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Source: Evidence/Effective Introduction of Evidence in California/Preface

Preface

By popular demand, in 2000 CEB published the second edition of Effective Introduction of Evidence in California. Attorneys over the years have acclaimed this book's unique approach to teaching the rules of evidence.

This book is written for civil and criminal lawyers who examine witnesses in proceedings governed by the California Evidence Code. Each chapter emphasizes the importance of careful preparation for direct examination: As a general plans for battle, a trial lawyer must plan the presentation of the client's case through the direct examination of witnesses. Attorneys need to formulate questions ahead of time and anticipate objections from the opposition.

As a teaching tool, the book both instructs new lawyers and enlightens seasoned practitioners who are preparing for direct examination at depositions, hearings, and trials. It may also be used during hearings and trials to respond to an unexpected problem or provide authority for a point of law. Litigators may return to this book again and again to refresh their grasp of a particular evidence provision and to discover new ideas for admitting or objecting to evidence. CEB is committed to updating this book each year to ensure that it remains a reliable source of current law and procedure.

Attorneys must be ready for the unexpected. Direct examination is like an improvisational play in which the attorney knows the identity of all of the characters, but is unaware of exactly what they will say. Witnesses may forget important points because of nervousness, or may give different testimony from their earlier testimony. Opposing counsel may object throughout the examination, and some of those objections may be sustained. In trial, the judge may interject a question. The opponent's cross-examination is also an unknown, and the attorney must base any redirect examination on the questions the opponent asked the witness on cross-examination.

The chapters' sample questions give practitioners an idea of the issues that can arise during trial and illustrate some of the endless possibilities. The goal of the book is to guide attorneys through preparation for examining witnesses so well that they will be able to concentrate in court—even in the face of aggressive adversaries—on what the witnesses are saying and how that testimony is affecting the trier of fact.

Chapters 1-7 cover general information such as witness preparation and guidelines for asking effective questions. Each of the remaining 46 chapters explores a different evidence topic, such as authentication, former testimony, and the like. These topics are tabbed alphabetically to permit attorneys to turn instantly to the evidence rule in issue. The index and the tables of statutes and cases offer additional ways for litigators to quickly locate specific information.

Chapters 8-53, which appear in alphabetical order, have the same internal organization:

- The "Scope of Chapter" section summarizes the rule discussed in the chapter.
- The "Requirements" section lists the elements the proponent must satisfy to admit evidence under the particular rule, followed by objections that the opponent may make to exclude the evidence.
- The heart of each chapter follows: Sample question segments for different hypothetical cases illustrate how to phrase questions and indicate the order in which to ask them. An introductory section, usually titled "Information to Elicit," keys the reader to the facts that the proponent wants the witness to testify to. Only the questions are shown when the answers are obvious, but when needed the responses are also given. Practice Tips interspersed provide tactical advice, suggesting objections that may be made to particular questions as well as ideas and techniques on how to counter objections. Notes often follow the questions to explain the reasons for asking them.
- A "Comment" section organized with descriptive topic headings discusses case law and procedures relevant to the evidence rule covered in the chapter.
- Two checklists are usually included in each chapter: "Witnesses to Subpoena" lists the types of witness testimony or other evidence that may be needed to admit the evidence or to meet foundational requirements for an evidentiary hearing. Attorneys are relentless in pursuit of a way to admit evidence that is important to their case. The checklist titled "Alternative Methods of Admissibility" points to other possible avenues for introducing testimony that is precluded by the particular rule under discussion.
- The last section in each chapter sets out relevant Evidence Code and other statutory provisions verbatim, and cross-refers to sources such as practice books and treatises on the same topic. The table of statutes and rules at the end of the book may be used to locate where a particular code section is discussed or reproduced in a chapter.

CEB extends its thanks to the trial lawyers who wrote the chapters of this book. Their names appear on the first page of their respective chapters, on the contents pages, and—along with biographical and professional data—in the "About the Authors" section. CEB acknowledges the assistance of Ralph Shapiro, Deputy District Attorney from Los Angeles County, who read the entire manuscript and commented on the criminal law discussions in the second edition.

CEB is grateful to the following judges and justices, who served as consultants, reviewing and commenting on the first edition's chapters at various stages in their development: Ken M. Kawaichi, Judge of the Alameda County Superior Court; William Lally, Judge (ret.) of the Sacramento County Superior Court; Jeffery T. Miller, Judge of the United States District Court, Southern District of California; Timothy A. Reardon, Associate Justice of Division Four of the First Appellate District Court of Appeal; Ann H. Rutherford, Judge of the Butte County Superior Court; Gary E. Strankman, Presiding Justice of Division One of the First Appellate District Court of Appeal; and Clinton Wayne White, Presiding Justice (ret.) of Division Three of the First Appellate District Court of Appeal. CEB also wishes to acknowledge the contribution of Samuel Shore, the author of the first edition's chapter on dying declarations. Anne Harris, former CEB attorney, planned and edited the first edition.

Linda A. Compton, CEB attorney, planned and edited the second edition. Wesley Liu and Thomas Quinn provided legal research analysis and citation checking. Cinda Ely was responsible for production and copyediting. The Indexing Staff wrote the index, and composition was performed by CEB's Electronic Publishing Staff. The cover was designed by Grier Thornburg.

January 2010 Update

CEB wishes to thank author William H. Armstrong, of Armstrong & Associates, LLP (Oakland) for his assistance with this update.

CEB Attorney Editor Amy Righter and Legal Editor Sarah Beth Pate contributed to this update. Administrative support was provided by Nila Kanzaria and Kenya Denman. Richard Dempewolf handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

Robin D. Kojima
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Except where noted, the biographical information listed for each of the authors is current as of 2000, the date that this edition was published.

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Source: Evidence/Effective Introduction of Evidence in California/Selected Developments

Selected Developments

January 2010 Update

Summarized below are some of the more important developments included in this update since publication of the March 2009 Update:

Character Evidence

A defendant accused of first degree felony murder, with rape as the underlying felony, is accused of a sexual offense for purposes of Evid C §1108. *People v Story* (2009) 45 C4th 1282, 1285, 91 CR3d 709. See §16.2.

Discovery

Under the Electronic Discovery Act, effective August 11, 2009, counsel has new responsibilities regarding electronic discovery in civil cases. See Cal Rules of Ct 3.724(8), discussed in §39.11.

At least one appellate court has found no statutory authority for the imposition of monetary sanctions for disclosing for the first time at trial a theory not disclosed by the expert in the expert witness declaration. *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 905, 91 CR3d 617. See §24.16.

Impeachment

Voluntary statements obtained from represented defendants in the absence of counsel may be used for impeachment purposes. See *Kansas v Ventris* (2009) ___ US ___, 173 L Ed 2d 801, 129 S Ct 1841 (to jailhouse informant). See §10.25.

Judicial Notice

Although the existence of certain documents may be judicially noticeable at the demurrer stage, the content of those documents may not be judicially noticeable. See *C.R. v Tenet Healthcare Corp.* (2009) 169 CA4th 1094, 1104, 87 CR3d 424, discussed in §31.11.

***Kelly* Rule**

The National Research Council of the National Academies published a report in 2009 entitled *Strengthening Forensic Science in the United States: A Path Forward,* which is critical of the reliability of forensic identification techniques and arguably opens the door to renewed *Kelly* challenges to such evidence. See §23.16.

Official Records and Writings

For a case holding that coroner and autopsy reports in a suspected homicide case constituted "investigatory files" for law enforcement purposes and therefore were exempt from disclosure under Govt C §6254(f), see *Dixon v Superior Court* (2009) 170 CA4th 1271, 1275, 88 CR3d 847, discussed in §36.3.

Privileges and Waiver

The marital communications privilege does not apply in law enforcement administrative investigations and hearings. *Riverside County Sheriff's Dep't v Zigman* (2008) 169 CA4th 763, 87 CR3d 358. See §43.5A.

Disclosures to real parties in interest do not constitute a waiver under Evid C §912(d). *California Oak Found. v County of Tehama* (2009) 174 CA4th 1217, 1222, 94 CR3d 902. Nor do attorneys waive the attorney-client privilege by communicating with each other in the interest of their respective clients. *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 973, 98 CR3d 422. See §47.7.

Relevance

Evidence of partition ratio variability is relevant to generic DUI cases but irrelevant to per se DUI cases. *People v McNeal* (2009) 46 C4th 1183, 1200, 96 CR3d 261. See §§45.2, 45.10.

Testimonial Statements and Confrontation Rights

The United States Supreme Court has held that regardless of whether they also qualified as public records, sworn certificates of

analysis indicating the results of laboratory drug testing constituted testimonial statements under *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 194, 124 S Ct 1354, and rendered the lab analysts witnesses for Sixth Amendment purposes. *Melendez-Diaz v Massachusetts* (2009) ___ US ___, 174 L Ed 2d 314, 129 S Ct 2527. See §23.16.

The question remains, however, whether the admission of expert opinion testimony concerning lab results obtained by someone other than the testifying expert violates a defendant's Sixth Amendment right to confrontation. Compare *People v Rutterschmidt* (2009) 176 CA4th 1047, 1074, 98 CR3d 390 (Sixth Amendment jurisprudence does not preclude expert opinion testimony on laboratory results obtained by another scientist) with *People v Dungo* (2009) 176 CA4th 1388, 1401, 98 CR3d 702 (expert opinion is end-run around constitutional prohibition; when expert bases opinion on testimonial statements, *Crawford* requires defendant to have opportunity to confront individual who issued them). For further discussion, see §§23.16, 24.12.

Additional cases in which courts have considered the testimonial nature of hearsay statements, *e.g.*, *People v Gutierrez* (2009) 45 C4th 789, 813, 89 CR3d 225 (statement by three-year-old to his aunt that implicated defendant was more like "a casual remark to an acquaintance" and was therefore nontestimonial); *People v Byron* (2009) 170 CA4th 657, 670, 88 CR3d 386 (domestic violence victim's statement to responding officer at hospital, her videotaped police interview two weeks later, and her preliminary hearing testimony were testimonial; her 911 call and statement to responding officer at scene were nontestimonial); and *People v Garcia* (2008) 168 CA4th 261, 290, 85 CR3d 393 (implied hearsay in note written by codefendant's cellmate was nontestimonial), are discussed in §20.20B.

See also *Melkonians v Los Angeles County Civil Serv. Comm'n* (2009) 174 CA4th 1159, 1171, 95 CR3d 415 (even if *Crawford* applied to civil service proceedings, victim's call to business line of sheriff's station was spontaneous and equivalent of 911 call) discussed in §49.4.

Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of November 5, 2009, and monitored developments through November 13, 2009.

CEB Citation

Cite this publication as: Effective Introduction of Evidence in California (2d ed Cal CEB 2000).

1

How to Ask Questions

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§1.1 I. SCOPE OF CHAPTER

This chapter explores the principles of effective examination during trial, at depositions, and at preliminary hearings in criminal cases. The difference between questioning a witness who is on the stand or who is giving deposition testimony are highlighted in §1.15. Techniques for asking questions during direct or cross-examination, and the distinction between leading and nonleading questions, are discussed. Sample questions illustrate both suitable and objectionable examination of witnesses.

II. DIRECT EXAMINATION AT TRIAL AND DEPOSITIONS

§1.2 A. Rules for Effective Questioning

There is a fundamental difference between questions asked at trial and at depositions. At depositions, an attorney asks questions that *may* lead to relevant evidence. CCP §2018.020. At trial, only questions that elicit specific relevant information are permissible. Evid C §350. For further discussion, see §1.15. Nonetheless, the guidelines for asking questions are the same. See §§1.3-1.14.

§1.3 1. Make Your Questions Easily Understood

One of your most important jobs is to phrase questions so that witnesses and jurors understand them without any effort. To accomplish this:

- Use simple words ("car" not "vehicle").
- Eliminate legal and other jargon ("whereupon," "aforesaid").
- Speak clearly.
- Speak more slowly than you think is necessary.
- Make your sentences short, not compound.
- Tailor your questions to the witness.
- Do not ask leading questions on direct examination unless necessary, *e.g.,* the witness is adverse (see chap 6), or to save court time, *e.g.,* the questions cover preliminary or uncontested material (see chap 5).
- Be specific; avoid vague and ambiguous questions.
- Do not ask argumentative questions.
- Decide whether particular information is more clearly elicited by a question that calls for specific information or by an open-ended question that calls for a narrative response.
- Have the witness explain any technical terms or concepts that must be part of a question, using demonstrative evidence such as charts and diagrams to help jurors understand them.
- Allow the witness to complete his or her answer before asking your next question.

PRACTICE TIP: Ascertain the trial judge's "rules of the road" in the courtroom, *e.g.,* when you can stand, walk, approach witnesses.

§1.4 2. Be Sure Jurors Can Hear You

When questioning a witness at trial, always stand where the jurors can hear you. This spot will vary among lawyers and from courtroom to courtroom.

§1.5 3. Be Sure Jurors Can Hear Witness

To help jurors hear a witness, stand far enough from the witness so that the witness feels the need to speak in a loud voice.

§1.6 4. Listen to Witness's Answers to Your Questions

Allow for spontaneity. A witness may not give you exactly the information you expect, and you may have to rephrase the question. The witness may remember something for the first time on the stand, and you must be able to formulate questions on the spot. Also, you may have to refresh the recollection of—or impeach—a witness who deviates from former testimony.

§1.7 5. Ask Questions Concerning Every Aspect of Each Important Piece of Evidence

Jurors sometimes speculate about details you may consider unimportant or obvious. Do not cover key points perfunctorily. For example, you may have a witness who can testify that he was at the intersection of Bay and Green on August 1, 1998, at 10 a.m. when an accident occurred; he saw that the traffic light was green for those proceeding north on Bay. In this instance, it is important to have this witness testify as fully as possible. Jurors may be interested in why he was there, what time he had arrived, whether he was on foot or in a car, whether he had poor vision, whether anyone was with him, whether he knew anyone involved in the accident, and why he was looking at the light. If you do not bring out information that jurors wish to know, they may speculate on why in the jury room—to your client's detriment.

§1.8 6. Appeal to Jurors Who Learn by Seeing and Doing as Well as to Those Who Learn by Listening

Individuals learn best in different ways, some by seeing a document or diagram, others by listening, still others by working with information in some way. Consider using demonstrative evidence as often as possible. Documentary exhibits can be displayed from a computer projector or presented as blowups. Models can be helpful. With the court's approval, jurors may be given notebooks containing copies of important exhibits. Computer simulations, short video presentations, or other physical evidence all can present your story in a more compelling way than oral testimony alone. When using such materials, always consider what the rules or the judge's practice require with regard to showing the materials first to opposing counsel. Aside from impeachment on cross examination, you normally must show opposing counsel any physical or demonstrative evidence before showing it to the jury.

Try to tie your questions to objects or people in the courtroom, or into the demonstrative evidence you are presenting. Use descriptive language. If jurors are taking notes, notice if they write down your most important points. If they do not, you may want to ask further questions on that point or consider whether some issues should be clarified or presented differently.

There are many books and articles on body language, which may help lawyers detect how jurors are responding to their presentation during trial. See, *e.g.,* Hamlin, How to Talk So People Listen: Connecting in Today's Workplace (2006); National Jury Project, Jurywork: Systematic Techniques, chap 18 (2d ed 1983). On using trial exhibits, see California Trial Practice: Civil Procedure During Trial, chap 13 (3d ed Cal CEB 1995).

PRACTICE TIP: To involve jurors as much as possible, consider passing evidence among them. For documents, the court may allow each juror to receive a copy. It will be necessary to inform opposing counsel and to obtain permission from the court before giving any material to jurors. While the item is circulating among the jurors, do not attempt to resume examination of a witness; the jurors will probably be unable to listen while looking at the evidence.

§1.9 7. Make Your Questions Interesting

Jurors may have something happening in their lives that interferes with giving their full attention to the trial. Think of the trial as a play or movie and try to describe the events that led up to it as compellingly as possible. Make sure the witness that you present is interesting, understandable, and has relevant testimony on the issue you are trying to establish. To help the jurors listen to you and see you as occupying center stage, try to incorporate the following into your questions:

- Vary your tone of voice.
- Modulate the volume so that you speak softly sometimes and more loudly at other times.
- If you have a particular accent that may affect jurors—either bring it out during voir dire to accustom jurors to your accent or try to modify it during trial.
- Use silence, *e.g.,* in the form of pauses, effectively.

PRACTICE TIP: Watch jurors to see whether they are paying attention. If not, try to regain their attention by, *e.g.,* changing your tone of voice, pausing, or walking to a different part of the courtroom.

- Ask your questions in an inherently interesting order. You do not always have to ask for information in chronological order.
- Begin with a question that is dramatic or that calls for a dramatic answer.
- Consider whether it might be effective to start in the middle or at the end rather than the beginning.

PRACTICE TIP: When preparing for direct examination, do not write out questions. Written questions inhibit your creative thinking and detract from listening to the witness's answers. Use a checklist or an outline instead.

- Intersperse questions with demonstrative evidence that you have previously cleared with the court and counsel (see chap 39).
- Write important information on paper (or ask the witness to do so) to highlight testimony. You can use this paper again during closing argument.
- If feasible, bring the actual equipment or other technical apparatus being discussed into the courtroom.
- Use photographs, models, maps, diagrams, videotapes, computer simulations, and other demonstrative evidence whenever possible to illustrate testimony.
- Avoid repetition unless you use it for dramatic effect.
- Be as brief as you can when covering collateral subjects; jurors become bored by endless questioning on insignificant points.

PRACTICE TIP: Use words and phrases that appear in the jury instructions that you know the judge may give at the end of the trial. Tie the wording of your questions to the theme of your case whenever possible. See Effective Direct & Cross-Examination §§1.1-1.2 (Cal CEB 1986) for examples of case themes.

§1.10 8. Put Your Witnesses on in Strategic Order

Try to have important witnesses testify when the jury will best grasp the content of their testimony. Consider what other witnesses and evidence you want jurors to hear and see before you call each important witness to testify.

- Schedule important witnesses to testify when jurors are alert, *e.g.,* mornings are generally better than late afternoons.
- You may want to build suspense concerning a witness discussed by other witnesses; have that witness testify last or when you feel that his or her testimony will have the greatest impact on the jury.

§1.11 9. Try to Ask Questions That Will Not Be Objectionable

Although juries and judges do not like objections, they are even less tolerant of lawyers who do not know how to ask questions properly. In preparing your checklist of questions, think of any objection that may be made and be sure you provide a proper foundation to forestall that objection. The most important general considerations are that:

- The witness must be competent to testify.
- If giving an opinion, the witness, whether lay or expert, must be properly qualified to give the opinion asked for.
- The question must call for relevant information.
- The question must call for facts, not legal conclusions.
- The question must be technically correct, *i.e.,* it is not leading, compound, vague, argumentative, has not already been asked and answered, and the like. See §§1.17-1.19. See also California Trial Objections, chaps 7-16 (Cal CEB Annual).

PRACTICE TIP: Some of your most important evidence may come through your cross-examining opposing witnesses. The primary difference between direct and cross-examination is that you can ask leading questions on cross-examination. See §1.17. See also Effective Direct & Cross-Examination §4.5 (Cal CEB 1986). Before asking a question on cross-examination, be reasonably sure of the answer and how to deal with it.

§1.12 10. Do Not Argue With Witness

Your job is to persuade the jury, not the witness. Arguing with a witness is unprofessional and usually lowers your stature with the jury. For exceptions, see discussion in Effective Direct & Cross-Examination §4.11 (Cal CEB 1986).

§1.13 11. Require Witness to Testify to Facts Rather Than to Subjective Conclusions

Do not let the witness testify to opinions, assumptions, or beliefs, even when they are based on facts the witness observed, unless the testimony will enhance your case and you do not think your opponent will object. A witness, unless qualified to testify to an opinion, may testify only to acts actually perceived. See Evid C §§800-801.

§1.14 12. Do Not Repeat Questions

Avoid repeating what the witness just said. This is amateurish and annoying (*e.g.,* "You say the car was red?").

§1.15 B. Differences Between Questioning at Trial and Depositions

The differences between questioning a witness at trial or at a deposition may be highlighted as follows:

Questioning at trial:

- The examiner attempts to present legally admissible facts in a way that will persuade the trier of fact to find for the examiner's client.
- Only questions that elicit specific relevant information are permissible. Evid C §350.
- All appropriate objections must be made.

Questioning at deposition:

- The examiner seeks discovery, probing the extent of knowledge the witness possesses.
- The examiner may ask questions that are not necessarily relevant but that may lead to the discovery of relevant evidence. CCP §2018.020. Open-ended questions are usually permissible.
- Objections are unnecessary concerning the competence of the deponent, or the relevance, materiality, and admissibility at trial of the witness's testimony or of the materials produced. CCP §2025.460(c).
- Objections on the grounds of privilege or attorney work product protection must be made at the deposition; otherwise, they are waived. See California Trial Objections §§33.9, 35.8 (Cal CEB Annual).
- Objections to the form of the question are waived at trial unless a specific objection was timely made during the deposition. CCP §2025.460(b). This is important when you wish to use part of the deposition as evidence or for impeachment at trial.

PRACTICE TIP: Your primary goal at a deposition is to acquire information. Your secondary goal is to create a good record to be used to impeach or to refresh recollection at trial. Rarely, you may wish to approach the deponent in a strictly adversarial manner (*e.g.,* to encourage settlement). Although "gentle cross-examination" may be desirable, the purpose of a discovery deposition is to ascertain facts and to "pin down" the witness to a story, not to provide a preview of your cross-examination at trial, which would allow that witness time to repair holes in the initial testimony.

§1.16 III. QUESTIONING AT PRELIMINARY HEARING IN CRIMINAL CASE

Since the passage of Proposition 115 in 1990, the evidentiary rules for preliminary hearings have been quite different from the rules for trials. Proposition 115 has been held constitutional except for its §3, which mandated that certain rights of criminal defendants would be construed consistently with the United States Constitution so that criminal defendants would not receive greater rights than those provided by the United States Constitution. *Raven v Deukmejian* (1990) 52 C3d 336, 276 CR 326.

Police officers (including those who have honorably retired) who meet certain requirements are allowed to testify at the preliminary hearing on the statements of declarants made out of court and offered for the truth of the matter asserted, despite Evid C §1200. Cal Const art I, §30(b); Pen C §872(b). Penal Code §872(b) was held constitutional in *Whitman v Superior Court* (1991) 54 C3d 1063, 2 CR2d 160. But the *Whitman* court held that the police officer testifying at the hearing must have sufficient knowledge of the crime or circumstances of the case to assist the judge in assessing the reliability of the declarants' statements. It is not enough just to read another investigating officer's report into the record. See *People v Best* (1997) 56 CA4th 41, 64 CR2d 809 (court followed *Whitman*; held investigating officer's testimony inadmissible because it did not fall within an exception to the hearsay rule). The testifying officer may also report the testimony of expert witnesses (*e.g.,* coroner's findings, fingerprints, firearm identification), assuming that a proper foundation is laid relating to any expert's qualifications. The testimony of a qualified law enforcement officer reporting the confession of a nontestifying codefendant is admissible at a criminal defendant's preliminary hearing for the limited purpose of establishing probable cause to hold the defendant for trial, over objections of hearsay, confrontation clause, and due process, even if such testimony would be inadmissible at trial. *People v Miranda* (2000) 23 C4th 340, 96 CR2d 758.

Proposition 115 also curtailed a defendant's right to present witnesses and affirmative defenses at the preliminary hearing. Penal Code §866(a) requires a magistrate's finding that proposed defense testimony would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant before it can be presented. The defense must present a specific offer of proof to support a request to present witnesses or other evidence. See *People v Eid* (1994) 31 CA4th 114, 36 CR2d 835. Compare *Eid* with *People v Rodrigues* (1994) 8 C4th 1060, 36 CR2d 235. Also, Pen C §866(b) precludes the defense from using cross-examination of prosecution witnesses at the preliminary hearing to obtain discovery.

IV. EXAMINATION TECHNIQUES

§1.17 A. Leading Versus Nonleading Questions

Leading questions are ones that suggest a particular answer to the witness. See Evid C §764. Generally, leading questions may be asked only on cross- and recross-examination. Evid C §767(a).

The court may make exceptions to this general rule in special circumstances and when required by the interests of justice. Evid C §767(a). In the interests of justice, the court may also permit leading questions to be asked of children under age 10 in prosecutions for child abuse under Pen C §§273a, 273d, 288, and 288.5.

An example of a leading question is:

Q. The light was green when you crossed the street, wasn't it?

An example of a nonleading question is:

Q. What color was the light when you crossed the street?

The test of whether a question is leading is if a reasonable person would think that the questioner wants one answer rather than another. See Jefferson's California Evidence Benchbook, chap 28 (4th ed CJA-CEB 2009); 3 Witkin, California Evidence, *Presentation at Trial* §§165-167 (4th ed 2000). It is therefore often possible to ask "whether" something happened as a nonleading question. See *People v Calloway* (1954) 127 CA2d 504, 507, 274 P2d 497.

Leading questions are permitted on direct examination when there is little danger of improper suggestion and when they are necessary to obtain relevant evidence. See Comment to Evid C §767. According to this Comment, the typical circumstances in which leading questions are used on direct examination are "for preliminary matters, refreshing recollection, and examining handicapped witnesses, expert witnesses, and hostile witnesses."

PRACTICE TIP: Be prepared to prove that a witness is hostile before expecting the judge to permit you to ask leading questions of the witness on direct examination. See Evid C §776.

Case law has given additional authority to counsel's right to ask leading questions in direct examination of expert witnesses. See *People v Campbell* (1965) 233 CA2d 38, 44, 43 CR 237. As a practical matter, however, an expert's testimony is more persuasive if nonleading questions are asked.

According to the Comment to Evid C §767, judges may forbid leading questions during cross- and recross-examination when "the witness is biased in favor of the cross-examiner and would be unduly susceptible to the influence of questions that suggested the desired answer."

PRACTICE TIP: If leading questions do not help a witness recall preliminary matters, consider trying to refresh the witness's memory under Evid C §771. See chap 44.

For further discussion of leading and nonleading questions, see California Trial Objections, chap 13 (Cal CEB Annual).

B. Sample Questions

§1.18 1. Good Questions

If the witness is testifying that the light was green for your client at the time of the accident, direct examination questions could include:

Q: Did you observe an automobile collision on August 1, 1998, at about 7:15 p.m.?

Q: Where were you at the time of the collision?

Q: Please take this green pen and mark on the diagram a "W-1" to show where you were standing at that time?

Q: Why were you there?

Q: Was anyone with you?

Q: Do you wear glasses?

Q: Were you wearing them at that time?

Q: Are you color blind?

Q: Did you see the green 1990 Chevrolet that was involved in that collision before it occurred?

Q: What street was it on?

Q: In what direction was it going?

Q: How did you happen to notice the Chevrolet?

Q: What color was the traffic light as the Chevrolet was approaching?

Q: Did you see the Chevrolet enter the intersection?

Q: Will you please mark on this diagram a "W-2" at the point where you saw the Chevrolet enter the intersection?

Q: Did you see the color of the traffic light facing the Chevrolet when it entered the intersection?

Q: Why did you notice the color of the traffic light?

Q: What color was the traffic light facing the Chevrolet when it entered the intersection?

Q: Would you take this green pen and mark on the diagram the words "green signal" at the place the signal was located?

Q: Your Honor, may the record reflect that the witness has marked Plaintiff's Exhibit No. 1 with a "W-1" for his location at the time he observed the green 1990 Chevrolet enter the intersection. He has marked "W-2" for the point where the Chevrolet entered the intersection. May the record also reflect that the witness has indicated the location of the green light for the Chevrolet in green ink with the words "green light."

§1.19 2. Poor Questions

Given the same fact situation as in the previous section, counsel should avoid questions that are objectionable or annoying to the trier of fact, such as the following:

Q: You were following the witness, correct?

[*Leading; jury will think you are testifying instead of witness*]

Q: Isn't it true that the traffic light was red when the vehicle entered the intersection?

[*Leading*]

Q: Do you know if the car had entered the intersection at the time the light turned red?

[*Compound; if witness says yes, jurors do not know if witness means yes the car entered the intersection, yes the light was red, or both*]

Q: Do you think he had enough time to stop his car before it entered the intersection?

[*Calls for conclusion and speculation*]

Q: Don't you think the car was speeding when it entered the intersection?

[*Calls for conclusion and speculation*]

Q: Could the light have been red when the Chevrolet entered the intersection?

[*Calls for speculation*]

Q: Would I be correct in saying that the Chevrolet went through a red light?

[*Leading*]

Q: The aforesaid vehicle was proceeding from which direction?

[*Contains legalese and is not worded simply*]

Q: What do you think happened?

[*Vague, ambiguous, calls for opinion without proper foundation, calls for a narrative answer, and may call for an answer not based on personal observation*]

§1.20 V. SOURCES

See especially Effective Direct & Cross-Examination, chaps 1-2 (Cal CEB 1986); California Trial Objections (Cal CEB Annual); Kestler, Questioning Techniques and Tactics (3d ed 1999).

2

Planning Case: Securing Witnesses and Evidence; Witness Preparation; Trial Notebook

William H. Armstrong

§2.1 I. SCOPE OF CHAPTER

This chapter focuses on preparing a case for trial, including the trial outline and the role of evidence in telling the client's story to the jury. Counsel must decide which witnesses to subpoena and how to secure documentary and other physical evidence. Counsel must prepare witnesses, including experts, before they testify. It is also essential to assemble a trial notebook.

II. PLANNING YOUR CASE

§2.2 A. Using Evidence to Tell a Story

Evidence is a tool with which the trial lawyer tells the client's story to the trier of fact. The trial story must:

- Contain all essential elements of the cause of action or defense. On the discovery methods used to gather information, see California Civil Discovery Practice (4th ed Cal CEB 2006).
- Be as compelling and persuasive as possible.
- Have a theme, *e.g.,* your client is "the fall guy." See discussion and examples in Effective Direct & Cross-Examination §§1.1-1.2 (Cal CEB 1986).
- Support your presentation and your planned response to your opponent's case.
- Be a convincing part of your opening statement and closing argument. On composing opening statements and closing arguments, see California Trial Practice: Civil Procedure During Trial, chaps 9, 19 (3d ed Cal CEB 1995).

PRACTICE TIP: It is often useful for counsel to "test" the trial story on colleagues, family members, or friends, asking them whether anything seems confusing or contradictory. To develop the story, start with a concise statement of what the case is about. Think of this brief statement as the case theme. Every part of the trial story should hang together and support that theme.

B. Creating Trial Outline

§2.3 1. Description

The lawyer's trial outline is the foundation for planning. It should include:

- A list of all essential elements of the case.
- For each element of the case, a designation of which side has the burden of proof (Evid C §§115, 500) and, if different, of producing evidence (Evid C §§110, 550).
- For each element of the case, the evidence for and against, *e.g.,* witnesses, demonstrative evidence, stipulations, judicial notice.
- Any significant evidentiary problems followed by relevant Evidence Code and case law citations.

PRACTICE TIP: Review relevant instructions—the Judicial Council's plain English civil jury instructions (JC Cal Civ Jury Inst (CACI)) and criminal jury instructions (JC Cal Crim Jury Inst (CALCRIM))—and your notes for your opening statement and closing argument to help ensure a complete outline.

§2.4 2. Sample: Plaintiff's Partial Trial Outline

I. Did Acme manufacture the bolt that failed?

A. Plaintiff's evidence (burden of proof):

1. Deposition testimony of Mr. White (former Acme Vice President), p 12.

Exhibits: deposition testimony (Plaintiff's Exhibit 5); broken bolt (Plaintiff's Exhibit 6).

Problem: Will defense object on basis of lack of competence because White was on vacation during period the bolt was manufactured? But testimony is admissible as habit/custom (Evid C §1105).

2. Testimony of Ms. Johnson (repair person) whose shop bought all bolts from Acme.

Exhibits: Invoices (Plaintiff's Exhibits 7-9); canceled checks (Exhibits 10-14); shop specifications (Exhibit 15); parts list (Exhibit 16).

Problem: She has vacation plans from 6/20 to 6/27.

B. Possible defense evidence:

1. Testimony of Dr. Black (Acme engineer).

Problem: Deposition not yet taken/scheduling problems with Black. Will court allow testimony if expert depo not arranged before trial?

PRACTICE TIP: The outline should not omit the "simple" essential elements. Until the other side has formally stipulated or otherwise conceded an element, it remains a potentially fatal failure of proof. Even when a stipulation or other concession exists, it should be substituted for the evidence in the outline so that the trial lawyer can track the situation.

For further discussion on planning your case, see California Trial Practice: Civil Procedure During Trial, chap 3 (3d ed Cal CEB 1995).

III. SECURING WITNESSES AND EVIDENCE

§2.5 A. Deciding Which Witnesses to Subpoena

At the planning stage, the trial outline summarizes your investigation, discovery, and legal research, and indicates the specific evidence that will be used to establish the essential elements of the case. Although judicial notice, stipulations of counsel, or prior testimony may establish many of these elements, live witnesses should almost always present evidence of the most important issues.

Many tactical judgments are involved in selecting witnesses to testify at trial. Counsel must evaluate which witnesses are capable of testifying to each element and decide which ones will be most persuasive to the jury.

PRACTICE TIP: Do not leave the service of subpoenas until the last minute; serve them at least two to three weeks before the trial date. On deadlines for service of subpoenas and subpoenas duces tecum, see, *e.g.,* CCP §§594, 1985.3, 1987. Service of subpoenas on most government employees involves special procedures and payment of different fees. See Govt C §§68096.1 (most local government employees), 68097.2 (peace officers, firefighters, and state government employees).

For a detailed discussion of compelling witness attendance and evidence production, see California Trial Practice: Civil Procedure During Trial, chap 4 (3d ed Cal CEB 1995). On selecting witnesses and preparing them to testify, see Civ Proc During Trial, chap 5.

§2.6 1. General Pretrial Requirements

In civil cases, counsel must have complied with pretrial discovery requests. See California Civil Discovery Practice §2.20 (4th ed Cal CEB 2006). Note that effective August 14, 2009, new rules affect counsel's responsibilities regarding electronic discovery. See Cal Rules of Ct 3.724(8). Counsel should also check for any local rules or fast-track rules requiring pretrial disclosure.

In criminal cases, both the defense and the prosecution are required to disclose the names of persons they intend to call as witnesses at trial. Pen C §§1054.1, 1054.3; *Izazaga v Superior Court* (1991) 54 C3d 356, 285 CR 231.

For further discovery provisions in criminal cases, see generally Pen C §§1054-1054.7. For discussion of informant issues, see California Criminal Law Procedure and Practice, chap 17 (Cal CEB Annual). For discussion of remedies for the prosecution's failure to keep in contact with informants, see Crim Law §§17.18-17.19.

Source: Evidence/Effective Introduction of Evidence in California/2 Planning Case: Securing Witnesses and Evidence; Witness Preparation; Trial Notebook/§2.7 2. Requirements for Witnesses

§2.7 2. Requirements for Witnesses

Every person is qualified to be a witness (Evid C §700) unless the party objecting to the witness meets the burden of showing a basis for disqualification. Evid C §701; *People v Ayala* (2000) 23 C4th 225, 264, 96 CR2d 682. Counsel who wants to introduce potential witnesses should ensure that they can overcome any objections by opposing party to their giving oral testimony in court.

