**EVIDENCE**

全体構造

 Is The Evidence Admissible?

1 relevance

① Logical relevance **401**

② Legal relevance a) Rule **403,** b) Public Policy, c) Character evidence

2 Proper presentation?

・Writings and other Physical Evidence = 1) Authenticated 2) Best evidence rule

・Testimonial evidence =Competency 1) must have personal knowledge (除expert)

2) must take an Oath or Affirmation

特則 ①Witnesses USE of Documents ②Opinion Testimony ③Witness Credibility

3 NO ①Hearsay ②Privileges 特則: Judicial Notice

 Writings : 1) relevant 2) authenticated 3) original 4) not hearsay 5) not privileged

 Testimony : 1) relevant 2) competent (personal knowledge) 3) not hearsay 4) not privileged

**Logical Relevance**

In order to be admissible, evidence must be logically and legally relevant.

Evidence is relevant if

**1) it has any tendency to make a fact more or less probable than it would be without the evidence,**

**2) and the fact is of consequence in determining the action. Rule 401.**

**原則** relevant evidence =1) probative value ＆ 2) material (＝of consequence=重大な)

CA requires the fact of consequence to be in **DISPUTE**.

**Exceptions**

Usually evidence is irrelevant if it is not **about the specific people and events** in issue.

**1 Habit rule 406**

1) Evidence of a person’s **habit** or an organization’s **routine practice** may be admitted

2) to prove that on a **particular** occasion the person or organization **acted in accordance**

**with** the habit or routine practice.

Habit = one's regular response to a repeated specific situation. **コメント**

 ※ MBE: look for the words “instinctively” “automatically” ×usually, often, frequently

※ Frequency＆**Particularity**が必要（後者がないとcharacter evidence）

× good driving record ∵no particularity, habitではなく評価

 × Dはスピード違反で三回も今月つかまってます⇒だから今回もスピード違反はダメ ∵no particularity

e.g. いつも送ったら綴じているファイルから取り出した請求書を請求した証拠に使えるか？

　　 → OK ∵organization’s routine practice

 e.g. 保険が切れる前に通知をいつもどう送っていたかを証言し，今回も送ったはずと立証

※ negative habit evidenceもＯＫ

※ habitでreputationは立証できない ∵性格証拠になる

**・Industry Custom** → admissible to prove standard of care

**2** **Similar occurrences**

General Rule: Usually irrelevant, and then inadmissible.

Exception

Plaintiff's Accident History 事故歴、訴訟歴は原則×

→ admissible IF: to prove 1) a pattern of fraud 　　　 　　　 例:保険金詐欺の計画

2) preexisting condition 例:ケガが前の事故で起こったこと。

Similar Accidents Caused by Same Event or Condition

→ admissible IF the other accident occurred under **substantially similar** circumstances:

1) to show **the existence of a dangerous condition**;

2) to show **causation** of the accident; OR

3) to show prior **notice** to defendant.

 例 two people eating same food and both get food poisoning

 ・多数説は、同種の事故や苦情が無かったことを過失否定の証拠として認めない（関連性なし）

 = absence of similar accidents is generally not admissible to show an absence of negligence.

例: ×1000人が利用したが一つの事故もなかった

Intent in Issue

Prior similar conduct may be admissible **to prove intent.** (to raise an inference of the

person's intent on a later occasion).

※ Absence of similar accidents may prove lack of knowledge.

Sales of similar property

 → admissible to prove **value**

**Legal relevance**: **Rule 403**

Even relevant evidence may be excluded

**if its probative value is substantially outweighed by the danger** of

① unfair prejudice ② confusing the issues ③ misleading the jury ④ wasting of time

① unfair prejudice ② confusing the issues ③ misleading the jury

④ undue delay or waste of time ⑤ needlessly presenting cumulative evidence

・ポリグラフ検査の結果は不可が多数派判例（ポリグラフ検査の結果を問うことも×）

・autopsy photoが①で争われることも多い

・statistical probabilityも基本的には不可（誤認逮捕率は１％以下という証言）

　→しかしDNA検査結果についてはかなり認められている

・反対尋問ができない状況であることが典型的なprejudice

・‟substantially”なのでprobative valueを優先。The test favors the admissibility.

**1. Policy-based exclusion**

① Liability Insurance 　　　　　　　　 ② Subsequent Remedial Measures

③ Compromise Offers and Negotiations　 ④ Offer to Pay Medical Expenses

⑤ Plea Discussions in Criminal Cases

　　　　①**411:** Evidence that a person was or was not insured against liability is not admissible

×to prove whether the person **acted negligently** or otherwise wrongfully.

〇But the court may admit this evidence for another purpose,

 such as proving a witness’s **bias** or prejudice, **agency, ownership**, or **control**.

　　　　　　　　　　（放火事件で，最近高額の火災保険を掛けたことはOK）

 〇所有権,コントロールの証拠 control → c.f.：independent contractor

 〇弾劾目的

×life insuranceは含まれない

 　・invite higher awardsの恐れを403テストではチェックが必要

CA not insuredは含まれない

②**407:** When measures are taken that would have made an earlier injury or harm **less**

**likely to occur,**

evidence of **the subsequent measures** is not admissible to prove:

1) **negligence**; 2) culpable conduct;

3) a **defect** in a product or its design; or 4) a **need for a warning** or instruction.

But the court may admit this evidence for another purpose, such as

impeachment or

— if disputed — proving a) **ownership**, b) **control**, or

c) **the feasibility of precautionary measures**.

 〇弾劾目的 〇所有権,コントロールの証拠 〇安全化の容易性 **(注：争いが必要)**

・人間の是正行為も含まれる　例:ドラッグリハビリセンターに入所

　　　　③**408** ×所有権,コントロールの証拠 〇弾劾目的　※他の事由と違い和解交渉下の言動もダメ

Evidence of the following is not admissible

a) to prove or disprove **the validity or amount of a disputed claim**

or b) to **impeach by a prior inconsistent statement** or a contradiction.

(1) furnishing, promising, or **offering**－**or accepting**, or promising to accept－

**a valuable consideration in compromising the claim** and

(2) conduct or a statement made **during compromise negotiations** about the claim

— except when offered in a criminal case and when the negotiations related to a claim by

 a public office in the exercise of its regulatory, investigative, or enforcement authority.

 = 捜査機関等との和解的な話は刑事事件において証拠能力あり

**・the claim is disputed as to liability or amount**が必要

　例：水道工事の翌日に漏水。工事屋に電話したときの「すぐに行って，無料で修理します！」

という発言→ 該当せず ∵ no pending dispute (和解提案前に争うことが実務上重要)

Exceptions. The court may admit for another purpose, such as proving a witness’s

**bias or prejudice**, negating a contention of undue delay, or proving an

effort to obstruct a criminal investigation or prosecution.

×「脱税で起訴しないと約束してくれればすぐに1万ドルを払います」という匿名手紙

 ∵not attempt to compromise a claim which is in dispute. offered in a criminal case,

 negotiations related to a claim by a public office in the exercise of enforcement authority.

 ・(2)但書から刑事事件でもliabilityに争いがある時に適用はある。しかし，同但書の通り適

 用範囲は限定 (かなりマニアな論点, 刑事はguilty pleaだけと覚えればよい)

　　　　④**409** ×to prove the liability（disputed claimは要件でない）

 　　 ・Other statements made in connection with offer →OK

Evidence of furnishing, **promising to pay**, or offering to pay **medical**, hospital, or similar **expenses resulting from an injury** is not admissible to prove liability for the injury. ※ 葬式代も入る ∵similar expenses

⑤**410** ×1) **offer** to plead guilty

2) guilty plea **later withdrawn**

3) **nolo contendere** plea (plea of no contest)

 　　　　関連答弁 = a statement made during a proceedingも証拠排除される。

※ 本来はadmission (hearsay例外)

※ not admissible against the defendant → 他の人相手には利用可能

**2. Character Evidence**

※ 人間のみ, よく噛む犬であるという名声は**not character evidence**

※ Legal Relevanceの一部, rule 403の補足的位置 (essayではprior bad actsはここで論じる

∵実務的にはrelevanceなしとされる場合も多いが,するとこの論点が上手く出ない.)

**考え順**

**1) 性格証拠 (含むprior bad acts)を同性格と一致した行動をとる立証目的に使っているか**

**以下は立証目的が違う 1) character at issue ：性格や悪行が要件事実**

**2) impeachment 　 ：一部の有罪判決や反対尋問での悪行**

**3) MIMIC　　　　　　　　　　　　 ：動機，同一性など balancing testの上**

**以下は性格証拠でない a) habit b) similar occurrence**

 **2) 刑事例外に該当するか**

**a) 性的暴行・幼児性的虐待をしたこと（連邦は民事も？）**

**b) 被告人の関連性格評判防御的使用 (暴力事件で平和的名声，詐欺事件で正直名声等)**

**→を反駁する①被告人の悪評, ②被告人の悪行＠反対尋問**

**c) 被害者の関連性格評判 (通常正当防衛における暴力的性格だけ)**

**→を反駁する①被害者の名声, ②被告の悪評 (OK悪行＠反対尋問)**

**※ 関連しても被害者の性的志向等は原則不可（例外：①同意 ②物証反駁）**

**In general**.

**FRE404(a)**

Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person **acted in accordance with** the character or trait.

**FRE404(b)**

Evidence of **a crime, wrong, or other act** is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. Essay Tip: a crime or wrongが出て来たら論じる.

・Character = Person’s general propensity and disposition (通常honesty, peacefulness, violence)

※ Habits = fixed pattern of behavior→ Character = general tendency to behave in a certain ways

※ Character is rarely in issue ⇔ The credibility of a witness is always in issue

 →Evidence that a witness lacks credibility is independently admissible under the Impeachment Rules.

 Rule404C: (defendant, victim含む) 弾劾目的での使用可能

民事刑事共通例外

Prior sexual assault ＆ Child molestation are OK **to prove conduct** CAはcriminalのみ

民事例外

必須要件（specific actsまでOK. 民事にしかない）※ subject to 403 balancing !

a person's character is an **essential element** of a charge, claim, or defense **Rule405**

1) Negligent hiring ＆ Negligent entrustment.

