 - c. **Prior judgments:** Felony conviction admissible against Δ to prove an essential fact
- 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** that are established as reliable authority ([CA] only facts of general notoriety and interest)
- vi. **Catchall:** 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:** Can testify as to opinions or inferences only if testimony is 1) rationally based on perception (personal knowledge, 5 senses), 2) helpful to a clear understanding to determination of a material fact or of his own testimony, and 3) [FRE] not based on scientific, technical or other specialized knowledge (unless grossly apparent)
- b. **Expert witness testimony** must meet requirements to be admissible: 1) Specialized knowledge helpful to jury, 2) qualified as expert, 3) reasonable certainty of opinion, 4) testimony based on proper facts or data, 5) testimony 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. [CA] Reliable if generally accepted
 - i. Expert witness may testify as to an ultimate issue. Not appropriate: conclusory legal opinions, criminal Δ's mental state if element of crime or defense
- c. **Impeachment refers to the casting of an adverse reflection of the truthfulness of a witness to discredit him**

Impeachment method	Intrinsic ("Isn't it true YOU...")	Extrinsic ("HE did...") – may also be hearsay
Prior inconsistent statements (PIS)	X-exam (including collateral/non-material matters, e.g., different sock colors, reason for why W was out)	Non-collateral only: Relate circumstances to recall (may be <i>after</i> PIS admitted to evid) + give W opp to explain/deny + give other side opp to interrogate
Prior bad acts re: truthfulness (act of lying or deceit)—cross-examiner needs good-faith basis first	X-exam (ct has discretion to allow)	Never admissible (must take W's answer)
Poor reputation/opinion for truthfulness—call a witness	–	Anything (usually testimony)
Prior convictions - felony (if II shows PV > UP) - <i>crimen falsi</i> (dishonesty crimes) - otherwise w/in judge's discretion	- Evidence of felony conviction up to 10 years old, unless PV >> UP - Evidence of felony conviction is also a hearsay exception to prove any fact essential to lead to judgment (FRE 803(22)(C)) - [CA] Only felony involving moral turpitude is admissible, subject to PV/UP balancing - [CA] Only criminal misdemeanor involving moral turpitude is 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 drug possession, negligence, unintentional acts

MAGICSHEETS | EVIDENCE 4/4

- 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 (unwilling) witnesses, 2) adverse witnesses, 3) child witnesses, 4) solicit preliminary background information (“You’re licensed, right?”), or 5) refresh W’s 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 are governed by common law. In CA, statutory and exempt from Prop 8)
- a. Attorney-client privilege: Communication between client and atty (or representative employed to assist in rendering legal services, e.g., physician examines client at atty’s request) intended by client to be confidential and made with *purpose* to seek legal advice is privileged indefinitely, unless waived by *client* ([CA] ends when estate distributed). Attorney may invoke privilege on client’s behalf. Voluntary disclosure waives privilege w/r/t/ disclosed material
 - i. EXCEPTIONS: Furthers what client should have known was a crime or fraud, between former joint clients, dispute between attorney 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 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. Physician- (state created—presume N/A in MBE) / psychotherapist-patient privilege: Confidential medical communication between professional and patient made with *purpose* of diagnosis or treatment. Patient holds privilege (doc 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/tort
- 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 x-exam 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. **Prop 8 is part of the CA Constitution. Prop 8 makes all relevant evidence in a CRIMINAL case ADMISSIBLE, even though objectionable under the CEC, UNLESS it falls under certain EXCEPTIONS (CHOP SUR):**
 - i. Constitution: Exclusionary rules based on U.S. Constitution, e.g., confrontation clause, Miranda violation
 - ii. Hearsay: Hearsay evidence remains inadmissible, and 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, spousal witness and marital communications, physician-patient, 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 << danger
 - 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 x-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, criminal misdemeanors involving moral turpitude) and impeachment by prior bad acts involving moral turpitude, both types admissible by x-exam or EE
 - 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 ordinary CA rules
 - 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