- Witnesses must be competent. Evid C §701.
- Witnesses must be capable of expressing themselves well enough to be understood directly or through an interpreter. Evid C §701(a)(1).
- Witnesses must be capable of understanding the duty of a witness to tell the truth. Evid C §701(a)(2).
- With specified exceptions, judges, arbitrators, and mediators are not competent to testify in a subsequent civil proceeding about matters occurring at or in conjunction with the prior proceeding (see Evid C §703.5), and neither judges nor jurors may be witnesses in trials in which they serve as such unless all parties consent (Evid C §§703-704).

WARNING: You risk a mistrial if you call the trial judge or a juror as a witness. Evid C §§703(b), 704(c).

NOTE: For a federal case in which a judge violated a federal evidence rule by interjecting his own observations and personal knowledge of facts related to a case for which he served as the judicial officer, see *U.S. v Berber-Tinoco* (9th Cir 2007) 510 F3d 1083, 1091 (construing Fed R Evid 605).

- Lay witnesses must have personal knowledge of the matters to which they testify. Evid C §702.
- Personal knowledge is a foundational requirement for admissibility, and the proponent has the burden of producing evidence of personal knowledge before the evidence will be admissible. See Evid C §§402, 403(a)(2); chap 4.
- Personal knowledge involves the capacity both to perceive and to remember the facts in question. See Jefferson's California Evidence Benchbook, chap 27 (4th ed CJA-CEB 2009).

NOTE: As opposed to a memory that is a credibility issue for the jury, the case law does not clearly define when a memory problem is so bad that the required personal knowledge is absent.

- If a witness is to give an opinion, the witness must be an expert, or the opinion must be one that can be given by a lay person. Evid C §§800-801.
- Witnesses should be credible. See Evid C §780.
- It may be appropriate to ask prospective witnesses about any prior criminal convictions that could become the basis for an attack on credibility. See chaps 26-27 on prior convictions used to impeach witnesses.
- It may also be a good idea to ask witnesses about any other character evidence that could be used to impeach them. See chaps 14-16.

NOTE: Credibility is a jury issue, not a threshold requirement for admissibility (*Michael Distrib. Co. v Tobin* (1964) 225 CA2d 655, 37 CR 518), but it is important to the success of your case.

- Witnesses must usually be available to testify at trial. Exceptions in civil cases include:
- An adverse party's admissible deposition testimony (CCP §2025.620(b)), whether videotaped (CCP §2025.340) or read from a transcript (see CCP §2025.620(e); Evid C §1290(c)).
- A stipulation to the desired testimony. See chap 51.
- Written documents or written or oral statements, admissible as exceptions to the hearsay rule, *e.g.,* business records (Evid C §§1270-1272), admissions (Evid C §§1220-1228.1), and declarations against interest (Evid C §1230).
- Videotaped deposition of treating or consulting physician or of any expert witness. CCP §2025.620(d).

- Former testimony. Evid C §§1290-1292; see chap 28.
- Reliable hearsay introduced through the testimony of an expert. Evid C §801(b). See California Expert Witness Guide, chap 4 (2d ed Cal CEB 1991).

WARNING: Beware of the limits on an expert's right to relate hearsay. *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 3 CR2d 833. See chap 24.

- Exceptions in criminal cases that allow the testimony of witnesses to be admitted in their absence include:
- Testimony in the preliminary hearing transcript. See *People v King* (1969) 269 CA2d 40, 74 CR 679.
- Witness conditionally examined under Pen C §§1335-1345. See, *e.g., People v Mays* (2009) 174 CA4th 156, 168, 95 CR3d 219.
- Out-of-state witness examined under Pen C §§1349-1362.
- Written documents or written or oral statements, admissible as exceptions to the hearsay rule, *e.g.,* business records (Evid C §§1270-1272), admissions (Evid C §§1220-1228), and declarations against interest (Evid C §1230).
- Former testimony. Evid C §§1290-1292.
- Reliable hearsay introduced through an expert's testimony. Evid C §801(b). See Caution above.

PRACTICE TIP: Keep track of witness plans for vacations, business trips, etc. It is essential to consider how you will establish that the witness is unavailable, if that becomes necessary. Unavailability is a fact to be proved just as any other fact.

For general discussion of using prior testimony in criminal cases, see California Criminal Law Procedure and Practice §§31.20-31.21 (Cal CEB Annual).

§2.8 B. Evaluating Documentary or Other Physical Evidence

Many rules affect documentary or other physical evidence that is admissible at trial, including the following:

- The evidence must be "a writing." Evid C §250; see chap 11.
- A writing must be authenticated. Evid C §§1400-1454; see chap 11.
- The content of a writing may be proved by an otherwise admissible original or by otherwise admissible secondary evidence. Evid C §§1520-1567; Pen C §872.5; see chaps 47-48.
- Counsel may have to show the chain of custody of an item of evidence.

NOTE: An attack on chain of custody aims to show that the evidence was tampered with in some way or that another item of evidence was substituted for the original. *People v Riser* (1956) 47 C2d 566, 581, 305 P2d 1, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201; see chap 39.

- A subpoena duces tecum is required for the production of physical evidence, or to require a witness to bring physical evidence. CCP §1985. See California Trial Practice: Civil Procedure During Trial, chap 4 (3d ed Cal CEB 1995).
- Demonstrative evidence must be substantially similar to the event being depicted. See chap 39.
- A proper foundation must be established for experiments and other scientific tests. Evid C §§400-405; *People v Kelly* (1976) 17 C3d 24, 130 CR 144; see chaps 4, 23.
- If the evidence is, or contains, an out-of-court statement offered for the truth of the matter asserted, it must satisfy an exception to the hearsay rule. Evid C §1200.

WARNING: Many courts require attorneys to submit a list of all exhibits before trial. Check local rules.

For further discussion of documentary and other physical evidence, see chap 39. See also Civ Proc During Trial, chap 13; Cotchett, California Courtroom Evidence, chaps 26-27 (2008); 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* (4th ed 2000); 2 Witkin, California Evidence, *Documentary Evidence* (4th ed 2000); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, chap 4 (3d ed 2000); California Personal Injury Proof (Cal CEB 1970).

IV. PREPARING WITNESSES

§2.9 A. Meet With Each Witness Before Trial

It is important for the lawyer to see and hear each witness before trial begins because the witness's testimony, demeanor, and appearance will affect the trier of fact. In particular, counsel should take the time to carefully prepare the client to testify effectively.

Source: Evidence/Effective Introduction of Evidence in California/2 Planning Case: Securing Witnesses and Evidence; Witness Preparation; Trial Notebook/§2.10 B. Common Topics of Discussion

§2.10 B. Common Topics of Discussion

When meeting with a witness, counsel should cover the following topics:

- Review the parts of the trial story to which the witness's testimony is supposed to relate (*e.g.,* "We want you to tell the jury what you know about who made this broken bolt").
- Remind the witness of the purpose of the testimony (*e.g.,* "There is an argument about who made the bolt, and the jury needs to hear what you know about that").
- Tell the witness how his or her testimony "fits" with the entire trial story (*e.g.,* "Our client says he was injured when this bolt broke and some machinery fell on him; the other side says it's not their bolt and it didn't cause the accident").
- Ask the witness to bring any physical evidence that he or she will identify or use on the stand (*e.g.,* business records or demonstrative evidence) and familiarize the witness with the procedures for using them, your introducing them into evidence, and his or her testifying about them.
- Refresh the witness's recollection of facts relating to the anticipated testimony, including any contrary facts (in expected testimony or existing documents) that may be raised in cross-examination.
- Review any anticipated evidentiary problems and what the witness may be expected to do to resolve them (*e.g.,* "They may object to our introducing this bolt as evidence on the ground that there is no foundation. I will then ask you to describe how the bolt came into your possession so that the judge and jury will know that you took it from the accident wreckage and have had it ever since").
- Review any credibility questions that may affect the witness, including behavior on the stand and appropriate attire. If the witness has special needs (*e.g.,* medical problems, must have a cigarette every hour) those should be resolved before trial.
- Remind the witness of the importance of the oath to tell the truth. The witness should be told that, if the truth is "I don't know" or "I don't remember," that is the correct answer rather than guessing.
- Let the witness know that opposing counsel sometimes asks witnesses whether they have discussed their testimony with the attorney calling them. Tell the witnesses that it is all right for witnesses to talk to an attorney before testifying and to respond truthfully if asked by opposing counsel.
- Tell the witness to listen to the entire question before beginning to answer, and to wait for the judge's ruling if there is an objection to the question.

NOTE: Whether you instruct witnesses to look at the jury while testifying, or look at the person asking the question, have witnesses speak loudly and clearly enough to be understood by everyone in the courtroom.

In civil cases in many counties, counsel may be required to disclose witness names before trial. See, *e.g.,* Los Angeles Ct R 7.9(h). However, enforcement of these local rules is unpredictable. Check local rules to learn what the actual practice is, keeping in mind that asking the trial judge may remind the judge of a requirement otherwise forgotten. Witness lists are subject to a qualified work product protection (*City of Long Beach v Superior Court* (1976) 64 CA3d 65, 134 CR 468), but mandated disclosure "shortly before trial" has been held permissible (*In re Jeanette H.* (1990) 225 CA3d 25, 275 CR 9), even in a criminal case applying Proposition 115 (*In re Littlefield* (1993) 5 C4th 122, 19 CR2d 248).

You may want to have an investigator or office assistant serve the witness with a subpoena at the time of the attorney-witness interview to save the expense of separate service. Note in your witness file which documents have been shown to each witness, particularly expert witnesses. Plan how to handle those matters on direct examination. Prepare the witness on how to respond to questions about particular documents on cross-examination. See California Expert Witness Guide, chap 8 (2d ed Cal CEB 1991).

PRACTICE TIP: If the witness is your client, you should discuss how the attorney-client privilege may apply to the testimony. If the witness is not your client, you must confirm that the witness is not represented by an attorney, or that a privilege held by another person does not bar the witness from speaking with you about any privileged matters. If there is no legal prohibition against your discussions with a nonclient, you should explain that opposing counsel may ask the nonclient about the preparatory meeting. You must bear in mind the risk that what you say may be repeated, or misstated, to the trier of fact, and it may be

prudent to have another person present as a witness to the discussion or to arrange for a recording of the meeting to be made.

For further discussion of witness preparation, see California Trial Practice: Civil Procedure During Trial, chap 5 (3d ed Cal CEB 1995).

§2.11 C. Preparing Expert Witnesses

Many of the matters discussed in §§2.9-2.10 about lay witnesses also apply to expert witnesses. Preparing an expert may involve additional items, depending on the case and the expert's forensic experience. See Evid C §§801-805. At a minimum, you should advise the expert about the special evidentiary rules that apply to materials on which the expert's opinion is based. See chaps 23-24.

In preparing an expert witness, counsel should make sure the expert knows:

- It is generally proper for an expert witness to list the publications on which he or she bases an opinion but not to discuss on direct examination the detailed contents that are hearsay.

- Opposing counsel is entitled during cross-examination to read portions of publications that the expert has read or relied on, and portions of publications that are established as "reliable authority" by another expert. Opposing counsel may also ask "Do you agree" questions that may require a "yes" or "no" answer. Depending on the trial judge, the witness may be allowed to explain immediately or be required to wait for redirect examination.

See generally California Expert Witness Guide, chap 12 (2d ed Cal CEB 1991).

V. TRIAL NOTEBOOK

§2.12 A. Description

A trial notebook should contain everything a lawyer needs to take to court to try a case. The contents should reflect the personal style of the individual trial lawyer and the particular requirements of the case. The notebook can take several forms, *e.g.,* a three-ring binder, a box containing file folders, or computer files.

PRACTICE TIP: Documents relevant to more than one category should be copied and placed in each relevant file.

Most judges are accustomed to attorneys using laptop computers in court, but it is wise to ask the judge for permission first, or to plug it into a particular outlet, if necessary. You should also seek permission from the judge to set up display monitors and related equipment, and communicate with the clerk before installing equipment in the courtroom. Some judges want their own monitor on the bench; others have particular ideas about where equipment should be located and which display techniques will be permitted. Check first, and remember—even if you know more about the technology, the judge is in charge of the courtroom.

§2.13 1. Office Files Are Foundation of Trial Notebook

The trial notebook is prepared from documents taken from existing office files, whether those files are paper or computer files. It is essential that these office files be set up when the case is opened so that they can serve as an organizing tool throughout the litigation. Simple cases may require only one file at the outset; more complex cases may require several files. Different types of cases require different file categories. Indexes are necessary in all but simple cases. Some common general file categories include:

- Checklist of actions to take, *e.g.,* specific investigation, discovery, witness subpoenas, graphic aids.
- Trial outline.
- Correspondence.
- Pleadings and other papers filed with court.
- Discovery document copies organized according to issue.

WARNING: Put originals, or copies that will be treated as originals, of each complete document in a locked, fireproof file cabinet. Computer files should be backed up, with the back-up file stored in a separate location for optimum security.

- Individual witness files. These may contain, *e.g.,* letters, witness statements, summaries of interviews with witnesses, and summaries or copies of portions of relevant discovery documents.
- Subpoena returns.
- Exhibit list.
- Copies of legal memorandums filed with court.
- Motions that will be filed with court before or during trial.
- Ideas and summaries of relevant cases and articles on important legal and factual issues.
- Ideas on jury selection, opening statement, closing argument, jury instructions, and general trial tactics.

PRACTICE TIP: The trial notebook is only as good as your case preparation. Well-organized office files help you see the case clearly, so that you can fill in your own evidentiary gaps while taking advantage of weaknesses in the opponent's case.

§2.14 2. When to Start Trial Notebook

Although it is never too soon to rough out a trial notebook, the time to actually assemble and complete the notebook depends on the complexity of the case. In a simple case, the trial notebook may not need to be put together until about a week before trial.

§2.15 B. How to Prepare Trial Notebook

The trial notebook should be designed for your personal use. It should not be designed to impress a client, an adversary, or another lawyer in your office (although it may serve to do so).

Think about what you will need or want during trial. The more trial experience you acquire, the more you will know what is needed. Tasks to do when preparing the trial notebook include:

- Complete your trial outline. Unless the parties have stipulated to consecutive or other exhibit numbers during discovery, give numbers (if you represent the plaintiff) and letters (if you represent the defendant) to the evidence you will offer as exhibits or use as demonstrative evidence at trial; write the numbers or letters of relevant physical evidence next to each issue. You may have to use new numbers at trial if, *e.g.*, the court numbers all exhibits consecutively. Write the names of relevant witnesses next to each issue; list any relevant cases or statutes next to each issue.

- Make a witness list in order of anticipated appearance. Include a column on the list that allows you to check off whether a subpoena has issued and has been served.

- Prepare a trial brief (if the judge accepts trial briefs) showing your summary of the law and the facts of the case. Many judges find them helpful in that they alert the court to important issues and to areas that the judge may want to research. A tactical disadvantage is that trial briefs make your approach clear to the other side, alerting them to possible proof or evidentiary problems.

- Devise a table of exhibits for introducing evidence at trial. Give the exhibit number, a description, the witness who will introduce it, and leave two columns for use at trial to show whether the evidence is either admitted or offered but not admitted. Have an extra column for the trial exhibit number if it is different from the number or letter you have assigned it before trial begins.

- Draft any written in limine motions.

- Make an outline of the legal arguments for use during oral argument of any possible evidentiary trial issues.

- Prepare a separate file for each plaintiff and defense witness. For each witness, list the facts to which you wish them to testify (either on direct or cross-examination). Check them off as you receive the information from the witness during trial or before you complete your questioning, to be sure you have covered them. You may wish to use an outline format for your proposed questions. Include copies of all relevant material to be used to examine or cross-examine each witness. Place all prior testimony, reports, and other material concerning the witness in the folder in the event you need to impeach or refresh recollection.

- Check your witness subpoenas returns to make sure all necessary witnesses have been personally served and will be present.

- Consider putting some or all witnesses on telephone standby. See CCP §1985.1. You may also ask the court to place your witnesses on standby at the beginning of the case; you must still notify them.

- Prepare any stipulations or requests for judicial notice that will be used instead of other evidence or testimony.

- If relevant, prepare a written brief on why prior testimony will be substituted for an unavailable witness. Be sure you have the witnesses to testify to the missing witness's unavailability.

- Include any pretrial orders that may regulate the trial's course.

- Prepare sample questions for jury voir dire.

- Draft any written questionnaire you plan to submit to the venire. See Juror Questionnaire for Civil Cases (Judicial Council Form MC-001).

- Prepare witness lists to present to the judge for use during voir dire. In civil cases, be sure you also prepare a brief factual statement of the case for the judge to use during voir dire.

- Write an outline of your opening statement.
- Write an outline of your closing argument(s).
- Make sure you have a complete set of jury instructions.
- Prepare sample verdict forms.

PRACTICE TIP: Be sure you have enough copies of jury instructions and sample verdict forms for opposing counsel. See California Trial Practice: Civil Procedure During Trial, chaps 20, 22 (3d ed Cal CEB 1995).

- List the actions still to be taken.
- Arrange to have all charts and other demonstrative evidence prepared.
- Have your investigator or assistant gather all real evidence (*e.g.,* defective part, written contract) and store them in one safe place.
- If you will use a computer to display documents or graphics at trial, check the equipment arrangements and consider how you plan to scroll through your display while you are speaking.

PRACTICE TIP: Be sure to comply with any special rules of the Trial Court Delay Reduction Act and local rules. Remember that the local rules may have been superseded by as-yet-unpublished procedures, or they may have fallen out of use. It is best to check with the clerk or judge to make certain you are in compliance with local practices on submitting in limine motions, lodging jury instructions and verdict forms, and introducing trial exhibits. As a practical matter, this burden is more urgent for the party who must proceed first, usually the plaintiff.

§2.16 VI. SOURCES

Burden of proof and production of evidence are discussed in Jefferson's California Evidence Benchbook, chap 47 (4th ed CJA-CEB 2009).

For further discussion of organizing of trial materials, see California Trial Practice: Civil Procedure During Trial, chap 3 (3d ed Cal CEB 1995).

Jury selection is discussed in Civ Proc During Trial, chap 8; see also National Jury Project, Jurywork: Systematic Techniques (2d ed 1983).

Opening statements and closing arguments are discussed in Persuasive Opening Statements & Closing Arguments (Cal CEB 1988).

Jury instruction sources include the Judicial Council's plain English civil jury instructions (JC Cal Civ Jury Inst (CACI)) and criminal jury instructions (JC Cal Crim Jury Inst (CALCRIM)). See Civ Proc During Trial, chap 20. See also Rucker & Overland, California Criminal Practice, Motions, Jury Instructions and Sentencing (3d ed 2004).

Source: Evidence/Effective Introduction of Evidence in California/3 How to Combat Objections: In Limine Evidentiary Motions; Bench Conferences; Offers of Proof/Chapter Outline

3

How to Combat Objections: In Limine Evidentiary Motions; Bench Conferences; Offers of Proof

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§3.1 I. SCOPE OF CHAPTER

This chapter discusses how counsel may meet objections. Counsel may foresee an objection and confront the issue first, by bringing an in limine or other pretrial motion before the opponent raises the objection. Alternatively, counsel may wait for the opponent to object, then argue for a favorable ruling. On foundational problems, which are subject to preliminary fact hearings under Evid C §§402-405, see chap 4.

§3.2 II. HOW TO COMBAT OBJECTIONS

A proponent of evidence may counter anticipated objections by making an in limine or other motion to admit the evidence. See §§3.3-3.16. Some judges believe that in limine motions may only seek the exclusion of evidence, perhaps because the Latin phrase appears to mean "to limit." Actually, the phrase means "at the threshold" but since the authority for such motions is based on the court's authority to control the proceedings (see, *e.g.,* CCP §128), if the judge thinks in limine motions may only be used to exclude evidence, then that is the rule in that judge's court. If you are not sure about your judge's viewpoint on this issue, it may be better to avoid the Latin phrase and make a "motion for threshold determination of anticipated objection to evidence" and cite CCP §128. If the anticipated objection relates to a foundational matter, then as the proponent you have the burden of establishing the predicate facts, and your motion should be a motion to determine the existence of foundational facts under Evid C §§402 and 403. If you expect the evidentiary issue to be complex, or to require a factual hearing out of the jury's presence, it is important to apprise the judge of this. Usually, however, counsel combats objections after the opponent objects at trial. You may counter objections in one or more of the following ways:

- Submit a previously prepared legal memorandum briefing the admissibility issue.
- Contest objections orally with the appropriate evidence rule permitting admissibility.

PRACTICE TIP: As you prepare your examination outline, anticipate objections and write the Evidence Code section and case citations supporting admissibility in the margins.

- Propose "conditional admissibility" to the judge—subject to Evid C §§403, 405. See chap 4.
- Make an offer of proof either by summarizing the testimony that this witness (and other witnesses) will provide or by having the witness testify outside the jury's presence so that the court can "preview" the evidence and determine its admissibility. See §§3.21-3.26. Be sure to explain the relevance of the evidence.
- Propose alternative theories of admissibility. For example, if the evidence is not admissible in its entirety, part of it may be admissible, or the entire piece of evidence may be admissible for a limited purpose under Evid C §355. See chap 7.
- Ask to be allowed to pursue further questioning. If the relevance of a line of questioning will become apparent in a few minutes, ask the court to permit you to proceed. Be careful, however, not to make promises you cannot keep.
- Request an opportunity to brief the issue, although a brief or memorandum of law should already have been prepared if the issue is novel or otherwise requires such attention. If the objection comes as a surprise and is of sufficient complexity to warrant it, request the opportunity to brief the issue overnight. Consider, however, the impact of any delay on the jury.
- If all else fails, move on. If your opponent's objection is well taken, it is best to proceed without skipping a beat so you do not accentuate the matter before the jury.

PRACTICE TIP: Keep written evidence memorandums short and to the point. Do not argue with opposing counsel; address your points to the judge.

For further discussion, see generally California Trial Objections (Cal CEB Annual).

III. IN LIMINE EVIDENTIARY MOTIONS

§3.3 A. Description

An in limine motion is a request made before trial to admit or exclude evidence before the evidence is offered. It is most commonly used to exclude evidence that might be prejudicial if offered or discussed in front of the jury. See, *e.g.,* *Piscitelli v Salesian Soc'y* (2008) 166 CA4th 1, 5, 82 CR3d 139 (in limine motion seeking ruling that priest's prior conviction for child molestation would be unduly prejudicial). The motion is made outside the jury's presence. See Evid C §402(b); California Trial Objections §§2.2-2.7 (Cal CEB Annual).

PRACTICE TIP: The motion in limine is not expressly authorized by statute, but is within the trial court's inherent power to entertain and grant. *Peat, Marwick, Mitchell & Co. v Superior Court* (1988) 200 CA3d 272, 288, 245 CR 873. Trial judges enjoy broad authority over the admission and exclusion of evidence, and most courts require written in limine motions. See, *e.g.,* San Francisco Ct R 6.1; Los Angeles Ct R 8.92.

§3.4 1. Elements of Motion In Limine

For an in limine motion to be effective, counsel's moving papers should:

- Describe briefly the evidence sought to be admitted or excluded. For more discussion of this aspect of the motion, see "Offers of Proof" in §§3.21-3.26.
- Argue factually why the evidence should be admitted or excluded and why the court needs to rule before the evidence is offered.
- Explain legally why the evidence is properly admitted or excluded.
- Cite appropriate legal authority.

PRACTICE TIP: Be sure that the motion and court's ruling (and the grounds of the ruling) are made on the record, or put on the record, to preserve the objection for appeal.

See California Trial Practice: Civil Procedure During Trial, chap 7 (3d ed Cal CEB 1995).

§3.5 2. Purpose

Counsel's objective in making a motion in limine is to obtain an evidentiary ruling in advance. It avoids the necessity of trying to "unring the bell" once a jury knows that such evidence exists. *Blanks v Seyfarth Shaw LLP* (2009) 171 CA4th 336, 375, 89 CR3d 710; *Condon-Johnson & Assoc. v Sacramento Mun. Util. Dist.* (2007) 149 CA4th 1384, 1392, 57 CR3d 849. See §3.11.

PRACTICE TIP: Motions in limine should be used only to manage a case by deciding difficult evidentiary issues before trial; counsel should use care to avoid using them to achieve other goals that are based on specific statutory motions. See §3.10.

B. Procedures

§3.6 1. Who Makes Motion

The motion is usually made by the party seeking to exclude evidence, but may also be made by the party seeking to introduce it.

§3.7 2. Form of Motion

Local rules require in limine motions to be written and may prescribe the format and contents. See, *e.g.,* San Francisco Ct R 6.1; Los Angeles Ct R 8.92. No specific form is required by statute.

If made orally, the court reporter should be present. An in limine motion is usually made before trial begins and therefore outside the jury's presence. For sample forms of oral motions in limine, see §§3.15-3.16. See also California Trial Objections §§2.2, 2.12 (Cal CEB Annual).

PRACTICE TIP: Judges usually pay more attention to written in limine motions than to oral motions (when local rules do not bar them) or to oral offers of proof. Written motions are particularly effective when legal issues are subtle or complex. But they are best used when your legal theories are solid. If your legal arguments are weak, an oral offer of evidence during trial may be preferable so that opposing counsel does not have time to fully expose your argument's weaknesses. On offers of proof, see §§3.21-3.26.

When the admissibility of the evidence depends on how certain witnesses may testify, and the court, even after an offer of proof, expresses concern that the testimony has yet to be heard, the moving party should seek to present the proposed witness's testimony on voir dire outside the jury's presence. The moving party should also make clear any anticipated prejudice that might result from the court's failure to rule on the motion in limine. See *People v Bolden* (2002) 29 C4th 515, 542, 127 CR2d 802.

§3.8 3. Timing of Motion

In limine motions are usually heard before trial either at a chambers conference or motion hearing. Motions to exclude or admit evidence may also, of course, be made during trial and have been referred to as in limine motions (see *Mardirossian & Assoc. v Ersoff* (2007) 153 CA4th 257, 268, 62 CR3d 665), though "in limine" means "at the threshold." Most counties require in limine motions to be submitted before trial in civil cases. See, *e.g.,* San Francisco Ct R 6.1; Los Angeles Ct R 7.9(h), 8.92; Alameda Ct R 3.35(e). Whatever the motion may be called, it is a good idea to alert the judge as soon as possible if you expect to raise a complex evidentiary issue.

Local rules are often unclear about whether the *proponent* of the evidence must raise the issue of admissibility and can appear to apply only to the party who *opposes* the evidence. This can put the proponent of evidence in a bind: Counsel might not want to alert an opponent to a particular witness or piece of evidence, but neither does counsel want the trial judge to exclude the evidence based on the failure to timely bring the issue to the court's attention with a motion before trial. A key consideration is how much time is required to address the evidentiary issue and whether counsel should expect a dispute. To solve the dilemma, ask the trial judge or the clerk what the court's practice is concerning in limine or pretrial motions.

PRACTICE TIP: Some judges are reluctant to rule in a vacuum; they will instruct counsel not to refer to the evidence during voir dire or opening statement and will defer a ruling until testimony is heard.

§3.9 C. Possible Rulings

The court may rule to exclude or to admit the evidence or may defer ruling until later in trial. The court may also rule conditionally, either admitting the evidence subject to connecting it up later or excluding it subject to reconsideration after foundational facts have been established.

§3.10 D. Misuse of Motion In Limine

It is a misuse of a motion in limine to attempt to compel a witness or a party to conform trial testimony to a preconceived factual scenario based on testimony given during pretrial discovery. See *Kelly v New W. Fed. Sav.* (1996) 49 CA4th 659, 56 CR2d 803. Nor should matters of day-to-day trial logistics and professional courtesy be the subject of motions in limine. See *Kelly v New W. Fed. Sav., supra*.

Motions in limine may be used to dispose of a cause of action or a case, but courts have expressed skepticism about this tactic. It may be more appropriate to use a motion for summary judgment or for judgment on the pleadings, or another statutory motion that provides specific procedural protections to the nonmoving party. See *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1593, 71 CR3d 361 (procedural irregularity found harmless). If a cause of action or a case is dismissed through a motion in limine, counsel should anticipate that appellate courts will review the ruling and construe all evidentiary conflicts and inferences in favor of the losing party and against the disfavored judgment. 158 CA4th at 1594.

E. Effect of Motion

§3.11 1. Excluding Evidence

If the court excludes evidence, it may neither be introduced nor be referred to at trial (including opening statement). Opposing counsel should object to any attempt to introduce evidence excluded in limine. Counsel's violation of an exclusion order may result in a mistrial (see Evid C §353) or contempt citation. See *Charbonneau v Superior Court* (1974) 42 CA3d 505, 116 CR 153. If a mistrial occurs, or the initial judgment is reversed on appeal, the judge at the subsequent retrial may redetermine the question of admissibility and rule differently than the judge at the prior trial. See *People v Riva* (2003) 112 CA4th 981, 5 CR3d 649 (mistrial); *People v Mattson* (1990) 50 C3d 826, 849, 268 CR 802 (retrial after reversal on appeal).

PRACTICE TIP: If an in limine motion is granted, consider asking the judge to sign a written order setting forth the ruling and to instruct opposing counsel to notify all witnesses of the ruling. Note that judges may change rulings made in limine, depending on how the evidence comes out at trial.

2. Preserving Issue for Appeal

§3.12 a. If Trial Court Excludes the Evidence

To preserve the issue for appeal, the record must include counsel's in limine motion with an offer of proof (see §3.24) and the legal arguments set forth, and the court's ruling with its grounds stated.

When the court's decision on a motion to exclude evidence will determine counsel's offer of other evidence (*e.g.*, a motion to exclude reference to a prior felony conviction), it is important to provide the court with specific information, including the name of the proposed witness, the purpose and content of the anticipated testimony, and any relevant documents or other things. If the offer is not sufficiently specific, a denial of a motion to exclude impeachment or rebuttal evidence may not be reviewable, because the appellate court lacks an adequate record to determine whether the trial court erred. *People v Foss* (2007) 155 CA4th 113, 126, 65 CR3d 790. See *People v Rodrigues* (1994) 8 C4th 1060, 36 CR2d 235. Compare *Rodrigues* with *People v Eid* (1994) 31 CA4th 114, 36 CR2d 835. It is also essential that the trial court's ruling be final, not tentative. See *People v Burnett* (2003) 110 CA4th 868, 2 CR3d 120.

On potential adverse evidentiary consequences if a cause of action or a case is dismissed by means of a motion in limine, see §3.10.

§3.12A b. If Trial Court Admits the Evidence

If a motion to exclude evidence is denied, counsel opposing its admissibility should obtain a court-approved stipulation with opposing counsel or a ruling from the court on the record that no further objection is needed to preserve the objection. Otherwise, an objection at trial may be required. See Evid C §353(a); *People v Brown* (2003) 31 C4th 518, 546, 3 CR3d 145; *People v Jennings* (1988) 46 C3d 963, 975 n3, 251 CR 278. This rule is called the "reiteration rule." On the reiteration rule generally, and circumstances in which reiterating an objection may be excused, see *People v Morris* (1991) 53 C3d 152, 189, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394; *Boston v Penny Lane Ctrs., Inc.* (2009) 170 CA4th 936, 950, 88 CR3d 707.

No further objection is needed when a trial judge commits misconduct in admitting the evidence and a further objection raising that misconduct would be fruitless and a curative jury instruction ineffective. See *Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 1007, 60 CR3d 542 (judge committed misconduct and violated judicial standards by viewing ex parte, before admissibility ruling, defense's proffered videotape with only defense counsel present).

§3.13 F. Alternatives to In Limine Motions

In limine motions are still the exception, not the rule. *Most* of the court's decisions on the admissibility of evidence are made at the time evidence is offered and objected to during trial. See *Haluck v Ricoh Electronics, Inc.* (2007) 151 CA4th 994, 60 CR3d 542.

§3.14 G. Table: Should In Limine Motion Be Made?

Advantages of In Limine Motion	*Advantages of Introducing Evidence Without In Limine Hearing*
Aids trial planning: you can plan testimony relying on admissibility of evidence in question or can compensate when evidence has been ruled inadmissible.	Introducing the evidence during trial may not trigger an objection.
Permits briefing; gives judge time to consider issue.	An in limine motion reveals some of your trial strategy.
May give you more insight into your opponent's case.	A written motion allows opposing counsel time to research counter arguments.
Makes for smoother presentation at trial.	It may be advantageous for jury to witness your efforts to admit evidence in the face of obstructionist efforts by opposing counsel.
Educates judge about your case.	If the facts favor your position more than the law does, you may want to force the judge to make a quick decision without the opportunity for research.
May create better written record for appeal.	If you simply present or oppose the evidence during trial, you may catch opposing counsel unprepared and with less opportunity to make a good record.

PRACTICE TIP: Opposing counsel's failure to object usually waives any error on appeal. See Evid C §353(a); *People v Sheldon* (1989) 48 C3d 935, 951, 258 CR 242. There is no waiver, however, if dramatic changes were made in the law after trial that counsel could not have anticipated. *People v Turner* (1990) 50 C3d 668, 704, 268 CR 706.

H. Sample Motions In Limine

§3.15 1. Oral Motion to Exclude Evidence

[Pretrial in-chambers conference]

Court: Are there any evidentiary matters counsel wish to take up at this time?

Opponent: Yes. As Your Honor knows, my client has reached a settlement agreement with some similarly situated plaintiffs in another case. I move in limine to exclude all reference to that settlement or to any discussions or admissions made during its negotiation, under Evidence Code §§1152 and 1154, on the ground that such evidence is irrelevant to this action and would be highly prejudicial to my client.

Proponent: May I be heard on this point, Your Honor?

Court: Yes.

Proponent: I have no intention of introducing evidence concerning the fact or amount of that settlement. However, during the settlement discussions, defense counsel produced documents for the other plaintiffs' counsel. These were preexisting documents not subject to Section 1152, and I will seek to have them admitted at trial.

Court: I will permit you to offer the documents, subject to proper authentication and a showing of relevance. But I want no reference to the fact that they were produced during a settlement discussion and I want no reference at all to the settlement during this trial.

Opponent: May it be stipulated that I object to the admissibility of the documents, without having to reassert my objection or explain my reasons before the jury?

Proponent: So stipulated.

Court: Agreed.

PRACTICE TIP: Ensure that motions in limine are made on the record or that the results of the motion and any stipulation that the objection need not be reasserted during trial is put on the record.

For sample written motion in limine, see California Trial Practice: Civil Procedure During Trial §7.49 (3d ed Cal CEB 1995).

§3.16 2. Oral Motion to Admit Evidence

[Pretrial in-chambers conference]

Court: Are there any other evidentiary matters?

Proponent: Yes, Your Honor. I intend to offer evidence at trial of other occasions when Gizmo Company machines caused grave injuries similar to those experienced by my client. I expect counsel for Gizmo to object; however, such evidence is admissible to show knowledge on the part of Gizmo and I seek the court's ruling to that effect.

Opponent: This is the first I've heard of this, Your Honor. I ask that counsel explain more fully what he has in mind, and I ask the court for the opportunity to brief the issue.