2) Defamation (None in criminal case).

　・「被告人は泥棒として有名」は要件事実であるとともに損害額確定のためにも重要事実

3) Child Custody

※ wrongful deathでもvalue is dependent on his character.損害額確定のためにも必要

刑事例外　民事に適用無し！

例外①**404**　被告人の防御のための使用 ×specific acts 〇reputation＆opinion

Dの性格

A defendant may offer evidence of the defendant’s **pertinent** trait

※ 殺人事件でtruthfulnessの性格証拠は提出不可 ∵not pertinent

 A crime of violence → Peacefulness is the pertinent trait

 A crime of fraud → Honesty is the pertinent trait

⇒If the evidence is admitted,(**Once defendant opens door)**

the prosecutor may offer evidence to rebut it;

a) P can **cross examine** D’s witness regarding the basis for her testimony, including

 whether **she knows or has heard of** **specific instances** of the D’s misconduct.

b) P can call another witness to testify to the defendant’s bad **reputation or their**

**opinions** of D’s character.

Vの性格

Subject to the limitations in [Rule 412](https://www.law.cornell.edu/rules/fre/rule_412), a defendant may offer evidence of an

alleged victim’s **pertinent** trait. (強姦特例例外有り)

⇒ If the evidence is admitted (**Once defendant opens door),** P may

(i)　　　　　 offer evidence to rebut it; and (**good character of the victim)**

(ii) offer evidence of the **defendant’s same trait**…

 **(bad character of D, cross-examine specific acts OK)**

※ limited to the same character trait that the defendant has introduced.

例: 正当防衛に関して被害者の性格が典型例 ×specific acts 〇reputation＆opinion

　 　　 Evidence of **victim’s violent character** to prove that victim was **the first aggressor**

 **→** prosecutorはvictim’s good character for peacefulnessで対抗可

　　　　　　　　　　 ※ first aggressionのみ争点でVの性格が攻撃前の段階ではDの性格証拠は出せない

　　　　　　　　　　　　 問：正当防衛が争点。殺された被害者が前日「被告人のことを愛している」と言った

　　　　　　　　　　　　 答：character evidenceではない。but OK for state of mind exception

例: 暴行で起訴。被告人も被害者も正当防衛を主張

　　→reputation for peacefulnessはＯＫ, for trustfulnessは× ∵not pertinent trait

※ Specific actsが許される例外

She had a reasonable and justifiable **fear** of the victim because of V's violent

character, D may offer proof of specific acts of violence.

　　　 ※ 交通事故損害賠償で加害者のreckless driverという評判は× ∵civil case

殺人特例

in a homicide case, **the prosecutor** may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first

 aggressor. (even if D does not offer character evidence.)　No such rule

※ 被告人性格証拠提出前に被害者性格証拠出せる例外 ∵ 被害者死亡のため証言不可能

強姦特例 (以下**Rule 412：**victim’s pertinent trait例外の例外, 各州Rape Shield Law有り)

※ rape shield lawがなくてもnot relevant (or character evidence)として通常除外だが論争防止

 The following evidence is not admissible in a civil or criminal proceeding

(1) evidence offered to prove that a victim engaged in other **sexual behavior**; or

(2) evidence offered to prove a victim’s **sexual predisposition**.

“Sexual Behavior” ＝“all activities that involve physical conduct, sexual intercourse,

use of contraceptives, venereal disease and even fantasies or

dream”

“Sexual predisposition” ＝“evidence that does not directly refer to sexual activities or

thoughts but that the proponent believes may have a sexual

connotation for the factfinder” ex, dress, speech, mode.

Exceptions ※ exceptionも提出前にmotionが必要

(1) Criminal Cases.

1) specific instances of sex behavior with respect to D **to prove consent**

 (コメント例)

・sexual activities between the alleged victim and the accused

・the alleged victim expressed an intent to engage in sexual intercourse with the accused

・the word “behavior” should be construed to include activities of the mind, such

as fantasies or dreams→OK: inquiry into victim’s sexual fantasies with D CA**は×**

2) evidence of specific instances of sexual behavior by the alleged victim offered

to prove that **a person other than the accused was the source of semen,**

**injury or other physical evidence.** 例: 性病の原因は別の男だと立証

Not only the alleged victim in a particular case but also any witness who is an alleged victim of sexual misconduct.

3) evidence whose exclusion would violate the defendant’s constitutional rights

i.e. Due process Right to confront and cross-examine. (412の保護狭い)

(2) Civil Cases: if its probative value substantially outweighs the danger of harm.

例外②　**MIMIC Exceptions**

・**Prior bad conduct** to prove anything else that is relevant other than characters

a) Motive 　b) Intent 　c) Mistake or accident (absence of) (故意か事故か)

d) Identity e) Common scheme or plan

 1) the probative value >> the unfair prejudice ＆ 2) Limiting Instructionsが不可欠

例：放火事件において, 以前の火事で保険金を詐取したこと

　　→× character evidence = to show he acted in accordance with his character

〇 to show his motive

例：放火事件において, 妻を証言したら殺すと脅したこと

〇 to show his consciousness of guilt

例：強盗事件で，翌日大量の麻薬を生じしていたこと

〇 to show his motive →しかし, **×**∵the probative value <<the unfair prejudice

例：正当防衛を訴える被告人に対し, 以前の刑事事件で虚偽の正当防衛主張をしたこと

　　　× character evidenceそのもの

　　　Character evidenceの証人の条件

based on reputation　→ the witness must establish he is aware of the reputation in the relevant community.

　　　　based on opinion 　　　　　　　　　　　 → the witness must have sufficient knowledge to form an opinion.

**Writings and other Physical Evidence**

**Authentication**

All evidence, other than testimony, must be authenticated as genuine in order to be admitted.

 Oral statements must be authenticated in case where the identity is important.

**901:** To satisfy the requirement of authenticating or identifying an item of evidence, the

proponent must produce evidence **sufficient to support** a finding that the item is

**what the proponent claims it is**.

 **\***preponderance of evidence**による証明までは不要**

**How to Authenticate REAL EVIDENCE**

 **Physical evidence can be authenticated by**

**a) testimony of personal knowledge showing familiarity,**

 **b) chain of custody, or**

**c) distinctive markings or characteristics.**

a) **Personal knowledge** must be **distinctive.**

(e.g., Witness testifies “I recognize this gun as the one found at the crime scene.”)

b) **Chain of custody** must be **substantially unbroken.**

proponent must account for an item’s whereabouts from the time of issue until trial.

**How to Authenticate WRITING (signatures)**

**Writings can be authenticated by** 1) testimony by a witness with personal knowledge,

2) proof of the handwriting (訴訟提起後の素人の知識は不可), or 3) circumstantial evidence.

 Direct evidence

1) testimony by a witness with personal knowledge

※ 有罪判決を聞いた人の証言は出せる ∵ authentication by first knowledge (伝聞の問題は後述)

Certified copyはauthenticationの問題。best evidence ruleはirrelevant

 2) proof of the handwriting (lay witness familiar with writing, expert comparison, jury comparison).

3) admission

Indirect evidence

4) Circumstantial evidence (Reply letter referencing previous letter)

5) Ancient document rule

a) At least 20 years old (CA – 30 years)

b) Found in such a condition as to be free from suspicion as to authenticity, AND

found in a place where such a writing would likely be kept.

 ※ あくまでもauthenticationの問題。hearsayでなくなるわけではない。ただし，後述のinterest

in propertyに影響あるものは，hearsay exception　e.g., deed

Self-authenticating writings

公1) Certified copies of public documents (deeds, wills, etc.)

2) Official publications (government pamphlet)

3) Acknowledged documents (notarized documents)

　 他4) Newspapers and Periodicals

5) Business records (hearsay例外と同じ)　CA NO

6) Trade inscriptions (Tag or label) CA NO

7) Commercial paper (check, promissory note）

**特殊なAuthentication**

1. Photos

Witness must testify that the photo fairly and accurately depicts the particular scene.

i.e. doesn’t have to be photographer.

2. X-Rays – Must show:

1) The machine was in working order,

2) Operator was qualified to operate it,

And 3) Chain of custody of the x-ray.

3. Oral Recorded Statements

Voice may be authenticated by ANY person who has heard the voice at ANY TIME,

even after litigation has begun for the sole purpose of testifying. (訴訟提起後の知識でＯＫ)

Telephone Conversations – May be authenticated by a witness who testifies that

1) he recognized the persons voice,

2) speaker had knowledge of certain facts that only the speaker would have,

3) he called a particular number and the person answered as that particular person.

 例：“Two weeks later, Kiyo called me telephone”→ testify how he knew it was Kiyoがないと

 lack of authenticationとして違法

 = 電話主が「内田です」と言ったからといってauthenticateされない

 （文書に内田の署名があればauthenticateされないのと同様）

**Best Evidence Rule: 1002** ※書証のみに適用

**An original writing**, recording, or photograph is required in order **to prove its content** unless these rules or a federal statute provides otherwise.

 　　 Official Comment: Application of the rule requires a resolution of the question whether contents are

 　　sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a

 　　written record of it was made. If, however, the event is sought to be proved by the written record, the

 　　rule applies. For example, payment may be proved without producing the written receipt which was

 　　given. Earnings may be proved without producing books of account in which they are entered.

 ※ Preferred evidence (=best evidence) to prove a matterがあるのに劣った証拠を出すのは禁じ

 られない。to prove the “content of the writing.”

= to prove that the content of the item offered is accurate, だけが禁止。

[**O'Brien v. Ed Donnelly Enterprises, Inc.**](http://federalevidence.com/pdf/2009/08-Aug/O%27Brien_v._Donnelly.pdf) **7 (6th Cir. 2009)**

マック店員の残業代請求。労働スケジュール表があるのに，口頭で労働時間を証言してもOK

To prove something **besides** the ‘content’ of the schedulesはOK

 There are only two situations

**Only when the material terms of a writing is at issue, the original writing is required.**

 → 1) The writing, recording, or photo has independent probative value or

2) The witness is testifying relying on the writing.

 但しThe rule only applies to material term. Not to collateral documents, as said below.