Court: Counsel, just what is your theory?

Proponent: The evidence in this case will show that my clients, Mr. and Mrs. Victim, were gravely injured when the blades of a Gizmo machine flew off and struck them. At trial, I intend to offer evidence of other injuries caused by Gizmo machines, including injuries to Mrs. Nice, who wrote to the Gizmo Company to complain of the problem of loose Gizmo blades just three weeks before my clients purchased their Gizmo machine.

Court: I don't want to try Mrs. Nice's case in this court. However, I'll permit you to admit evidence of the letter, to prove knowledge, unless defense counsel can come up with some authority before trial to prohibit this. And I mean *before* trial, because I assume you'll want to use this in your opening statement.

Proponent: Yes, I intend to do that, Your Honor.

Opponent: I'll get a brief to you within the week, Your Honor.

PRACTICE TIP: If caught by surprise, it is a good idea to ask the court for time to brief the issue in writing.

For sample written motion in limine, see California Trial Practice: Civil Procedure During Trial §7.49 (3d ed Cal CEB 1995).

IV. BENCH CONFERENCES

§3.17 A. Description

Counsel who wishes to object or to argue an objection but does not want the jury to hear may ask the judge's permission to approach the bench and make any objection there. The court reporter should be asked to take down what is said during the bench conference or, at a minimum, the court's ruling should be put on the record at the conclusion of the bench conference.

PRACTICE TIP: If the location of the jury box permits jurors to hear what is said at the bench, counsel should ask before trial that all bench conferences be held outside the courtroom, *e.g.,* in the judge's chambers.

§3.18 B. When Bench Conferences Appropriate

Examples of situations in which bench conferences would be appropriate include:

- The proponent asks a question and the opponent objects. The proponent needs to explain factually why the evidence is admissible. See §3.20.
- The opponent sees that an objectionable question is coming and objects before it is asked. Counsel may ask permission to approach the bench to explain the objection. See, *e.g.,* Los Angeles Ct R 8.46.
- The proponent knows that his or her next question may be objectionable and that a curative instruction will not suffice. An in limine motion would also be appropriate.

PRACTICE TIP: If a lengthy discussion is anticipated, counsel should request an in-chambers conference.

§3.19 C. Disadvantages of Bench Conferences

Many judges discourage bench conferences in their courts. Ascertain each judge's preference before trial. Local court rules may also regulate them. See, *e.g.,* Los Angeles Ct R 8.41. In addition, juries do not like bench conferences. They find such breaks in the trial annoying and boring, and they resent information being withheld from them.

NOTE: The Standards of Judicial Administration specifically recommend that the trial judge, in meeting the responsibility to manage the trial proceedings without needless interruptions, "[p]ermit sidebar conferences only when necessary, and keep them as short as possible." Cal Rules of Ct, Standards of J Admin 2.20(b)(8).

§3.20 D. Sample Approach to Bench by Proponent

Proponent: Mrs. Mother, who told you that your son had been injured?

Opponent: Objection; calls for hearsay.

Proponent: May we approach the bench, Your Honor?

Court: Yes.

[*Counsel and reporter approach bench*]

Proponent: Your Honor, the witness learned of her son's injury when Mr. Driver ran to her shouting, "I ran over your kid." The statement is properly introduced as a party admission under Evidence Code §1220.

Opponent: There has been no proof that the person who said "I ran over your kid" was in fact my client. Someone else may have made that statement. Until it is proved that those words came from my client's mouth, the evidence is hearsay and should not be admitted.

Proponent: My next witness, Your Honor, is Mrs. Witness, who saw Mr. Driver leave the automobile and run toward Mrs. Mother shouting.

Court: I'll admit the testimony, subject to your connecting it up under Evidence Code §403(b).

PRACTICE TIP: Because the anticipated testimony is potentially so prejudicial, the court should rule on its admissibility beforehand.

V. OFFERS OF PROOF

§3.21 A. Description

An offer of proof is the proponent's offer to show the court, by counsel's written or oral paraphrasing or by a witness's testimony, what the evidence being tendered would be. It should be made on the record outside the jury's presence. See, *e.g.,* Los Angeles Ct R 8.42. See also Evid C §354.

Offers of proof must be specific, setting out the actual evidence to be produced, not merely facts or issues to be addressed or argued, so that the trial court has an opportunity to change or clarify its ruling. *People v Schmies* (1996) 44 CA4th 38, 53, 51 CR2d 185. The offer must inform the trial court of the substance, purpose, and relevance of excluded evidence. Evid C §354(a); *People v Valdez* (2004) 32 C4th 73, 108, 8 CR3d 271; *Gordon v Nissan Motor Co.* (2009) 170 CA4th 1103, 1113, 88 CR3d 778. Absent a stipulation, the court may not consider an offer of proof as a substitute for evidence. *Espinoza v Calva* (2008) 169 CA4th 1393, 1398, 87 CR3d 492.

If the court erroneously excludes evidence, the error is waived unless the proponent can show that the substance, purpose and relevance of the evidence was made known to the court by an offer of proof or other means. Evid C §354; *People v Foss* (2007) 155 CA4th 113, 126, 65 CR3d 790; *Austin B. v Escondido Union Sch. Dist.* (2007) 149 CA4th 860, 885, 57 CR3d 454.

§3.22 B. Timing

An offer of proof may be made after an objection has been raised, to encourage the judge to admit the evidence. It may also be made after the judge has ruled that the evidence is inadmissible, to try to persuade the judge to reconsider and to make a record for appeal.

§3.23 C. Table: Elements of Offer of Proof (Evid C §354)

- A showing that the evidence is available:

Sufficient Showing	*Insufficient Showing*
Mrs. Jones is waiting in the hall and is prepared to testify that…	We want to put on some evidence that…

- A specific summary of the substance of the evidence:

Sufficient Showing	*Insufficient Showing*
Mrs. Jones would testify that she saw Mr. Smith at the scene of the crime.	Mrs. Jones would testify about what she saw.

- A specific showing of the purpose of the evidence:

Sufficient Showing	*Insufficient Showing*
Mrs. Jones's eyewitness testimony would conclusively establish the presence of another person at the scene.	Mrs. Jones's testimony would show that my client is innocent.

- A specific showing of the relevance of the evidence:

Sufficient Showing	*Insufficient Showing*
Mr. Smith's presence at the scene near the time of the robbery is a relevant fact that the jury should consider in determining whether or not my client was in fact the man who took Mr. Victim's wallet.	Mrs. Jones's testimony hurts the prosecution's case.

PRACTICE TIP: If the evidence is a document, mark it for identification.

§3.24 D. Reasons to Make Offer of Proof

The legal reasons for making an offer of proof are:

- To persuade the judge before a ruling is made to admit the evidence.
- To persuade the judge after a ruling is made to reconsider the ruling.
- To create a record for appeal that the judge was specifically aware of the nature of the evidence being excluded.

NOTE: To preserve the right to appeal the exclusion of evidence, you must show that the trial judge was aware of the substance, purpose, and relevance of the evidence. Evid C §354; *People v Foss* (2007) 155 CA4th 113, 126, 65 CR3d 790; *Heiner v Kmart Corp.* (2000) 84 CA4th 335, 100 CR2d 854. A proper offer of proof is the most certain way to do that.

Making an offer of proof may also provide tactical benefits. For example, the testimony will be emphasized because it is the first thing the jury will hear on returning to the courtroom after recessing for the offer of proof. In addition, witnesses who testify before the judge in the offer of proof have a chance to "practice" their testimony.

WARNING: A witness's testifying first during an offer of proof gives your opponent a "sneak preview" that may assist in formulating effective cross-examination.

§3.25 E. When Offer of Proof Is Not Required

An offer of proof is not required in the following situations:

- The question itself, or other matters the court has heard, apprise the court of the substance, purpose, and relevance of the evidence. Evid C §354(a); *People v Foss* (2007) 155 CA4th 113, 126, 65 CR3d 790.
- The court has already ruled on the same evidence in another context; thus, further offers of proof are futile. Evid C §354(b).
- The evidence emerges as a result of questions asked during cross- or recross-examination. Evid C §354(c); *Foss*, 155 CA4th at 127.

§3.26 F. Sample Offer of Proof

Proponent: Dr. Smith, do you practice medicine in Alaska?

Opponent: Objection, Your Honor. What possible relevance could this have?

Proponent: I submit, Your Honor, that if I could pursue this line of questioning the relevance would become apparent.

Court: I don't see what Alaska has to do with this. I'll sustain the objection.

Proponent: May I make an offer of proof?

Court: Yes. Approach the bench.

[*At sidebar*]

Proponent: Plaintiff claims that my client was negligent because he lacked sufficient training and expertise to perform the surgery. I intend to elicit Dr. Smith's testimony that for 6 years he worked at the military hospital in Anchorage, where he performed surgery of this sort on numerous occasions with great success. This testimony will rebut plaintiff's claims of incompetence and inexperience. I further intend to have Dr. Jones testify as my next witness to compare the standards of care applicable to physicians in Alaska and California to establish that my client's performance in Alaska is relevant to his performance here.

Court: On the basis of that offer of proof, I will admit the evidence.

PRACTICE TIP: Even if not required, an offer of proof is often useful in educating the judge to make a favorable ruling for your client.

VI. SOURCES

§3.27 A. Evidence Code

Evid C §353. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

Evid C §354. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

(a) The substance, purpose and relevance of the excluded evidence was made known to the court by the question asked, an offer of proof, or by any other means;

(b) The rulings of the court made compliance with subdivision (a) futile; or

(c) The evidence was sought by questions asked during cross-examination or recross-examination.

Evidence Code §§402-405 are discussed and reproduced in chap 4.

§3.28 B. Other

For further discussion of in limine motions, see California Trial Objections, chap 2 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial, chap 7 (3d ed Cal CEB 1995); Jefferson's California Evidence Benchbook, chap 20 (4th ed CJA-CEB 2009).

For further discussion of offers of proof, see Trial Objections, chap 3; Civ Proc During Trial §§15.50-15.60; Jefferson's Evidence Benchbook, chap 20.

Source: Evidence/Effective Introduction of Evidence in California/4 Laying a Foundation: Preliminary Fact Hearings (Evid C §§402-405)/Chapter Outline

4

Laying a Foundation: Preliminary Fact Hearings (Evid C §§402-405)

Donald D. Howard

A. Evidence Code §4.24

B. Other §4.25

§4.1 I. SCOPE OF CHAPTER

This chapter focuses on preliminary hearings in which the court determines foundational facts necessary to the admissibility of evidence. Evidence Code §402 sets out the general procedures for the court's rulings on these foundational matters. Evidence Code §§403 and 405 apply these procedures to specific types of preliminary facts. Evid C §404 hearings determine whether the privilege against self-incrimination applies.

II. GENERAL PROCEDURES

§4.2 A. When Preliminary Fact Finding Is Necessary (Evid C §402)

Not all objections can be determined by the court on the face of the posed question or proffered answer. The resolution of some objections depends on the establishment of preliminary facts, which usually requires the taking of evidence outside the jury's presence.

The court must determine the existence or nonexistence of a disputed preliminary fact. Evid C §§310(a), 402(a). Hearings under Evid C §§402-405 are the procedural mechanisms for resolving objections about these preliminary facts, which must be settled before the evidence can be admitted. The trial court has discretion, except in criminal cases on issues related to the admissibility of a confession or defendant's admission, whether to hold a hearing,. Evid C §402(b). See *People v Gonzales* (1944) 24 C2d 870, 151 P2d 251; *People v Garcia* (2005) 134 CA4th 521, 36 CR3d 181 (trial court's failure to conduct Evid C §402 hearing to establish facts bearing on reliability of hearsay statement was not error). See also *U.S. v Alatorre* (9th Cir 2000) 222 F3d 1098.

The most important difference between §403 and §405 hearings is:

- Under Evid C §403(b)-(c), the court has the discretion to admit the evidence conditionally, leaving the jury to decide whether the preliminary fact exists; the court instructs the jury to disregard the evidence if it does not.
- Under Evid C §405, the court alone decides the issue.

To prevail in a preliminary fact hearing, the proponent must distinguish between the situations governed by Evid C §§403 and 405. See §§4.9, 4.14. Under §403, the court must admit the proffered evidence merely on the introduction of enough evidence to sustain a finding of the preliminary fact, and the jury hears both the preliminary fact and the proffered evidence. Under §405, the court must be persuaded of the existence of the preliminary fact on which admissibility depends, and the jury never hears of this fact. See Comment to Evid C §402(a). For further discussion, see §§4.12, 4.19.

PRACTICE TIP: Evidence Code §401 uses the term "proffered evidence" to mean that which the proponent of the evidence wishes admitted. Evidence Code §400 uses the term "preliminary fact" to refer to the foundational matters that must be proved in order for the proffered evidence to be admitted over objection.

§4.3 B. When In Limine Motion Should Be Made

As the proponent of the evidence, counsel may simply introduce the proffered evidence rather than first ask for an in limine ruling on the preliminary facts that support the evidence. The opponent may not realize that an objection is possible, and if there is no objection, no preliminary fact hearing is necessary. By failing to object, the opponent waives the error as a basis for a new trial or an appeal (Evid C §353(a)), except under highly unusual circumstances. See California Trial Objections §4.8 (Cal CEB Annual).

Counsel may wish, however, to raise the issue before trial to avoid unnecessary objections or disruptive hearings out of the jury's presence during the course of trial, or to assist trial planning. As discussed in chapter 3, it may be prudent to avoid the Latin term and call the motion a "motion for threshold determination of foundational facts" under Evid C §§402 and 403. An in limine hearing is also desirable when a mistrial is possible if jurors hear evidence later ruled inadmissible. The drawbacks to motions in limine are that the process allows more time for opponents to respond and may give them notice of a defect of which they were unaware. If the judge rules the evidence inadmissible before trial, counsel will not be able to mention it in jury selection or opening statement. The court may hold an attorney in contempt for bringing in evidence that was ruled inadmissible. See CCP §1209(a)(5). Unless the evidence becomes admissible, *e.g.,* for impeachment, counsel will be completely foreclosed from bringing the information before the jury. For further discussion on in limine motions, see chap 3.

PRACTICE TIP: If the opponent merely states "lack of foundation" when you ask a question, alert the court that this is an inadequate objection. *Parlier Fruit Co. v Fireman's Fund Ins. Co.* (1957) 151 CA2d 6, 15, 311 P2d 62.

§4.4 C. Whether Hearing Should Be In or Out of Jury's Presence

When opposing counsel objects to proffered evidence and requests a preliminary hearing during trial, it is almost always preferable for the proponent to have the hearing held in the jury's presence. Whether or not the proponent is successful, jurors will then have heard the evidence. The proffered evidence, once heard, is subject only to a motion to strike. It would be to the proponent's disadvantage to have the hearing before the jury, however, if the evidence is so prejudicial that a mistrial might be declared if the judge rules the evidence inadmissible. It is to the advantage of the opponent to have the hearing held outside the jury's presence, because the issue will be ruled on without the jury hearing the proffered evidence. If the opponent is successful, the jury will never hear it.

The court has the discretion in civil cases to handle these foundational matters either in or out of the jury's presence. Evid C §402(b). Counsel should be prepared to argue this point based on the potential for prejudice. When counsel requests or when significant issues are involved, the hearing usually takes place out of the jury's presence, particularly Evid C §405 issues. In criminal cases, some issues *must* be heard out of the jury's presence when requested. See §§4.17, 4.20.

PRACTICE TIP: When an objection is sustained, and the opponent forgets to move to strike any questions or testimony that occurred before the objection, that testimony remains in evidence.

§4.5 D. Judge Has Broad Discretion

Judges do not have to give reasons for admitting or for excluding evidence; nor do they have to state the burden of proof that they applied in doing so. See Comment to Evid C §402(c).

§4.6 E. No Objection Required at Deposition

Objections to the competency of the deponent and to the relevance, materiality, or admissibility at trial of testimony or evidence are not waived by failure to make them before or during depositions. CCP §2025.460(c). However, counsel often stipulate at the beginning of depositions that all objections, except to the form of the question, under CCP §2025.460(b) (errors and irregularities that "might be cured" if objections are timely made) are reserved until trial. See California Civil Discovery Practice §6.29 (4th ed Cal CEB 2006).

§4.7 F. Check Local Court Rules

Check local court rules for particular requirements on fact-finding hearings or in limine motions. There may be requirements on when and how counsel should raise evidentiary issues. There may be a requirement that the motion be in writing (see, *e.g.,* San Francisco Ct R 6.1) or that it be raised at a particular time (see, *e.g.,* Los Angeles Ct R 7.9(h), 8.92 (motions in limine must be heard at status conference held before trial date, on proper notice)).

§4.8 G. When Proffered Evidence Ruled Inadmissible

If the proffered evidence is ruled inadmissible, it may be possible to introduce the same evidence under another Evidence Code section. It is prudent to have that "backup" in mind when the initial argument is made; the judge may be less receptive at a later time to arguments for admitting evidence he or she has already ruled inadmissible. Consider, as well, whether using another witness or other evidence might communicate the same information to the jury.

Even when proffered evidence has been ruled inadmissible before trial, other evidence may come in differently than anticipated, making it possible to overcome earlier objections. In that event, you should renew your motion.

PRACTICE TIP: Be alert to opposing witnesses who may "open the door" to admission of excluded evidence. If so, you may seek to introduce your evidence on cross-examination or in rebuttal.

III. EVIDENCE CODE §403 HEARINGS

§4.9 A. Preliminary Facts Subject to Evid C §403 Hearing

These hearings are used primarily to determine the following disputed preliminary facts (see Comment to Evid C §403):

- Relevance of the proffered evidence;
- That the witness has personal knowledge of the evidence to which he or she will testify;
- That the person claiming to have made a statement, or to have engaged in certain conduct, in fact did so;
- Authenticity of a writing; and
- Identity of the person who made a confession or admission in a criminal case.

NOTE: The judge is the trier of fact at the §403 hearing. Evid C §403.

§4.10 B. Burden of Proof at Evid C §403 Hearing

The court is to decide only whether the jury could reasonably find the existence of the preliminary fact based on the evidence presented. Evid C §403(a). The burden of producing the evidence of the preliminary fact's existence rests with the proponent of the proffered evidence. Evid C §403(a).

Section 403 does not state what standard of proof applies to the determination of the existence of the preliminary fact. Under Evid C §115, "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." The correct standard of proof for the existence of a preliminary fact would therefore be preponderance of the evidence. See *People v Marshall* (1996) 13 C4th 799, 832, 55 CR2d 347; *People v Simon* (1986) 184 CA3d 125, 132, 228 CR 855. However, in *People v Jones* (2003) 112 CA4th 341, 349, 4 CR3d 916, the reviewing court held that a criminal defendant seeking to admit evidence of his physician's approval of marijuana use need only produce evidence sufficient to raise a reasonable doubt as to whether the physician had approved, because at trial he would need only to raise a reasonable doubt as to that fact in his defense. If the rationale of *Jones* is correct, it raises a question of whether a *higher* burden of admissibility can be asserted for preliminary facts when the burden of proof at trial is clear and convincing.

§4.11 C. Conditional Admission of Proffered Evidence

If your opponent objects to particular evidence, you may wish to ask the court to defer its decision on your opponent's objection. If the objection is made before trial, you may ask the court to allow you to meet the objection through testimony or other evidence during trial, at which time your opponent will have the right to renew the objection.

If the objection is made during trial, you may wish to ask the court to admit the proffered evidenced conditionally, subject to evidence of the preliminary fact being supplied later in the trial. Evid C §403(b). Of course, the court may strike proffered evidence that was conditionally accepted if the court later rules that a jury could not reasonably find that the preliminary fact exists.

PRACTICE TIP: The court may not admit evidence conditionally when the objection to it is that the witness has no personal knowledge of the matter. Evid C §§403(b), 702(a).

§4.12 D. If Judge Decides to Allow Jurors to Hear Proffered Evidence

If the judge decides to allow jurors to hear proffered evidence following an Evid C §403 hearing, it is up to the jury to determine the existence or nonexistence of the preliminary fact. See Evid C §403(c)(1). If jurors find that the preliminary fact exists, they are to consider the proffered evidence in their deliberations. The jury thus hears evidence concerning the preliminary fact as well as the proffered evidence.

§4.13 E. Judge Required to Instruct Jurors on Their Duty

If requested by counsel, the court is required in Evid C §403 matters to instruct jurors that the proponent of the evidence has the burden of establishing the preliminary fact's existence by a preponderance of the evidence and that jurors are to disregard the evidence if they are not persuaded by a preponderance of the evidence that the preliminary fact exists. Evid C §§403(a), 115. But see *People v Jones* (2003) 112 CA4th 341, 349, 4 CR3d 916 (criminal defendant had only to raise reasonable doubt whether physician had approved marijuana use); §4.10.

PRACTICE TIP: Consider whether you want the judge to instruct the jury when the evidence is admitted, during formal jury instructions, or at both times.

Source: Evidence/Effective Introduction of Evidence in California/4 Laying a Foundation: Preliminary Fact Hearings (Evid C §§402-405)/ IV. EVIDENCE CODE §405 HEARINGS/§4.14 A. Preliminary Facts Subject to Evid C §405 Hearing

IV. EVIDENCE CODE §405 HEARINGS

§4.14 A. Preliminary Facts Subject to Evid C §405 Hearing

These hearings are used primarily to determine disputed preliminary facts not covered by Evid C §403 or §404. Some examples include:

- Confessions and admissions (except declarant's identity);
- Admissibility of original or secondary evidence to prove content of writing;
- Hearsay exceptions;
- Lay opinion evidence;
- Privileges; and
- Qualifications of expert witness.

NOTE: The judge is the trier of fact at the §405 hearing. Evid C §405.

A detailed discussion of the most common preliminary facts subject to Evid C §405 is in the Comment to Evid C §405 and in Jefferson's California Evidence Benchbook, chap 26 (4th ed CJA-CEB 2009).

§4.15 B. Judge to Decide Which Party Has Burden of Producing Evidence, and to Specify Burden of Proof

When Evid C §405 issues are involved, the court must indicate which party has the burden of producing evidence and specify the burden of proof. Evid C §405(a). The burden of producing evidence and the applicable burden of proof is given for each issue. For most preliminary facts, the burden of proof is by a preponderance of the evidence. See Evid C §115.

PRACTICE TIP: If the opponent objects on the ground of privilege, the burden shifts to the opponent to prove the existence of the privilege. If privilege is proved, the burden shifts back to the proponent to offer evidence to prove an exception. This procedure is used when dealing with statements or admissions made during settlement negotiations. See chap 43.

§4.16 C. Whether Proponent Should Make In Limine Motion

As the proponent of the evidence, when Evid C §405 matters are involved, you will probably want to introduce the proffered evidence during trial rather than raising the issue as an in limine motion. At §405 hearings, the judge makes the final determination on whether the proponent of the evidence has established the existence of the preliminary fact. As with Evid C §403 issues, the benefits of raising an issue as an in limine motion are that you avoid unnecessary objections and assist your own trial planning. The drawbacks are that you allow more time for your opponent to respond and may give them notice of a defect of which they were unaware. Also, in limine hearings cannot take place in the presence of a jury.

§4.17 D. Conditional Admission of Proffered Evidence; When Hearing Must Be Outside Jury's Presence

As in Evid C §403 hearings, the proponent of the evidence may wish, after an objection, to ask the court to admit proffered evidence conditioned on later introduction of proof of the preliminary facts. It is less common for Evid C §405 issues to be conditionally admitted, because the judge's decision on these preliminary facts is final. See Comment to Evid C §405 and discussion in §4.18.

In criminal cases, §405 hearings on certain issues must be decided out of the jury's presence, if any party so requests: confessions and admissions (Evid C §402(b)); validity of prior convictions (*People v Coffey* (1967) 67 C2d 204, 217, 60 CR 457); lineup evidence (*People v Enos* (1973) 34 CA3d 25, 38, 109 CR 876 (error not prejudicial)).

NOTE: Issues concerning confessions and privileges are almost never admitted conditionally.

§4.18 E. Judge's Ruling on Preliminary Fact Is Final

Unlike judicial determinations under Evid C §403, the judge ruling on the admissibility of a preliminary fact under Evid C §405 makes a final ruling on the admissibility of the evidence. See Comment to Evid C §405. Only after the court is satisfied that the party having the burden of producing evidence has met its burden of proof will the court allow or exclude the proffered evidence. Once the court has admitted proffered evidence under §405, the jury may not redetermine the existence or nonexistence of the preliminary fact. See Comment to Evid C §405; see Jefferson's California Evidence Benchbook, chap 26 (4th ed CJA-CEB 2009). Nevertheless, if the proffered evidence is admitted, counsel can reintroduce the same evidence used to prove or disprove the existence of the preliminary fact, for the purpose of affecting the weight or credibility of that evidence. Evid C §406; see Jefferson's Evidence Benchbook, chap 26.

PRACTICE TIP: Because the judge's ruling on the preliminary facts is final, the proponent of the evidence will usually prefer to have any hearing on the preliminary facts in the jury's presence.

§4.19 F. Jury Instructions

The jury is not informed of a judge's Evid C §405 ruling. See Comment to Evid C §405. This is true even when the preliminary fact is also a fact that the jury is to decide as a contested issue in the case. See Comment to Evid C §405; Jefferson's California Evidence Benchbook, chap 26 (4th ed CJA-CEB 2009).

§4.20 V. EVIDENCE CODE §404 HEARINGS

Evidence Code §404 hearings are held to determine whether the privilege against self-incrimination applies. This privilege can be claimed in both civil and criminal cases as long as the requirements of the privilege are met. See, *e.g.*, *Pacers, Inc. v Superior Court* (1984) 162 CA3d 686, 208 CR 743. The burden is on the person claiming the privilege to prove that the testimony or evidence might tend to incriminate him or her. Evid C §404. In ruling on the claim, the court must exclude the evidence unless it clearly appears that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege. Evid C §404.

The court can make its determination out of the jury's presence. See *People v Johnson* (1974) 39 CA3d 749, 758, 114 CR 545. The judge can, however, require the claim of privilege to be decided on a question-by-question basis before the jury. See discussion in *People v Cornejo* (1979) 92 CA3d 637, 658, 155 CR 238. The court may not, however, allow a prosecutor to ask questions that put crucial evidence before the jury when the prosecutor knows that the witness will refuse to answer. *People v Rios* (1985) 163 CA3d 852, 868, 210 CR 271.

For further discussion of the privilege against self-incrimination, see 2 Witkin, California Evidence, *Witnesses* §§355-502 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 46 (4th ed CJA-CEB 2009); California Trial Objections, chap 46 (Cal CEB Annual). See also California Criminal Law Procedure and Practice, chap 49 (Cal CEB Annual) (immunity for testimony), Crim Law, chap 51 (representing witnesses in criminal proceedings), Crim Law, chap 58 (contempt).

§4.21 VI. SAMPLE QUESTIONS

Sample questions that raise foundational issues, which may be considered in preliminary fact hearings, may be found elsewhere in this book. See, *e.g.,*

- Authentication of writing (see §36.9);
- Hearsay (see §§9.5, 12.5, 49.8);
- Judicial notice (see §31.6);
- Personal knowledge, relevance (see §8.5);
- Prior felony conviction (see §26.5); and
- Witness's understanding of duty to tell the truth (see §32.8).

VII. CHECKLISTS

§4.22 A. Checklist: Witnesses to Subpoena

- Witness to introduce proffered evidence.

PRACTICE TIP: The proponent may use additional witnesses to bolster the primary witness's testimony. In the first example below, a secretary or law office partner might be able to corroborate the attorney's testimony.

- Possibly another witness or witnesses to testify to the preliminary fact.

EXAMPLE: If the attorney-client privilege is at issue, the attorney/ witness could testify both to the privileged statement and to the existence of the privilege. However, if the objection is that the witness is not capable of testifying, because the witness lacks the mental capacity, an expert witness should testify as to that issue.

§4.23 B. Checklist: Alternative Methods of Admissibility

For ideas on alternative methods of admissibility, see the chapters on the particular matter at issue, *e.g.*, dying declarations, expert witnesses.

Source: Evidence/Effective Introduction of Evidence in California/4 Laying a Foundation: Preliminary Fact Hearings (Evid C §§402-405)/ VIII. SOURCES/§4.24 A. Evidence Code

VIII. SOURCES

§4.24 A. Evidence Code

Evid C §402. (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is requisite thereto; a separate or formal finding is unnecessary unless required by statute.

Evid C §403. (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;

(3) The preliminary fact is the authenticity of a writing; or

(4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

(c) If the court admits the proffered evidence under this section, the court:

(1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

Evid C §404. Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Evid C §405. With respect to preliminary fact determinations not governed by Section 403 or 404:

(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

(b) If a preliminary fact is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or non-existence of the preliminary fact.

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

Evid C §406. This article does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

§4.25 B. Other

For further discussion of preliminary fact-finding hearings, see Jefferson's California Evidence Benchbook, chaps 24-26 (4th ed CJA-CEB 2009); California Trial Objections, chap 21 (Cal CEB Annual); 3 Witkin, California Evidence, *Presentation at Trial* §§48-65 (4th ed 2000).

5

Order of Proof and of Witness Examination

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§5.1 I. SCOPE OF CHAPTER

This chapter focuses on the order of proof and the order in which the phases of examination (*e.g.*, direct examination, cross-examination) of each witness are conducted. Many factors, such as the court's exercise of discretion or a motion for severance, can affect the order of proof set forth in the Evidence Code. Strategic factors also affect counsel's decisions on the order in which witnesses take the stand during trial, particularly in light of the rules governing when leading questions may be asked.

II. ORDER OF PROOF

§5.2 A. Ground Rules for Order of Proof (CCP §607)

The court has the inherent power to regulate the order of proof (Evid C §320) and the mode of interrogation (Evid C §765(a)). The usual order of trial presentation in civil actions in both jury trials (CCP §607) and bench trials (CCP §631.7) is:

- Plaintiff's evidence;
- Defendant's evidence;
- Plaintiff's rebuttal;
- Defendant's rebuttal.

The usual order of trial presentation in criminal actions is (Pen C §§1093-1094):

- Prosecution evidence;
- Defense evidence;
- Prosecution rebuttal;
- Defense rebuttal.

§5.3 1. Court May Conditionally Admit Evidence Out of Order

The court may admit evidence that requires proof of preliminary foundational facts, subject to later proof of those facts. Evid C §§403, 405. See chap 4. The court may also admit evidence that does not appear relevant, subject to the proponent's claim that its relevance will become evident either during the witness's testimony or later in the trial. Evid C §403(b).

§5.4 2. Court May Call Its Own Witnesses to Testify

Judges may call their own witnesses. Evid C §775. Although counsel cannot profitably prevent a judge from doing so, counsel may direct follow-up questions to the witness, either to highlight favorable points raised by the judge or to counter unfavorable points.

PRACTICE TIP: Although judges rarely call their own witnesses, it is not unusual for a judge to ask questions of a witness on the stand, especially during a bench trial. See *People v Hawkins* (1995) 10 C4th 920, 947, 42 CR2d 636, disapproved on another ground in *People v Lasko* (2000) 23 C4th 101, 96 CR2d 441. See also *Conservatorship of Pamela J.* (2005) 133 CA4th 807, 35 CR3d 228 (court has authority to question witnesses during evidentiary hearing under Welf & I C §5326.7(f)).

3. Severance or Bifurcation Affects Order of Proof

§5.5 a. In Civil Cases

The parties may move for certain issues to be tried first in civil cases. CCP §1048(b). For example, certain special defenses (*e.g.*, statute of limitations, judgment bar, abatement issues) may be tried before other issues are tried. CCP §§597-597.5. The term "bifurcation" is generally used to refer to a particular type of severance, namely the procedure of holding separate trials on the issues of liability and damages. See CCP §598.

Severance of causes of action in a complaint from causes of action in a cross-complaint is also possible. CCP §1048(b). For general discussion of motions and orders for separate trials, see California Civil Procedure Before Trial §§43.63-43.102, 43.106-43.108 (4th ed Cal CEB 2004).

Source: Evidence/Effective Introduction of Evidence in California/5 Order of Proof and of Witness Examination/§5.6 b. In Criminal Cases

§5.6 b. In Criminal Cases

Although this tactic is rarely used, a party may attack joinder of counts, codefendants, or both before trial in a criminal case through a demurrer (Pen C §1004(3)) and/or through a motion to sever (Pen C §954). The differences and procedures are discussed in California Criminal Law Procedure and Practice §§7.27-7.42 (Cal CEB Annual).

It is routine for a defendant to move to bifurcate a prior conviction from the rest of a case. Denial of a timely request to bifurcate a prior conviction from the determination of defendant's guilt in the instant matter is an abuse of discretion if admitting evidence of an alleged prior conviction, for purposes of sentence enhancement during the trial, would pose a substantial risk of undue prejudice. Bifurcation is never required, but it is common for a defendant to request it because of the prejudicial effect that a prior felony conviction has on a jury. A defendant does not usually request bifurcation, however, when the jury will learn of the prior offense in any event. See *People v Calderon* (1994) 9 C4th 69, 36 CR2d 333.

NOTE: Judges may sever issues (offenses or counts) to expedite trial. Pen C §954.

Source: Evidence/Effective Introduction of Evidence in California/5 Order of Proof and of Witness Examination/§5.7 B. Factors to Consider Concerning Order of Witnesses

§5.7 B. Factors to Consider Concerning Order of Witnesses

The order of proof listed in §5.2 sets forth the general framework of the trial. The more interesting and difficult decisions for a trial lawyer are the choices in selecting the order of witnesses in a particular segment of the trial (*e.g.,* defendant's evidence, plaintiff's rebuttal).

Witness order choices are necessarily made on a case-by-case basis. A few factors to consider in setting the order of witnesses are:

- **Start strong and end strong.** This rule should govern your overall trial plan. The jury pays most attention to the first and last witnesses of the trial and, to a lesser extent, to the first and last witnesses of each trial day.

- **Tell a story that makes sense.** A trial attorney is the director of a play and must present testimony in a way that tells a story the jury can understand and remember. To the extent possible, have witnesses testify about events in chronological order.

- **Order your witnesses so that evidentiary matters flow smoothly.** Although the rules of evidence permit conditional admissibility subject to proof of facts, or subject to showing their relevance later in the trial ("connecting them up"), too much reliance on these rules results in a disjointed presentation. Try to order witnesses in accordance with foundational and relevance rules, *e.g.,* a witness who can authenticate documents should testify prior to witnesses who discuss the documents' contents.

- **Order witnesses to corroborate the testimony of friendly witnesses and to impeach the testimony of hostile witnesses.** For example, if you have a weak witness who will be severely cross-examined, follow that witness's testimony immediately with corroborating witnesses. Similarly, follow a hostile witness's testimony with friendly witnesses who can impeach the hostile witness or neutralize any damaging facts that came out.

- **Plan the timing of your client's testimony.** To set the stage, it is sometimes a good idea to have your client testify as the first witness. More often, it is better to have the client testify last, to tie up any loose ends. As a party, a client who testifies last also has the benefit of having heard all other witnesses testify.

PRACTICE TIP: If you have one witness whose testimony gives an overview of the entire case, consider having that witness testify first. If that witness is your client, also take into account the considerations above on when to have your client testify.

- **Accommodate your witnesses.** Although a subpoena legally compels attendance, reality often mandates adjustments of the date and time a witness will testify in accordance with the witness's needs. An annoyed or distracted witness will not be as effective as one who is at ease and wants to be there.

- **Consider dramatic effects.** Never forget your role as director of the courtroom play. Consider these staging decisions:

- *Call early in the trial a witness who can authenticate an important exhibit.* The exhibit could be a chart, map, diagram, photograph, or other visual aid. Leave the exhibit visible during the rest of the trial and use it with each witness.

- *Call early in the trial any witness you want present to observe the rest of the trial.* This applies, for example, to a family member, or a knowledgeable participant, if the witness would otherwise be excluded before testifying. On exclusion, see §§6.13-6.17.

- *Intersperse boring witnesses with interesting ones.*

- *Choose when to have your stipulations and judicial notice orders read into the record.* Choose a time that logically makes sense and minimizes boredom. Stipulations may be written agreements filed with the clerk or oral recitations read into the record. See CCP §283(1). Generally, counsel reads the stipulation to the jury, and the judge instructs the jury that the it has the effect of conclusive proof. See CACI 106, 5002. Some judges prefer to read stipulations to the jury themselves.

- *Slow down or speed up your examination of a witness.* You may want to end the day or begin the next morning with the examination of a particular witness.

- *Think about court recesses.* Consider what testimony you want the jury to hear before the lunch break or end-of-day recess.

- *Key the jury to your scheduling plans.* For example, let the jury know when the end of the day is coming, with comments such as, "One last area I would like to ask you about today, Mr. Jones,…"; "Our final witness this afternoon will be Mr. Smith."

- *On occasion, conclude questions abruptly.* By ending direct examination of a witness unexpectedly, you may tender a witness your opponent is not ready to cross-examine.

WARNING: By allowing cross-examination to commence, you may restrict your own ability to consult with your witness. See *Perry v Leeke* (1989) 488 US 272, 102 L Ed 2d 624, 109 S Ct 594 (not a violation of Sixth Amendment right to counsel to prohibit defendant from consulting attorney during recess, when defendant was on witness stand prior to recess); *Kadelbach v Amaral* (1973) 31 CA3d 814, 823, 107 CR 720 (permitting restriction of consultation between counsel and witness until cross-examination completed).

III. ORDER OF WITNESS EXAMINATION

§5.8 A. Order of Examination of Each Witness (Evid C §772(a))

The order of examination of each witness is commonly the following (Evid C §772(a)):

- Direct examination;
- Cross-examination;
- Redirect examination;
- Recross-examination;
- Redirect and recross as needed.

PRACTICE TIP: When more than one party will cross-examine a witness, the court sets the order in which the questioning will occur. Evid C §773(a).

§5.9 B. Each Phase to Be Completed Before Next Begins

Each phase of the examination must be completed before the next begins. Evid C §772(b). The court, for good cause, can make an exception to this requirement. Evid C §772(b). For example, the need to accommodate a witness with extraordinary scheduling conflicts might constitute "good cause."

C. Descriptions of Each Stage of Witness Examination

§5.10 1. Direct Examination

Direct examination is your first questioning of one of your witnesses on a matter not within the scope of any previous examination of that witness. Evid C §760. Leading questions (see Evid C §764) ordinarily may not be asked on direct examination, but there are several exceptions, particularly when the interests of justice require. See Evid C §767. Leading questions are permissible during direct examination in the following situations:

- To question a hostile witness (see Evid C §§767, 776);
- To question a witness who is a minor under age 10 or a dependent person with a substantial cognitive impairment in certain types of criminal cases (Evid C §767(b));
- To establish preliminary matters (see Evid C §765 and Comment to Evid C §767);
- To refresh recollection (see Comment to Evid C §767);
- To aid witnesses who require assistance in testifying (see Comment to Evid C §767; *People v Augustin* (2003) 112 CA4th 444, 449, 5 CR3d 171 (leading questions appropriate on direct examination of victim witness with cerebral palsy and communication problems));
- To question expert witnesses (see Comment to Evid C §767);
- To impeach your own witness (Evid C §§767, 785);
- To identify exhibits (*People v Campbell* (1965) 233 CA2d 38, 44, 43 CR 237);
- To question a witness who does not understand English well (see *People v McNeal* (1954) 123 CA2d 222, 225, 266 P2d 529).

PRACTICE TIP: A criminal defendant may not be directly examined by a codefendant or by the prosecution without the defendant's permission. Evid C §772(d). See US Const amend V; Evid C §§930 (criminal defendant has right not to be called as witness and not to testify), 940 (privilege against self-incrimination).

§5.11 2. Cross-Examination

Cross-examination is questioning another party's witness on a matter within the scope of the direct examination of that witness. Evid C §§761, 773. It is generally limited to matters "within the scope" of the direct examination. Rather than require a witness to be recalled later, however, courts usually permit a cross-examiner to inquire into relevant matters even though "beyond the scope" of the direct examination. Evid C §772(c). In this event, the court may instruct the cross-examiner "to take the witness as though on direct," *i.e.,* no leading questions during that portion of the examination.

Counsel may ask leading questions during cross-examination. Evid C §767(a)(2). One exception is when the witness is biased in favor of the cross-examiner and would be unduly susceptible to giving answers suggested by the question. In that instance, only nonleading questions are permissible. See Comment to Evid C §767.

PRACTICE TIP: If you are cross-examining a witness and your interest is not adverse to that of the party who called the witness, you are subject to the same rules as on direct examination. Evid C §773(b). In multiparty cases, repetition of the same areas of cross-examination is not permitted. See Evid C §§352, 723, 765(a).

§5.12 3. Redirect Examination

Redirect examination is your questioning of your witness after cross-examination by another party. Evid C §762. You may not ask questions on the same matter you covered in your direct examination of that witness without the court's permission, but you may question the witness on any new matters raised during cross-examination. Evid C §774. You may not ask leading questions except as allowed on direct examination. See §5.10.

§5.13 4. Recross-Examination

Recross-examination is your questioning of another party's witness following redirect examination of that witness. Evid C §763. You may ask leading questions as on cross-examination. Evid C §767(a)(2).

§5.14 D. Questions Not Within Scope of Previous Examination

With the court's permission, you may interrupt your cross-, redirect, or recross-examination of a witness to question that witness on a matter not within the scope of a previous examination of that witness. Evid C §772(c). The court's decision is discretionary. Evid C §772(c). See *People v Foss* (2007) 155 CA4th 113, 127, 65 CR3d 790.

IV. SOURCES

§5.15 A. Evidence Code

Evid C §320. Except as otherwise provided by law, the court in its discretion shall regulate the order of proof.

Evid C §760. "Direct examination" is the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness.

Evid C §761. "Cross-examination" is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.

Evid C §762. "Redirect examination" is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness.

Evid C §763. "Recross-examination" is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness.

Evid C §764. A "leading question" is a question that suggests to the witness the answer that the examining party desires.

Evid C §765(a). The court shall exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment.

Evid C §772. (a) The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination.

(b) Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.

(c) Subject to subdivision (d), a party may, in the discretion of the court, interrupt his cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness upon a matter not within the scope of a previous examination of the witness.

(d) If the witness is the defendant in a criminal action, the witness may not, without his consent, be examined under direct examination by another party.

Evid C §773. (a) A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.

(b) The cross-examination of a witness by any party whose interest is not adverse to the party calling him is subject to the same rules that are applicable to the direct examination.

Evid C §775. The court, on its own motion or on the motion of any party, may call witnesses and interrogate them as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witness were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs.

Evid C §785. The credibility of a witness may be attacked or supported by any party including the party calling him.

Evidence Code §774 is reprinted in §6.18.

§5.16 B. Code of Civil Procedure

CCP §607. When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:

1. The plaintiff may state the issue and his case;

2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;

3. The plaintiff must then produce the evidence on his part;

4. The defendant may then open his defense, if he has not done so previously;

5. The defendant may then produce the evidence on his part;

6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;

8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;

9. The court may then charge the jury.

CCP §631.7. Ordinarily, unless the court otherwise directs, the trial of a civil action tried by the court without a jury shall proceed in the order specified in Section 607.

See also CCP §§592, 597, 597.5-598 on order of issues in civil cases.

§5.17 C. Penal Code

Pen C §1093. The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court:

(a) If the accusatory pleading be for a felony, the clerk shall read it, and state the plea of the defendant to the jury, and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction. In all other cases, this formality may be dispensed with.

(b) The district attorney, or other counsel for the people, may make an opening statement in support of the charge. Whether or not the district attorney, or other counsel for the people, makes an opening statement, the defendant or his or her counsel may then make an opening statement, or may reserve the making of an opening statement until after introduction of the evidence in support of the charge.

(c) The district attorney, or other counsel for the people shall then offer the evidence in support of the charge. The defendant or his or her counsel may then offer his or her evidence in support of the defense.

(d) The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

(e) When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close.

(f) The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case. Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy.

Pen C §1094. When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in Section 1093 may be departed from.

6

Calling Adverse Parties or Witnesses; Recalling or Excluding Witnesses

Jan Nielsen Little
E. Stewart Moritz

§6.1 I. SCOPE OF CHAPTER

This chapter focuses on both the legal rules and the strategies that counsel should consider when calling adverse parties or party-related witnesses in counsel's own case, recalling witnesses who have already been examined, and excluding witnesses from the courtroom who have not yet testified.

II. CALLING ADVERSE PARTIES OR WITNESSES

§6.2 A. Rules That Apply to Examination Under Evid C §776

In civil cases, counsel may call an adverse party, or a person "identified with" an adverse party, as a witness in counsel's own case. Evid C §776(d). A witness is identified as an adverse party when (Evid C §776(d)):

- The action is prosecuted or defended by the party for the witness's benefit.
- The witness is at the time of trial a director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person for whose benefit the action is prosecuted or defended.
- The witness was at the time of the act or omission giving rise to the cause of action a director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person for whose benefit the action is prosecuted or defended.

§6.3 1. Leading Questions Permissible

Direct examination of an adverse party or witness may be conducted as though it were cross-examination (*i.e.,* leading questions are permissible). Evid C §776(a); see Evid C §767(a)(2).

§6.4 2. Counsel for All Other Parties May Also Examine Witness

If the witness is a party, or anyone identified with a party, counsel for the party and counsel for parties whose interests are aligned with the party may examine the witness only "as if under redirect examination." Evid C §776(b). In other words, no leading questions are permitted (Evid C §767(a)(1)), and the examination is limited to "new matters" raised by other parties' questions (Evid C §774).

PRACTICE TIP: There is an exception to this rule: When you represent a party with whom the witness is identified, and the party calling the witness is also identified with or nonadverse to your client, you *may* use leading questions and are not limited to new matters. Evid C §776(e).

Source: Evidence/Effective Introduction of Evidence in California/6 Calling Adverse Parties or Witnesses; Recalling or Excluding Witnesses/§6.5 B. Procedure for Compelling Adverse Party or Party-Related Witness to Appear

§6.5 B. Procedure for Compelling Adverse Party or Party-Related Witness to Appear

To compel the attendance of an adverse party or of a party-related witness at trial, and to compel an adverse party or party-related witness to produce documents on the stand, you may serve a notice to appear on the party's attorney instead of serving a subpoena or subpoena duces tecum on the witness.

The notice to appear has the same effect as a subpoena or a subpoena duces tecum. CCP §1987(b)-(c). The notice must be served at least 10 calendar days before trial or at least 20 calendar days before trial if the notice calls for documents to be produced. CCP §1987(b)-(c). Counsel may obtain an order shortening time. CCP §1987(b)-(c).

PRACTICE TIP: If any of the records requested require a consumer privacy notice under CCP §1985.3, allow sufficient time to accomplish this notice.

For further discussion of notices to appear and of subpoenas, including sample forms, see California Trial Practice: Civil Procedure During Trial, chap 4 (3d ed Cal CEB 1995).

Source: Evidence/Effective Introduction of Evidence in California/6 Calling Adverse Parties or Witnesses; Recalling or Excluding Witnesses/§6.6 C. Criminal Cases

§6.6 C. Criminal Cases

Evidence Code §776 does not apply to criminal cases; the statute specifically mentions only civil actions. This does not mean that the parties cannot call any witnesses they wish (except for the defendant). See Evid C §930. The significance is in the type of questions to be asked, *i.e.,* §776 cannot be relied on to specify when leading questions are proper on direct or redirect examination. Other Evidence Code sections, however, may be used to accomplish the same purpose in criminal trials. They may also be used in civil actions when §776 does not apply because a witness is not "adverse":

- Evidence Code §772(c) allows the examiner, in the court's discretion, to question a witness during cross- or recross-examination on matters outside the scope of a previous examination of that witness.
- Evidence Code §767 allows the examiner to ask leading questions on direct or redirect examination in "special circumstances where the interests of justice otherwise require." For further discussion, see §5.10.
- Finally, an adverse witness called on direct or redirect examination can be impeached in the same manner as any other witness. See chaps 14-16, 19, 41.

PRACTICE TIP: Many judges and practitioners assume that Evid C §776 *does* apply to criminal cases. If challenged, you may wish to argue that it applies to criminal cases based on notions of equity and equal protection.

§6.7 D. Table: Strategy Considerations in Calling Adverse Party or Witness

Reasons to Call an Adverse Party or Witness	*Reasons Not to Call an Adverse Party or Witness*
The witness possesses evidence, not otherwise obtainable, needed for your case.	Opposing counsel will use this chance to pump in as much of the other side's evidence as possible.
Your opponent's lack of appeal is important to your case, and the adverse witness is unappealing.	The jury's dislike of an unappealing witness may inadvertently spill over to your case.
To tell the story of your case sensibly, the witness is the next in logical order.	Evidence from the lips of an adverse witness may come reluctantly and may cast an unfavorable light on your case.
You want first crack to cross-examine the witness, before your opponent can elicit testimony favorable to opponent on direct examination.	Your opponent will be able to rehabilitate the witness *after* your examination, rather than offering damaging testimony first to blunt your anticipated cross-examination.
You want to catch your opponent unprepared.	Do not count on your opponent's lack of preparation.
You want to impress on the jury that you are not afraid of this witness, or that you are the only lawyer who will give them the whole story.	The jury may not understand your motives and may think that you called a witness who backfired and turned hostile on you.
You want to get this witness out of the way.	You may lose the possibility to cross-examine this witness with information learned from later witnesses.
You need this witness's testimony and cannot rely on your opponent to call the witness.	It may be better to see whether your opponent calls the witness, and then cross-examine. If opposing counsel does not call that witness, you may be able to do so on rebuttal.

III. RECALLING WITNESSES

§6.8 A. Recalling Excused Witness Usually Not Permitted

When a witness has concluded his or her testimony and been excused by the court, that witness may not be recalled as a witness by either party without leave of court. Evid C §778.

The purpose of this rule is to avoid undue delay and to prevent harassment of witnesses. See Jefferson's California Evidence Benchbook, chap 28 (4th ed CJA-CEB 2009).

§6.9 1. Exception to Rule

If later witnesses raise new facts on which further testimony is needed from a previously excused witness, the court may in its discretion allow counsel to recall that witness. Evid C §§774, 778.

WARNING: Do not count on the court's favorable exercise of discretion. If you foresee a problem, ask the witness all questions the first time or excuse the witness subject to being recalled. See §6.12.

§6.10 2. Asking Court to Excuse Witness Subject to Being Recalled Later

There are several reasons for recalling a witness. For example, you may want a witness to be available for rebuttal, or you may want to introduce deposition statements inconsistent with the witness's trial testimony. See Evid C §770(b). If you wish to introduce extrinsic evidence of a witness's inconsistent statement, be sure to give the witness the opportunity to explain or deny the statement, or ask the court not to excuse the witness. Evid C §770. On prior inconsistent statements, see chap 41.

PRACTICE TIP: To minimize the witnesses' inconvenience, ask the court to put witnesses subject to recall on telephone standby, instead of requiring them to wait in the courthouse. Having a witness on recall also avoids having to issue and serve a new subpoena.

§6.11 B. Excused Witness No Longer Bound by Court's Witness Exclusion Order

After a witness has been excused without being subject to recall, that witness is not subject to an exclusion order under Evid C §777 and can watch the trial. On excluding witnesses, see §§6.13-6.17.

Witnesses who may be needed to testify again should be asked by counsel, or instructed by the court, not to attend court proceedings.

WARNING: Jurors may doubt a witness's credibility if you allow the witness to listen to other witnesses before testifying, even though there is no exclusion order.

§6.12 C. Strategic Considerations

Counsel should be prepared for the possibility that a witness will not be recalled and should take the following precautions:

- On direct examination of your witness, be sure to cover all areas you need to prove, in the event the court does not permit recall.
- On cross-examination of the opponent's witness, inquire into areas relevant to your case even if they are outside the scope of direct examination. Meet objections to your questions with a request to ask questions outside the scope of the previous examination under Evid C §772(c) or to recall the witness as your own under Evid C §776.

IV. EXCLUDING WITNESSES

§6.13 A. Motion and Order to Exclude Witnesses

On motion, usually at the outset of trial, the judge has discretion to exclude nonparty witnesses from the courtroom while other witnesses testify. Evid C §777. Parties, and designated agents of a corporate party, may not be excluded. Evid C §777(b)-(c).

Excluding witnesses from the courtroom while other witnesses testify keeps them from being influenced, consciously or unconsciously, by the testimony of other witnesses. When the motion is granted, ask the judge to admonish witnesses either directly or through counsel not to discuss their testimony with other witnesses until the trial is over.

PRACTICE TIP: If you see persons watching the trial who are or may be witnesses, or who are unknown to you, ask the court to inquire whether they are witnesses.

§6.14 1. Expert Witnesses Sometimes Allowed to Remain in Courtroom

Counsel may be able to argue successfully that an expert witness or another witness should be allowed to remain in the courtroom because that witness is needed to help evaluate other testimony in the case. See, *e.g.,* *People v Maxey* (1972) 28 CA3d 190, 198, 104 CR 466.

§6.15 2. Advantages and Disadvantages of Having Judge Exclude Witnesses

Reasons to invoke the "rule on witnesses," as it is sometimes called, include:

- Preventing your opponent's witnesses from tailoring their testimony.
- Preventing accusations by your opponent that your witnesses have tailored their testimony.

The principal disadvantage is that it is sometimes useful and efficient for witnesses to refer to other testimony. If your witnesses have not observed the trial, they cannot comment on what other witnesses said unless you feed them that information during your direct examination. Witnesses may also recognize important matters in other witness's testimony that you may not have fully grasped.

§6.16 B. Penalty for Disobeying Exclusion Order

Disobedience of an exclusion order is punishable by contempt sanctions and may disqualify the witness from testifying. If the witness violates the exclusion order through no fault of the party offering the witness's testimony, the witness may be held in contempt but may not be precluded from testifying. *People v Duane* (1942) 21 C2d 71, 130 P2d 123; *People v Ortega* (1969) 2 CA3d 884, 894, 83 CR 260. However, if the witness's violation of the exclusion order is caused by or is the fault of the party offering the witness's testimony, the court may exclude the witness's testimony. *People v Valdez* (1986) 177 CA3d 680, 693, 223 CR 149.

If your opponent calls a witness who was present during the trial, be sure to bring it to the court's and the jury's attention.

PRACTICE TIP: To avoid risking sanctions, and having jurors think you or your witness cheated, tell your witnesses to stay out of the courtroom once exclusion is ordered. Alternatively, if you want a witness to observe the trial (*e.g.,* a knowledgeable participant who can evaluate others' testimony, or a party's spouse) and an exclusion order is in effect, call that witness to testify early in the trial so that the person is no longer bound by the order.

Source: Evidence/Effective Introduction of Evidence in California/6 Calling Adverse Parties or Witnesses; Recalling or Excluding Witnesses/§6.17 C. Excluding Witnesses at Preliminary Hearing

§6.17 C. Excluding Witnesses at Preliminary Hearing

In criminal cases, the court may exclude the public from the preliminary hearing at the defense's request. Pen C §868.

Section 868 specifies the people who may remain. The court may also close the preliminary hearing at the prosecutor's request in limited situations. Pen C §868.7. Potential and actual witnesses may be excluded until they testify. Pen C §867.

Source: Evidence/Effective Introduction of Evidence in California/6 Calling Adverse Parties or Witnesses; Recalling or Excluding Witnesses/ V. SOURCES/§6.18 A. Evidence Code

V. SOURCES

§6.18 A. Evidence Code

Calling Adverse Witnesses

Evid C §776. (a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but, subject to subdivision (e), the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.

(4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.

(e) Paragraph (2) of subdivision (b) does not require counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified to examine the witness as if under redirect examination if the party who called the witness for examination under this section:

(1) Is also a person identified with the same party with whom the witness is identified.

(2) Is the personal representative, heir, successor, or assignee of a person identified with the same party with whom the witness is identified.

Evid C §767. (a) Except under special circumstances where the interests of justice otherwise require:

(1) A leading question may not be asked of a witness on direct or redirect examination.

(2) A leading question may be asked of a witness on cross-examination or recross-examination.

(b) The court may, in the interests of justice permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment in a case involving a prosecution under Section 273a, 273d, 288.5, 368, or any of the acts described in Section 11165.1 or 11165.2 of the Penal Code.

Recalling Witnesses

Evid C §774. A witness once examined cannot be reexamined as to the same matter without leave of court, but he may be reexamined as to any new matter upon which he has been examined by another party to the action. Leave may be granted or withheld in the court's discretion.

Evid C §778. After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion.

Evid C §770. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

(b) The witness has not been excused from giving further testimony in the action.

Excluding Witnesses

Evid C §777. (a) Subject to subdivisions (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.

(b) A party to the action cannot be excluded under this section.

(c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

§6.19 B. Other

On recalling witnesses, see Jefferson's California Evidence Benchbook, chap 28 (4th ed CJA-CEB 2009). On excluding witnesses, see discussion in California Trial Practice: Civil Procedure During Trial §9.13 (3d ed Cal CEB 1995); Jefferson's Evidence Benchbook, chap 28.

7

Evidence Offered for a Limited Purpose

Jan Nielsen Little
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§7.1 I. SCOPE OF CHAPTER

This chapter focuses on the procedure for introducing evidence for a limited purpose and the right to ask the court to give limiting instructions to the jury. Both the proponent and the opponent of the evidence should consider the advantages and disadvantages of evidence offered for a limited purpose.

II. ADMISSIBILITY

§7.2 A. Definition

Evidence is admitted for a limited purpose when the court admits it for one purpose or against one party but otherwise rules it inadmissible. Evid C §355. Both documentary and testimonial evidence may be limited in this manner.

PRACTICE TIP: Judges are usually disinclined to admit evidence for a limited purpose if there are alternative ways of proving the facts, or if the information is irrelevant to the case.

§7.3 B. Party's Request for Limited Admissibility

Limited admissibility may be requested by a party or independently ordered by the court under Evid C §§352 and 355. Although the court may give instructions on limited admissibility on its own motion, the court is generally not required to do so unless a party requests such an instruction. See, *e.g.*, *People v Visciotti* (1992) 2 C4th 1, 55, 5 CR2d 495; *People v Collie* (1981) 30 C3d 43, 63, 177 CR 458. A party's failure to request an instruction in the trial court forfeits a direct appellate claim that the instruction should have been given. *People v Boyer* (2006) 38 C4th 412, 465, 42 CR3d 677. On limiting instructions, see §7.5.

§7.4 1. When Desirable

The proponent of the evidence should consider requesting limited admissibility:

- When the proponent knows that it might be error to admit the evidence without a limiting instruction;
- As a compromise proposal to meet an opponent's objection to evidence; or
- As a way to place evidence before the jury on an admissible basis.

The opponent of evidence should consider proposing limited admissibility as a compromise proposal if an objection to exclude the evidence in its entirety fails.

§7.5 2. Court's Limiting Instructions

On a proper request for limited admissibility, the court must restrict the scope of use of evidence and give proper limiting instructions to the jury. Evid C §355; *Bullock v Philip Morris USA, Inc.* (2008) 159 CA4th 655, 693, 71 CR3d 775. Note that in providing a court with a limiting instruction about impermissible uses of evidence, a party need not include a description of permissible uses of that evidence. It is the duty of each party to propose jury instructions that encompass all the rules of law supporting that party's respective case. 159 CA4th at 694.

Limiting instructions may be given when the evidence is admitted, at the end of the case, or both. See CACI 206-207 and CALCRIM 303. When a limiting instruction cannot cure the prejudicial effects of the evidence in question, the court may exclude the evidence in its entirety under Evid C §352.

WARNING: A limiting instruction may sometimes draw more attention to the evidence than it would otherwise attract.

Source: Evidence/Effective Introduction of Evidence in California/7 Evidence Offered for a Limited Purpose/§7.6 III. SAMPLE QUESTIONS

§7.6 III. SAMPLE QUESTIONS

Prosecutor: Police Officer, when you observed Mr. Suspect purchasing cocaine from Mr. Dealer at the corner of First and Main on June 1, was that the first time you had seen Mr. Suspect in the neighborhood?

Witness: No, I had seen him in the neighborhood a week earlier.

Prosecutor: What did you see at that time?

Defense Attorney: Objection, Your Honor. I fail to see the relevance of this line of questioning. May we approach the bench?

PRACTICE TIP: Be sure that the court reporter takes down what is said out of the hearing of the jury so you have a record if needed later in the trial or on appeal.

[Conference at the bench]

Court: Ms. Prosecutor, what is the relevance of this line of questioning?

Prosecutor: A week before the cocaine sale, Police Officer arrested the defendant in connection with a liquor store robbery one block away.

Defense Attorney: That robbery charge is not before this jury and has nothing to do with this case. This is nothing more than an attempt to smear my client's character.

Prosecutor: Your Honor, I am not offering this evidence in any attempt to suggest that the defendant is a bad person. Rather, I offer it under Evidence Code §1101(b) to show motive, opportunity, identity, and knowledge. The evidence of the arrest will show, first, that the defendant did frequent the neighborhood where the cocaine buy occurred; second, that Police Officer knew what the defendant looked like and recognized him at the time of the cocaine incident a week later; and third, that the defendant needed money, which is consistent with the state's contention that he was buying cocaine on June 1.

Defense Attorney: Even if Your Honor were to accept this tenuous theory of relevance, the prejudicial impact of this evidence far outweighs its probative value and the evidence should therefore be excluded under Evidence Code §352.

Court: I disagree with you, and I will allow the evidence of the arrest under Evidence Code §1101, but only as to the identification issue, because defense counsel has contested Police Officer's eyewitness identification of the defendant.

Defense Attorney: Your Honor, there is no need to give the details of the prior arrest. Would you order the prosecutor to instruct her witness to say only that he saw the defendant a week earlier, without mentioning the arrest?

Court: No. I will allow the officer to identify the nature of the contact. However, nothing about the robbery will come in; nor will the result of the arrest, that is, whether there was a conviction or not.

Defense Attorney: My exception to the rest of Your Honor's ruling is noted for the record. May we also have a limiting instruction on this, instructing the jury that the evidence only goes to the identification issue?

Court: Yes.

[Back to open court]

Prosecutor: Police Officer, when we left off I was asking you whether you had seen the defendant in the vicinity a week earlier.

Witness: Yes, I arrested him a block away the week before.

Court: Ladies and Gentlemen of the jury, Mr. Defendant is not on trial here for any charge relating to an earlier arrest, and in your consideration of the evidence of this case you are not to concern yourselves with whether he did or did not commit another crime. However, you may consider Police Officer's testimony that he had had contact with the defendant before in the neighborhood, in your evaluation of Police Officer's testimony concerning his ability to identify the person he said he saw buying cocaine one week later.

NOTE: The judge can use CALCRIM 350 as a guide for drafting such a limiting instruction.

§7.7 IV. COMMENT

Requests for limited admissibility are sometimes a way around the rules of evidence. For example, if counsel wants the jury to know that repairs to stairs were made after the victim's fall (inadmissible under Evid C §1151), counsel may argue that the evidence is being offered not to prove negligence but rather to impeach the defendant's claim that it would have been impossible to build the stairs any other way.

If you are a proponent of evidence, you can use limited admissibility in creative ways. If you oppose the admission of evidence, you can argue that the proponent is making an end run around the rules.

Counsel usually requests that evidence be admitted for a limited purpose only if the opponent has objected to it. If the evidence is admissible on some theory of the case, an appellate court will not overrule a trial court's admission of that evidence. The opponent's best option for evidence that may be partially admissible is to request a limiting instruction. *Bullock v Philip Morris USA, Inc.* (2008) 159 CA4th 655, 683, 71 CR3d 775. Arguments between counsel and the opponent may take place before the jury, at the bench, or in chambers.

PRACTICE TIP: If you are the proponent of the evidence you want to argue the merits of admissibility before the jury so that, even if the judge rules against you, the jury will know you have additional evidence to present. Most judges dislike this practice, however, and some have rules against it.

V. SOURCES

§7.8 A. Evidence Code

Evid C §352. 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 of undue prejudice, of confusing the issues, or of misleading the jury.

Evid C §355. When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

§7.9 B. Other

For detailed discussion of limited admissibility, see 1 Witkin, California Evidence, *Circumstantial Evidence* §§30-35 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 20 (4th ed CJA-CEB 2009).

8

Accidents: Absence of Similar Ones

William H. Armstrong

§8.1 I. SCOPE OF CHAPTER

This chapter discusses evidence of the absence of similar accidents. Showing the absence of similar accidents is admissible when relevant (see Evid C §351), subject to exclusion under Evid C §352 (too time consuming, prejudicial, confusing, or misleading).

II. REQUIREMENTS

§8.2 A. To Admit

The proponent of the evidence must establish the following:

- Evidence of absence of similar accidents is offered to prove a relevant fact, *e.g.:*
- Property was not in a dangerous or defective condition,
- Product was not defective in its manufacture or design,
- Lack of knowledge or notice of any dangerous or defective condition, or
- Party was not negligent;
- The place, product, or other thing allegedly involved in the disputed case (or a similar place, product, or thing) was used a substantial number of times or over a substantial period of time;
- It was used in circumstances substantially similar to those in the disputed case; and
- No similar accident occurred.

See Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009).

§8.3 B. To Object

The opponent may object to evidence of absence of similar accidents on one or more of the following grounds:

- Irrelevant (Evid C §350);
- Hearsay (Evid C §1200);
- Lack of foundation showing that, *e.g.:*
- The product was similar to that in the present case,
- The amount of use was sufficient to be meaningful,
- The circumstances of use were similar to those in this case,
- All accidents that occurred were recorded; or
- Too time consuming, prejudicial, misleading, or confusing (Evid C §352), *e.g.,* a preliminary fact hearing is required to determine foundational requirements (see chap 4), and such a hearing would be too time-consuming.

III. SAMPLE QUESTIONS

§8.4 A. Information to Elicit

To prove the absence of similar accidents (no one else was ever hit by a golf ball in the golf course parking lot), counsel for the golf club attempts to cover the following matters with the questions asked in §8.5:

- Time period involved;
- Extent to which witness present to observe; and
- Witness observed no similar accidents.

§8.5 B. Questions to Ask

Q: How long have you been the manager of the Valley Golf Club?

Q: During what hours of course operation are you present at the course?

Q: Who supervises things when you are not there?

Q: Have you ever seen anyone get hit by a golf ball in the parking lot at the course?

Opponent: Objection. There is no foundation that this witness would be in a position to see any such thing.

PRACTICE TIP: The witness's personal knowledge is an Evid C §403 issue; jurors will redetermine the admissibility and weight of the witness's testimony if the evidence is admitted. See chap 4.

Court: Sustained on the basis of the testimony so far.

Q: Tell us, please, when you are at the course, can you observe the parking lot from the location in which you normally work?

Q: Once again, have you ever seen anyone get hit by a golf ball in that parking lot?

Opponent: Objection. This one witness's observations of the parking lot are not relevant.

PRACTICE TIP: Relevance is also a §403 issue. See chap 4.

Proponent: Your Honor, this question is a part of our evidence that the defendant had no notice of any problem in the parking lot.

Court: The objection is overruled.

Q: During the ten years you have been manager at the course, has anyone ever told you of anyone being hit by a golf ball in the parking lot?

Opponent: Objection, hearsay.

Proponent: Your Honor, we are offering this evidence only to show that no report was made. That is not a hearsay purpose. Both Witkin and Jefferson recognize the admissibility of evidence of absence of similar accidents under these circumstances.

Court: Objection overruled.

NOTE: Hearsay exceptions are determined under Evid C §405: the judge's ruling is final. See chap 4.

IV. COMMENT

§8.6 A. Few Cases on Point

There is little case law in this area. The primary case holds that absence of similar accidents is admissible subject to exclusion under Evid C §352. See *Beauchamp v Los Gatos Golf Course* (1969) 273 CA2d 20, 37, 77 CR 914. The same rule was applied to admit evidence of the absence of prior similar *claims* in a personal injury action against a defendant car manufacturer in *Benson v Honda Motor Co.* (1994) 26 CA4th 1337, 1344, 32 CR2d 322. The court held that evidence of the absence of prior similar *claims* can be admitted in negligence or strict products liability actions, but whether such evidence should be admitted depends on the purpose of the evidence and a showing of foundational requirements.

PRACTICE TIP: Under particular facts, your opponent may try to distinguish between absence of similar accidents before and after the subject accident. Relevant factors would be, *e.g.,* whether *notice* of a defect is an issue, whether the product or property is claimed to be dangerous, and whether changes have been made to the product or property since the accident.

§8.7 B. Objection: Lack of Similar Conditions of Use

Your opponent could raise an objection based on lack of similar conditions in the use of a product. If so, this is a foundational matter that is properly the subject of a preliminary fact hearing, which may be held outside the jury's presence. See chap 4. If, however, the product is one normally used by ordinary consumers, *e.g.,* a household product, the court may well conclude that a total absence of complaints is relevant evidence.

§8.8 C. Consider In Limine Motion

The proponent of the evidence may profitably raise evidence of absence of similar accidents in an in limine motion, requesting the court to rule on foundational issues, such as relevance and similarity, at a preliminary fact hearing. See chap 4. The judge then has time to consider the issues carefully, and the opponent is robbed of one of the Evid C §352 arguments: deciding whether to admit that evidence will be time-consuming. The proponent also has more time to consider any changes needed for the presentation of a defense, if the court rules that the absence of similar accidents evidence is inadmissible.

V. CHECKLISTS

§8.9 A. Checklist: Witnesses to Subpoena

- Witness to testify that he or she would have received any complaints, and none were received.

NOTE: It may be necessary to have more than one person testify to receipt of complaints, depending on how the company handled them.

- Witness to testify that the product was used many times, or the situation occurred over a long period of time, in similar circumstances, without accident.

§8.10 B. Checklist: Alternative Methods of Admissibility

- Absence in business records (Evid C §1272; see chap 13).
- Habit or custom evidence (Evid C §1105; see chap 29).

VI. SOURCES

§8.11 A. Evidence Code

The Evidence Code sections applicable to absence of similar accidents are reproduced in other chapters of this book: Evid C §§210 (see §45.15), 350 (see §45.15), 352 (see §7.8), 402-405 (see §4.24). See also Evid C §1272 in §13.35.