**×** where a fact to be proved has a source independent from the writing.

 ※「娘の結婚が新聞に出ていたので日付を覚えている」という証言で新聞の提出必要？

The witness is testifying relying on document, the writing must be produced. However, it does not apply where the item is not closely related to a controlling issue. →不要

例:名誉毀損発言がテレビ放送。スタジオで被告が名誉毀損発言をしたことが要証事実であれば，録画内容に

independent probative valueはないので，録画提出必要なし。「放送されたこと」を証明したいのであれば

(contents of a videotape is issue = damage resulting from broadcastが立証命題)，録画内容を提出すべき

例: **×「**business recordに・・・と書いてある**」∵** business recordはhearsay例外だが原本必要

 **×**‟He enclosed a note, which said if I ever did it again I will be fired” enclose=囲う，同封する

 ※ the rule will seldom apply to ordinary photographs. コメント

　 ∵ Inapplicable to photographs when witness “adopts picture as his own testimony or

 uses the picture to illustrate his testimony.”

⇒ However, situations arise in which contents are sought to be proved. Copyright, defamation,

and invasion of privacy by photograph or motion picture falls in this category.

Similarly as to situations in which the picture is offered as having independent probative

value, e.g. automatic photograph of bank robber…

The X-ray → best evidence ruleが適用される場合が多い

但し・Rule 703 allows an expert to give an opinion based on matters not in evidence.

・Hospital records which may be admitted as business records … these reports need

not be excluded from the records by the instant rule.

**When will non-production of the original be excused?**

if the original 1) is **lost,** or cannot be found with **due diligence;** or,

2) has been **destroyed without bad faith;** or,

3) cannot be obtained with **legal process**.

**FRE 1001:** If data are stored in a computer or similar device, any printout or other output

readable by sight, shown to reflect the data accurately is an “original.”

**Don’t need originals**

(a) **Voluminous records** can be presented through a **summary** or **chart**,

 provided the original records would be admissible and they are available for inspection.

(b) **Certified copies** of **public records**.

(c) **Collateral documents**; the document is **unimportant** to the issues in the case.

**Duplicates**

**Rule1003** A duplicate is admissible to the same extent as the original

unless **a genuine question** is raised about the original’s authenticity.

duplicate＝copy produced by same impression that produced original

 　 　　　 ○ carbon copy, photocopy, photo × Handwritten

※Video画面のPhotoもduplicateにあたる→ best evidence rule違反にならずに提出可

CA: duplicateとoriginalとの区別をしない

**Testimonial Evidence**

※ The court **shall** exclude the witness.

(法廷からの退席が必要。証言終っていてもさらに聞かれる可能性があれば同様, 在廷許す裁量無し)

**Competency**

Witness 1) must have **Personal Knowledge** and

2) take an **Oath or Affirmation** to tell the truth.

 連邦– 4歳の子でも証言できる。特別にPがcompetenceを立証する必要はない。

　・first knowledgeがあったか証明不要, whether a reasonable juror could find that the witness is

speaking on the basis of personal knowledge. easier to satisfy than “more likely than not”.

 ・prior jury service in a case involving a party does not render the witness incompetent.

CA – must also **understand legal duty to tell the truth.**

CA – disqualifies a **witness who has been hypnotized to refresh recollection,**

except in criminal case, Witness hypnotized by police using procedures to

protect against suggestion. **hypnotize＝催眠術をかける，催眠誘導をする**

Dead Man Acts – An interested party in the lawsuit is **incompetent** to testify to a personal

transaction or communication with a **deceased**.

・権利義務が法的にbindingされる関係のある者のみに適用（例executer, heir）

**Writings in aid of oral testimony**

**1. Present Recollection Refreshed**

**Basic rule**: Witness must testify on basis of **current recollection**.

**Refreshing Recollection:** But, if a witness **forgets** something he once knew,

he may be shown a writing to **jog his memory**.

※ **Any** writing or thing may be used to refresh a witness’s present recollection;

 1) Witness must first state that he has forgotten something;

 2) Witness may not directly read from the writing while testifying;

 3) The writing is notadmitted into evidence

 → the opposing party has a right to:

 a) **Inspect** it, b) Use it in **cross examination**, or c) **Introduce** it into evidence.

 **手続①copyを裁判官と相手方に渡す ②identificationのみのために呈示 ③証人に黙読させる**

**④書面を取り戻す ⑤証人に質問する**

 **※** privileged evidence**を利用すれば**waiver of the privilege occur**.**

**2. Past Recollection Recorded FRE 805(5)**

A writing may be **read to the jury** if: (Hearsay Exception参照)

**Opinion Testimony**

 **Layperson : must have first hand knowledge**

 **Expert : personal knowledge is not required**

**1. Lay Witness Opinion:** Lay opinion testimony is **admissible,**

if it is: (1) **Rationally** based on the witness’s **perception** (personal knowledge); and

(2) **Helpful** to the **jury　　　　　　　　　　　　　　　　　　　　701**.

 　 〇① Speed of a moving object　　　　　　　 ② general appearance or condition of a person,

③ emotion of a person, sense recognition, 　 ④ voice or handwriting identification

⑤ value of he own services, value of property ⑥ rational or irrational behavior, sanity or intoxication

×legal conclusions 例:D assaulted victim, He acted as an agent, An agreement was made.

×must not be based on scientific, technical, or other specialized knowledge

×Were you familiar with the term “consigliori” ? ∵improper opinion

**2. Expert Witness**:

①科学的、技術的、その他専門分野に関する意見や見解は、Expertによるものでない限り

inadmissible

②Expertであるかは裁判所が認定

③Expert Witnessの見解や証言は, relevantかつreliableと裁判所が一定の基準 (連邦では

Daubert基準)で認定しない限り, 証拠力は有しない。

論証パターン

A witness may testify its opinion if 1) he is qualified as expert, 2) it is helpful to the jury, 3) based on sufficient facts 4) and based on proper application of reliable principles.

Opinion testimony is admissible even if it addresses an ultimate issue (but in criminal case expert cannot testify whether defendant had the mental state to constitute the crime).

 条文

A witness **who is qualified as an expert** **by** knowledge, skill, **experience**, training, or **education may testify in the form of an opinion**… if:

(a) **the expert’s … specialized knowledge will help the trier of fact** to understand

the evidence or to determine a fact in issue;

(b) **the testimony is based on sufficient facts or data**; such as

a) Personal knowledge, b) admitted evidence,

c) inadmissible evidence **reasonably relied upon by experts in his particular field**.

(c) **the testimony is the product of reliable principles** and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Daubert standard – the court examines reliability by asking if

1) the method has been **tested,**

2) **the rate of error** is law,

3) the method has been subject to **peer review,**

4) the method has been **reasonably accepted.**

Frye standard CA – **generally accepted** by experts in the field.

 Case law: rape trauma syndrome ⇒ OK to explain the behavior of the woman

Rule 704. Opinion on **an Ultimate Issue**

(a) An opinion is not objectionable just because it embraces an ultimate issue.

〇legal conclusions　例A product is unreasonably dangerous

Cause of accident or death

The standard of care in a civil malpractice action

(b) **In a criminal case**, an expert witness must not state an opinion about **whether the**

**defendant did or did not have a mental state or condition that constitutes an**

**element of the crime charged or of a defense**. Those matters are for the trier of

fact alone.

・the diminished capacity defenseにおける被告人の精神状態やself-defenseにおけ

る精神状態についても (少なくとも結論的な意見は) 証拠にできない。

・児童心理学者の「彼がchild abuseをしたと思う」という証言は不可　∵beyond expertise

　CA　CEC805 permits an opinion on the ultimate issue.

 → ただし，通常improper opinion beyond expertise.

　　　　　※ 専門家は, may state an opinion without first testifying to the underlying facts or data: 705

※ あなたは大学で化学の単位を落としませんでしたか？

OK: P is permitted to challenge the witness’s qualification after the court permitted the testimony.

×: impeachment by bad acts ∵ truthfulnessと関係ない

**WITNESS CREDIBILITY**

**・**Cannot bolster own witness until that witness is being impeached by the other side.

 Hypo：性犯罪を受けた子供has no tendency to exaggerate or fantasizeという証言

⇒ Such bolstering testimony is not generally allowed Prop 8 may allow

但し Prior consistent statement is admissible to rebut a charge of recent fabrication.

**Impeachment (not hearsay if offered only to impeach)**

Methods of witness impeachment　to show witness is a liar, biased, or mistaken.

1. Prior inconsistent statements

**・矛盾供述は重要事実→しかし傍論についての外部証拠は出せない (反対尋問はOK)**

2. Bad character for truthfulness

**・ 有罪判決は偏見危険強いが重要→基本OKだが嘘に関わらない軽罪の有罪判決は外部証拠では出せない**

**・ 有罪判決されていない悪行は偏見危険強く信用性も疑問→反対尋問でのみOK**

3. Bias or prejudice extrinsic evidence原則〇

4. Sensory defects extrinsic evidence原則〇

　 **ダメは ① extrinsic evidence of bad acts (FS or Felonyの有罪判決以外)**

**② extrinsic evidence of** **prior inconsistent statements on a collateral matter**

 only **intrinsic evidence is admissible = only on cross-exam**

1) Prior inconsistent statements on collateral matter

2) Inquiry about bad acts (FS＆Felony**の**有罪判決以外)

1 Impeachment by **Prior Inconsistent Statement** (PIS)　**rule613**

Extrinsic evidence of PIS is admissible

 1) to impeach on a **material** matter. (to the issues in the case)

注:信用性判断において重要かではない Collateral matter=a fact solely affecting the credibility of a witness

⇔ Extrinsic evidence of PIS is inadmissible to impeach on a collateral matter.

 CA – admissible for all purposes (oathがなくても, 弾劾目的以外でも, 使える)

 2) if the witness is given the opportunity to explain or deny the statement before introduction

 ※ 典型は目撃者の警察への供述

※ 前発言自体を示す必要はない。「以前に別の供述しなかった？」→「ＮＯ」で十分。

　 但し相手方弁護士にはstatementの事前開示が必要

※　　伝聞発言者については同人が説明の機会なくても不一致供述提出可能

806. When a hearsay statement …has been admitted in evidence, the declarant’s credibility may

be attacked, and then supported, by any evidence that would be admissible for those

purposes if the declarant had testified as a witness. The court may admit evidence of the

declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the

declarant had an opportunity to explain or deny it.

※ prior omission(沈黙等)も含む. Ｄは「アリバイがある」と述べていた⇔そのことを最初は言わなかった

**PIS まとめ**

**連邦: Impeachment :基本的にOK 1) opportunity to explain 2) “material” for extrinsic evidence**

**Hearsay exemption　:基本的に適用ない: 例外1)今: subject to cross-exam 2)当時: under oath**

 **※ Former testimony if 1)unavailable 2) opportunity and same motive to cross examine**

**ＣＡ:** **全てＯＫ,** admissible for all purposes

2 Impeachment of a witness’ character for truthfulness

**Rule 609 :** Impeachment by evidence **Conviction of a Crime**

原則 The following rules apply to attacking a witness’s character for truthfulness by evidence of a criminal conviction:

(1) for any FS crime **must** be admitted (10年以内ならRule 403の適用なく必ず採用)

 \*FS crime=**crimes involving “dishonesty or false statement.”**

 (2) for felony (A) must be admitted, subject to Rule 403, in a civil case or in a

criminal case in which the witness is not a defendant;

 (B) must be admitted in a criminal case subject to Rule V>P

in which the witness is a defendant (刑事は立証責任転換，原則不可)

Felony ＝ the crime was punishable by death or imprisonment in excess of one year

 under the law under which the witness was convicted

FS 　　　＝ e.g. perjury, forgery, fraud… underlying factsから判断theft等は州による

 V>P ＝ **probative value of the evidence substantially outweighs its prejudicial**

 **effect** (＝reverse 403 test)

 例外 If more than 10 years have passed since the witness’s conviction or release

from confinement for it, whichever is later， apply to both (1)(2)

→ Evidence of the conviction is admissible only if: a) V>P　＆　b) notice

※ generally do not have much probative value CA no concrete time limit

※ Criminal conviction of **NO-FS Misdemeanors is inadmissible. ∵上記反対解釈**

※ If the conviction is admissible, then it may be proved with extrinsic evidence.

※ Juvenile convictions are inadmissible in general. (defendant以外では稀にOK)

※ Pardon – Conviction is inadmissible if pardon was based on innocence, or if the person

 pardoned has not been convicted of a subsequent felony.

CA – All **felonies** involving moral turpitude are admissible **subject to CEC 352.**

Felonies NOT involving moral turpitude are **inadmissible.**

※ Moral turpitude: almost anything except battery and mere negligence.

crimes of lying, violence, theft, extreme recklessness, and

 sexual misconduct.

CEC makes **misdemeanor** convictions **inadmissible** to impeach (involving FSでも)

however **Prop 8** allows misdemeanor convictions to be admitted in **criminal case** if

involving crime of **moral turpitude.**subject to 352.

**まとめ　Felonies involving moral turpitude → 全面OK**

**Misdemeanors involving moral turpitude → OK in criminal case**

**Felonies not involving moral turpitude → 全面ダメ**

**Rule 608.** FREはNon-Conviction Misconductに特別ルール無し，下記ルールで規制

(a) Reputation or Opinion Evidence ＝ OK, 但し良性格は攻撃後 (not bolstering)

A witness’s credibility may be attacked or supported by testimony about the witness’s reputation or in the form of an opinion about that character.

But evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked.　　**extrinsic evidence OK**

Prop 8: Both sides can offer opinion or reputation character evidence even if it is not related to the character for honesty as long as the evidence is somehow related to credibility, can offer good character evidence without waiting for bad character evidence first, and can use character evidence of specific instances to prove honesty or veracity.

(b) Specific Instances of Conduct.

**Extrinsic evidence (except 609 conviction) is not admissible** to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness.

But the court **may, on cross-examination, allow** them to be inquired into if they are **probative of the character for truthfulness** or untruthfulness of:

1) the witness; or

2) another witness whose character the witness cross-examined has testified about.

×「（先に証言した）証人Xは人をだましたことがある」∵extrinsic, not inconsistent acts.

〇 (Dのgood characterの証人に)「Dが学生時代カンニングで停学になったとか知っている?」

∵ the credibility may be attacked by the lack of knowledge.

※ good-faith basisは必要。適当に言ってはダメ

**例 Character witnesses** may be cross-examined about whether they have heard about

1) the defendant’s prior convictions for assault

2) the defendant's prior arrests for crimes of violence not ended in convictions

 　 ※ 但し, 事前開示は必要

　　 　　 United States v. Williams, (7th Cir. 1984)

×hypothetical questions "Would your opinion of the defendant's character change if .."

 ※ a witness does not waive any privilege against self-incrimination.

 (never be waived, preliminary hearingで証言してもtrialで証言拒絶可能)

※ An arrestは外部証拠提出は原則不可

※ 性格証人の反対尋問で「３年前にも殺人したよね？」は？→×∵not probative of the character for truthfulness

※ 10年以上前のbad actsは×

CA – CEC makes prior misconduct inadmissible, but Prop 8 makes it admissible in criminal

cases if it involves moral turpitude. (subject to 352)

3 Impeachment with Evidence of Bias, Interest, or Motive

1) extrinsic evidence is admissible,

2) if witness is **given the opportunity** to explain or deny.

例：「先週，横領を理由に解雇されたのではないですか？」(だから嘘の証言してるでは)

例：「あなたも共犯者なのではないですか？」(だから起訴されたくなく嘘の証言してるのでは)

例：OJ Simpson case: “nigger”発言を性格証拠でなく黒人への偏見証拠として提出

　　→ extrinsic evidenceも許可されうるがCEC352違反として却下

610: Evidence of a witness’s religious beliefs or opinions is not admissible to attack or

support the witness’s credibility.

→biasで弾劾するため「税金を払わないことを是とする宗教団体に加入しているか」は問える

4 Impeachment with Sensory deficiencies

・May impeach on cross examination or with extrinsic evidence

that his perception was so impaired to raise doubt that he could have perceived those facts.

例：目撃時にヘロインを吸っていたのではではないですか？

→OK for impeachment, but can invoke the privilege against self-incrimination. (普通は403で✕)

例：“Have you promised immunity from punishment?” → OK

5 Impeachment by **Contradiction** (1と同様, FREに特別規定ない)

・Extrinsic evidence is inadmissible to contradict on collateral matter.

**HEARSAY**

1) Out of court 2) statement 3) offered to prove the truth of the content of the statement

 　→ 基本inadmissible

 　 statement＝ a) a person’s oral, written assertion, or

b) nonverbal conduct, if the person intended it as an assertion. **rule801**

∵ untested with respect to the perception, memory, and narration of the actor

 ※ If the declarant is the witness testifying, it is still hearsay. 「私は昨日『・・・』と言いました」

 “What did you say?” → I said, “…” は基本的にhearsay

**重要例外一覧　1)** NOT hearsay**にあたるか，2)** Hearsay exception**に当たるかの順番で議論する。**

**Not hearsay**

**(not to prove the truth) 大例外としてImpeachment**

1) Verbal Acts 2) To Show Effect 3) Circumstantial Evidence of Speaker’s State of Mind

 **(exemptions)**

1) Prior statements of trial witness 2) Party admission

**Hearsay Exceptions**

**unavailable**  1) Former Testimony 2) Statement against Interest 3) Dying Declaration

**even available**  1) Excited Utterance 2) Present Sense Impression

3) State of Mind Exception 4) Statement for Medical Treatment

5) Business records 6) Public records 7) Past Recorded Recollection

**NOT Hearsay 　403 balancing testが常に必要**

 **(Not offered for the truth of the matter asserted)**

① **Verbal acts** are excluded

 = **the significance** of an offered statement **lies solely in the fact that it was made**

 例: letters of complaint from customers offered as a reason for cancellation

 見積がオーバーした時にletterの送付が契約上要件である場合のletter

 → not hearsay ∵not offered to prove the content of the statement.

② Evidence to Show **Effect on Hearer of Reader** (threats, warnings, notification)

③ Circumstantial Evidence of **State of Mind** :statements demonstrating insanity

 questions that demonstrate a lack of knowledge

**Hearsay EXEMPTIONS**

④ PRIOR STATEMENTS OF TRIAL WITNESS **FRE:801**

 簡易版

A) Prior inconsistent statement made under oath at formal proceeding.

B) Prior consistent statement offered to rebut of recent fabrication

C) Prior statement of identification by witness

as long as the witness is subject to cross-examination at trial.

※ The requirement that the witness be subject to cross-examination is satisfied if the witness is

available to be recalled for recross-examination.

正確版

The declarant **testifies** and is subject to cross-exam about a prior statement, and the statement:

is **inconsistent** with the declarant’s testimony and was given **under penalty of perjury** at a trial,

hearing, or other proceeding or in a deposition (法廷等で行った矛盾供述, 別事件でもＯＫ)

: 宣誓証言に限られるので利用は非常に限定

→例：×警察への「１０キロは違反していました」∵not under oath (grand juryならＯＫ)

但し, party admission.またimpeachment目的では広くOK

例：○depositionでの「１０キロは違反していました」

 なお，impeachment例外と異なり同証人が，スピードに関連して反対尋問に服し

 ていれば，「10キロは違反していたと述べてませんでしたか？」と尋ねる必要ない

・“I don’t remember” = the loss of memory is genuine and totalであれば矛盾供述の提出不可 (People v. Sam CA 1967, 連邦でも同様)

　　「彼が盗んだのを見たのかも，彼が盗んだと言ったのかも覚えていない」⇒原則として，「彼

 が盗んだのを見たと言ったよね？」とは質問できない ∵矛盾はない

CA – admissible for all purposes if the witness is given the opportunity to explain or

 deny: (oathなくても弾劾目的以外に使える) In CA, it is hearsay exception.

b) is **consistent** with the declarant’s testimony and is offered:

i) to **rebut** an express or implied charge that the declarant recently fabricated it or acted from a

recent improper influence or motive in so testifying or (一致供述, 最近思い付きへの反論)

ii) to **rehabilitate** the declarant's credibility as a witness when attacked on another ground; or

 (一致供述：攻撃後の信用回復)

CA – Prop 8 may apply (裁判例はなさそう, CEC352では排斥される可能性高いとも聞く)

c) **identifies a person** as someone the declarant perceived earlier. (犯人識別供述)

　　 e.g.「私は写真を見てAが犯人だと言いました」という証言は法廷外供述だがadmissible

・There is no requirement that the witness first be impeached. Another person who was

present, such as a police officer may testify to the previous identification if the witness is

subject to cross-exam.