§8.12 B. Other

For further discussion, see 1 Witkin, California Evidence, *Circumstantial Evidence* §106 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009).

9

Accidents: Prior or Subsequent Ones

Richard P. Caputo
Robert A. Franklin

§9.1 I. SCOPE OF CHAPTER

This chapter discusses evidence of prior or subsequent accidents. Evidence of a prior or subsequent accident may be admissible to prove the existence of a dangerous condition or a defect in a product if the accident occurred under substantially similar circumstances or involved a product with similar characteristics or design. Such evidence may also be admissible to show knowledge of the condition or defect, to establish the cause of an accident, or to prove certain types of negligence.

II. REQUIREMENTS

§9.2 A. To Admit

The proponent of the evidence must establish the following:

- The evidence of a prior or subsequent accident must be offered to prove a dangerous condition of property, a party's knowledge or notice of that condition, the cause of an accident or injury, or the defectiveness of a product (see Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009)); or

- In certain limited circumstances, evidence of prior accidents may be admissible if relevant to an issue in the case, *e.g.,* negligent entrustment, when evidence of a driver's prior accidents shows that a party negligently entrusted a vehicle to the driver (see Jefferson's Evidence Benchbook, chap 21); and

NOTE: The authors know of no case in which evidence of subsequent accidents was admitted to prove negligence, although evidence of subsequent accidents may be admissible to show a defect. See Jefferson's Evidence Benchbook, chap 21.

- The prior or subsequent accident must have occurred in similar conditions to those in the subject accident (see *Gilbert v Pessin Grocery Co.* (1955) 132 CA2d 212, 282 P2d 148); or

- The prior or subsequent accident must have involved a product substantially similar to the design or characteristics of a product that is alleged to be defective and that caused injury in the subject accident (see *Ault v International Harvester Co.* (1974) 13 C3d 113, 117 CR 812).

Source: Evidence/Effective Introduction of Evidence in California/9 Accidents: Prior or Subsequent Ones/§9.3 B. To Object

§9.3 B. To Object

The opponent may object to evidence of prior or subsequent accidents on the following grounds:

- Lack of foundation, *e.g.:*
- No showing that the prior or subsequent accident was substantially similar to the subject accident;
- The prior accident involved a product design different from the design of the product in issue;
- The evidence is being offered for an improper purpose; or
- Too time consuming, prejudicial, confusing, or misleading (Evid C §352).

III. SAMPLE QUESTIONS

A. Evidence Offered to Show Notice of Dangerous Condition

§9.4 1. Information to Elicit

To prove that the defendant had notice of a dangerous condition, plaintiff's counsel wants the witness to testify to the following matters during the direct examination segment in §9.5:

- Why the witness is qualified to testify about the prior accident;
- The facts involved in the prior accident; and
- That the landlord was aware of the prior accident.

§9.5 2. Questions to Ask

Q: Were you employed by the defendant landlord before the date of this incident?

A: Yes.

Q: Did you, in fact, manage and maintain the apartment house owned by the defendant?

A: Yes.

Q: Before the date of the accident, did you tell the defendant anything about the area where the plaintiff fell?

A: Yes, I told him I had heard that another tenant's guests had fallen in the same place.

Opponent: Objection; hearsay. This witness has no personal knowledge of any accident. I move to strike this witness's testimony.

Proponent: Your Honor, the evidence is offered as an exception to the hearsay rule to show that the defendant had notice of a prior accident occurring in the area where the plaintiff fell. In *Laird v T.W. Mather, Inc.* (1958) 51 C2d 210, 331 P2d 617, at page 220, the court held that evidence of a similar statement by a witness was admissible to show notice. This witness's testimony is not being offered to prove the truth of the matter asserted, namely that an accident did in fact occur earlier. We have another witness to testify to that accident. This witness is only testifying to the fact that she told the owner about the prior accident, in order to prove notice. The witness who had the earlier accident did not talk to the owner.

Court: On that representation, I will allow the testimony.

B. Evidence Offered of Prior Accident in Same Location

§9.6 1. Information to Elicit

To prove the occurrence of a prior similar accident, plaintiff's counsel asks the witness to testify to falling on the same step that the plaintiff fell on, but as illustrated in the direct examination segment in §9.7 counsel is unprepared for the testimony the witness gives.

§9.7 2. Questions to Ask

Q: Did you fall on the stairs at 123 B Street?

PRACTICE TIP: Opponent might object to this question as leading. If such an objection were sustained, counsel could break the question into smaller parts, *e.g.*: (1) Have you ever been to 123 B Street? (2) Does that building have a stairway? (3) Have you ever walked on those stairs? (4) Have you ever had a problem while on those stairs?

A: Yes. I fell on the staircase.

Q: Which step did you fall on?

A: I don't remember.

Opponent: I move to strike all of this witness's testimony because of an insufficient showing of similar circumstances, that is, that she fell on the same step. *Thompson v Buffums', Inc.* (1936) 17 CA2d 401, 62 P2d 171, is directly on point.

NOTE: *Thompson v Buffums', Inc., supra,* was disapproved on other grounds in *Laird v T.W. Mather, Inc.* (1958) 51 C2d 210, 220, 331 P2d 617 (holding that evidence of prior accidents is admissible if it reasonably tends to show defendant knew or should have known something was wrong, and that defendant should have inspected area to discover any dangerous condition).

Court: Granted. This witness's testimony shall be stricken from the record.

PRACTICE TIP: The determination of relevance depends on what the proponent claims to be trying to prove. If the plaintiff were trying to establish that a particular step was dangerous because of a rotten board, then evidence of a fall on a different step would not be relevant. However, evidence of other accidents on other steps would be relevant, under *Laird v T.W. Mather, Inc., supra,* if it could be shown that the defendant had notice of such accidents, on the theory that the defendant would have notice of a problem and should have inspected to discover any dangerous condition. That scenario would probably require evidence from which the jury could infer that such an inspection would have revealed the rotten board. Furthermore, evidence of other accidents would be relevant to establish the dangerous condition if the danger was not a single rotten board, but a danger relating to the entire staircase. For example, if the plaintiff claims that she fell because of lack of lighting, evidence that others had fallen on the stairway should be admissible without showing that the same step was involved. See *Westman v Clifton's Brookdale* (1948) 89 CA2d 307, 200 P2d 814. See also 1 Witkin, California Evidence, *Circumstantial Evidence* §104 (4th ed 2000).

C. Evidence of Prior or Subsequent Accidents Involving Same or Similar Products

§9.8 1. Information to Elicit

To prove the occurrence of prior or subsequent accidents involving the same or similar products, plaintiff's counsel wants the expert witness to testify to the following matters in the direct examination segment in §9.9:

- Her qualifications;
- Extent of investigation, *i.e.,* work performed;
- Knowledge of prior or subsequent incident;
- All parts involved in the incidents were manufactured by defendant;
- Similarity of parts, with a description of how they were similar; and
- Her opinion on cause of incidents.

§9.9 2. Questions to Ask

[*Earlier questions on foundational testimony established witness's qualifications*]

Q: Dr. Engineer, at my request did you examine these products, marked Plaintiff's Exhibits Nos. 9A through 9H?

A: Yes.

Q: Do you know who manufactured these products?

A: Yes; it was the defendant.

Q: Did you perform tests on these products?

A: Yes.

Q: Would you please describe those tests?

PRACTICE TIP: The expert should bring the products, or models or drawings of them, to use to illustrate her testimony.

[*Witness testifies about tests performed*]

Q: Do you have an opinion on whether the products you tested possess similar physical properties and designs in comparison with the product marked Plaintiff's Exhibit No. 1?

A: Yes I do. They are similar.

[*Expert details the similarities, using a chart that prominently displays them*]

Opponent: Objection. Your Honor, this testimony is irrelevant because the gear boxes are not identical.

Proponent: Your Honor, the facts of this case are almost identical to those in *Ault v International Harvester Co.* (1974) 13 C3d 113, 117 CR 812, at page 121. There, the court held that the expert's testimony on similar gear boxes was admissible to show the defective condition of the product based on the inherent similarity in the physical and mechanical properties of the products, all of which contained similar defects.

Court: I will allow the expert to give her opinion on this issue, based on the similarity in materials and design.

Q: Do you have an opinion with respect to the cause of failure of these three products?

A: Yes, in all nine cases, the failure arose from metal fatigue of gear boxes that incorporated the same type of materials and the same design.

IV. COMMENT

§9.10 A. Relevancy Is Primary Consideration

Introduction into evidence of prior or subsequent accidents presents a classic test of relevancy principles. See Evid C §§210, 351. Counsel should be thorough in exploring all possible avenues of relevance. Although evidence based on one theory may be inadmissible, another theory may be successful.

§9.11 B. Evidence of Accidents Obtained Through Discovery

Evidence of prior or subsequent accidents is generally obtained through pretrial discovery. See California Civil Discovery Practice (4th ed Cal CEB 2006).

V. CHECKLISTS

§9.12 A. Checklist: Witnesses to Subpoena

- Principals involved in the other accident(s).
- Expert to testify about the other accident(s).

NOTE: You may also be able to read documents into the record, *e.g.,* the answers to interrogatories or documents obtained through discovery.

§9.13 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1228; see chap 10.
- Former testimony. Evid C §§1290-1292; see chap 28.
- Judgment. Evid C §§1300-1302; see chap 30.
- Stipulation. See chap 51.

§9.14 VI. SOURCES

See Evid C §§210, 351, discussed and reproduced in chap 45.

For further discussion on using evidence of prior or subsequent accidents, see Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009).

Source: Evidence/Effective Introduction of Evidence in California/10 Admissions and Confessions/Chapter Outline

10

Admissions and Confessions

Nancy M. Naftel

§10.1 I. SCOPE OF CHAPTER

Admissions made, adopted, or authorized by parties that are offered against that party are admissible as exceptions to the hearsay rule. See Evid C §§1220-1227. Admissions include admissions and confessions for purposes of §§1220-1227. This chapter uses the term "admissions" to include both admissions and confessions.

NOTE: The admissions discussed in this chapter are referred to as "evidentiary" admissions, and should be distinguished from "judicial" admissions. A judicial admission is made when a party voluntarily concedes the truth of certain matters in the course of the litigation, usually in a pleading or by counsel's statement on the record at trial. See, *e.g.*, *Monroy v City of Los Angeles* (2008) 164 CA4th 248, 259, 78 CR3d 738 (unambiguous response to request for admission conclusively binding). The effect is that the opposing party need not offer proof on the admitted matter, which is deemed conclusively established. In contrast, an evidentiary admission is an exception to the hearsay rule, allowing the admission to be weighed by the trier of fact as evidence of a fact. See California Trial Practice: Civil Procedure During Trial §§14.43-14.46 (3d ed Cal CEB 1995).

II. REQUIREMENTS

§10.2 A. To Admit

The proponent seeking to introduce an admission must establish that the statement is offered against a party (Evid C §§1220-1227), and was:

- Made personally by a party, and the truth of the statement offered is relevant to prove or disprove an element of the case (Evid C §1220);
- Adopted by a party ("adoptive admission") (Evid C §1221);
- Authorized by a party ("authorized admission") (Evid C §1222);
- Made by a coconspirator before or during and in furtherance of the conspiracy (Evid C §1223);
- Made by a declarant whose liability or breach of duty is in issue (Evid C §1224);
- Made by a declarant whose right, title, or interest in property or in a claim is in issue (Evid C §1225);
- Made by a minor child in the parent's action for child's injury (Evid C §1226); or
- Made by a declarant in an action for his or her wrongful death (Evid C §1227).

Source: Evidence/Effective Introduction of Evidence in California/10 Admissions and Confessions/§10.3 B. To Object

§10.3 B. To Object

The opponent may object to evidence of an admission on one or more of the following grounds, asserting that the statement:

- Was not personally made by party alleged (Evid C §1220);
- Is not offered against a party (Evid C §§1220-1227); see *California Sch. Employees Ass'n v Sunnyvale Elementary Sch. Dist.* (1973) 36 CA3d 46, 69, 111 CR 433;
- Is irrelevant (Evid C §350);
- Would be too time consuming, prejudicial, confusing, or misleading (Evid C §352);
- Was an expression of sympathy for the pain, suffering, or death of a person involved in an accident; was offered to that person or to that person's family; and did not include a statement of fault (Evid C §1160);
- Was not adopted by party (Evid C §1221);
- Was not authorized by party (Evid C §1222);
- Was not made before or during a conspiracy and in furtherance of a conspiracy (Evid C §1223);
- Is inadmissible because liability or breach of duty not in issue (Evid C §1224); or
- Is inadmissible because right, title, or interest in property or claim not in issue (Evid C §1225);
- In a criminal case (see §10.25), evidence of an admission may also be objectionable because of:
- A *Miranda* violation (*Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602);
- Involuntariness (see *Brown v Mississippi* (1936) 297 US 278, 286, 80 L Ed 682, 687, 56 S Ct 461);
- *Massiah* error (see *Massiah v U.S.* (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199); or
- Privilege (see *McKnew v Superior Court* (1943) 23 C2d 58, 62, 142 P2d 1).

NOTE: If the admission was made by a codefendant or coconspirator, a defendant in a criminal case may object on the ground that there has been no opportunity (or an inadequate opportunity) to cross-examine the declarant. *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354. For discussion, see §20.20B. If, however, the admission was made to a person who was murdered by the defendant to keep him or her from testifying, it may be admissible under Evid C §1350, if specified conditions are met. See *Giles v California* (2008) ___ US ___, 171 L Ed 2d 488, 496, 128 S Ct 2678 (unconfronted testimonial hearsay admissible *only* if defendant bribed, intimidated, or killed declarant with specific design of preventing declarant's testimony). Proof of the allegation that the defendant caused a declarant's unavailability must be shown by clear and convincing evidence and there must be other evidence corroborating a connection between the defendant and the commission of the serious felony charged. *People v Zambrano* (2007) 41 C4th 1082, 1143, 63 CR3d 297, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209 (murder victim's prior testimonial statement to police about defendant's confession of assault admissible under §1350). For a discussion about the narrow exception of forfeiture by wrongdoing with intent to stop testimony and confrontation clause rights, see §22.3.

III. SAMPLE QUESTIONS

A. Statement Made Personally by Civil Party (Evid C §1220)

§10.4 1. Information to Elicit

To introduce defendant's statement that she was speeding at the time of the automobile accident in a personal injury case, plaintiff's counsel wants the witness to testify to the following points in response to the direct examination questions asked in §10.5:

- Identify self as the one who heard admission;
- Identify person who made admission;
- Show personal knowledge of the situation in which admission was made; and
- Reveal admission's contents.

§10.5 2. Questions to Ask

Q: Mr. Witness, do you know Ms. Defendant?

Q: Do you see Ms. Defendant in the courtroom?

Counsel: May the record reflect that the witness identified Ms. Defendant.

Q: Did you talk with Ms. Defendant on March 24, 2000?

Q: Did you discuss the accident that she was involved in on December 30, 1999?

Q: Did she tell you anything about the cause of the accident?

Q: What did she say?

PRACTICE TIP: If defendant's attorney tries to introduce the defendant's statement that she was only going at the posted rate of speed, that statement should be inadmissible as hearsay because not offered *against* a party.

B. Statement Made Personally by Criminal Defendant (Evid C §1220)

§10.6 1. Information to Elicit

To introduce a taped statement of a Mirandized criminal defendant interrogated while in custody, the prosecutor wants the witness to testify to the following points in response to the direct examination questions asked in §10.7 (a preliminary fact hearing has already been held, with the judge ruling the statement admissible):

- Identify self as the one who heard admission;
- Identify the person who made admission;
- Establish that *Miranda* warnings were given (although not required in front of jury—because judge has already ruled that admission was voluntary and met *Miranda* requirements—this evidence should bolster jury's acceptance of truth of admission);
- Relate contents of admission; and
- If statement on audiotape, authenticate it:
- Identify tape,
- Show tape is either same one used to tape defendant's admission or a duplicate as defined in Evid C §260,
- State tape accurately reflects defendant's admission,
- Describe chain of custody, if challenged,
- Move tape into evidence, and
- Play tape for jury; or
- If confession in writing:
- Authenticate it,
- Move statement into evidence, and
- Have confession read to jury.

On procedures and events that do *not* constitute a police interrogation, and therefore are not subject to *Miranda,* see, *e.g., Tawfeq Saleh v Fleming* (9th Cir 2008) 512 F3d 548, 550 (phone call initiated by defendant on unrelated offense); *People v Jefferson* (2008) 158 CA4th 830, 840, 70 CR3d 451 (secretly recorded jail cell recording).

Source: Evidence/Effective Introduction of Evidence in California/10 Admissions and Confessions/§10.7 2. Questions to Ask

§10.7 2. Questions to Ask

Q: Mr. Police Officer, did you interview the defendant in this matter on June 4, 1998?

Q: Do you see the defendant in the courtroom?

Proponent: May the record reflect that Mr. Police Officer identified Mr. Defendant.

Q: Where did your interview with the defendant take place?

Q: Was the defendant under arrest?

Q: Before questioning him, did you advise him of his constitutional rights?

Q: Did you read him his rights from a card, or did you advise him of his rights by memory?

Q: Do you have that card with you today?

Q: Would you read the card as you read it to the defendant that day and relate any response the defendant gave to any questions you asked?

Q: Did the defendant state that he would waive his rights and talk to you without an attorney being present?

Q: Were any threats made against the defendant or the defendant's parents before you questioned the defendant?

NOTE: If a defendant was threatened into confessing, the confession is inadmissible as involuntary. *People v Hill* (1967) 66 C2d 536, 548, 58 CR 340. But a defendant may expressly waive the right to object to the admission of an involuntary, coerced confession. *Carrillo v Superior Court* (2006) 145 CA4th 1511, 1528, 52 CR3d 614.

Q: Were any promises made to the defendant before questioning?

NOTE: Promises of leniency that result in a confession also make the statement inadmissible as involuntary. *People v Hill, supra*.

Q: What did you ask the defendant?

Q: What did he say?

Q: Mr. Police Officer, was your conversation with the defendant recorded in any way?

Q: How was that done?

Q: Do you have that tape with you today?

Q: Your Honor, may this tape be marked as People's No. 14 for identification?

Q: Are the contents of this tape an accurate recording of the conversation between you and the defendant?

PRACTICE TIP: Because tapes often have to be "enhanced" to remove static, background noise, and the like, the proponent in authenticating the recording should (1) seek a stipulation from defense counsel that the enhanced tape is still an accurate representation of what was recorded on the original tape or (2) subpoena a witness to testify about the methods used to prepare and protect the accuracy of the enhanced tape for court.

Proponent: Your Honor, may the tape be admitted into evidence?

Court: Yes.

[*Tape is played for jury*]

PRACTICE TIP: Many courts require that a written transcript be prepared for any tape recording to be used in trial. Even if not

required, a transcript is helpful to jurors so they can follow along while the tape is playing. Although the transcript would not normally be admitted into evidence, it is helpful to make a copy for the court so it will become part of the appellate record, if needed. A tape that is not in English will require translation, which may need to be certified as accurate by a court interpreter or other expert. Counsel can stipulate before trial to the transcript's accuracy, or the court can rule on disputed passages before the tape and transcript are presented to the jury.

Q: Mr. Police Officer, was your conversation with the defendant put in writing?

Proponent: Your Honor, I have a three-page document dated June 4, 1998. May the document be marked as People's Exhibit No. 15 for identification?

Q: Officer, I am showing you a three-page document that has been marked People's Exhibit No. 15 for identification. Do you recognize this document?

Q: What is this document?

Q: Who prepared it?

Q: Is this document an accurate account of the conversation you had with the defendant on June 4, 1998?

Q: Do you recognize these signatures?

A: Yes. The first one is the defendant's. I watched him sign it. The second is mine.

Proponent: Your Honor, I request that People's Exhibit No. 15 be admitted into evidence.

NOTE: If the defendant did not sign the statement or if the officer merely offers notes of the conversation, defense counsel can argue that they are inadmissible. *People v Young* (1941) 17 C2d 451, 110 P2d 392.

C. Adoptive Admission (Evid C §1221)

§10.8 1. Information to Elicit

The plaintiff in an automobile accident personal injury case seeks to introduce Mr. Witness's statement, through Ms. Witness's testimony, that if Ms. Defendant had observed the speed limit she would not have been involved in an accident, and Ms. Defendant's concurrence with the statement—either by agreement or by failure to deny it in circumstances that called for a denial if she disagreed. Plaintiff's counsel wants the witness to testify to the following matters in response to the direct examination questions asked in §10.9:

- Identify self as the one who witnessed the defendant's adoptive admission;
- Identify defendant;
- Identify the witness who made the statement;
- Tell where, when, and why statement was made;
- Describe who else was present when statement was made;
- Show defendant's response to statement, her silence, or other reaction;
- Establish witness's ability to hear and perceive, if relevant; and
- Relate contents of statement and describe silence or other reaction that indicates defendant's adoption of admission.

NOTE: One who forwards an e-mail may be deemed to have adopted the content of the original e-mail when the forwarder's comment manifests a belief in the truth of the forwarded message. *Sea-Land Serv., Inc. v Lozen Int'l LLC* (9th Cir 2002) 285 F3d 808, 821.

NOTE: An adoptive admission may not support a strike based on a prior conviction that is dependent on great bodily injury, when a defendant's failure to contest a prosecutor's description of the victim's injuries occurred after the defendant's guilty plea, and thus after the record of conviction. *People v Thoma* (2007) 150 CA4th 1096, 1102, 58 CR3d 855.

§10.9 2. Questions to Ask

Q: Ms. Witness, were you present at the home of Mr. Witness on July 24, 1998?

Q: Was Ms. Defendant there also?

Q: Did Mr. Witness make any statement about an accident involving Ms. Defendant that occurred on May 3, 1997?

Q: What did Mr. Witness say?

Q: When Mr. Witness made that statement, where was Ms. Defendant?

Q: How close to Mr. Witness was Ms. Defendant?

Q: Was Mr. Witness speaking in a normal tone of voice?

Q: How close were you to Mr. Witness?

Q: Did you have any trouble hearing what he said?

Q: Did Ms. Defendant say anything regarding Mr. Witness's statement?

Q: What did Ms. Defendant say?

NOTE: To admit a party's silence or other reaction as an adoptive admission, counsel must show that the party reacted under circumstances that would call for a denial if the statement were not true. See *J. & J. Builders Supply v Caffin* (1967) 248 CA2d 292, 56 CR 365. Opposing counsel may request a cautionary instruction. See CACI 213-214; CALCRIM 357.

In criminal cases, a suspect's silence during custodial interrogation is constitutionally protected. It may not be introduced as an adoptive admission. *People v Cockrell* (1965) 63 C2d 659, 47 CR 788; *People v Jennings* (2003) 112 CA4th 459, 5 CR3d 243. By contrast, a witness or a prosecutor may comment on a defendant's silence in direct response to the defendant's questioning or argument. *U.S. v Robinson* (1988) 485 US 25, 31, 99 L Ed 2d 23, 31, 108 S Ct 864. It is also proper to comment on a defendant's failure to produce exculpatory evidence, so long as there is no comment about the defendant's failure to testify. *Lockett v Ohio* (1978) 438 US 586, 595, 57 L Ed 2d 973, 983, 98 S Ct 2954; *Cook v Schriro* (9th Cir 2008) 538 F3d 1000, 1019.

Q: Did you notice any reaction to Mr. Witness's statement by Ms. Defendant?

D. Authorized Admission (Evid C §1222)

§10.10 1. Information to Elicit

Counsel who seeks to admit evidence as an authorized admission must establish that the admission was made by a person authorized to speak for the party "concerning the subject matter of the statement," and that the statement was made during the existence of an agency relationship. See Evid C §1222; *Markley v Beagle* (1967) 66 C2d 951, 59 CR 809. Generally, only officers, directors, or managing agents of an organization may make authorized admissions binding on the employer. Lower-ranking employees are unlikely to have the actual authority to speak on behalf of the organization. *Snider v Superior Court* (2003) 113 CA4th 1187, 1203, 7 CR3d 119.

The determination of an individual's authority, however, may not be based solely on his or her title or place in the employer's hierarchy. *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1403, 55 CR3d 551. Rather, the question of the individual's authority is determined by the law of agency, and when the individual's statement involves the work he or she is employed to perform, the necessary authority may be implied. *O'Mary v Mitsubishi Electronics America Inc.* (1997) 59 CA4th 563, 69 CR2d 389; *Miller v Anson-Smith Construction Co.* (1960) 185 CA2d 161, 8 CR 131 (construction superintendent's praise of subcontractor's work); *W.T. Grant Co. v Superior Court* (1972) 23 CA3d 284, 100 CR 179 (store manager's statement authorized admission of chain store).

Counsel seeking to establish an authorized admission in response to the direct examination questions asked in §10.11 wants the witness who heard the admission to:

- Identify self as person who heard authorized admission;
- Identify person who made admission;
- Show knowledge of that person and his or her duties to prove that one making admission was authorized to speak for a party;
- Give facts indicating admission made during existence of agency relationship;
- Show witness's personal knowledge of admission; and
- Relate contents of authorized admission.

PRACTICE TIP: The court may allow a statement to be admitted in evidence before proof is offered of the declarant's authority to bind the party. Evid C §1222(b).

On the difference between evidentiary and judicial admissions, see §10.1.

§10.11 2. Questions to Ask

[*Preliminary questions omitted*]

Q: Did Mr. Employee work for ABC Corporation on May 3, 1998?

Q: In what capacity?

Q: What were his duties?

Q: Did Mr. Employee prepare reports of any kind for ABC?

Q: What type of reports did he prepare?

Q: To whom were these reports distributed?

Q: Did Mr. Employee negotiate contracts for ABC?

Q: Did Mr. Employee sign contracts for ABC?

Q: Did Mr. Employee release information to the media on behalf of ABC?

Q: Did Mr. Employee sign correspondence on ABC's behalf?

[*Questions on admission omitted*]

NOTE: Proof of the declarant's authority to bind the party may be either express or implied and is determined by the law of agency. See Comment to Evid C §1222.

E. Coconspirator Admission (Evid C §1223)

§10.12 1. Information to Elicit

The prosecutor eliciting statements of a coconspirator about defendant's involvement with the coconspirator in narcotics dealing wants the witness to cover the following points in response to the direct examination questions asked in §10.13:

- Identify self as person who heard coconspirator's admission;
- Identify coconspirator;
- Prove conspiracy;
- Tell where, when, and why admission was made;
- State who else was present at that time;
- Show personal knowledge of admission; and
- Relate conversation, including admission.

§10.13 2. Questions to Ask

Q: Mr. Police Officer, what was your occupation on May 14, 1999?

Q: Were you working as an undercover narcotics officer on that date?

Q: Did you meet with a person by the name of Coconspirator on that date?

Q: Is Coconspirator in the courtroom today?

Q: Where is he?

Proponent: May the record reflect that the witness has identified Coconspirator.

Q: Is the person you referred to as Little Joe in court today?

Q: Where is he?

Proponent: Your Honor, may the record reflect that the witness has identified the defendant.

Q: Was there any conversation among the three of you regarding narcotics?

PRACTICE TIP: The judge may allow the statement to be offered before proof of the conspiracy or may require the proponent to prove the conspiracy first. Evid C §1223(c).

Q: What did you say?

Q: What did Coconspirator say?

Opponent: Objection. Hearsay as to my client. I request a limiting instruction.

Proponent: Because the foundational facts have been established to show a conspiracy to sell narcotics between Coconspirator and defendant and because the statement was made during the conspiracy and in its furtherance, the statement is admissible against the defendant.

NOTE: "Conspiracy," as used in Evid C §1223, has the same meaning as in Pen C §182. *People v Earnest* (1975) 53 CA3d 734, 735, 126 CR 107.

F. Declarant's Liability or Breach of Duty at Issue (Evid C §1224)

§10.14 1. Information to Elicit

With the employee's breach of duty at issue, the plaintiff seeks to introduce the statement of the employee driver that he caused the accident for which his employer is seeking to avoid liability. Plaintiff's counsel wants the witness to testify to the following matters in response to the direct examination questions in §10.15:

- Identify self as person who heard admission;
- Identify employee as the declarant (one whose liability or breach of duty is at issue);
- Tell where, when, and why admission was made;
- State who else was present at that time;
- Show personal knowledge of admission; and
- Report conversation, including admission.

§10.15 2. Questions to Ask

Q: Ms. Witness, do you know Mr. Employee?

Q: Is Mr. Employee present in the courtroom today?

Q: Where is he?

Proponent: Your Honor, may the record reflect that the witness has identified Mr. Employee?

Q: Did you ever have a conversation with Mr. Employee regarding his accident while Mr. Employee was driving a company truck on July 10, 1998?

Q: When did that conversation take place?

Q: Where did that conversation take place?

Q: What did Mr. Employee tell you about that accident?

[*Questions concerning admission omitted*]

NOTE: This situation is distinguishable from the authorized admission that the agent made on his company's behalf in §10.11; in this example, the employee made an admission about his conduct during working hours, but it was not authorized. See discussion in Jefferson's California Evidence Benchbook, chap 3 (4th ed CJA-CEB 2009).

G. Statement by Declarant Whose Interest in Real Property Is at Issue (Evid C §1225)

§10.16 1. Information to Elicit

The plaintiff seeks to introduce the statement of the former titleholder of real property that she was holding property as security for a debt owed her by the plaintiff at the time she transferred title without consideration to her brother. Plaintiff's counsel wants the witness to testify to the following matters in response to the direct examination questions in §10.17:

- Identify self;
- Identify declarant (one whose interest in real property is at issue);
- Tell where, when, and why admission was made;
- State who else was present at that time;
- Show personal knowledge of admission; and
- Report conversation, including admission.

§10.17 2. Questions to Ask

Q: Mr. Witness, do you know Ms. Declarant?

Q: Is Ms. Declarant in the courtroom today?

Q: Where is she?

Proponent: Your Honor, may the record reflect that the witness has identified Ms. Declarant.

Q: Did Ms. Declarant ever discuss with you her ownership of property at 123 Main Street?

Q: When did she discuss this with you?

Q: What did Ms. Declarant say regarding the circumstances of her ownership of that property?

[*Questions concerning admission omitted*]

NOTE: Declarant's statement must have been made while the declarant held title to the property, not before or after. Evid C §1225. See Jefferson's California Evidence Benchbook, chap 3 (4th ed CJA-CEB 2009).

H. Declarant a Minor Child in Parent's Action for Child's Injury (Evid C §1226)

§10.18 1. Information to Elicit

In an action by a parent for injuries to a child, the defendant seeks to introduce the child's statement that she failed to look before she ran into the street. Defense counsel wants the witness to testify to the following matters in response to the direct examination questions in §10.19:

- Identify self;
- Identify minor child;
- Tell where, when, and why admission was made;
- State who else was present at that time;
- Show personal knowledge of admission; and
- Report conversation, including admission.

§10.19 2. Questions to Ask

Q: Where do you live?

Q: Do you know Child Victim, daughter of the plaintiff?

Q: This is a photograph that has been introduced as Plaintiff's Exhibit No 4. Do you recognize the person in the photo?

[*Witness identifies photo as that of plaintiff's minor child*]

Q: How long have you known Child Victim?

Q: Did you talk to her after she was injured on July 4, 1998?

Q: When did you talk to her?

Q: Where did you talk to her?

Q: How long after she was injured did you talk to her?

Q: Was anyone else present during this conversation?

Q: Did she appear to have any difficulty understanding what you said?

PRACTICE TIP: If the injuries were severe, it may be necessary to ask questions similar to those asked in a wrongful death action as to declarant's capability and mental capacity.

Q: Did you have any problems understanding her?

Q: Did Child Victim tell you anything about how she was injured?

Q: What did she tell you?

I. Statement by Declarant in Action for Declarant's Wrongful Death (Evid C §1227)

§10.20 1. Information to Elicit

In seeking to introduce the decedent's statement in a wrongful death action, plaintiff's counsel wants the witness to testify about the following matters in response to the direct examination questions in §10.21:

- Identify self;
- Identify decedent;
- Tell where, when, and why statement was made;
- State who else was present at that time;
- Show personal knowledge of statement; and
- Report conversation, including admission.

§10.21 2. Questions to Ask

Q: Doctor, did you know Mrs. Decedent, the deceased wife of the plaintiff in this action?

Q: This is a photograph that has been introduced as Plaintiff's Exhibit No. 4. Do you recognize the person in the photo?

[*Witness identifies photo as that of her former patient, the decedent*]

Q: Did you talk to Mrs. Decedent after she was injured on April 30, 1999?

Q: How long after she was injured did you talk to her?

Q: Where did you talk to Mrs. Decedent?

Q: Were you her treating physician?

Q: Did she appear to be in any pain?

Q: Had she been given any medication, to your knowledge?

Q: Can you describe her mental condition?

Q: Did she appear to have any trouble understanding your questions?

PRACTICE TIP: You may want to qualify the witness as an expert in psychiatric disorders in order to give his or her opinion more weight with jurors. See chap 24 on qualification of experts.

Q: Were her answers appropriate?

Q: Did she know where she was?

Q: Did she know the date?

Q: Did you question her about the accident?

Q: What did she say?

IV. COMMENT

§10.22 A. Admissibility Determined at Preliminary Fact Hearing

"Admissions" as the term is used in this chapter includes statements that could be considered either admissions or confessions for purposes of Evid C §§1220-1227. Preliminary facts about the admissibility into evidence of admissions are governed by Evid C §405, except for the identity of the person who made an admission or a confession in a criminal case, in which event the issue is governed by Evid C §403 (see Comment to Evid C §403). The court usually determines such preliminary facts when the party opposing admissibility challenges an admission through a motion in limine before trial. See chaps 3 (in limine motions), 4 (preliminary fact hearings).

§10.23 B. Introducing Admission at Trial

The proponent may introduce an admission through the testimony of someone who heard it, by playing a tape recording of it, or by introducing a written admission signed by the party who made it. Evidence to support the truth and relevance of the admission must also be presented.

EXAMPLE: To convince the jury that a declarant's statement was an authorized admission, you should introduce evidence of other, similar statements by the declarant that were binding on the party. It is more persuasive if both testimony and physical evidence are offered.

§10.24 C. Admission Not Declaration Against Interest

Admissions should not be called declarations against interest, because there is no requirement that a statement be against the party-declarant's interest when made. An admission may, in fact, have been self-serving. See *California Sch. Employees Ass'n v Sunnyvale Elementary Sch. Dist.* (1973) 36 CA3d 46, 69, 111 CR 433. In addition, the declarant may have no personal knowledge of the facts asserted in the admission. See Jefferson's California Evidence Benchbook, chap 3 (4th ed CJA-CEB 2009). For discussion of declarations against interest, see chap 20.

Source: Evidence/Effective Introduction of Evidence in California/10 Admissions and Confessions/§10.25 D. Criminal Cases

§10.25 D. Criminal Cases

Objections to defendant's admission or confession. Objections to the introduction of a defendant's admission or confession may be made at various stages in the criminal process; typically, at the preliminary hearing, in a Pen C §995 motion, or at trial.