・The prior identification need not be consistent with the witness’s testimony.

The requirement that the witness be subject to cross-examination concerning the

statement is not violated by the witness having, or purporting to have, no present

recollection of the identity of the person.

 →〇 識別者が識別供述を忘れたと述べたので，それを聞いた警察に証言させる。

　　 ただし識別者が反対尋問に服することは必要。

U.S v. Owens (1981)

Facts: V was beaten with a metal pipe and suffered a fractured skull.

 V suffered severe memory loss from his injuries, but, he named Respondent.

At trial, V stated that he clearly remembered identifying Respondent during the second

interview, but on cross-examination, admitted that he could not recall seeing his

assailant, or whether any visitors had suggested to him that Respondent had committed

the crime.
Rule: Neither the Confrontation Clause nor Rule 802 is violated by admission of a prior, out-

of-court identification statement of a witness who is unable, because of memory loss,

to explain the basis for the identification.

CA – The declarant must testify the ID was true reflection of his opinion.

To be admissible under this hearsay exception, the proponent must show that the statement was made at a time when the crime or other occurrence was fresh in the declarant's memory. In addition, the proponent may not offer the statement unless the declarant first testifies that the statement of identification.

⑤ PARTY ADMISSIONAn Opposing Party’s Statement: **FRE801** (d)(2). Hearsay Exception

・反対当事者に対して提出される証拠（自らの提出は不可，発言の宛先は誰でもOK）

利益供述には適用ない ∵ not “against” an opposing party

→×: 自分は逮捕されてすぐに「自分はやっていない」と言った

・意見,法的結論も含む　例：友人に「自分に過失がある」「自分に法的責任がある」と言う

 1) Direct statement by party 2) Adoptive admission 3) Authorized admission

4) Vicarious admission 5) Admission by a co-conspirator

**An Opposing Party’s Statement.**

An opposing party’s statement that is offered against an opposing party and:

A) was **made by the party** in an individual or representative capacity;

B) is one the party manifested that **it adopted or believed to be true**

= **Adoptive Admissions**

※ Admission by Silence: ONLY if

(i) The declarant **heard and understood** the statement.

(ii) The declarant was **capable of responding, and**

(iii) **A reasonable person** would have **responded** under the circumstances.

例：売上高を問うinterrogatoryに対する返答として渡された売上高が記載された雑誌記事

※：共犯者の調書を見せられて否定しなくても適用されない ∵the right to remain silent

C) made by a person whom the party **authorized** to make a statement on the subject;

 ※ including statements by an agent to anyone including the principal.

 CA statements for the principal to the 3rd party

D) made by the party’s agent or employee on a matter = **Vicarious Admissions**

a) within the scope of that relationship and, b) while it existed（「元」はダメ）

トラックの運転手が、事故の際に、脇見運転を認めた 　　　　　　　→Vicarious Admission ○

トラックの運転手が、会社が採用時にしてる男女差別を認めた 　　　　→Vicarious Admission ×

E) made by the party’s coconspirator **during and in furtherance of** the conspiracy.

※ 共謀時に内容を忘れないように書いたノートは本例外に該当せず ∵not in furtherance of conspiracy

　 → しかし，忘れていれば, past recollection recordedの適用可能性あり

前提条件について補強証拠が要求される

The statement …does not by itself establish

1) the declarant’s authority under (C);

2) the existence or scope of the relationship under (D); or

3) the existence of the conspiracy or participation in it under (E).

CA can independently establish

**Hearsay Exceptions**

Unavailability Exceptions **804**

 **Unavailability**

1) Court exempts from testifying due to privilege

 ・invoke his right against self-incrimination and refuse to testifyが典型

2) Death or Physical / Mental Illness

3) Absent – Cannot procure declarant's attendance by process or reasonable means.

4) Refuses to testify despite court order (FRE);

5) Testifies as to Lack of Memory (FRE); Total memory loss CA

① Former Testimony

Testimony that: (A) was given as a witness at a trial, hearing, or lawful deposition,

whether given during the current proceeding or a different one; and

(B) is now offered against a party who had－or, in a civil case, whose

predecessor in interest had－an **opportunity and similar motive to**

**develop it** by direct, cross, or redirect examination.

※ predecessor in interest＝権利の前所有者 ＝a person or entity who

previously held the rights or interests that are now held by another.

※ 反対尋問を実際には真剣に行わなくてもその機会と動機があったのであれば

former testimonyに該当する。

 　例：詐欺罪で起訴。同詐欺について妻が破産事件の中で証言，本人は反対尋

問真剣にせず。その後妻死亡⇒OK

※ grand juryは被告人に反対尋問の機会ないので，同所の証言をformer

testimonyとして被告人に不利益使えない。preliminary hearingはOK

② Dying Declaration: FRE: 刑事ではhomicideのみ **CA**はすべてOK ※exited utteranceの場合も多い

A statement that (1) while believing the imminent death.

(2) made about its cause or circumstances.

※ FRE = Declarant must be unavailable CA must be “died”

※ “Help!”, ”Doctor!”と言っていれば適用無し ∵not believing the imminent death.

③ Statements against interest

 (1) against **financial interest** or (2) would subject Declarant to **criminal liability**

**※**Under FRE, in **a criminal case** a statement tending to exculpate the accused (e.g.,a confession of an unavailable declarant) is not admissible unless **corroborating circumstances** clearly indicate the trustworthiness of the statement.

※　相手方が当事者ならparty admissionと同時に発生, 第三者証人の時が重要

例：共犯者が「つかまりたくないから俺は海外逃げるよ」と母に述べて逃亡

　　(confrontation clause違反の問題があるが，逃走中共犯者の発言はtestimonialでなし)

CA – NO corroborating evidence is required.

CA – may also be against social interest. i.e. social disgrace in the community.

④　Statement of Personal or Family History

⑤　Forfeiture by wrong doing

Ｗhen a party intentionally or wrongfully makes the declarant unavailable to testify, the statement

of the declarant may be offered against the party.

 →殺人事件の被害者の供述が本項で許されるケースはある, しかしまずwrong doingの立証が必要

804(b)(5)A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant’s unavailability as a witness, and did so intending that result.

※ confrontation clauseに違反しない (最高裁)

Reliability Exceptions

**２. Excited Utterance**: Rule 803(2)

(1) The statement relating to a **startling event** (驚かせる出来事).

+ (2) made while the declarant was still **under the stress** of excitement that it caused.

**３. Present Sense Impression**: Rule 803(1)　　**過去形の発言も許容**

(1)A statement **describing or explaining** an event or condition

+ (2) made **while or immediately after** the declarant perceived it.

 　　例：「あの車，ライトつけていなかったよ」という死亡した同乗者の証言

　　　　　“He had just killed”　“I’ve just cleared” 等がキーワード

**４. Then-Existing Mental, Emotional, or Physical Condition** **Then-Existing=当時存在した**

**= State of mind exception**: Rule 803(3)  **過去形の発言は×**

1) A statement of the declarant’s then-existing state of mind (such as motive, intent, or

**plan**) or emotional, sensory, or physical condition (such as mental feeling, pain, or

bodily health)

2) but not including a statement of memory or belief (will案件では例外的にＯＫ)

 例・“I can’t wait to see you in X for New Year’s Eve”との手紙（同人がXにいたのかが争点）

・OK to show the conduct of the declarant in conformity with the expressed intention.

Ex.「これから飛行機に乗って外国に行く」、「自殺する」、「これからBに会うから帰ります」

・“I am scared because the defendant threatened me.” The first statement indicates an actual

state of mind, the second statement expresses belief about why the declarant is frightened.

Thus, “because the defendant threatened me” is outside the state-of-mind exception.

・“I am sorry” is usually state-of-mind.

✕ “I have been in so much pain” to prove her past pain ∵ memory

✕ “I am in pain because of the car accident” ∵ belief

**５. Statement made for medical treatment or diagnosis**: Rule 803(4)

A statement (A) that is made for medical diagnosis or treatment and

(B) describes **medical history**; **past or present symptoms** or sensations;

 their inception; or **their general cause.**

・Made to medical professional (doctor, nurse, EMT＝救急救命士)

・NOT: (a) Statements of fault or (b) Identity of the wrongdoer.

※ 現在状況ならpresent sense impressionでＯＫ, past conditionの説明でも対医師ならOKが意義

例：「事故に合うまで普通に肉体労働できていた」→ＯＫ, the lack of any symptom and pain

例：「相手の車が赤信号で進んできた　　　　　」→不可, not “general cause”＝怪我の一般的原因

例：死亡した医師の事故直後のaffidavit「最近生じた腰痛に苦しんでいることが分かった」

　 →不可∵患者のstatementでない

Documentary Exceptions

**６. Records of a Regularly Conducted Activity**: Rule 803(6)

1) made at or **near the time**

2) by a person with knowledge, or

from information transmitted by a person with knowledge

3) if kept in the **regular course of business** and

4) if making the record was a regular practice of that activity

5) unless the source of information or circumstances of preparation indicate a lack

 of **trustworthiness**.

例:　　　　　hospital chart(カルテ)が典型

例: 調査専門会社が作成した事故原因報告レポート (相手方従業員作成ならparty admission)

例: スーパー店員のお客を転ばした時の “Employee’s Report of Accident”

⇒ the author has a strong motive to misrepresent the facts→5)要件を欠くとして排斥され

るのが通常. 4)要件も満たすとは言えない。

**７. Public Records**:

簡易版

 if it sets out 1) the **office’s activities**, 2) a **matter observed** under a legal duty or 3) in a civil case investigative factual findings

1) A record or statement of a public office

2) if it sets out: a) the **office’s activities**

or b) a **matter observed** while under a legal duty to report,

 but not including, in a criminal case, a matter observed by law-

enforcement personnel

or c) in a civil case (or against the government in a criminal case),

**factual findings** from a legally authorized investigation

 3) unless circumstances indicate a lack of trustworthiness.