Objections may be based on several grounds, such as the following examples:

- *Miranda* error (*Duckworth v Eagan* (1989) 492 US 195, 106 L Ed 2d 166, 109 S Ct 2875), including the failure to clarify whether an ambiguous statement made by the defendant after receiving the *Miranda* warnings was or was not an invocation of *Miranda* rights (*U.S. v Rodriguez* (9th Cir 2008) 518 F3d 1072, 1080);
- Resuming interrogation once *Miranda* rights have been invoked (*Edwards v Arizona* (1981) 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880) without counsel present (*Minnick v Mississippi* (1990) 498 US 146, 112 L Ed 2d 489, 111 S Ct 486);
- Interrogation of a represented defendant in the absence of counsel, absent a valid waiver (see *Montejo v Louisiana* (2009) ___ US ___, 173 L Ed 2d 955, 129 S Ct 2079);
- Secret interrogation of a represented defendant in the absence of retained or appointed counsel (see *Massiah v U.S.* (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199);
- Involuntariness (see *Mincey v Arizona* (1978) 437 US 385, 398, 57 L Ed 2d 290, 98 S Ct 2408; *Brown v Mississippi* (1936) 297 US 278, 286, 80 L Ed 682, 687, 56 S Ct 461); and
- Privilege (see *McKnew v Superior Court* (1943) 23 C2d 58, 62, 142 P2d 1).

If the admission was made by a coconspirator or codefendant, the defendant may object on the ground that there has been no opportunity to cross-examine the declarant. See *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354. See also §20.20B. In *People v Roldan* (2005) 35 C4th 646, 711 n25, 27 CR3d 360, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209, the California Supreme Court concluded that a defendant cannot challenge the introduction of an adoptive admission on confrontation clause grounds. Statements adopted by the defendant "become, in effect, his statements." 35 C4th at 711 n25. Consequently, the court is "'no longer concerned with the veracity or credibility of the original declarant.'" 35 C4th at 711 n25 (citation omitted). See also *People v Combs* (2004) 34 C4th 821, 841, 22 CR3d 61; *People v Zavala* (2008) 168 CA4th 772, 780, 85 CR3d 734.

Preliminary fact hearing to challenge admissions. At trial, statements are traditionally challenged in motions for preliminary fact hearings made in limine. See Evid C §§402-403, 405; chaps 3-4. See California Criminal Law Procedure and Practice, chap 23 (Cal CEB Annual) for discussion of this complex area. If any party requests, the preliminary fact hearing must be held out of the jury's hearing in criminal cases. Evid C §402(b). The defense and prosecution may put on witnesses and submit written points and authorities. The statement is played (when a tape) or read (when written and signed) into the record. After the judge has listened to evidence concerning the admission, counsel argue, then the judge rules. If only the preliminary facts such as waiver of *Miranda* rights are in issue, the actual admission may not need to be admitted at this point.

Burden of proof and burden of production. The burden of producing evidence is on the prosecution for both voluntariness and *Miranda* questions. *People v Morris* (1991) 53 C3d 152, 202, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394 (*Miranda* error); *People v Murtishaw* (1981) 29 C3d 733, 753, 175 CR 738, overruled on other grounds in *People v Lee* (1987) 43 C3d 666, 671, 238 CR 406 (*Miranda* error); *People v Duren* (1973) 9 C3d 218, 237, 107 CR 157 (voluntariness); *People v Simpson* (1991) 2 CA4th 228, 232, 2 CR2d 589 (voluntariness). The burden of proof on the voluntariness of a *Miranda* waiver is preponderance of the evidence. *People v Markham* (1989) 49 C3d 63, 260 CR 273.

The burden of proof for preliminary facts such as whether a defendant was "in custody" is also preponderance of the evidence. *People v Stansbury* (1995) 9 C4th 824, 831, 38 CR2d 394 (citing *Markham*).

Voluntary confessions obtained in violation of Fifth and Sixth Amendments may still be used to impeach defendant. An accused who is in custody must be informed of the rights to remain silent and to an attorney before being questioned. *Dickerson v U.S.* (2000) 530 US 428, 147 L Ed 2d 405, 120 S Ct 2326; *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602. Thus, if a statement is excluded because of *Miranda* error, it may not be introduced in the prosecution's case-in-chief; but if it was voluntary, it may still be used to impeach the defendant. *People v May* (1988) 44 C3d 309, 243 CR 369. See *People v Macias* (1997) 16 C4th 739, 66 CR2d 659 (statements defendant made to probation officer in preparation for juvenile fitness hearing may be used

to impeach defendant in subsequent trial). Similarly, voluntary statements obtained from represented defendants in the absence of counsel may be used for impeachment purposes. See *Kansas v Ventris* (2009) ___ US ___, 173 L Ed 2d 801, 129 S Ct 1841 (to jailhouse informant); *Michigan v Harvey* (1990) 494 US 344, 108 L Ed 2d 293, 110 S Ct 1176 (to police).

Standard of review. In *People v Stansbury* (1995) 9 C4th 824, 830, 38 CR2d 394 the supreme court noted, but did not resolve, a dispute about whether the trial court's determination of the defendant's custodial status is reviewed under the deferential substantial evidence standard or subject to the more rigorous independent review standard.

Improper introduction of criminal confessions and admissions subject to "harmless error" rule. When an admission or confession is introduced in evidence at a criminal trial in violation of the United States Constitution, the error requires reversal unless shown to be harmless beyond a reasonable doubt. See *Arizona v Fulminante* (1991) 499 US 279, 113 L Ed 2d 302, 111 S Ct 1246 (admission of coerced confession subject to harmless error analysis). The California Supreme Court adopted *Fulminante* as a matter of California law in *People v Cahill* (1993) 5 C4th 478, 20 CR2d 582.

Further discussion. For further discussion of admissions and confessions in criminal cases, see Crim Law, chap 23.

V. CHECKLISTS

§10.26 A. Checklist: Witnesses to Subpoena

- Witness who heard the admission.
- Witness who can testify to existence of a necessary element, *e.g.,* existence of conspiracy or of agency.
- In criminal case, witness who can prove corpus, that defendant was Mirandized, and that statement was voluntary.
- If the admission is in writing:
- Lay or expert witness who can recognize or identify declarant's handwriting or signature (authentication).
- Witness to show chain of custody, if necessary.

§10.27 B. Checklist: Alternative Methods of Admissibility

- Dying declaration. Evid C §1242; see chap 22.
- Impeachment. Although a statement may not be admissible on direct or cross-examination, it may later be admissible to impeach the declarant; see *People v May* (1988) 44 C3d 309, 243 CR 369 (non-Mirandized confession); *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 82 CR 1 (superseded pleading). See chap 19 on credibility.
- Nonhearsay, usually to show consciousness of guilt. See, *e.g., People v Kimble* (1988) 44 C3d 480, 495, 244 CR 148.
- Prior inconsistent statement. Evid C §1235; see chap 41.
- Spontaneous statement. Evid C §1240; *Dillon v Wallace* (1957) 148 CA2d 447, 306 P2d 1044; see chap 49.
- State of mind. Evid C §1250(a); see chap 50.

PRACTICE TIP: When a confession or an admission is used to impeach, a limiting instruction is required. See *People v Duncan* (1988) 204 CA3d 613, 251 CR 355 (must be given sua sponte).

VI. SOURCES

§10.28 A. Evidence Code

Evid C §1220. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

Evid C §1221. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

Evid C §1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Evid C §1223. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Evid C §1224. When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

Evid C §1225. When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.

Evid C §1226. Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 of the Code of Civil Procedure for injury to such minor child.

Evid C §1227. Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action for wrongful death brought under Section 377 of the Code of Civil Procedure.

§10.29 B. Other

For detailed discussion of admissions and confessions, see Jefferson's California Evidence Benchbook, chap 3 (4th ed CJA-CEB 2009). For discussion of admissions in criminal cases, see California Criminal Law Procedure and Practice, chap 23 (Cal CEB Annual).

11

Authentication

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§11.1 I. SCOPE OF CHAPTER

The chapter discusses authentication of writings, which is required before they may be received in evidence. Evid C §1400. The Evidence Code defines "writing" broadly. It treats audio and video recordings, motion pictures, photographs, maps, diagrams, and any form of representation, including any combination of words, pictures, sounds, or symbols, as "writings." Evid C §250. In addition, photostats, photocopies, e-mail, facsimile transmissions, and other records of items considered to be writings are also included in the definition of "writing," no matter how the records are stored. Evid C §250. To authenticate a writing, the proponent must produce evidence to establish that the particular writing is what the proponent claims it is. Evid C §1401.

PRACTICE TIP: Authentication by itself does not overcome other potential grounds for excluding evidence, including the hearsay rule. For discussion of the difference between the foundational requirement of authenticity and substantive rules of admissibility of evidence, see *Stockinger v Feather River Community College* (2003) 111 CA4th 1014, 1027, 4 CR3d 385.

II. REQUIREMENTS

§11.2 A. To Admit

To authenticate a writing, the proponent must:

- Have a witness testify that the writing is what the proponent says it is (see Evid C §1400; *Landale-Cameron Court, Inc. v Ahonen* (2007) 155 CA4th 1401, 1409, 66 CR3d 776); or

- Establish authentication by "any other means provided by law"—usually by a statutory presumption, stipulation, or the pleadings (see Comment to Evid C §1400; checklist of examples in §11.18).

The following requirements may also need to be met when a writing is involved and are sometimes treated as part of the "authentication":

- Establish the chain of custody. See *People v Riser* (1956) 47 C2d 566, 580, 305 P2d 1, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201.

- To admit a reenactment of events on videotape, the trial court must find whether the "writing" (see Evid C §250) is a reasonable representation of that which it is alleged to portray, and whether use of the videotape would either assist jurors or mislead them. The demonstration must also have been made under conditions substantially similar to those of the actual occurrence. *People v Pedroza* (2007) 147 CA4th 784, 795, 54 CR3d 636.

- If complicated equipment was used, testimony may be required about the equipment, its reliability, and the qualifications of its operator. See chap 23 on experiments and scientific tests.

A copy or other secondary evidence of an original writing may usually be authenticated with evidence that the original is what it purports to be. See Evid C §§1400-1401, 1521. When secondary evidence will be used to prove the contents of the original *and* the opponent shows that a genuine dispute exists about the material terms of the original, however, the proponent of the secondary evidence may need to produce evidence authenticating the accuracy of the secondary evidence. The court must exclude secondary evidence of a writing under such circumstances if justice requires. Evid C §1521(a)(1). See also chaps 47-48.

Source: Evidence/Effective Introduction of Evidence in California/11 Authentication/§11.3 B. To Object

§11.3 B. To Object

The opponent may object to the admissibility of the writing on one or more of the following grounds:

- Not properly authenticated (Evid C §1401);
- Witness has no personal knowledge of facts to which testifying (Evid C §702);
- Inadmissible secondary evidence (Evid C §1521);
- Inadmissible hearsay (Evid C §1200);
- No chain of custody (see *People v Riser* (1956) 47 C2d 566, 580, 305 P2d 1, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201);
- No foundation made for alterations in writing (Evid C §1402);
- Misleading (see California Trial Objections §31.11 (Cal CEB Annual);
- Cumulative (see Trial Objections §§31.6-31.10);
- Unduly time-consuming, prejudicial, confusing, or misleading to jury (Evid C §352);
- Irrelevant (Evid C §350);
- Privileged (Evid C §§900-1070);
- Inadmissible opinion (Evid C §§800-805); or
- Writing not produced in response to a discovery request (see, *e.g.,* CCP §§2028.010-2028.080, 2030.010-2031.320—civil cases).

For additional objections that may be available in criminal cases, see §10.23.

NOTE: For additional discussion of authentication, see Jefferson's California Evidence Benchbook, chap 31 (4th ed CJA-CEB 2009).

III. SAMPLE QUESTIONS

§11.4 A. Information to Elicit

In introducing testimony of the investigator who interviewed the witness and tape recorded a statement that will be used to impeach the witness, counsel wants the investigator to cover the following points in the direct examination segments in §§11.5-11.8:

- Preliminary matters:
- Identify self as a licensed, experienced investigator; and
- Enumerate procedures used when conducting an interview;
- Description of taping:
- Specify investigative work that led to interview;
- Itemize date, time, and people present at interview; and
- Report procedure used during taping;
- Identification of tape:
- Describe how tape marked for identification at time made;
- Identify tape in court;
- Identify tape transcription and verify its accuracy; and
- Establish unbroken chain of custody;
- Impeachment:
- Read impeaching material; and
- Relate impeaching material to witness's testimony at trial.

NOTE: Counsel should then move to have the tape and transcript received into evidence. See §11.8.

B. Questions to Ask

§11.5 1. Investigator's Background

Proponent: The plaintiffs call Mr. Investigator.

Q: Mr. Investigator, would you please state your name and address?

A: Scott Investigator, 100 Main Street, Los Toros, California.

Q: Mr. Investigator, do you hold any professional licenses?

A: I am a licensed investigator, License No. A-54321.

Q: Mr. Investigator, would you please describe briefly for the jury the type of work involved in your profession as an investigator?

A: A private investigator is licensed by the State of California to provide services to attorneys and others, gathering information for matters involved in legal cases as well as other services for individuals and companies.

Q: What is the principal focus of your work, Mr. Investigator?

A: I am employed mainly by attorneys who work both for plaintiffs and defendants in lawsuits, to gather facts and find information relating to various kinds of claims.

Q: Mr. Investigator, would you describe how you gather the facts and information in a case?

A: My work frequently requires going to the scene of an automobile accident, finding the names and addresses of witnesses to the accident, as well as the names and addresses of the people involved in the accident. I am frequently requested to take photographs of the automobiles involved in the accident, as well as to interview the people involved in the accident and any witnesses.

Q: In your work, do you regularly use certain procedures in speaking to witnesses and parties?

A: Yes.

Q: Would you describe your usual procedure?

A: I will speak either in person or by telephone to a witness or someone involved in the accident and, with their permission, ask them questions about what they remember and what they know about the accident scene. To be accurate, I also request permission to tape record the interview so that there is no confusion as to what is said.

Q: Would you describe the procedure you use to tape record an interview?

PRACTICE TIP: The opponent may object to this question and the one immediately preceding it on the ground that they are irrelevant. You may respond that you will connect them up later in the examination and will make an offer of proof, if necessary.

A: Yes. I place the tape recorder in front of the witness if I am conducting the interview in person. I then start the tape recorder and record a statement to the effect that this person has given me permission to tape record the interview. If I am interviewing by phone, I tell the person when I start the tape recorder. I then ask questions relating to the accident to learn what the witness knows regarding the incident. At the conclusion of the interview, I ask whether I have had the witness's permission to tape record the interview and, when interviewing in person, further ask if at any time I have stopped the tape during the interview.

§11.6 2. Description of Taping

Q: Mr. Investigator, you previously described the procedure you regularly employ in your work as an investigator and particularly the method by which you interview witnesses to obtain their knowledge of the facts of a particular incident, is that correct?

A: Yes.

Q: In reference to that procedure, were you asked to do investigative work in the matter of *Hamilton versus Smith*?

A: Yes.

Q: When were you asked to investigate in this matter?

A: I received a call from you on March 1, 1999, regarding *Hamilton versus Smith*, indicating there had been an automobile collision on 5th and Main Streets at approximately 10:00 a.m. on February 15, 1999, and you asked me to do investigative work on the case.

Q: Did you subsequently receive additional information regarding this incident?

A: Yes.

Q: When did you receive that information?

A: I went to the California Highway Patrol and obtained an accident report on March 1, 1999. That report listed two individuals as witnesses to the accident. One was Jane Witness at 200 Arthur Street in San Jose, and the second was her husband, John Witness, at the same address.

Q: After you received this information, what did you do?

A: I interviewed Jane and John Witness to learn what they knew of the accident.

Q: When did you interview them?

A: On March 10th, I called Jane Witness, told her who I was and by whom I had been hired and why, and asked if I could come to her home that evening to speak to her about her knowledge of the accident, and she said I could.

Q: Would you state what took place that evening?

A: I went to Ms. Witness's home on 200 Anthony Street, and she let me in.

Q: What occurred then?

A: I asked if I could take a statement from her about the accident.

Q: What procedure did you use in obtaining that statement?

A: I used the standard procedure I described to you a few minutes ago. I took my cassette tape recorder, a Widget Model 100, and placed a new cassette tape in it. I turned it on at the start of the interview, kept it on for the entire interview, and turned it off at the end of the interview.

Q: What did you tell Ms. Witness at the start of the interview?

A: I turned on the tape recorder and identified myself to Ms. Witness. I said that I was hired to investigate the accident for Jim Hamilton, the plaintiff, and asked whether I had her permission to tape record the interview.

Q: Did Ms. Witness give you permission?

A: Yes.

Q: How long did this interview take?

A: The interview took about 30 minutes.

Q: What did you do at the conclusion of the interview?

A: I again asked Ms. Witness whether I had permission to tape record the interview and whether I had turned off the tape machine at any time during the course of the interview.

Q: Did she respond?

A: Yes. She said yes, I did have permission to record the interview and that the machine had not been turned off during the interview.

§11.7 3. Identification of Tape

Q: What did you do with the cassette tape at the conclusion of the interview?

PRACTICE TIP: It is usually easier to have all exhibits marked for identification during a recess. Be sure you comply with any local rules for marking exhibits.

A: I removed the tabs at the back of the tape so it could not be recorded over accidentally and then marked the tape as follows: "No. 1, March 10, 1999, audiotape interview with Ms. Jane Witness by Scott Investigator."

[*Audiocassette shown to opposing counsel and judge, and then handed to witness*]

Q: Let me show you an audiocassette that has been marked Plaintiff's Exhibit No. 1 for identification. Mr. Investigator, do you recognize this exhibit?

PRACTICE TIP: It is wise at some point to state for the record the connection between the item being discussed and its exhibit number. You will then have a clear record if questions arise later either during trial or on appeal concerning the witness's testimony or the exhibit.

A: Yes.

Q: What is it?

A: It is the audiotape cassette of the interview I had with Ms. Witness on March 10, 1999.

Q: Have you listened to the entire audiotape?

A: Yes.

Q: Does the tape accurately reflect the entire interview?

A: Yes.

Q: Mr. Investigator, I show you the writing on the front of the tape; would you please read that for the court?

A: No. 1, March 10, 1999, audiotape interview with Ms. Jane Witness, by Scott Investigator.

Q: Is that your handwriting?

A: Yes.

Q: When did you write that on the cassette?

A: At the conclusion of the interview.

Q: After you marked the tape, what did you do?

A: I turned the tape over to my transcriber and had the tape transcribed.

[*Transcription of tape shown to counsel and to judge and then handed to the witness*]

Q: Mr. Investigator, directing your attention to the tape transcription marked for identification as Plaintiff's Exhibit No. 2—have you seen this before?

A: Yes.

Q: Would you please identify it?

A: It is the transcription of the tape-recorded interview of Jane Witness on March 10, 1999.

Q: Have you read the transcript?

A: Yes.

Q: Have you listened to the transcribed cassette marked as Exhibit 1, while reading the transcript marked as Exhibit 2?

A: Yes.

Q: Have you compared the transcript of the tape to the tape recorded cassette?

A: Yes.

Q: Does the transcript accurately reflect all of the words spoken on the tape?

A: Yes.

§11.7A 4. Authentication of Edited Videotape

For various reasons—including conservation of the court's time and removal of irrelevant portions of a videotape—counsel may want to authenticate and introduce into evidence an edited copy of a videotape. The edited tape is admissible only if the proponent shows that the editing does not change the meaning of the tape with respect to aspects material to the dispute. Evid C §1402. See *Fashion 21 v Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 CA4th 1138, 1146, 12 CR3d 493.

After establishing the identification of the videotape and the qualifications of the videographer, establish the foundation required under section 1402 with questions such as the following:

Q: Mr. Investigator, did you personally videotape persons smoking cigarettes outside the front door of the Acme Corporation offices on April 1, 2005?

A: Yes.

Q: Please describe where you were located while you were videotaping.

A: I was directly across the street from the Acme Corporation offices.

Q: Mr. Investigator, how long did you videotape persons smoking cigarettes outside the front door of the Acme Corporation offices on April 1, 2005?

A: I videotaped outside the front door of the Acme Corporation offices for ten hours on April 1, 2005.

Q: How long is the videotape marked for identification as Plaintiff's Exhibit 3?

A: That videotape—marked as Plaintiff's Exhibit 3—is one hour in length.

Q: Can you explain the difference between the original videotape and the videotape marked for identification as Plaintiff's Exhibit 3?

A: Yes. I personally edited the original videotape down from ten hours to one hour because for nine hours of the ten hours no one was outside the offices; it was simply a videotape of the building.

Q: Does the edited version of the tape accurately reflect all cigarette-smoking activity that was captured on the original videotape?

A: Yes, it does.

PRACTICE TIP: Opposing counsel must be given a reasonable opportunity to compare the original and edited versions. It is therefore best to attempt to obtain a stipulation as to the admissibility of the edited version before trial by submitting both versions to opposing counsel. If a stipulation is not possible, counsel must advise the court sufficiently in advance of the planned use of the tape for a hearing to be scheduled, typically a hearing under Evid C §402. See *Fashion 21* at 1148 n19.

Source: Evidence/Effective Introduction of Evidence in California/11 Authentication/§11.8 5. Impeaching Witness With Tape--Using Sections of Tape as Direct Evidence of a Fact

§11.8 5. Impeaching Witness With Tape—Using Sections of Tape as Direct Evidence of a Fact

Q: Mr. Investigator, I would like to direct your attention to page 2 of the transcript—the first question on page 2 through the last question on page 3. Were those the questions you asked, and the answers that Mrs. Witness gave you when you conducted your interview?

A: Yes.

Q: Mr. Investigator, would you read from page 2 to the bottom of page 3?

A: Yes.

[*Witness then reads from transcript as follows*]

A: "Q: Ms. Witness, did you observe an accident on February 15, 1999, at or about 10 a.m.?

A: Yes.

Q: Where were you when the accident occurred?

A: I was standing on the corner of 5th Street and Main Street and preparing to cross the street.

Q: Which corner were you standing on?

A: The southwest corner.

Q: In which direction were you crossing?

A: I was crossing 5th Street heading uptown toward my office.

Q: In what direction is "uptown?"

A: North.

Q: Did you see an automobile accident at that time?

A: Yes.

Q: Did you observe the signal light at the corner of 5th Street and Main Street at the time of the accident?

A: Yes.

Q: What color was the signal light when the accident occurred?

A: The light was green for the traffic on Main Street and red for the traffic on 5th Street. I was starting to cross 5th Street when I saw the Volkswagen on Main Street enter the intersection on the green light. The next thing I saw was the Oldsmobile coming along on 5th Street, run the red light and hit the Volkswagen broadside."

PRACTICE TIP: If the judge permits, it is also a good idea to play the tape for jurors and provide them with a copy of the transcription.

[*Questioning investigator about witness's earlier trial testimony follows*]

Q: Mr. Investigator, were you in the courtroom this morning?

A: Yes.

Q: Did you hear Ms. Witness testify about her recollection of what occurred at the accident?

A: Yes.

PRACTICE TIP: The proponent must have laid the necessary foundation under Evid C §770 for introducing extrinsic evidence of Mrs. Witness's prior inconsistent statement. See discussion in chap 41. If witnesses were excluded from the courtroom (see §§6.13-6.17), the proponent will have to use the less effective approach, reporting Mrs. Witness's prior testimony to the investigator rather than asking him whether he heard her testify.

Q: Was her testimony as to who had the red light different from what she told you in your interview on March 10, 1999?

PRACTICE TIP: The opponent may object that the prior testimony speaks for itself, or that your question calls for a conclusion.

A: Yes.

Q: In what way?

A: She stated on the stand that the Volkswagen had the red light and the Oldsmobile had the green light.

Q: Mr. Investigator, does that differ from what she told you?

A: Yes.

Q: How?

A: Well, as I previously stated, it is absolutely opposite to what she told me when I interviewed her after the accident. What she told me then is reflected in the transcript and the tape recording. She told me that the Volkswagen had the green light and the Oldsmobile had the red light.

Q: Thank you.

Proponent: Your Honor, we move to admit the tape recording marked for identification as Plaintiff's Exhibit No. 1, and the transcript of the tape recording marked for identification as Plaintiff's Exhibit No. 2 into evidence.

IV. COMMENT

§11.9 A. Writings Must Be Authenticated

Examples of ways in which writings may be authenticated are listed in §11.18. See also Evid C §§1400-1454. The statutory list is not exclusive. Circumstantial evidence, content, and location of the writing may be valid means of authentication. *People v Gibson* (2001) 90 CA4th 371, 108 CR2d 809 (manuscripts discussing prostitution business found in defendant's residence adequately authenticated other evidence showing where defendant was operating as a madam).

NOTE: The relevance requirement for nonwritings—and principles of "substantial similarity" between the demonstrative evidence and the thing it purports to represent—accomplish much the same purpose as authentication of writings. See §39.3 (admissibility of physical evidence). Tests and scientific experiments are discussed in chap 23. See also §11.16.

§11.10 1. Dispensing With Live Testimony

The proponent of the evidence may be able to dispense with using witnesses to authenticate a particular writing through:

- **Stipulations.** Many judges encourage stipulations among counsel when there is no real dispute over a document's authenticity, because stipulations shorten the trial. They may be obtained before trial begins. See Comment to Evid C §1400; chap 51.
- **Judicial notice.** Court records need not be authenticated if you obtain judicial notice of them. Evid C §452; see chap 31.
- **Pleadings.** Pleadings may be used to establish the authenticity of writings. See Comment to Evid C §1400; CCP §446; chaps 39, 51.
- **Statutory and case law presumptions.** Examples of presumptions that affect authentication are listed in §11.18. Additional discussion of authentication is in chaps 10 (admissions and confessions), 13 (business records), 26-27 (prior felony convictions), 36 (official records and writings), 39 (physical evidence), and 51 (undisputed facts).

§11.11 2. When to Mark Exhibits for Identification

There are usually several appropriate times during a trial when exhibits may be marked for identification—at pretrial in limine motions, immediately before the trial begins; during a break or recess in the trial; while the authenticating witness is on the stand; and immediately before showing the exhibit to opposing counsel, the judge, or the witness.

Local rules sometimes dictate a particular time for marking exhibits for identification or in some other way affect the timing of when exhibits are marked. See, *e.g.,* Los Angeles Ct R 7.9(h), which requires counsel to exchange lists of exhibits at least 5 days before the pretrial status conference, which is held not more than 10 days before the trial date. The trial judge may also indicate a particular procedure to follow.

PRACTICE TIP: In the absence of one of these requirements, the primary tactical considerations are:

- For a smoother presentation, have the exhibit marked out of the jury's presence.
- If possible, resolve the admissibility of the evidence before the trial begins by either stipulating to admissibility or making a motion in limine. Evid C §402(b).
- If your purpose is not to tip your hand about key evidence or trial strategy, wait until the witness is on the stand to have the exhibit marked (but be certain it is admissible).

§11.12 B. Demonstrative and Documentary Evidence

Writings are used during trial for two main purposes:

- Writings as evidence of facts are usually called "documentary evidence." See California Trial Practice: Civil Procedure During Trial §13.2 (3d ed Cal CEB 1995). Their admission depends on their relevance as real evidence. See Evid C §350.
- When used to illustrate testimony, writings are usually called "demonstrative evidence." See Civ Proc During Trial §§13.3-13.4. Admission of demonstrative evidence is discretionary with the judge. See Evid C §352.

Both types must be authenticated before they can be admitted. The type of authentication depends on the nature of the evidence and its intended use. For detailed discussion, see Civ Proc During Trial, chap 13 (trial exhibits). See also chap 39 (physical evidence).

§11.13 1. Demonstrative Evidence That Judges Are Inclined to Admit

Judges are most likely to allow witnesses to use demonstrative evidence that makes it easier for the witness to testify clearly, that is based on competent evidence, and that is not independent proof of some fact important to the case.

EXAMPLE: During direct and cross-examination, judges usually allow parties to use a diagram of the intersection where an accident took place to help illustrate and clarify testimony.

§11.14 2. Demonstrative Evidence That May Receive Closer Scrutiny

Audio and video recordings and motion pictures of actual events are used so often in court proceedings that their admissibility is usually not controversial. When a recording or film will be used to reconstruct an event or to simulate conditions at a time relevant in the litigation, however, the proponent should be prepared to counter any objection that the recording or film is misleading. If, for example, a recording is used to show the scene of a traffic accident, the proponent should be prepared to prove, over objection, that it accurately reflects everything pertinent to the event, such as the time of day, weather conditions, amount of traffic, and the color, make, and model of car.

PRACTICE TIP: When presenting a video recording or motion picture, be prepared to present evidence of the photographer's qualifications; the type of camera, film, lens, and lighting used; how the film was developed and edited; who has had custody of the film; the accuracy or the speed of the film; and the distance of the subject from the camera. See *People v Estrada* (1979) 93 CA3d 76, 155 CR 731.

It is not necessary to have the maker (*e.g.,* the photographer or videographer) testify to the accuracy of the writing (*e.g.,* the photograph or videotape). It is sufficient to have a witness with personal knowledge of what the writing purports to depict testify to its accuracy. See *McGarry v Sax* (2008) 158 CA4th 983, 990, 70 CR3d 519 (authentication of videotape insufficient when proponent does not know its provenance, and describes it variously as showing sporting event in question, a later event, or "typical" event); *Adams v City of San Jose* (1958) 164 CA2d 665, 667, 330 P2d 840 (photographer did not testify, but photograph properly authenticated by witness).

Edited video recordings of actual events pertinent to the case may also receive closer scrutiny from the court and draw a greater number of objections from opposing counsel. See sample questions in §11.7A.

Computers can be a source of even more powerful demonstrative evidence. Because of the many ways a computer can manipulate data, however, computer-produced or enhanced evidence is even more likely than other demonstrative evidence to draw an objection on the ground that it is misleading. The courts have only begun to grapple with the evidentiary issues inherent in the use of computer-produced evidence. See, *e.g., People v Hood* (1997) 53 CA4th 965, 62 CR2d 137 (computer animation not subject to *Kelly* rule for admissibility of evidence based on novel scientific technique). The definition of a "writing" in Evid C §250 includes the record of any item that fits the definition no matter how stored, suggesting that the evidentiary issues involved in the use of tangible representations of computer data are the same issues involved in any other piece of demonstrative evidence.

§11.15 C. Authentication Subject to Evid C §403

The authentication of a writing is a foundational matter usually subject to Evid C §403. See Comment to Evid C §403. One exception is whether a lay witness can identify handwriting, which is determined under Evid C §405. See Comment to Evid C §405. When the writing is an audio or video recording or motion picture, the proponent of the evidence should attempt to settle the issue of its admissibility by stipulation or by an in limine motion for a preliminary fact hearing under Evid C §402 because equipment will have to be set up in the courtroom to play the recording or picture. See chaps 3-4.

PRACTICE TIP: With other types of writings, you may simply want to call to the stand the witness who will authenticate and introduce the evidence, and proceed with questioning. Elicit information on the writing's authenticity before asking questions about its content—this avoids a lack of foundation objection from your opponent and makes your witness's testimony more credible to the jury.

§11.16 D. Relevance Standard for Nonwritings

Commentators sometimes refer to "authentication of nonwritings," such as a voice over the phone or a weapon. It may be necessary to prove that the voice belongs to a particular person and that the weapon is the one used in a particular robbery. These are not, however, authentication problems. They relate instead to the issue of relevance (identification of voice or weapon). See discussion of relevance in chap 45. Physical evidence is discussed in chap 39. See also §11.9.

V. CHECKLISTS

§11.17 A. Checklist: Witnesses to Subpoena

- Witness to authenticate writing based on personal knowledge, *e.g.,* a person familiar with a scene in a photograph, or the photographer, may authenticate a photograph.
- Witness to testify to custody of writing, if chain of custody may be at issue.
- Expert to testify that writing was not tampered with, if such an objection is made.
- Witness to establish hearsay exception, if necessary.
- Witness to show relevance, if necessary.

Source: Evidence/Effective Introduction of Evidence in California/11 Authentication/§11.18 B. Checklist: Examples of Authentication and Presumptions Affecting Authentication

§11.18 B. Checklist: Examples of Authentication and Presumptions Affecting Authentication

- Blood sample: In criminal cases, evidence of technique used in taking blood samples can be proved by affidavit. Evid C §712.
- Book containing reports of legal cases is presumed to contain correct reports of those cases. Evid C §645.
- Book purporting to be printed by public authority is presumed to have been so printed. Evid C §644.
- Business records submitted by affidavit under Evid C §1560 may be authenticated by contents of an affidavit (see *People v Blagg* (1968) 267 CA2d 598, 609, 73 CR 93) unless the subpoena duces tecum requires the personal attendance of the custodian of records (Evid C §1564). For discussion of authenticating business records, see chap 13.
- Certificate of acknowledgment or of proof of a writing other than a will is prima facie evidence of genuineness of signature of persons who signed writing if certificate complies with CC §§1180-1207. Evid C §1451. See Evid C §1531.
- Commercial documents: Certain documents listed in Com C §1307 (*e.g.,* bill of lading, official weigher's certificate).
- Comparison of handwriting by trier of fact with exemplar known to be genuine. Evid C §1412; see Jefferson's California Evidence Benchbook, chap 31 (4th ed CJA-CEB 2009).
- Content that authenticates writing. Evid C §1421; see *People v Fonville* (1973) 35 CA3d 693, 708, 111 CR 53, disapproved on other grounds in *Donaldson v Superior Court* (1983) 35 C3d 24, 32, 196 CR 704.
- Copy of writing in official custody is presumed authenticated by certified or attested copy. Evid C §§1530-1531; see chap 36.
- Deed, will, or other writing affecting an interest in real or personal property presumed to be authentic if at least 30 years old and in a condition that creates no doubt about its authenticity. Evid C §643; see chap 21.
- Disputed audiotape recording and genuine exemplar of speaker's voice presented to jurors to allow comparison by trier of fact. See *People v Fonville, supra*.
- Expert testimony comparing questioned writing with exemplar known to be genuine. Evid C §1418; see chap 24.
- Judicial notice. Evid C §452; see chap 31.
- Lay testimony on genuineness of maker's handwriting. Evid C §§1415-1416; see chap 33.
- Official records of recorded writings showing execution by a public official or accompanied by a certificate of acknowledgment or similar proof. See Comment to Evid C §1532; chap 36.
- Person against whom writing admitted has at any time acknowledged its authenticity or acted on it as authentic. Evid C §1414.
- Pleadings. See Comment to Evid C §1400.
- Prior prison conviction can be proved by certified prison record. Pen C §969b.
- Questioned writing received in response to writing sent to person claimed to be author of questioned writing (reply letter doctrine—Evid C §1420).
- Return of process server registered under Bus & P C §§22350-22360: facts in return presumed accurate unless shown otherwise (Evid C §647).
- Seals: certain official seals presumed to be genuine. Evid C §1452.
- Signatures: Certain domestic official signatures presumed to be genuine. Evid C §1453.

- Signatures: Certain foreign official signatures presumed to be genuine. Evid C §1454.
- Spanish title records: Execution of originals need not be proved if recorded copies of original title papers that satisfy Evid C §1605 are provided.
- Stipulation. See Comment to Evid C §1400; chap 51.
- Subscribing witness. Evid C §1413.
- Writings more than 30 years old need lesser degree of proof under Evid C §§1417-1418. Evid C §1419.
- Witness who heard speaker's words and observed speaker's conduct can identify that person on a video recording or motion picture. See *People v Estrada* (1979) 93 CA3d 76, 155 CR 731.
- Witness who saw writing made or executed. Evid C §1413.
- Witness with personal knowledge of what a photo, silent motion picture, map, or diagram purports to depict can verify its accuracy. Evid C §702.
- Writing presumed to have been truly dated. Evid C §640.

VI. SOURCES

§11.19 A. Evidence Code

Evid C §250. "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

Evid C §1400. Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.

Evid C §1401. (a) Authentication of a writing is required before it may be received in evidence.

(b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

Evid C §1410. Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved.

Evid C §1413. A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness.

§11.20 B. Other

On writings, see generally Evid C §§1400-1605. See also Jefferson's California Evidence Benchbook, chap 31 (4th ed CJA-CEB 2009); California Trial Objections §§1.3, 19.26, 21.6, 24.2, 34.19 (Cal CEB Annual); California Trial Practice: Civil Procedure During Trial, chap 13 (3d ed Cal CEB 1995) (documentary and demonstrative evidence).

For more examples of questions and answers used to introduce the types of evidence discussed in this chapter, see California Personal Injury Proof, chap 8 (Cal CEB 1970) (handling exhibits and demonstrations), P I Proof, chap 15 (photographs), P I Proof, chap 16 (X-ray films), P I Proof, chap 17 (motion pictures, video recordings, and computer animation), P I Proof, chap 18 (models), and P I Proof, chap 19 (maps and diagrams).

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Books, Maps, Charts, and Treatises: Proving Facts of Notoriety and Interest

Richard P. Caputo
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§12.1 I. SCOPE OF CHAPTER

This chapter discusses historical works, books of science and art, and published maps and charts that are admissible as exceptions to the hearsay rule if they are published by a person disinterested in the proceedings and if they are offered to prove a fact of general notoriety or interest. Evid C §1341.

II. REQUIREMENTS

§12.2 A. To Admit

To be introduced into evidence under Evid C §1341, a book of science or art, historical work, or published map or chart must be:

- Published by persons indifferent to the parties (Evid C §1341);
- Offered to prove facts of general notoriety and interest (Evid C §1341); and
- Authenticated (see Evid C §1401).

§12.3 B. To Object

Opposing counsel may object to the admissibility of a book of science or art, historical work, or published map or chart on any of the following grounds.

- Hearsay (Evid C §1200);
- The work (*e.g.,* medical textbook) is not a "publication" as defined by Evid C §1341 (see §12.7);
- The work was published by a person interested in the litigation, *e.g.,* by an expert retained by plaintiff to testify (Evid C §1341);
- Evidence is offered to prove a fact not of general notoriety or interest (Evid C §1341; *Deutsch v Masonic Homes of Cal., Inc.* (2008) 164 CA4th 748, 767, 80 CR3d 368 (scientific publications containing third parties' opinions and analyses of historical custom and practice on child sexual abuse are not within ambit of facts of general notoriety or interest));
- Inadmissible opinion (Evid C §§800-801);
- Not authenticated (Evid C §1401); or
- Inadmissible secondary evidence (Evid C §1521).

III. SAMPLE QUESTIONS

§12.4 A. Information to Elicit

In an action for injunctive relief to prevent defendants from mining plaintiff's claim, counsel seeks to introduce a history book used to establish the original location of the mine. Plaintiff's counsel follows the procedures listed below at the motion in limine hearing and in court after the judge grants the motion (see §12.5):

- At motion in limine hearing:
- Have item marked for identification and show to opposing counsel;
- Recite name of book and description of relevant facts for the judge, other counsel, and the record; and
- Argue the statutory and case authority relevant to the case.
- During trial (after in limine motion granted):
- Give name and description of item;
- Move item into evidence;
- Have witness read relevant sections to jury if work is introduced through a witness; have sections read to jury by clerk if not introduced through a witness; or (often the best approach) request the court's permission to allow counsel to read the material to the jury; and
- If desired and approved by the court, pass a copy, or give each juror a copy, of relevant pages.

§12.5 B. Questions to Ask

[*In limine motion in chambers*]

Proponent: Your Honor, on the issue of the original location of this mining claim, I wish to introduce into evidence the publication titled *History of Yuba County* by Chamberlain and Wells, published in 1879, which describes the location of these claims. It has been marked as Plaintiff's Exhibit F for identification. It is well settled that, in an action such as this, locations of mining claims can be proved by evidence of general reputation previous to the controversy. This publication qualifies under Evidence Code §1341 as one made by a person indifferent to the parties and concerns facts of general reputation and notoriety. This publication qualifies under Evidence Code §1341 as an exception to the hearsay rule and is relevant and admissible for this purpose. The case of *Ames v Empire Star Mines Co.* (1941) 17 C2d 213, 110 P2d 13, at page 224 is on point.

Opponent: Your Honor, I object to introduction of this book on the ground of hearsay. As Justice Jefferson points out in his evidence book, section 18.17, Evidence Code §1341 has been very narrowly construed. The proponent has introduced no evidence to prove that the information in this book is accurate. In addition, the location of these mining claims is a matter of personal interest to only a few people. It definitely does not rise to the level of "facts of general notoriety and interest," as required by the statute.

Court: I'll allow it. The information has the elements of both a published map and an historical work, and it meets the requirements of §1341.

[*Questioning before jury after proponent's expert witness called to the stand*]

Q: Have you read the book *History of Yuba County*?

A: Yes.

Q: Would you please describe the book?

A: It is a history of Yuba County from 1840 to 1860. It was written by Chamberlain and Wells, two California scholars who spent ten years researching this period.

Q: Is there any information in the book on mining claims?

A: Yes. The period covered in the book was a time when mining, particularly gold mining, was paramount in terms of how people were living—where they were living, what they were doing, the standard of living, and even who was elected to office. Mining affected just about everything.

Q: Is there any discussion in the book of the Midas Gold Mines?

A: Yes.

Q: Why were those particular mines mentioned?

A: Those mines were of particular interest because they were found near Famous Mines, one of the most important mines of that period and area.

Q: What is the location given in this book for the Midas Gold Mines?

[*Description read from book*]

Witness: There is a map in the book too that shows the mine's location.

Proponent: I move that the book be admitted into evidence as Plaintiff's next in order.

Court: Accepted.

Proponent: Your Honor, I request permission to give each juror a photocopy of the map on page 42 of *The History of Yuba County*, showing the location of the Midas Gold Mines.

Court: Have you shown them to opposing counsel?

Proponent: Yes. She has a copy.

Court: All right. Give them to the bailiff, and she will give each juror a copy.

IV. COMMENT

§12.6 A. Admissible to Prove Generally Known Facts

This exception to the hearsay rule allows the introduction of historical works, books of science and art, and maps or charts to prove facts of general notoriety and interest. *Osborn v Irwin Mem. Blood Bank* (1992) 5 CA4th 234, 261 n5, 7 CR2d 101.

§12.7 B. Judicial Interpretations

An early decision interpreted "facts of general notoriety and interest" to mean "facts of a public nature… as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses." *Gallagher v Market St. Ry.* (1885) 67 C 13, 15, 6 P 869. Dictionaries, "mortuary tables" (*i.e.,* life expectancy tables), tables of weights and measures, and interest tables exemplify material admissible under this section. 67 C at 16. In the court's view, medical books would not qualify because medicine was "not considered as one of the exact sciences." 67 C at 16.

NOTE: *Gallagher* is a very old case. As a practical matter, the author believes that if a litigant needed to use a medical text to prove certain generally accepted facts, *e.g.,* the normal values for laboratory work, the court would allow it.

The *Gallagher* decision has been interpreted to exclude works whose author is alive (*Osborn v Irwin Mem. Blood Bank* (1992) 5 CA4th 234, 261 n5, 7 CR2d 101), although nothing in the case or the statute suggests that a dictionary definition, for example, would be inadmissible because the dictionary's author was alive. One case approved the admission of a historical text to show the location of mines, when that fact was in dispute. *Ames v Empire Star Mines Co.* (1941) 17 C2d 213, 225, 110 P2d 13 (sample question segment in §12.5 drawn from this case); Jefferson's California Evidence Benchbook, chap 18 (4th ed CJA-CEB 2009).

More recently, an appellate court found that a trial court had not abused its discretion in ruling that an expert could not cite to and quote various scientific publications concerning child sexual abuse from 1960 on. *Deutsch v Masonic Homes of Cal., Inc.* (2008) 164 CA4th 748, 765, 80 CR3d 368 (underlying case reversed and remanded for instructional error). In that case, the opinions and analyses of third parties described in those publications were disputed by the parties, and the proffered testimony did not fit within the context of facts of general notoriety and interest in order to be admissible under Evid C §1341. 164 CA4th at 766.

PRACTICE TIP: Consider relying on Evid C §1340, not §1341, for any tabulation or list. See chap 17.

§12.8 C. Authentication

Authentication of published materials is usually not a problem. You can request a stipulation from your opponent or ask the trial judge to take judicial notice under Evid C §452(h) of the matter covered in the publication. Maps and charts, however, usually require a witness to authenticate them.

§12.9 D. Preliminary Fact Hearing

The authenticity of hearsay exceptions is an Evid C §403 question. Other foundational issues concerning hearsay are Evid C §405 issues. Relevance issues are determined under Evid C §§403 and 405. See Comment to Evid C §405; chap 4 on preliminary fact hearings.

V. CHECKLISTS

§12.10 A. Checklist: Witnesses to Subpoena

- Witness who has read publication or looked at map or chart and will use it in testifying.
- Witness who can testify that the fact at issue is one of general notoriety and interest, if that is disputed.
- Witness to authenticate, if necessary.
- Witness to prove it is admissible secondary evidence, if necessary.

NOTE: If no witness is needed, the relevant pages may simply be read to the jury.

§12.11 B. Checklist: Alternative Methods of Admissibility

- Business record. Evid C §§1560-1566; see chap 13.
- Commercial lists and the like. Evid C §1340; see chap 17.
- Community reputation concerning community history, public interest in property, boundaries, and land. Evid C §§1320-1322; see chap 18.
- Dispositive instruments and ancient writings. Evid C §§1330-1331; see chap 21.
- Expert witness. Evid C §§720, 801; see chap 24.
- Habit or custom evidence. Evid C §1105; see chap 29.
- Judicial notice. Evid C §§450-460; see chap 31.
- Nonhearsay use. See chap 35.
- Official records and writings. Evid C §§1280-1281; see chap 36.
- Statements and reputation concerning family history. Evid C §§1310-1314; see chap 25.
- Statements relating to wills and to claims against estates. Evid C §§1260-1261; see chap 53.
- Stipulation. See chap 51.

VI. SOURCES

§12.12 A. Evidence Code

Evid C §1341. Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.

§12.13 B. Other

For further discussion of treatises, books, maps, and charts, see 1 Witkin, California Evidence, *Hearsay* §§295-296 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 18 (4th ed CJA-CEB 2009).

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/Chapter Outline

13

Business Records

Holly J. Fujie

§13.1 I. SCOPE OF CHAPTER

This chapter discusses the business-record exception to the hearsay rule, which allows records to be authenticated through either (1) live testimony or (2) an affidavit (or declaration), without requiring the testimony of the person who made the report. The business-record provisions make it easier for businesses to provide records during litigation without undue disruption. The term "business records" applies to records of every kind of business enterprise, profession, occupation, calling, institutional operation, or governmental activity, whether profit or nonprofit. Evid C §1270.

II. REQUIREMENTS

A. Business Records in General

1. To Admit

§13.2 a. By Custodian's Testimony

To introduce the relevant business record through live testimony, the custodian of records or other qualified witness must authenticate it by testifying that the writing:

- Was made as a record of an act, condition, or event and is offered to prove the occurrence of that act, condition, or event (Evid C §1271);
- Was made in the regular course of business (Evid C §1271(a));
- Was made at or near the time the act, condition, or event occurred (Evid C §1271(b));
- Was prepared in a certain way (mode of preparation) and is identified as the writing it purports to be (Evid C §1271(c)); and
- Is trustworthy, given the sources of information for the writing, and the method and time of its preparation (Evid C §1271(d); see *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 720, 128 CR2d 529).

NOTE: See Evid C §1564, which requires the original record and the personal attendance of the custodian if the subpoena duces tecum, at the discretion of the requesting party, so specifies. If the record is a public record, additional requirements must be satisfied; see chap 36 on official records.

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/§13.3 b. By Affidavit or Declaration

§13.3 b. By Affidavit or Declaration

To authenticate and admit business records without a witness's testimony, the records must be accompanied by the affidavit (or declaration—see CCP §2015.5) of the custodian or other qualified witness, stating in substance the following:

- The affiant or declarant is the duly authorized custodian of the records, or otherwise qualified to make the statements in the affidavit or declaration (Evid C §1561(a)(1));

NOTE: "Qualified" probably means competent and having personal knowledge. See Evid C §§700, 702. If the witness is not the custodian, it would be best to describe the basis for the witness's knowledge of the facts set forth (*e.g.,* knowledge of custom and practice for preparing and maintaining records should suffice).

- The copy is a true copy of all records described in the subpoena duces tecum or the specified records were delivered to the attorney or attorney's representative for copying (Evid C §1561(a)(2));
- The records were prepared by personnel of the business in the ordinary course of business at or near the time of the act, condition, or event (Evid C §1561(a)(3));
- The identity of the records (Evid C §1561(a)(4)); and
- A description of the mode of preparation of the records (Evid C §1561(a)(5)).

NOTE: The affidavit or declaration should not merely state legal conclusions regarding any of the above elements. Some judges require that the factual basis for each of these elements be sufficiently stated to establish a valid basis for those conclusory statements, *e.g.,* stating how records are prepared by personnel of the business and the basis for stating that they are prepared at or near the time of the act, condition, or event. When the records were delivered to the attorney or attorney's representative for copying, an affidavit (or a declaration—see CCP §2015.5) of the attorney or the attorney's representative, stating that the copy is a true copy of all records delivered for copying, is also required under Evid C §1561(c).

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/§13.4 2. To Object

§13.4 2. To Object

The opponent may object to the admission of the business record on any of the following grounds:

- Hearsay (Evid C §1200);
- Not (properly) authenticated (Evid C §§1401, 1271; see *In re Cruse* (2003) 110 CA4th 1495, 1500, 2 CR3d 548; *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 720, 128 CR2d 529; chap 11);
- The person who is the source of the writing lacked personal knowledge of the information reported (*e.g.,* patient's complaints in medical record, witness's account of accident in police report, or summaries of exit interviews) (see *Zanone v City of Whittier* (2008) 162 CA4th 174, 192, 75 CR3d 439 (police employees who compiled summaries of exit interviews lacked firsthand knowledge of facts));
- No foundation (Evid C §1271):
- Not made in regular course of business (Evid C §1271(a); see *Zanone v City of Whittier* (2008) 162 CA4th 174, 192, 75 CR3d 439 (police officers *with* firsthand knowledge of reasons they left police department lacked *business duty* to accurately report facts about their departure in exit interviews));
- Not made at or near time of event (Evid C §1271(b));
- Source of writing not trustworthy (Evid C §1271(d); see *Zanone,* 162 CA4th at 192; *Taggart v Super Seer Corp.* (1995) 33 CA4th 1697, 1706, 40 CR2d 56 (custodian's declaration deficient on identity and preparation method and thus did not show trustworthiness of records));
- No business duty to report (Evid C §1271(a); see *Zanone,* 162 CA4th at 192 (officers transferring to another police department had no duty to report accurately in their exit interviews));
- Method of preparation untrustworthy (Evid C §1271(d));
- Witness not qualified to testify as custodian of records (Evid C §1271; see *People v Crabtree* (2009) 169 CA4th 1293, 1313, 88 CR3d 41 (law enforcement agent who recovered receipt was not qualified to testify to its identity and mode of preparation));
- No foundation—affidavit submitted (Evid C §§1561-1562) (same as no foundation under §1271 above, except that information must be in affidavit);
- Irrelevant (Evid C §350);
- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352);
- Improper opinion (Evid C §§800-801);
- Privilege (Evid C §§900-1070);
- Hearsay on hearsay (see Evid C §1201; 1 Witkin, California Evidence, *Hearsay* §6 (4th ed 2000));
- Inadmissible secondary evidence (Evid C §1521); and
- Any other objection that can be made to a writing, *e.g.,* testimonial hearsay. See *Melendez-Diaz v Massachusetts* (2009) ___ US ___, 174 L Ed 2d 314, 328, 129 S Ct 2527 (whether or not drug analysts' certificates qualified as business records, they were testimonial hearsay within meaning of *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, and the analysts subject to cross-examination). See also *People v Mitchell* (2005) 131 CA4th 1210, 1222, 32 CR3d 613 (designation of police dispatch tape as business record did not alone determine whether it was admissible as nontestimonial hearsay under *Crawford*); *U.S. v Hagege* (9th Cir 2006) 437 F3d 943 (foreign business records admitted under 18 USC §3505 are not subject to *Crawford*). For additional discussion of *Crawford,* see §20.20B.

B. Computer Information

1. To Admit

§13.5 a. Accurate Reflection Requirement

When introducing computer information into evidence, the proponent must show that (Evid C §§255, 1271, 1552):

- The data stored in the computer accurately reflects a writing that would otherwise satisfy the business-record exception; and
- The computer printout is readable and accurately reflects the stored data.

On computer reports of their own internal operations as nonhearsay, see *People v Hawkins* (2002) 98 CA4th 1428, 121 CR2d 627.

§13.6 b. Accurate Reflection Presumption

A printed representation of computer information or a computer program is presumed to be accurate. If evidence of inaccuracy or unreliability is presented, however, then the party introducing the printed representation must prove by a preponderance of the evidence that it accurately represents what it purports to represent. Evid C §1552. See *Ampex Corp. v Cargle* (2005) 128 CA4th 1569, 1573 n2, 27 CR3d 863 (computer records were self-authenticating as computer printouts). This presumption and process do not apply to computer-generated official records certified in accordance with Evid C §452.5 or §1530. Evid C 1552(b). For further discussion, see chap 47 (secondary evidence to prove content of writing).

PRACTICE TIP: You may be able to rebut a charge of inaccuracy or unreliability by oral testimony about the normal business practice for preparing such printouts. You should argue that there is enough evidence to admit the record and that opponent's arguments go to the weight to be given the record, not to its admissibility. See Evid C §1552(a); *People v Lugashi* (1988) 205 CA3d 632, 640, 252 CR 434.

§13.6A 2. To Object

The opponent may object to the admission of the computer records on the following grounds:

- No foundation that the printout or printed representation accurately reflects the writing or is otherwise reliable (see Evid C §§255, 1271, 1552-1553), *e.g.:*
- No evidence of how data was input or whether proofread,
- No evidence that the record is the latest version;
- Inadmissible secondary evidence (Evid C §1521); and
- Any other objection that can be made to a writing.

§13.7 C. Summaries of Voluminous Documents

Oral testimony summarizing voluminous documents may be admitted if the evidence sought from them is only the general result of the whole. Evid C §1523(d). But see *Zanone v City of Whittier* (2008) 162 CA4th 174, 192, 75 CR3d 439 (summary of inadmissible hearsay statement cannot be made admissible merely because it is repeated in valid business record). On oral testimony to prove content of writings, see chap 48.

NOTE: Unlike former Evid C §1509, the current statutory scheme does not discuss whether the court has discretion to order that the documents be made available to the opposing party, even if the court rules that oral testimony is admissible. In contrast, Fed R Evid 1006 requires the proponent to make the original or copies available to the opponent. See Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009). To the extent that former Evid C §1509 provided a means of obtaining writings for inspection, that aspect was eliminated because other statutes afford sufficient inspection opportunity. See, *e.g.*, CCP §§1985.3, 1987, 2031.010-2031.320; Pen C §§1054.1, 1054.3. In order to avoid delay at trial if the court orders that the documents be made available to the opposing party for review before the oral testimony is permitted, however, it may be the better practice to follow the federal rule and make the original or copies available to the opponent before trial.

§13.8 D. Police Reports

Although police reports are kept in the regular course of business and are written at or near the time of the events they describe, and thus would appear to qualify as business records under Evid C §1271, they are usually not admissible under the business records exception because they contain inadmissible hearsay, *e.g.,* statements of witnesses. See *People v Hernandez* (1997) 55 CA4th 225, 63 CR2d 769 (reversible error to admit into evidence crime analyst's testimony because it was derived from police reports that contained inadmissible hearsay). On multiple hearsay, see Jefferson's California Evidence Benchbook, chap 2 (4th ed CJA-CEB 2009).

§13.9 E. Video or Digital Images

A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. However, if evidence of inaccuracy or unreliability is presented, the party introducing the printed representation must prove by a preponderance of the evidence that it is an accurate representation of the existence and content of the images it purports to represent. Evid C §1553.

Photographic copies of an original destroyed or lost image are admissible if a certificate meets the following conditions that comply with Evid C §1531 (see Evid C §1551):

- Was prepared at the time of taking the image;
- Was attached to the copy or to the container in which it was placed and kept, or incorporated in the film or electronic recording by the person under whose direction or control it was taken; and
- States the date and that it was in fact taken under that person's direction and control.

§13.10 F. To Object [Deleted]

Material formerly contained in this section has been moved to §13.6A.

G. Evidence of No Record

§13.11 1. To Admit

To admit evidence that there is no entry in the records, the proponent must show that:

- The business regularly makes records of all such acts, conditions, or events at or near the time they occur (Evid C §1272(a)); and
- The sources of information and method and time of preparation of the records are such that the absence of a record of a particular act, condition, or event is a trustworthy indication that it did not occur (Evid C §1272(b)).

PRACTICE TIP: Be prepared to provide evidence about how the entity ensures that all such events are recorded, all records are placed in the business's files, and records are not removed from the file without other evidence left in the file regarding the removal of the records.

§13.12 2. To Object

If evidence is offered that there was no entry in the records, the opponent may object to its admission on the following ground:

- No foundation (Evid C §1272), *e.g.:*
- Business does not regularly make records of all such events;
- Business does not always place or maintain records in its files;
- Records may have been removed; and
- Sources of information and method of preparation not trustworthy.

III. SAMPLE QUESTIONS

A. Using Witness to Introduce Business Records

§13.13 1. Information to Elicit

To admit business records into evidence, the proponent wants the witness to testify to the following matters in the direct examination segments in §§13.14-13.15:

- Identify self as the custodian of records or other qualified witness and establish duties or access;
- Identify writing;
- Identify writing as an original or, if the requirements of Evid C §1271 have been met, a true and correct copy;
- Identify author of writing, if known, and if not known give indicia of trustworthiness;
- Demonstrate that author had personal knowledge of what is described;
- State whether writing was made in regular course of business and at or near time of event; and
- Explain circumstances if a delay occurred between event and when writing was made.

NOTE: The proponent should move that the record be received in evidence and obtain the court's permission to have the relevant portions read aloud to the jury.

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/ 2. Questions to Ask/§13.14 a. Testimony of Custodian of Records to Introduce Company Report on Mining Claim

2. Questions to Ask

§13.14 a. Testimony of Custodian of Records to Introduce Company Report on Mining Claim

Q: Do you currently perform any business functions for Z Co.?

PRACTICE TIP: The custodial position is not required to be an employment position, particularly if the business is nonprofit. See Evid C §1270.

Q: Do you have access to the records of Z Co. that relate to mining claims?

A: Yes.

PRACTICE TIP: The authenticating witness does not have to be the custodian of records but can be "another qualified witness" who has access to the records. Evid C §1561(a)(1); *People v Fowzer* (1954) 127 CA2d 742, 747, 274 P2d 471. Generally, this means someone who can testify to the Evid C §1271 requirement for personal knowledge.

Q: Did you bring any records with you to court?

A: Yes.

Q: Could you describe those records, which are marked as Defendant's Exhibit 5 for identification?

A: Yes. Exhibit 5 is a report by a field investigator of Z Corp. of an accident at Y Co. on February 1, 2006.

PRACTICE TIP: The document need not be a type that is periodically prepared by the organization. It may be a one-time entry as long as it was not prepared in anticipation of litigation. *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 783, 142 CR 1.

Q: Where did you obtain this report?

A: In the files that Z Co. maintains relating to the Y Co. account.

Q: Do you know who prepared this report?

A: No. The field investigator who does the report usually signs his or her name, but there was no name on this report. Since this report was written, several of our field investigators left the company, and we were unable to get in touch with them to find out which of them prepared the report.

Q: Are you sure this report was in fact prepared by an employee of Z Co.?

A: Yes. The report is on our company form. It is filled in as required. It was filed in the proper place, and it has been relied on by us since then. Although we try to get our field investigators to put their names on these reports, this is not the first time they have neglected to do so. They are pretty busy and sometimes just forget to initial their reports.

PRACTICE TIP: The business-record exception is not rendered inapplicable on the sole ground that the author of the original report cannot be identified, as long as other indicia of trustworthiness are present. *People v Williams* (1973) 36 CA3d 262, 274, 111 CR 378.

Q: Are there standard procedures for field investigators to follow to secure information for this type of report?

A: Yes.

Q: Can you describe those procedures?

A: Yes. The field investigators go to the customer's business and view the location of the accident, interview all witnesses, and speak with company representatives.

Q: Do the matters set forth in the report reflect activities related to the ordinary business of Z Co.?

A: Yes.

Q: Was this document created in the ordinary course of the business of Z Co.?

A: Yes.

Q: Was Exhibit 5 prepared in contemplation of or in preparation for litigation?

A: No. We always prepare this type of report as soon as we learn of an accident.

Q: How long after the incident reported in Exhibit 5 was this document created?

A: Two days after the field investigators went to the site.

Q: What caused the delay in creation of Exhibit 5?

A: The site visit was on a Friday, and because the site visit was in a different state from Z Co.'s premises, they did not return and report on the results of their investigation until the next Monday.

PRACTICE TIP: The amount of time that may reasonably be allowed to have passed between the incident and the writing is a matter for the court's discretion and is based on the diminution in the trustworthiness to be attributed to the time lapse and the circumstances of the writing. For example, an emergency that lasts several days may prevent a writing from being made contemporaneously but a reliable writing may still be produced after the emergency has passed. *Landis v Turner* (1860) 14 C 573.

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/§13.15 b. Testimony of Fire Department Employee to Introduce Fire Accident Report

§13.15 b. Testimony of Fire Department Employee to Introduce Fire Accident Report

Q: Where are you employed?

A: X Town Fire Department.

Q: Are you the custodian of the records of the X Town Fire Department?

A: Yes.

Q: Did you bring fire accident reports of the X Town Fire Department to court with you concerning a fire at Acme Warehouse on April 6, 1999?

A: Yes.

PRACTICE TIP: You may usually either directly ask leading or quasi-leading questions to elicit this foundational information because they are typically not controversial and it saves time. See Evid C §765; Comment to Evid C §767.

Q: Could you describe those records, which are marked as Plaintiff's Exhibit No. 10 for identification?

A: Yes. They are reports of the fire that occurred at the Acme Warehouse on April 6, 1999.

Q: Does this report contain information on the source of the fire that occurred at the Acme Warehouse on April 6, 1999?

A: Yes.

PRACTICE TIP: Opposing counsel might object to this question as calling for an opinion. Statements of opinion may be admitted when contained in an otherwise properly admissible business record, if based primarily on the declarant's (Y in this hypothetical) personal knowledge, and if the statement would be admissible if testified to by the declarant as a witness in court. See *People v Beeler* (1995) 9 C4th 953, 39 CR2d 607; Jefferson's California Evidence Benchbook, chap 4 (4th ed CJA-CEB 2009). Here, the declarant did not have personal knowledge of the facts, and an objection should be sustained. Because no objection was made here, the questioner continues. The questioner should, of course, be prepared to introduce this information in another way if the objection is made and sustained.

Q: Who was the source of that information?

A: The actual investigation was conducted by A and B, investigators employed by the X Town Fire Department, but the report was written by Y.

Q: Did A and B have an assignment concerning the fire at the Acme Warehouse?

A: Yes.

Q: What was their assignment?

A: They were assigned to determine the cause of the fire.

Q: To whom did A and B report?

A: To Y. She is their supervisor.

Q: Did A and B have an obligation to report accurately to Y on the matters set forth in Exhibit 10?

A: Yes.

Q: What did Y's job as supervisor entail at that time?

A: Y's job was to obtain information from investigators such as A and B, to render an opinion as to the cause of fires, if possible, and to write reports based on that information.

Q: Did Y have an assignment concerning the fire at the Acme Warehouse?

A: Yes.

Q: What was that assignment?

A: To obtain information from the investigators assigned to this fire—A and B—to render an opinion as to the cause of the fire, and to write a report based on that information.

Q: Did Y complete that assignment?

A: Yes.

PRACTICE TIP: You might want to eliminate some of the questions about A's and B's duties unless the report's trustworthiness is challenged. The trial court need not make an explicit finding of trustworthiness before admitting business records. *Levy-Zentner Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 142 CR 1.

Q: As part of that assignment, did Y form an opinion concerning the cause of the fire based on the investigation by A and B?

A: Yes.

Q: What was that opinion?

A: She was of the opinion that the fire was caused by arson.

Proponent: Your honor, we ask that Exhibit 10, Y's report, be admitted into evidence.

B. Business Records Introduced by Affidavit or Declaration

§13.16 1. Information to Elicit

A proponent who wants to admit business records into evidence under Evid C §1561 (see §13.17) by an affidavit or declaration (see CCP §2015.5) that was prepared by the custodian of records or other "qualified witness" should:

- Have ready for presentation to the court a duly prepared affidavit or declaration that
- States that the business is neither a party nor a place where the cause of action arose;
- States that the author is the duly authorized custodian of records or other qualified witness and has authorization to certify the records;
- States that the records were prepared by business personnel in the ordinary course of business at or near time or event described;
- Includes a description of how records were prepared, sources of information, and mode and time of preparation sufficient to establish truthfulness;
- States that the record is the original or a true and correct copy of all of the records described in the subpoena duces tecum, or that, pursuant to Evid C §1560(e), the records were delivered to the subpoenaing party, its attorney, or a deposition officer for copying at the declarant's place of business; and
- States that the author had personal knowledge of what is described;
- Attach another affidavit or declaration of the representative who copied the records under Evid C §1569(e);
- Attach a copy of the subpoenaed record to the affidavit or declaration;
- Move to have records and supporting affidavits or declarations received in evidence; and
- Have relevant portions of records read aloud to the jury.

§13.17 2. Questions to Ask

Proponent: Your Honor, I have here an original of a declaration by the Custodian of Records of X Company, prepared in accordance with Evidence Code §§1561 and 1271. It has been marked Exhibit 23 for identification. I also have a declaration of my representative, stating that the copies of the business records described in the Custodian's declaration are true copies of all the records delivered to this representative for copying, as required by Evidence Code §1561(c). This declaration has been marked Exhibit 24. I have already given copies of these declarations to opposing counsel. On the basis of these declarations, I request that the business records of X Company produced in connection with these declarations, marked as Exhibit G for identification, be moved into evidence.

Court: Any objection? No? Then they are admitted into evidence. Ms. Clerk, what are their numbers in evidence?

Clerk: Defendant's 23, 24, and 25.

PRACTICE TIP: You may wish to introduce business records without first asking for an in limine hearing or hearing under Evid C §402 when you foresee no problem with their admission. If your opponent fails to object, he or she waives any later claim of a lack of foundation. *People v Utter* (1972) 24 CA3d 535, 552, 101 CR 214, overruled on other grounds in *People v Morante* (1999) 20 C4th 403, 432 n16, 84 CR2d 665.

C. Introducing Computer Records

§13.18 1. Information to Elicit

To admit computer records into evidence, counsel wants the witness to testify to the following matters under Evid C §1552 in the direct examination segment in §13.19:

- Familiarity with computer operations;
- That data stored in the computer is an accurate reflection of the writing and otherwise satisfies the business-record exception; and
- That the printout is readable and accurately reflects stored data.

NOTE: Counsel should move that the record be received in evidence and have the relevant portions read aloud to the jury.

§13.19 2. Questions to Ask

Q: Where do you work?

A: At AB Corp.

Q: What are your duties there?

A: I am the Chief Technology Officer and I am responsible for all computer operations.

Q: Are you familiar with the computer operations of AB Corp.?

A: Yes.

Q: What kind of computer does AB Corp. have?

A: A Widget 3000.

Q: How long has AB Corp. used this computer?

A: Since 1995.

Q: What does AB Corp. do to maintain its computer?

A: My staff, under my supervision, performs regular maintenance on the computer and checks its accuracy on a daily basis.

Q: How is sales information gathered by AB Corp.?

A: All AB Corp. sales people are required to record all sales information on daily logs.

Q: How soon is sales information entered into your computer after your sales people receive it?

A: All AB Corp. sales people are required to submit all sales information to my department on the day that they receive it.

Q: Can you describe how sales information is entered in the computer?

A: Each day, all daily logs are entered into the computer by the data entry clerks in my department.

Q: Is all information relating to sales generated in the ordinary course of business by AB Corp. input into the computer?

A: Yes.

Q: Is this information proofread to see that it conforms with the information in the original document?

A: Yes. We employ proofreaders whose duties include proofreading all sales data input into the computer.

Q: Did you bring a record with you to court today?

A: Yes.

Q: Would you please describe that record, which has been marked Defendant's Exhibit 15 for identification?

A: It is a computer summary of sales information from the Bakersfield office of AB Corp. for the month of May 1999.

NOTE: A witness is generally necessary to prove the meaning of a printout, especially if it includes abbreviations or other information that is unclear on its face. See *U.S. v De Georgia* (9th Cir 1969) 420 F2d 889.

Q: Does AB Corp. conduct its business operations in reliance on the accuracy of this computer in the retention and retrieval of its business information?

A: Yes.

PRACTICE TIP: You may want to use expert testimony concerning massive and complex computer printouts to avoid jury confusion and save time. See *Huber, Hunt & Nichols, Inc. v Moore* (1977) 67 CA3d 278, 294, 136 CR 603.

Proponent: Your Honor, we ask that Exhibit 15 be admitted into evidence.

PRACTICE TIP: This is the time when opposing counsel typically voices objections to admission of the business record either because it was not properly authenticated or because it is otherwise objectionable, for example, as an improper opinion. You should first dispute those contentions. If the judge still will not admit the record, ask permission to elicit additional information from your witness.

D. Absence of Entry in Records

§13.20 1. Information to Elicit

To admit evidence of no records made concerning the relevant event under Evid C §1272, counsel wants the witness to testify to the following in the direct examination segment in §13.21:

- That the witness's business regularly makes records of all such events; and
- That the sources of information and method and time of preparation of such records mean that the absence of a record for a particular event is a trustworthy indication that that event did not occur.

§13.21 2. Questions to Ask

Q: Where are you employed?

A: PDQ Agency.

Q: What are your duties there?

A: I gather and maintain all of its business records.

Q: In the regular course of business, does PDQ Agency make records of all employee evaluations?

A: Yes.

Q: In the regular course of the business of PDQ Agency, are such records made at or near the time of the evaluation?

A: Yes. They are required to be filled out the same day as the evaluation.