※ If offered against a defendant in a criminal case, an entry in a record may be excluded if its admission would violate the defendant's constitutional right to confront the witnesses.

 A writing 1) made by and within the scope of duty of a public employee, 2**) at or near the**

 **time of** the act, condition, or event, is admissible.

 **※** does NOT restrict prosecution from using public records.

**８. Recorded Recollection** 803(5)

**A record that:**

 1) is on a matter the witness **once knew** about but now **cannot recall** well enough

2) was made or adopted by the witness when **the memory was fresh**; and

3) accurately reflects the witness’s knowledge.

 →If admitted, the record **may be read** into evidence but may be received as an

 exhibit only if offered by an adverse party.

 ・the witness may **NOT show** the document to the **jury**.

 ・the **opposing party MAY** show the document to the jury

Miscellaneous Exceptions

Records of Vital Statistics

– Admissible if made by a public officer pursuant to requirements of law.

Statement of Absence of Public Report

– Evidence of a **certification or testimony** from the **custodian** of public records is

admissible to prove the matter was not recorded.

Learned Treatise

– Admissible to prove anything stated therein if it is an accepted authority in the field.

The expert must be **testifying on the stand** when an excerpt is read, AND the relevant

portion is **read into evidence** but not admitted as an exhibit. 読まれるだけ！

CA – admissible to show matters of **general notoriety or interest**. (very narrow)

Judgement of previous conviction **803(22)**

– Hearsay statement (i.e. copy of conviction) describing a **felony conviction** is

admissible in both **civil and criminal** cases to prove any fact essential to the judgement.

例:　　　民事事件で飲酒運転(懲役1年)の有罪判決をintoxicatedの証拠に使える。

※ For a purpose other than impeachment, 弾劾として提出が許されるかは上記**609**.

※ In a criminal case, if offered for any reason other than impeachment, the evidence

will be admissible only against the accused.

※ Prior criminal **acquittals**はhearsay例外にならず (無罪判決を受けたことは証拠にできない)

※ misdemeanor convictionsはだめ→public record例外でも提出不可 (US. v. Nugen.9th Cir 2006)

CA – this exception only applies in **civil** cases.

CA – a certified copy of a judgement of conviction is admissible under CA

 public records exception in both **civil** and **criminal** cases.

Ancient Documents and Documents affecting Property Interests

– Statements in an authenticated document **20 years old or more** are admissible,

 as are statements in documents affecting an **interest in property**.

Family Records

– Statements of fact concerning **personal or family history** contained in **family**

**bibles, jewelry, engravings in a tombstone** are **admissible.** Rule 803(11)(12)(13)

※ Oral statements of family history are admissible if the declarant is unavailable under 804(b)(4).

Residual Catchall Exception

– A hearsay statement that is **not otherwise covered** by an exception is admissible if it

is **trustworthy, strictly necessary for the case, and notice is given to the adversary**.

 **Hearsay within hearsay rule 805**

 Where there is hearsay contained within hearsay, each level of hearsay (the outer and inner layer) must fall within hearsay exception (or can be classified as non hearsay), or the entire statement is excluded.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

**Confrontation Clause**

excludes an out-of-court statement if 1) declarant **does not testify at trial,** 2) the statement

is **"testimonial"**, and 3) defendant had **no chance to cross-examine** declarant when the

Statement was made.

Crawford v. Washington (2004)

事案：殺人未遂で起訴された被告人が正当防衛を主張し，妻は夫婦間の証言拒絶権を理由に証言拒否。検察官は，statements against interestの伝聞例外として妻の警察に対する供述の録音を証拠として提出

判示：上記の通り判例変更。第６修正違反として同証拠を採用した原審判決を破棄差戻し。以降hearsay ruleがconfrontation clauseに違反していないかが吟味されることに。

 Testimonialの意味につき明確にしなかったが①予備審問における一方的な証言，②取

 調過程における警察官への供述が該当することは明白と判示。

①Davis v. Washington(2006) ②Hammon v. Indiana(2006)

①被害者が被告の暴行を911番通報。被害者出廷せず，同通報の録音を提出可能か？

 ②夫婦喧嘩の通報を受け急行した警察が夫の暴行について，妻から宣誓供述書をその場

で受領。妻が出廷拒否。Excited utterance又はPresent impressionで提出可能か？

・限定した状況 (police interrogation)でのtestimonialの意味を明らかに，警察の目的重視

Not testimonial : **The primary purpose** of the interrogation is to enable police **assistance to meet an ongoing emergency** 　　　　　**→①はＯＫ**

 **Michigan c. Bryana (2011)**

発砲で重症の被害者を警察官が発見した際の供述はＯＫ

Testimonial : 1) no ongoing emergency, and

2) that **the primary purpose** of the interrogation is **to prove past**

**events** potentially relevant to later criminal prosecution.**→②は×**

※ Dying declarations, Forfeiture by wrongdoingがconfrontation clauseに違反しないことは,

最高裁が明示, 他のhearsay ruleの合憲性については不明確.

捜査機関の依頼に基づく鑑定につき「証人」に該当するかは裁判例はsplit.

（従前の最高裁判例は伝統的に確立されたhearsay ruleは合憲. 新しいものはtrustworthinessを要求）

**Melendez-Diaz v. Massachusetts (2009)**,

 × for a prosecutor to submit a chemical drug test report without the testimony of the

person who performed the test.

 ・The Court found that the forensic analyst who tested the contraband substance and

 reported that it was cocaine was a witness for purposes of the Confrontation Clause.

 ・Even though evidence may be so contemporaneous that it meets the present sense

 impression exception to the hearsay rule, it may nevertheless be a violation of the

 Confrontation Clause.

**Privilege**

FRE501

Diversity case ⇒ States law適用

その他　　　　 ⇒ Federal common law, 制定法又は証拠規則適用

 Diversity Case以外で連邦で認められるものは以下のみ

1) Attorney-client privilege (FRE502), 2) Spousal privilege, 3) Marital privilege,

4) Psychotherapist-Patient Jaffee v. Redmond(1996)

All states recognize a) **clergy-penitent privilege**

Most recognize b) **Journalist-Confidential source** c) **Physician-Patient**

**Attorney-Client Privilege**（AttorneyのSecretaryに聞かれても、Privilegeを喪失しない）

 Protect

1) a) confidential b) communication c) between attorney and client d) seeking for legal advice.

 2) work product prepared in anticipation of litigation.

a)→ 社長と事故を起こした運転手が弁護士と相談⇒運転手は証言可能。社長の話は運転手

との関係ではconfidentialではない。

b)→ 確定申告書，血まみれの友人の姿は特権の対象にならない ∵not communication

 Not: Time records for the days on which the attorney purported to have worked for the client

c)→ including paralegals, secretaries, and doctors making physical exams ×会計士

 including anyone who is reasonably believed by the client to engage in the practice of law.

 ※ 弁護士に頼まれ被告人と面談したコンサルタントの聴取内容。大陪審でも証言拒絶OK

 ∵ Non-lawyer who has been engaged by the lawyer to aid in the representationにも及ぶ

d)→fee arrangement is not privileged information

 × 某製品が売れそうかどうかアドバイスを求めるメール ∵not legal service

　　 × 単に議事録を弁護士にメール ∵アドバイスを求めていない

Exceptions

1) Future crime or fraud 2) When client or patient affirmatively puts communication in issue

　 3) Dispute between the parties as to the professional relationship (actions for fees or malpractice).

 例: 弁護士への「税金を逃れるために契約書の日付を遡らさせたい」という手紙はcrime目的

だから，特権で保護されない。

※ 放棄で特権は消滅

・第三者に任意に開示したら放棄となるAny voluntary disclosure will waive the privilege

任意でなければ放棄にならないがtake reasonable steps to prevent disclosureが要件

・Waiver extends to an undisclosed communication

相手方に特許侵害していないという鑑定書を交付すれば，同じ議題に関する他のコミュ

ニケーションも放棄され他の鑑定書も開示対象に; subject matter waiver

・立ち聞きされても特権は消滅しない。但しWhere others could easily overhear, it is

evidence that the communications was not to be confidential.

(in publicの発言を盗み聞きした第三者は同内容を証言できる)

 ・Courts have occasionally revoked the privilege after the death of the client if it is

 deemed that doing so serves the client's intent, such as in the case of resolving

 testamentary disputes among heirs. (In general, it lasts after death)

 **Employees** communications are protected if the employee is **authorized to speak** to

 the lawyer on behalf of the corporation (Mere employee witnesses are not protected)

[**Upjohn**](https://en.wikipedia.org/wiki/Upjohn) **Co. v. United States (1981)**

　 Upjohn社の社外弁護士が書面質問を一定の範囲の従業員に送付して回答を求め，

税務調査に対し書面質問の回答提出を秘匿特権を理由として拒否。

　連邦最高裁は、下位の従業員の情報が重要な場合もあり，そのコミュニケーショ

ンを阻害すると、秘匿特権の目的を没却するとしてControl group testを否定。

lower ranking employeesでも基本保護されるとした。

→ 同回答は職務上の義務の範囲として行われており保護の対象

・Privilege exists not only to protect the one giving the professional legal

advice, but also to those who provide information to the lawyer to enable

him to give the advice.

⇒以降 "Upjohn warning" (従業員に会社は弁護士依頼者特権を放棄し従業員

との会話を開示する可能性がある警告)が必要になったと言われる

**夫婦間特権**

Exceptions

1)Intra-family injury cases (i.e. child abuse, incest)

2) Divorce proceedings

3) Spouses jointly participate in a crime

**Marital privilege (Confidential marital privilege)**

(a) (b) (c)’ between married spouses

 ・only covers those communications that occurred during the marriage.

・Either spouse holds the privilege, not just the witness (妻が反対すれば夫は証言不可)

　但し，他方配偶者が死亡すれば，一方的に放棄可能

・Civil caseにも適用

・夫が血まみれで帰ってきた事実は証言可能 ∵communicationのみに適用

**Spousal Privilege (Spousal Immunity)**

One spouse can’t be forced to give adverse testimony against the other in a **criminal** case.

・all testimony (秘密不要 / pre-marriage facts含む)

・can be waived by the witness spouse alone.

・離婚だけでなく，夫死亡によっても消滅する特権

 **※ Doctor-Patient Privilege**

**・Only through state law, then only diversity cases in federal court・**連邦法違反には適用なし

(a) (b) (c)’ between doctor and patient (d)’ for the purpose of medical diagnosis or treatment

 ※ not apply where the patient puts medical treatment at issue (personal injury).細かくは州ごと

**Judicial Notice : RULE 201**

＝Court's acceptance of fact as proven, without presenting evidence

**適用** **The court may judicially notice a fact** that is not subject to reasonable dispute because

it: (1) is **generally known within** the …jurisdiction; or

(2) can be 1) **accurately and readily determined from sources**

2) **whose accuracy cannot reasonably be questioned.**

 ×外国法, ×6月3日の現場の道路はぬれていた, ×有名人でない人の誕生日

**手続** The court(1) may take judicial notice **on its own**; or

(2) must take judicial notice if **a party requests** it with the necessary information.

CA –court **must** take judicial notice of matters generally known within jurisdiction.

(requested or not) ⇔ 連邦ではrequestが必要

**期限** The court may take judicial notice at any stage of the proceeding.

Instructing the Jury.

1) **In a civil case**, the court must instruct the jury to accept the noticed **fact as conclusive.**

2) **In a criminal case**, the court must instruct the jury that it **may or may not accept** the

noticed fact as conclusive.

※ Mandatory presumption is not allowed in criminal case. It violates the accused due process right

CA – Court instructs jury that it **must** accept judicially noticed fact in both **civil and criminal** cases.

**FORM** [In What way is the evidence being introduced?]

**1 . Type of question**

　　・The cross examiner must have a good-faith basis but need not be clear and convincing

evidence. (Judge made rule)

 ・Re-direct examination must be permitted only if there were significant new matters

raised on cross-examination.

**2. Use of writings**: A witness cannot read testimony from a previously prepared document.

EXCEPT:

Present Recollection Revived → see above

Past Recollection Recorded → see above

**Objections**

**Objections to form of question– Questions Only**

1) **Argumentative:** The question that consists of arguments, interpretation of the evidence.

2) **Assuming facts not in evidence**

3) **Bolstering** 例: 君はAと話をし，その情報に基づき逮捕したね？⇒Aとの話というhearsayをbolster

4) **Compound** (cumulative): More than one question within a question

5) **Leading:** that **suggests** the particular **answer.**

allowed a) on cross examination b) on preliminary and non-crucial matters

c) to refresh recollection d) on examining adverse party or hostile witness.

6) **Harassing / abusing**

**7) Misstates testimony**

例:　 Witness : She got back up and there was blood on her chin.
Attorney : As the blood was oozing out of her chin, did she look panicked ?

**FRE611**

(a) The court should exercise reasonable control over the mode and order of examining

witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go **beyond the subject**

**matter of the direct examination and matters affecting the witness’s credibility**.

The court may allow inquiry into additional matters as if on direct examination.

※ 後段の通り，主尋問の範囲を超えても裁量により許される

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness’s testimony. …the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness

**Objections – Questions and Answers**

1) **Misleading**

2) **Narrative** (calls for narrative)

Attorneys may ask open-ended questions. However, if a question is so broad that it essentially calls for the witness to give a lengthy narrative, an objection may be made. 例：tell me about your employment story since graduating high school

3) **Speculative** (calls for speculation)

 The question asks the witness to speculate or guess as to something that is not within his or her personal knowledge. Lay witnesses (i.e., non-experts) may testify as to their personal knowledge but generally not to matters outside their first-hand knowledge.

 例: **Why did the man use his credit card instead of paying with cash ?**

4) **Non-Responsive** (Motion to strike)

An objection for non-responsiveness can be made by any party to a witness’ answer that does not answer the question, or gives testimony that goes beyond the scope of the question. 典型：ハイ・イイエで答えるべき質問に長々答える等余剰回答

※ **Failure to timely and specific objection** is deemed a waiver of any ground for objection. **103**

※ **General or specific** objections are permitted.

 1. Merely stating objection without specifying the grounds is not sufficient to preserve the issue for appeal (hearsay objectionしかしないとconfrontation clause違反も主張し得なくなる; case law)

 2. If a question has been answered？

→1) motion to strike or 2) request that the jury be instructed to disregard the answer.

※ If **part of the conversation** or writing is introduced, the adverse party may require

the proponent introduce **any other part** that ought to be considered in fairness.

**Objections –** 証拠法一般に基づくもの

**1) Irrelevant　2) Unfair prejudice　3) Improper character evidence**

**4) Lacks of foundation**

If a question is asked without first establishing that the witness has a basis to answer it (i.e., personal knowledge or familiarity with the topic)

例: **Are you a tennis player?**→**Yes→What percentage of a tennis ball is made of rubber?**

**5) Hearsay**

**Burdens of proof**:

**1. Burden of producing evidence** on party who has burden of pleading.

**2. Burden of persuasion** (proof) is after parties have sustained their burden of production of

 evidence

Civil: 1) preponderance of evidence OR 2) clear and convincing evidence.

Crim: 3) beyond a reasonable doubt.

 ※ Admissibilityはpreponderance of evidence.

 A judge is not bound by Rules of Evidence **except for privilege rules**.

2) clear and convincing evidence

 →a) A criminally related civil case (fraud), b) validity of will or deed, c) insanity defense

**California Evidence**

1. **Key CA Distinction** (“Truth in Evidence” Amendment)

**Proposition 8** = aka. “The Victims' Bill of Rights” 1982成立,2008改正

– makes all **relevant** evidence admissible in a **criminal** case, even if it is inadmissible

 under CEC.

Exceptions:

1) Hearsay Exceptions 2) Privileges 3) Rape shield laws (section782)

4) Character evidence (section1102)

5) Exclusionary rules under the US Constitution such as Confrontation Clause (明文なし)

6) Exclusionary rules adopted by CA legislature with at least a 2/3 vote after 1982

(明文ないが6)のruleが幅広くカバー. secondary evidence rule等)

CEC 352

– courts may exclude if unfair prejudice substantially outweighs probative value

 　The court in its discretion may exclude evidence if its probative value is substantially outweighed

by the probability that its admission will

 (a) necessitate undue consumption of time or

(b) create substantial danger

i) of undue prejudice, ii) of confusing the issues, iii) or of misleading the jury.

① CECで除外されるか

⇒② relevanceがありproposition 8でadmissibleになるか

⇒③ CEC352で排斥されるかの順に検討が必要

　　　 実は・・・Prop 8 pretty much never applies.

適用例 まとめ：① 性格証拠における悪行，被害者性格証拠の攻撃前提出

② convictions of misdemeanor of bad acts involving moral turpitudeによる弾劾

もしかするとguilty plea

 性格証拠

1) **Mercy rule for specific conduct**

Evidence of the defendant’s pertinent trait (good character)

In a criminal case Prop 8 may **allow specific instances of conduct** subject to 352.

2) **Victim’s character**

**Prop 8** may allow evidence of the victim’s character in ANY form admissible

subject to 352 balancing. (victim’s good characterも攻撃前にOK)

弾劾証拠

3) **Impeachment with convictions of misdemeanor**

Under CEC, misdemeanor convictions can never be introduced.

In a criminal trail **you can introduce a misdemeanor conviction involving moral turpitude for impeachment** subject to CEC 352 balancing test (as long as it's not more prejudicial than probative) .

4) **Impeachment with Non-Conviction Misconduct** Bearing on **Truthfulness**

CEC makes **prior misconduct** inadmissible, but Prop 8 makes it admissible in criminal cases if it **involves moral turpitude**. Both cross and **extrinsic evidence** are admissible subject to 352

1. **RELEVANCE**

CA requires the fact of consequence to be in **DISPUTE**.

**Exclusion for PUBLIC POLICY reasons**

**Subsequent Remedial Measures** (Subsequent repairs)

CA does NOT apply to **Strict Liability** cases (products liability)

 (they are only inadmissible to prove negligence, in strict liability case they

 cannot be offered to show negligence because D is strictly liable.)

= strict liabilityは過失がなくても発生するので, CAでは常に利用可能。連邦では

原則過失の立証と同様に扱う.

**Settlement Offers**

CA discussions during **mediation proceedings** are also inadmissible

**Guilty Pleas**

CA – inadmissible but Prop 8 may make pleas admissible but prosecutors won’t

attempt this because it would discourage future plea negotiations

(law is unclear of Prop 8’s effect)

**Payment or Offers to pay Medical Expenses**

CA – Related **statements of fault** are **Inadmissible**

**Statements of Sympathy**

CA – Statements of **sympathy** are **inadmissible as an admission of the**

 **liability.** (“I’m sorry”)

Statements of fault with a statement of sympathy ARE admissible.

(In federal Court ALL statements would be admissible)

1. **CHARACTER EVIDENCE**

 **Prior Acts of Sexual Assault or Child Molestation**

CA – has NO exceptions for CIVIL cases.

**CRIMINAL Cases** (conduct)

CA–Prior acts of the D of **domestic violence, elder abuse, and child abuse** is admissible

CA　　　– Only violent character of the victim is admissible.

But **Prop 8** may allow evidence of the victim’s character in ANY form admissible subject to 352 balancing. (victim’s good characterも攻撃前にOK)

CA **–**Evidence of the defendant’s **pertinent** trait (good character) Mercy Rule

– Only allows **reputation and opinion** evidence on direct and cross examination

= no specific instances admissible even on cross examination

but **Prop 8** may allow **specific instances of conduct** subject to 352.

CA　　　　– If evidence of an alleged victim’s violent character is admitted, the prosecutor may

offer evidence that D has violent character (FREと異なりviolent characterに限定，

dishonestyはダメ, Prop 8の適用ない)

**specific instances of conduct**はdirect and cross examinationのみOK (FREは限定ない)

**4. WITNESS CREDIBILITY** PROP8適用

 Impeachment by **Prior Inconsistent Statement** (PIS)

 FRE: PIS of witness is NOT hearsay if given under oath at trial or deposition.

Otherwise it is hearsay and inadmissible if offered to prove truth.

CA – Exception extends to ALL prior inconsistent statements whether or not under oath

　　 Prior inconsistent statement is hearsay if offered to prove the fact asserted, but

admissible (even if it is not under oath)

Impeachment for Conviction of a Crime Involving **Felonies**

CA – All **felonies** involving **moral turpitude** are admissible subject to 352.

Felonies NOT involving moral turpitude are inadmissible

Moral turpitude: crimes of **lying, violence, theft, extreme recklessness, and sexual**

**misconduct.** (Not mere negligence)

※Prop 8 does not affect this because non moral turpitude crimes are **irrelevant** under CA law.

Impeachment with Conviction of Crime Involving **Misdemeanor**

CA – CEC makes **misdemeanor** convictions **inadmissible** to impeach (involving FSでも)

however **Prop 8** allows misdemeanor convictions to be admitted in **criminal case** if

involving crime of **moral turpitude**subject to 352.

※ Misdemeanors are inadmissible in CA to impeach in a civil case

※ CA no concrete time limit (10 years)

(a) Reputation or Opinion Evidence ＝ OK, 但し良性格は攻撃後 (not bolstering)

A witness’s credibility may be attacked or supported by testimony about the witness’s reputation or in the form of an opinion about that character.

But evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked.　　**extrinsic evidence OK**

CA Prop 8: Both sides can offer opinion or reputation character evidence even if it is not related to the character for honesty as long as the evidence is somehow related to credibility, can offer good character evidence without waiting for bad character evidence first, and can use character evidence of specific instances to prove honesty or veracity. ※ もっとも性格証拠としてto prove conduct in accordance with the characterは×

5. **HEARSAY** even in criminal case, the usual rules apply PROP8非適用

CA **–**No **NOT Hearsay** **(Hearsay exemptions)**, only **exceptions**.

**Exceptions**.

**Admission of Party Opponent**

CA – statement of employee is admission of employer ONLY if he is also responsible

for the employee's **conduct.　EMPLOYEE NEGLIGENCE ONLY**

**Prior Inconsistent Statement**

ALL inconsistent statements of a witness are admissible whether or not made under oath.

 ※ 連邦はoathがなければ弾劾証拠としてのみOK

**Hearsay UNAVAILABILITY Exceptions**

**Unavailable Defined**

**・Refuses to testify** despite court order;

**⇒2010改正:** Persistent in refusing to testify …despite having been found in contempt

for refusal to testify.が含むこと明確化

(以前はCAでは明文無くRefuses out of fearがunavailabilityにあたるかが争点だった**)**

・FRE: Testifies as to **Lack of Memory**; CA: **Total** memory loss

**1. Former Testimony**

 Same as federal law + in civil action,

Testimony against non-party in prior case when the party in prior case had opportunity

to cross-examine on the issue and had the same interest as the party in current case.

– NO privity-type relationship is required in a civil case.

※ FREではparty against whom testimony is now offeredが前訴と異なる場合

には前訴のpartyとprivity-type relationshipが必要

※ Deposition testimonyは証拠法上は含まないが

⇒民訴によりadmissible if the deponent is unavailable or lives more than 150

miles from the courthouse. CCP §2025.620.

**Reporter’s transcript of testimony. OK as** official records

**Witness recollection of testimony. OK:** People v Downs(1952)

**2. Dying Declaration**

FRE – Only admissible in **CIVIL** cases or **HOMICIDE** prosecutions

CA –Exception **applies to ALL** civil and criminal cases and declarant **must be dead**

 The statement was made upon his personal knowledgeが必要　×「妻が毒もったかも」

**3. Statements Against Interest**

CA – may also be against social interest. i.e. social disgrace in the community

 (例: I got drunk and had an affair with X)

CA – NO corroborating evidence is required.

Under FRE, in **a criminal case** a statement tending to exculpate the accused (e.g.,a confession of an unavailable declarant) is not admissible unless **corroborating circumstances** clearly indicate the trustworthiness of the statement.

**4. Statement Describing Infliction or Threat of Physical Abuse**: CA only

1) made at or near the time of injury or threat

2) and describing or explaining the infliction or threat of injury

3) **in** a) **writing** or recorded or b) **made to i) police or ii)physician, nurse, other professionals.**

例: An automobile accident victim who wrote out an account of how he was injured.

 → もっともconfrontation clause違反で争われている

・通称OJ exception　∵ OJ Simpson事件でOJから暴行を受けていたという亡妻の日記がthe

state of mind hearsay exceptionに当たらないとして証拠排除されたので法定.

(ただし同日記は fear of the defendant and that she thought he was going to kill her, fail the

requirement that the statements narrate, describe or explain the infliction or threat of physical injury on the declarantでありmade at or near the time の立証もないためいずれにせよ証拠に

ならなかったと言われている)

※ Trustworthinessが必要 the statement was made in contemplation of pending or anticipated litigation in which the declarant had an interest等の場合適用なし. comment

**5. Declaration of Past Physical or Mental Condition** (including intent): CA only 1370

to prove condition **if that condition is at issue** in the case.

No need for seeking medical care. **※ unavailableが要件**

**6. Declaration of Child Abuse of Neglect**: CA only 1360

In a criminal prosecution…, a statement made by the victim…describing any act of child

abuse or neglect performed with or on the child by another… is not made inadmissible by

the hearsay rule if …The child either:(A)Testifies at the proceedings.(B) is **unavailable**

as a witness, 例：“She said Rick made her take off her clothes and play funny game”

**Hearsay EXCEPTIONS** (Unavailability is irrelevant)

**CA –Spontaneous Statement 　　 　(FRE: Excited Utterance)**

 that must describe, or explain an act, condition, or event **perceived by the**

 **declarant 発言者が知覚した物の説明をするときのみ**

 (FREは広くrelating to a **startling event**に認める)

**CA – Contemporaneous Statement (FRE: Present Sense Impression)**

 the statement: (a) offered to explain, qualify, or make understandable the

 declarant’s **own** conduct and (b) made only **while** the declarant was engaged in

 such conduct. ×‟the red car is going fast!”: **発言者が自己の行為を説明するとき**

**Medical Diagnosis or Treatment**

 statement of past or present mental or physical condition is only admissible if

 declarant is a **minor, describing an act of child abuse or neglect.**

CA –上記Declaration of Past Physical or Mental Condition例外有り。

同例外は医者に対する供述である必要はないがdeclarant must be unavailable.

問題：事故後医者にmy leg is throbbing because it was hit by a car that ran a red light

Federal 前段〇 ∵present symptom and the mention of what caused the symptom

後段×∵statement of fault

CA ×∵not describing an act of child abuse (unavailableの場合のみＯＫ)

**Business Records**

CA (narrower) – does not refer to business records containing **opinions or diagnoses**,

 but courts will still admit simple opinions and diagnoses.

**Public records** CA – does NOT restrict prosecution from using public records.

CEC1280

Evidence of a writing made as a record of an act, condition, or event is not

made inadmissible by the hearsay rule when offered in any civil or criminal

proceeding to prove the act, condition, or event if all of the following applies:

a) The writing was made by and within the scope of duty of a public employee.

b) The writing was made at or near the time of the act, condition, or event

c) The sources of information and method and time of preparation were such

as to indicate its trustworthiness.

**Then-existing state of mind** 連邦法とＣＡ法はほぼ同じ

**6. Authentication**

 **Self-authenticating writings**

**Business records**, **Trade inscriptions** →federal only

7. **BEST EVIDENCE RULE**

CA = **Secondary Evidence Rule** (Prop 8の適用ない→刑事でも原本を要求)

: evidence **offered to prove the contents of a writing must be original**

 ・Admits duplicates and other **written evidence of contents** of original, such as

 **handwritten notes**.

・Testimony is admissible in the same ways as federal – testimony regarding contents of

writing may be admissible where original lost or destroyed, unless bad faith by proponent of

testimony.

8. **PRIVILEGES**

**Attorney-Client**

CAEmployees are privileged if

1) employee is the **natural person** to speak to the lawyer on behalf of the

corporation on the matter,

or 2) the employee did something for which the corporation may be liable and the

corporation ordered her to tell the lawyer.

　　　　　　　　　　　例：従業員のdiscussion about testimony with lawyerでも当然には保護されない

　　　　　　　　連邦: **Employees** communications are protected if the employee is **authorized to speak** to

the lawyer on behalf of the corporation (Mere employee witnesses are not protected)

CA Additional Exception

– privilege does not apply if disclosure is necessary to prevent crime

that is likely to result in death or substantial bodily harm.

**Spousal Privileges**

Federal: Applies only in **criminal cases.**

 CA – Applies in **civil and criminal** cases and spouse is privileged even from being

 called to witness stand.

**Doctor-patient**

CA recognizes both the doctor-patient privilege and psychotherapist-patient privilege

FRE: **psychotherapist**-patient privilege only

　 　※ 死亡しても消滅しない特権という考えが一般 ⇒ しかし，相続人は特権を放棄し，死者と医師とのcommunicationを開示させられると一般に考えられている（でないと死者への医療過誤訴訟を提起できない）

※ 弁護士秘密特権と異なり患者がソースの場合のみ

Exceptions

CA – California **does not** recognize this privilege in **criminal cases**.

CA – Privilege does not apply to information that doctor is required to report to a

public office. (i.e. gun shoot wounds)

CA – It does NOT apply when psychotherapist reasonably believes disclosure is

necessary to prevent a crime likely to result in **death or substantial bodily harm.**

 ※ 連邦裁でも州法が適用される事件では州法に基づき特権の有無が判断される。

Federal common lawが適用される連邦法事件では同特権は存在しないため医師は同特

権を主張できない。

**Other CA Privileges**

・ **Counselor and victim** communications involving sexual assault or domestic violence.

・ Penitential communications between **penitent and clergy.**

・ Immunity from contempt of court for **news reporter** who refuses to disclose sources.

・ **Statements during mediation** is absolute for civil actions. (attorney malpracticeにも適用)