Q: In the regular course of business of PDQ Agency, would a document recording such an event be preserved?

A: Yes.

Q: Where are the records of such events kept in the regular course of business at PDQ Agency?

A: They are kept in the employee's personnel file.

Q: Are records of employee evaluations ever removed from the employee files?

A: Yes, but in that case there is a written note placed in the file stating who has the record and when it was removed.

Q: Have you searched the records of PDQ Agency for a document describing or recounting an employee evaluation of Employee X on May 1, 2007?

A: Yes.

Q: Have you located any records describing or recounting this event?

A: No.

Q: Was there a written note contained in the file of Employee X stating that a report regarding a May 1, 2007, evaluation had been removed?

A: No.

IV. COMMENT

§13.22 A. Records to Which Business-Record Exception Applies

The business-record exception to the hearsay rule applies to records of any "business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not." Evid C §1270.

§13.23 1. Only Part of Record May Be Admissible

It is possible for only a part of a business record to be admissible. For example, a report, in addition to business-related information, may include information gathered from people with no business duty to report. See *Conservatorship of Buchanan* (1978) 78 CA3d 281, 288, 144 CR 241, overruled on other grounds in *Conservatorship of Early* (1983) 35 C3d 244, 197 CR 539.

§13.24 2. Person Who Prepared Record Not Required to Testify

The business-record exception to the hearsay rule allows qualifying business records to be admitted into evidence without the need for the person who prepared them to testify. See Evid C §§1271-1272, 1560-1562; *Jazayeri v Mao* (2009) 174 CA4th 301, 321, 94 CR3d 198; Jefferson's California Evidence Benchbook, chap 4 (4th ed CJA-CEB 2009). Other Evidence Code sections may provide a means of authenticating those records without testimony. See Evid C §§1400-1454; Jefferson's Evidence Benchbook, chap 31.

§13.25 3. Mode of Preparation Must Indicate Trustworthiness

Admissibility is subject to a general requirement that the source of information and method and time of preparation were such as to indicate trustworthiness. Evid C §1271(d) (incorporated into Evid C §1562 for records introduced by affidavit rather than by witness). The proponent of evidence has the burden of satisfying all requirements for admissibility (Evid C §403) and, if there is any doubt about the trustworthiness of the records, the description of their preparation should resolve that issue completely. The proponent may need to have a live witness available if a trustworthiness issue arises that the court cannot decide favorably based on the affidavit or declaration alone.

EXAMPLE: This requirement was not satisfied in *Remington Inv., Inc. v Hamedani* (1997) 55 CA4th 1033, 64 CR2d 376. In *Remington,* the plaintiff attempted to rely on the business-record exception to introduce records of advances made by a bank whose assets the plaintiff had acquired. The plaintiff introduced the declaration of its own officer on the manner in which the plaintiff's records were created and maintained. The record in question, however, was not actually created by plaintiff, but rather it was created by plaintiff's assignor, and no evidence was presented on the manner in which the assignor had created or maintained it. Thus, the evidence was insufficient to establish the business-record exception.

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/§13.25A B. Records to Which Business-Record Exception Does Not Apply

§13.25A B. Records to Which Business-Record Exception Does Not Apply

Some types of regularly kept records may not be admitted under the business-records hearsay exception because the records are derived from hearsay statements made by other people, are made based on statements by persons under no duty to report accurately, are not made in the ordinary course of business, or do not reflect the personal observation of the recordkeeper. Examples include:

- Police reports (see *Kramer v Barnes* (1963) 212 CA2d 440, 446, 27 CR 895; §13.8);
- Search results from a database consisting of information derived from police reports (*People v Hernandez* (1997) 55 CA4th 225, 239, 63 CR2d 769);
- Probation reports (*People v Campos* (1995) 32 CA4th 304, 309, 38 CR2d 113);
- Psychiatric evaluations (*People v Reyes* (1974) 12 C3d 486, 502, 116 CR 217);
- 911 dispatch log (*Alvarez v Jacmar Pac. Pizza Corp.* (2002) 100 CA4th 1190, 1203, 122 CR2d 890);
- Crisis intervention logs and/or client intake data maintained by organization assisting abused women (*People v Ayers* (2005) 125 CA4th 988, 994, 23 CR3d 242); and
- Police officer exit interviews and summaries of those exit interviews (*Zanone v City of Whittier* (2008) 162 CA4th 174, 191, 75 CR3d 439).

NOTE: If a separate hearsay objection exists for the second-level hearsay, the record may be admissible.

C. Live Testimony

§13.26 1. When to Use Witness to Authenticate Records

If a business record is important, or if you anticipate a serious objection to it, you should require the custodian of records to appear in court. It may be necessary to have the custodian lay the proper foundation for introduction of the record. See, *e.g.*, *Nichols v McCoy* (1952) 38 C2d 447, 449, 240 P2d 569 (testimony of standard business practice properly authenticated blood sample and resulting test in coroner's autopsy report).

If the custodian of records testifies, Evid C §1562 does not apply. Although secondary evidence is admissible to prove the content of records, originals may be required if (1) there is a genuine issue concerning material terms of the writing and justice requires exclusion or (2) admission of the secondary evidence would be unfair. Evid C §1521(a). See Evid C §§1523(b) (oral testimony on content of lost or destroyed writings when copy not available), 1551 (prints of lost or destroyed originals). On secondary evidence, see chaps 47-48.

§13.27 2. What to Do When Questioning Custodian of Records

When using the custodian of records or another qualifying witness to authenticate the record, the proponent should have the record marked for identification, give a copy to opposing counsel, call the witness to the stand, and ask the witness the questions needed to authenticate the record. Opposing counsel may then cross-examine the witness. After the proponent has called as many witnesses as needed to meet the requirements of the business-record exception to the hearsay rule, the proponent should move that the court receive the record in evidence.

PRACTICE TIP: Local rules or the trial judge's preference may govern when you have the record marked for identification.

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/§13.28 D. Using Affidavit (or Declaration) Instead of Witness to Authenticate Records

§13.28 D. Using Affidavit (or Declaration) Instead of Witness to Authenticate Records

The proponent may direct a business that fits within the Evid C §1270 definition to send specified records to a particular court by issuing a subpoena duces tecum that complies with Evid C §§1560-1566. See California Trial Practice: Civil Procedure During Trial §§4.6-4.20 (3d ed Cal CEB 1995) for discussion of issuing subpoenas. If the business is neither a party to the action nor a place where a cause of action is alleged to have arisen, the custodian of records can reply to the subpoena by mailing a legible copy of the records to the court along with the affidavit. Evid C §§1560-1561.

The affidavit must state that the records were prepared by personnel of the business in the ordinary course of business at or near the time of the relevant act, condition, or event (Evid C §1561(a)(3)), and must state facts that would establish that the mode of preparation, sources of information, and method and time of preparation indicate that the records are trustworthy (Evid C §1271). The subpoena must be served at least 5 days before the production date in a criminal case (Evid C §1560(b)(1)) or 15 days in a civil action (Evid C §1560(b)(2)), or as otherwise agreed. Evid C §1560(b)(3).

PRACTICE TIP: It is a good idea to (1) subpoena the custodian of records to attend the trial or deposition in addition to asking him or her to prepare the affidavit (see Evid C §1564), and (2) excuse his or her appearance only after you have reviewed the affidavit to assure its completeness.

A declaration may be used instead of an affidavit if it meets the requirements of CCP §2015.5. A declaration avoids the necessity of the custodian's having to have an affidavit notarized. The proponent may draft the declaration, direct the custodian to sign and date it when the records are produced in accordance with the accompanying subpoena, and send it to the court along with the records. If a declaration is used, it should include all Evid C §1271 requirements. See *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 720, 128 CR2d 529 (exhibits could not be admitted as business records because attorney's declaration did not provide foundation for admissibility; it contained no evidence as to how reports were prepared, on what sources of information they were based, and no evidence they were trustworthy). See also §13.2.

The proponent may want the court to rule in limine on whether the custodian's affidavit (or declaration) satisfies the business-record exception to the hearsay rule. More often, the matter is handled in open court at the time you seek to introduce the records. See chap 3 on in limine motions.

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/§13.29 E. Computer Records

§13.29 E. Computer Records

Computer records may require different proof from that required for other business records to satisfy the trustworthiness requirement of Evid C §1271. Among the issues to be considered are the method by which the information was entered in the computer, whether any safeguards were in place to prevent tampering while the data were stored in the computer, and whether the business or its customers regularly rely on the computer-generated information. When conducting research in this evolving area, bear in mind that the official records exception to the hearsay rule contains an identical trustworthiness requirement, so that informative decisions may arise under either Evid C §1271 (business records) or §1280 (official records). See, *e.g.*, *People v Martinez* (2000) 22 C4th 106, 91 CR2d 687; *People v Dunlap* (1993) 18 CA4th 1468, 23 CR2d 204. See also *People v Matthews* (1991) 229 CA3d 930, 938, 280 CR 134, and *People v Lugashi* (1988) 205 CA3d 632, 252 CR 434, for examples of some issues that may arise.

PRACTICE TIP: If you have reason to question the trustworthiness of a computer-generated document, you should plan discovery on this issue. For example, you may depose either the person who entered the data or another individual with the same job at the time of your litigation. In addition, you may depose the person who is in charge of information systems at the company, as well as someone from the hardware manufacturer or the software vendor, to learn how stored data can be modified and how to prevent modifications. It is important to take into account the relative ease with which computer data can be altered, whether deliberately or accidentally, and to identify the evidence bearing on the likelihood that this happened in your case. The true test for the admissibility of a printout reflecting a computer's internal operations is not whether the printout was made in the ordinary course of business, but whether the computer was operating properly at the time of the printout. Without evidence that the computer was acting improperly, the presumption exists that the computer was acting properly. *People v Hawkins* (2002) 98 CA4th 1428, 121 CR2d 627.

§13.30 F. Additional Objections Opponent May Make

Records are not automatically admissible just because the business-record exception to the hearsay rule (Evid C §§1270-1272) has been satisfied. Assuming that the hurdle of the business-record exception is overcome, the opponent may still object to the admissibility of all or portions of the records on other grounds.

EXAMPLES: The document may be challenged on grounds, *e.g.,* as irrelevant under Evid C §352, for lack of personal knowledge on the part of the person who prepared the report, or because it contains an inadmissible opinion. Privileges such as the official information privilege (Evid C §1040) may apply to the contents of business records as they may apply to any other records.

The opponent may object to all or portions of the record being admitted into evidence. The objection may require the proponent to elicit testimony in order to counter it, or it may just call for legal argument, and it may be successful in excluding the evidence.

V. CHECKLISTS

§13.31 A. Checklist: Witnesses to Subpoena

- If affidavit not used (see Evid C §1561), the custodian of records or another qualified person who can authenticate the writing and satisfy the Evid C §1271 requirements. See §13.2.
- If record is on computer, a person familiar with computer operations, such as an expert or the head of Information Technology for the company. See §13.5.

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/ B. Alternative Methods of Admissibility/§13.32 1. Checklist: Writing Itself Can Be Introduced

B. Alternative Methods of Admissibility

§13.32 1. Checklist: Writing Itself Can Be Introduced

- Admission. Evid C §1220; see chap 10.
- Affidavits of certain persons who drew blood samples can be submitted in place of their testimony in criminal cases, if there is no objection. Evid C §712.
- Authentication by any statutory method. Evid C §§1400-1454; see chap 11.
- Commercial Code §1307 allows bills of lading, policies or certificates of issuance, documents authorized or required by a commercial contract, and other specified documents to be admitted as evidence of facts stated in them.
- Copy of writing. Evid C §1521; see chap 47.
- Declaration against interest. Evid C §1230; see chap 20.
- Evidence of state of mind. Evid C §1200(a); see chap 50.
- Deeds of conveyance, wills, and other writings affecting an interest in real or personal property. Evid C §1330; see chap 21.
- Extrinsic evidence of statement when inconsistent with any part of witness's prior testimony at hearing. Evid C §770; see chap 41.
- Finding of presumed death under former Missing Persons Act (former 50 USC App §§1001-1018). Evid C §1282.

NOTE: Evidence Code §1282, which was enacted in 1965, refers to the former War and National Defense Missing Persons Act of 1942 "as enacted or as heretofore or hereafter amended." This Act was repealed in 1966 (and not amended). In that same year other provisions for payments to missing or interned persons employed by the federal government, or to their dependents, were enacted. See 5 USC §§5561-5570 (government employees); 37 USC §§551-559 (uniformed service members). See also Evid C §1282.

- Official report by United States employee of a person's status, *e.g.,* missing, missing in action, captured by a hostile force, detained in a foreign country against his or her will, or is dead or is alive. Evid C §1283.
- Official writings concerning property. Evid C §§1600-1605; see chap 36.
- Official writings (in custody of public entity). Evid C §§1530, 1532; see chap 36.
- Oral testimony on content of writing. Evid C §1523; see chap 48.
- Original of a writing. Evid C §1520; see chap 47.
- Matter that was judicially noticed. Evid C §§450-460; see chap 31.
- Public record of birth, death, or marriage required by law to be filed. Evid C §1281; see chap 36.
- Printed representations of computer information or computer program. Evid C §1552; see chap 47.
- Printed representations of images stored on videotape or digital medium. Evid C §1553; see chap 47.
- Refresh witness's present recollection (if preparer of document is available to testify). Only the adverse party may introduce the writing in evidence. Evid C §771; see chap 44.
- Religious group's record of family history. Evid C §1315; see chap 25.
- Stipulation. See chap 51.

- Tabulations, lists, directories, registers, and other published compilations relied on as accurate in the course of business. Evid C §1340; see chap 17.

- Writing by public employee. Evid C §1280; see chap 36.

- Writing more than 30 years old and acted on as true. Evid C §1331; see chap 21.

NOTE: Other relevant Evidence Code sections may suggest additional alternative methods of admissibility, *e.g.,* Evid C §250, with its all-inclusive definition of "writings" (see discussion in §47.9), and Evid C §255, defining an "original" as a photographic negative or any photographic print, and as a printout or other output readable by sight that accurately reflects computer data. See also Evid C §§1270 (definition of business for business-records exception), 1550 (use of copy of business record instead of original), 1562 (admissibility of copies of business records when admitted with affidavit of custodian of records), 1563 (witness fees in connection with production of business records).

§13.33 2. Checklist: Writing Can Only Assist Testimony

The writing itself cannot be introduced, but it can assist testimony in the following areas:

- Past recollection recorded. Evid C §1237; see chap 38.
- Refreshing recollection. Evid C §771; see chap 44.
- Any method of authentication. See chap 11.

§13.34 3. Checklist: Absence of Record

- Search by official custodian of public records may be used to prove absence of record in that office. Evid C §1284; see chap 36.

VI. SOURCES

A. Evidence Code

§13.35 1. Record Admitted Through Witness

Evid C §1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business;

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

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Evid C §1272. Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition if:

(a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

Source: Evidence/Effective Introduction of Evidence in California/13 Business Records/§13.36 2. Authentication With Affidavit

§13.36 2. Authentication With Affidavit

Evid C §1560. (a) As used in this article:

(1) "Business" includes every kind of business described in Section 1270.

(2) "Record" includes every kind of record maintained by a business.

(b) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or other qualified witness delivers by mail or otherwise a true, legible, and durable copy of all of the records described in the subpoena to the clerk of the court or to another person described in subdivision (d) of Section 2026.010 of the Code of Civil Procedure, together with the affidavit described in Section 1561, within one of the following time periods:

(1) In any criminal action, five days after the receipt of the subpoena.

(2) In any civil action, within 15 days after the receipt of the subpoena.

(3) Within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness.

(c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and directed as follows:

(1) If the subpoena directs attendance in court, to the clerk of the court.

(2) If the subpoena directs attendance at a deposition, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business.

(3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records that are original documents and that are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received. Records that are copies may be destroyed.

(e) As an alternative to the procedures described in subdivisions (b), (c), and (d), the subpoenaing party in a civil action may direct the witness to make the records available for inspection or copying by the party's attorney, the attorney's representative, or deposition officer as described in Section 2020.420 of the Code of Civil Procedure, at the witness' business address under reasonable conditions during normal business hours. Normal business hours, as used in this subdivision, means those hours that the business of the witness is normally open for business to the public. When provided with at least five business days' advance notice by the party's attorney, attorney's representative, or deposition officer, the witness shall designate a time period of not less than six continuous hours on a date certain for copying of records subject to the subpoena by the party's attorney, attorney's representative, or deposition officer. It shall be the responsibility of the attorney's representative to deliver any copy of the records as directed in the subpoena. Disobedience to the deposition subpoena issued pursuant to this subdivision is punishable as provided in Section 2020.240 of the Code of Civil Procedure.

Evid C §1561. (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

(2) The copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to subdivision (e) of Section 1560 the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be.

(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

(4) The identity of the records.

(5) A description of the mode of preparation of the records.

(b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560.

(c) Where the records described in the subpoena were delivered to the attorney or his or her representative or deposition officer for copying at the custodian's or witness' place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her representative or deposition officer stating that the copy is a true copy of all the records delivered to the attorney or his or her representative or deposition officer for copying.

Evid C §1564. The personal attendance of the custodian or other qualified witness and the production of the original records is not required unless, at the discretion of the requesting party, the subpoena duces tecum contains a clause which reads:

"The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena."

Evid C §1565. If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.

§13.37 B. Other

For detailed discussion of the business-record exception to the hearsay rule, see 1 Witkin, California Evidence, *Hearsay* §§226-243 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 4 (4th ed CJA-CEB 2009); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *The Hearsay Rule and Its Exceptions* §9.D (3d ed 2000); California Personal Injury Proof, chap 11 (Cal CEB 1970).

Several specialized types of business records are discussed in P I Proof, chap 9 (police accident reports), P I Proof, chap 10 (discovery documents), P I Proof, chap 12 (official records), P I Proof, chap 13 (hospital and medical records), and P I Proof, chap 14 (medical bills).

Source: Evidence/Effective Introduction of Evidence in California/14 Character: Opinion Evidence/Chapter Outline

14

Character: Opinion Evidence

Nancy M. Naftel

VI. SOURCES

A. Evidence Code §14.18

B. Other §14.19

§14.1 I. SCOPE OF CHAPTER

Character evidence falls into three categories: personal opinion, reputation, and specific instances of conduct. See Evid C §1100. This chapter focuses on the rules for using opinion evidence, which differ in criminal and civil cases. For further discussion of character evidence, see chaps 15 (reputation), 16 (specific acts).

II. REQUIREMENTS

A. Criminal Cases

1. Using Opinion Evidence Against Defendant or Defense Witness or on Prosecution's Behalf

§14.2 a. To Admit

A prosecutor may introduce opinion evidence in a criminal case in the following situations:

- To rebut evidence offered by the defendant to prove his or her conduct in conformity with evidence of character or a character trait. Evid C §1102(b).
- To rebut evidence offered by the defendant to prove conduct of the victim in conformity with a particular character or trait of character. Evid C §1103(a)(2). Reputation and specific acts evidence are also admissible for this purpose. Evid C §1103(a).
- To rebut evidence that the victim had a character trait for violence, the prosecution may introduce opinion evidence of the lack of that trait. Reputation and specific acts evidence are also admissible for this purpose. Evid C §1103(b). But an allegation that an arresting officer was unduly aggressive does not support evidence of a defendant's violent character under Evid C §1103(b) because such character evidence must be outside the time of the charged event. *People v Myers* (2007) 148 CA4th 546, 552, 56 CR3d 27.
- To attack or support credibility of a witness or hearsay declarant. Evid C §780. Reputation and specific acts evidence can also be used. See *People v Harris* (1989) 47 C3d 1047, 255 CR 352.

NOTE: Questions asked on cross-examination about reputation must be asked in good faith. See §14.15.

§14.3 b. To Object

Defense counsel may object to opinion evidence in a criminal case on any of the following grounds:

- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352);
- Irrelevant (Evid C §350);
- Hearsay (Evid C §1200);
- Does not meet procedural requirements of Evid C §782;
- Improper form of character evidence: Opinion evidence cannot be used under, *e.g.,* Evid C §1101 for this purpose (see *People v McFarland* (2000) 78 CA4th 489, 92 CR2d 884); or
- Witness lacks sufficient acquaintance with the person about whom he or she is testifying to give an opinion on (*e.g.,* specify person's character trait) (see chap 4).

2. Using Opinion Evidence Against Prosecution Witness or on Defendant's Behalf

§14.4 a. To Admit

Defense counsel may introduce opinion evidence in a criminal case in the following situations:

- To prove defendant's conduct in conformity with opinion evidence of character or a character trait. Evid C §1102(a). Reputation evidence may also be offered. Evid C §1102.

- To prove conduct of the victim in conformity with his or her character or a particular character trait. Evid C §1103(a)(1). Reputation and specific acts evidence may also be offered. Evid C §1103(a).

NOTE: Special rules apply, under Evid C §1103(c), to evidence of a victim's sexual conduct in certain criminal cases; see §16.4.

- To attack or support credibility of a witness or hearsay declarant. Evid C §780. Reputation and specific acts evidence can also be offered. *People v Harris* (1989) 47 C3d 1047, 255 CR 352.

§14.5 b. To Object

The prosecutor may object to opinion evidence in a criminal case on all of the same grounds as defense counsel (see §14.3) as well as on the ground that the subject matter is not sufficiently beyond common experience for expert testimony. See *People v Long* (2005) 126 CA4th 865, 871, 24 CR3d 654 (medical expert testifying about witness's borderline personality disorder may not give opinion on credibility because determination of credibility is not so beyond common experience that expert's opinion would help the jury).

B. Civil Cases

§14.6 1. To Admit

The proponent may introduce opinion evidence in a civil case in the following situations:

- To attack or support credibility of a witness or hearsay declarant. Evid C §§780, 785-787. Reputation evidence may also be used, but specific acts evidence may not be used to show witness's character for honesty or veracity. Evid C §§786-787.
- To prove character when character itself is in issue. Evid C §1100. Reputation and specific acts evidence may also be offered. Evid C §1100.

§14.7 2. To Object

Opposing counsel may object to opinion evidence in a civil case on any of the following grounds:

- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352);
- Irrelevant (Evid C §350);
- Hearsay (Evid C §1200);
- Improper form of character evidence: Opinion evidence cannot be used under, *e.g.,* Evid C §1101 for this purpose; or
- Witness lacks sufficient acquaintance with the person about whom he or she is testifying to give an opinion on (*e.g.,* specify person's character trait) (see chap 4).

NOTE: A witness's good character may not be shown in a civil case if it has not been previously attacked. Evid C §790. The rule is different in criminal cases; see §§15.15, 16.20.

III. SAMPLE QUESTIONS

A. Cross-Examination in Criminal Case

§14.8 1. Information to Elicit

In the cross-examination segment in §14.9, the prosecutor wants to cover the following areas with a defense witness who had testified that in his opinion the defendant is of good moral character and would not molest children:

- Ask witness whether he has heard of certain unfavorable evidence in the form of opinion, specific acts, or reputation about defendant; and
- Ask witness whether his opinion of defendant has now changed.

§14.9 2. Questions to Ask

Q: Mr. Witness, did Mr. Defendant ever tell you he has a niece in Texas?

Q: Have you ever met her?

Q: Had you heard that Mr. Defendant's niece reported to the police in Texas that Mr. Defendant raped her when she was ten years old?

NOTE: It is not necessary that the witness have actually heard of the report, but it is necessary that the questioner have a good faith belief in the factual basis of the prior act or report. See *People v Eli* (1967) 66 C2d 63, 79, 56 CR 916 (court recommended hearings outside jury's presence before questions asked, to make sure not based on fantasy).

Q: If you had heard of that report, would your opinion of Mr. Defendant's character have changed?

PRACTICE TIP: Whether the witness answers yes or no is irrelevant. If his opinion would change, then he is no longer a favorable defense witness. If his opinion would not change, even knowing of a reported child molestation by the defendant, then it can be argued that his opinion is worthless. But see discussion about whether courts approve of this type of question in §15.20.

Q: Mr. Witness, do you know what the charges in this case are?

Q: Are you aware that three children under the age of 14 have testified that Mr. Defendant molested them in the past year?

Q: If you had heard that, would your opinion of Mr. Defendant's moral character have changed?

B. Direct Examination in Criminal Case

§14.10 1. Information to Elicit

After the defendant offered evidence regarding his good character, the prosecutor in §14.11 wants her witness, in giving an opinion about the defendant's bad character, to testify to the following matters:

- Identify self and defendant;
- Show basis for opinion; and
- State opinion.

§14.11 2. Questions to Ask

Q: Mr. Witness, do you know Mr. Defendant?

Q: Is he in the courtroom today?

Q: Where is he?

Prosecutor: Your Honor, may the record reflect that the witness has identified the defendant?

Q: How long have you known the defendant?

Q: How often do you see him?

Q: Where do you usually see him?

Q: Do you know Mr. Defendant's occupation?

Q: What does he do?

Q: What is your occupation?

Q: Are you also a teacher at the school where Mr. Defendant was employed?

Q: Did you teach there at the same time that Mr. Defendant did?

Q: When was that?

Q: Did you ever see Mr. Defendant in the classroom with students?

Q: Did you ever see Mr. Defendant on the playground with students?

Q: Did you see Mr. Defendant on any other occasion with students?

Q: Did you ever see Mr. Defendant in the company of children other than his students?

Q: In what circumstances did you see him with other children?

Q: Based on your acquaintance with Mr. Defendant and on your observations of him around children, do you have an opinion on his moral character as it relates to children?

Q: What is that opinion?

A: My opinion is that he was obsessively interested in children and therefore I feel his moral character regarding children is not good.

C. Direct Examination in Civil Case

§14.12 1. Information to Elicit

In the direct examination segment in §14.13, defense counsel wants the witness, in testifying about the plaintiff's credibility in a civil suit, to cover the following matters:

- Identify self and the person being impeached;
- Show basis for opinion; and
- State opinion.

§14.13 2. Questions to Ask

Q: Ms. Witness, are you acquainted with Ms. Plaintiff?

Q: Is she present in the courtroom today?

Q: Where is she?

Q: Your Honor, may the record reflect that the witness has identified the plaintiff?

Q: How long have you known her?

Q: How often do you see her?

Q: Under what circumstances do you see her?

Q: Do you have any business dealings with her?

Q: Do you see her socially?

Q: Based on your acquaintance with Ms. Plaintiff and your business dealings with her, do you have any opinion on whether she is a truthful person?

IV. COMMENT

§14.14 A. When to Use Opinion Character Evidence

The following steps can help the proponent analyze whether and how to use opinion character evidence:

- Decide why you are using the evidence: To prove conduct? To prove character when character itself is in issue? To attack or support a witness's credibility?
- Research the statutes and case law that support, or arguably support, its admission.
- Consider the ramifications of using the evidence substantively, or to attack or to support credibility. (Does it open the door to negative testimony about your client or one of your witnesses?)
- Evaluate whether the witness for or against whom you wish to use character evidence must testify in order for the evidence to be admissible.
- Choose whether to bring out the evidence through cross-examination or through your own witness.
- Review the information on which the character witness will base his or her opinion.
- Ascertain what other information may be known to opposing counsel, whether to tell the character witness about it, and whether that new information changes the character witness's opinion.

As with reputation evidence, the witness must be shown to have sufficient information on which to base an opinion. Evid C §800. See *People v Ogg* (1968) 258 CA2d 841, 846, 66 CR 289 (lay witness's opinion must be based on own perception).

NOTE: The steps to take in analyzing whether to use opinion character evidence are equally applicable to reputation character evidence. See chap 15.

§14.15 B. Good Faith Questioning Required

Questions on cross-examination must be asked in good faith. *People v Ramos* (1997) 15 C4th 1133, 64 CR2d 892 (prosecutor did not engage in misconduct when he impeached witness with evidence indicating defendant's violent character, because he had good faith belief in foundation of impeachment). See *People v Eli* (1967) 66 C2d 63, 56 CR 916.

Cross-examination is not limited to opinion and reputation evidence; it can include bad acts. *People v Hempstead* (1983) 148 CA3d 949, 196 CR 412.

V. CHECKLISTS

§14.16 A. Checklist: Witnesses to Subpoena

- Witness who can testify from personal knowledge about the witness or hearsay declarant.

§14.17 B. Checklist: Alternative Methods of Admissibility

- Habit or custom evidence. Evid C §1105; see chap 29.
- Reputation character evidence. Evid C §1105; see chap 15.
- Specific acts character evidence. Evid C §1100; see chap 16.

Source: Evidence/Effective Introduction of Evidence in California/14 Character: Opinion Evidence/ VI. SOURCES/ §14.18 A. Evidence Code

VI. SOURCES

§14.18 A. Evidence Code

Evid C §782. (a) In any of the circumstances described in subdivision (c), if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court.

(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(5) An affidavit resealed by the court pursuant to paragraph (2) shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding.

(b) As used in this section, "complaining witness" means:

(1) The alleged victim of the crime charged, the prosecution of which is subject to this section, pursuant to paragraph (1) of subdivision (c).

(2) An alleged victim offering testimony pursuant to paragraph (2) or (3) of subdivision (c).

(c) The procedure provided by subdivision (a) shall apply in any of the following circumstances:

(1) In a prosecution under Section 261, 262, 264.1, 286, 288, 288a, 288.5, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in any of those sections, except if the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4 of the Penal Code, or in the state prison, as defined in Section 4504.

(2) When an alleged victim testifies pursuant to subdivision (b) of Section 1101 as a victim of a crime listed in Section 243.4, 261, 261.5, 269, 285, 286, 288, 288a, 288.5, 289, 314, or 647.6 of the Penal Code, except if the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4 of the Penal Code, or in a state prison, as defined in Section 4504 of the Penal Code.

(3) When an alleged victim of a sexual offense testifies pursuant to Section 1108, except if the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4 of the Penal Code, or in the state prison, as defined in Section 4504 of the Penal Code.

Evid C §790. Evidence of the good character of a witness is inadmissible to support his credibility unless evidence of his bad character has been admitted for the purpose of attacking his credibility.

See the following Evidence Code provisions, which are reproduced elsewhere in this book: Evid C §§785 in §5.15; 788 in §27.22; 786, 1100-1104 in §15.24; 783, 786-787, 1106 in §16.24; 780 in §19.29; and 352 in §7.8.

NOTE: See §15.17 on the exclusion of Evid C §§786-790 from use in criminal proceedings.

§14.19 B. Other

For further discussion of character evidence, see Jefferson's California Evidence Benchbook, chap 29 (4th ed CJA-CEB 2009) (attacking and supporting credibility), Jefferson's Evidence Benchbook, chap 35 (evidence of character, habit, and custom); 1 Witkin, California Evidence, *Circumstantial Evidence* §§38-66 (4th ed 2000); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, chaps 5-6 (3d ed 2000); Cotchett, California Courtroom Evidence, chap 19 (2008).

15

Character: Reputation Evidence

Nancy M. Naftel

§15.1 I. SCOPE OF CHAPTER

Character evidence is divided into three types: personal opinion, reputation, and specific instances of conduct. See Evid C §1100. This chapter focuses on reputation evidence. Subject to statutory requirements, reputation character evidence may be used as circumstantial evidence for the following purposes: to attack or support a witness's credibility (Evid C §§780, 782-783, 786, 1100); to prove conduct in a criminal case (Evid C §§1101-1102); and to prove character when character itself is in issue (Evid C §1100). For further discussion of character evidence, see chaps 14 (opinion), 16 (specific acts). On witnesses' credibility, see chap 19.

II. REQUIREMENTS

§15.2 A. To Admit

Reputation evidence is relevant to a case and is admissible when a witness has knowledge of a person's reputation and that evidence is used for one or more of the following purposes (Evid C §§780, 786, 1100-1103, 1106, 1324):

- To attack or support credibility of a witness or hearsay declarant in either a civil or a criminal case;
- To prove conduct in a criminal case (see §15.15); and
- To prove character when character itself is in issue in either a civil or a criminal case.

§15.3 B. To Object

Opposing counsel may object to reputation on any of the following grounds:

- Hearsay (Evid C §1200);
- Improper opinion (Evid C §800);
- Too time consuming, prejudicial, confusing, or misleading (Evid C §352);
- Irrelevant (Evid C §350);
- Improper impeachment (Evid C §786);
- Trait of character shown by the evidence is not in issue (see Evid C §350); or
- Improper character evidence (see §§15.12-15.21 for possible objections).

NOTE: A witness's good character may not be shown in a civil case if not previously attacked. Evid C §790; see §15.15 for rule in criminal cases.

III. SAMPLE QUESTIONS ON DIRECT EXAMINATION

A. Reputation for Truth and Veracity

§15.4 1. Information to Elicit

Counsel may introduce evidence through a character witness to attack or support the credibility of another witness by showing the witness's reputation for truth and veracity. See Evid C §§785, 1324; *Rios v Chand* (1955) 130 CA2d 833, 838, 280 P2d 47. In the direct examination segment in §15.5, the character witness testifies about Mr. Jones as follows:

- States she knows Mr. Jones and identifies him in courtroom;
- Tells how she has known Mr. Jones long enough to know his reputation;
- Shows their common community (*e.g.,* neighbors, coworkers, college friends—see Evid C §1324);
- Specifies occasions when Mr. Jones's reputation was discussed, and with whom;
- Describes the relevant character trait and his reputation for truth and veracity; and
- Reports on Mr. Jones's reputation.

§15.5 2. Questions to Ask

Q: Ms. Character Witness, do you know Mr. Jones?

Q: Is he in the courtroom today?

Q: Where is he?

Proponent: Your Honor, may the record reflect that Ms. Character Witness has identified Mr. Jones?

Q. Ms. Character Witness, how long have you known Mr. Jones?

Q: How is it you are acquainted with Mr. Jones?

Q: Do you know other persons who are acquainted with him?

Q: How many others do you know who are acquainted with Mr. Jones?

Q: Have you ever discussed with any of these persons Mr. Jones's reputation for truth and veracity?

Q: How many times have you done so?

Q: When have you done so?

Q: Have you ever heard others discuss Mr. Jones's reputation for truth and veracity?

Q: When did you hear that discussed?

PRACTICE TIP: The fact that a character witness has never heard anyone say anything about a witness's reputation for truth or veracity may be used as reputation evidence of the existence of that character trait. Compare *People v Stennett* (1921) 51 CA 370, 197 P 372 (error to reject testimony of witness who never heard reputation discussed), with *People v Pauli* (1922) 58 CA 594, 209 P 88 (rule applies when person in community long enough to acquire reputation), and *Orloff v Los Angeles Turf Club* (1951) 36 C2d 734, 227 P2d 449 (witness must have knowledge of reputation). See CALCRIM 350 ("If the defendant's character for certain traits has not been discussed among those who know (him/her), you may assume that (his/her) character for those traits is good"). See also 1 Witkin, California Evidence, *Circumstantial Evidence* §44 (4th ed 2000).

Q: How many times did you hear that discussed?

Q: Based on the conversations you had and other conversations you overheard, do you know what Mr. Jones's reputation in the community is for truth and veracity?

Q: What is that reputation?

PRACTICE TIP: Judges may permit attorneys to ask the following opinion question: "Knowing that reputation, would you believe Mr. Jones under oath?" See 3 Witkin, Evidence, *Presentation at Trial* §290(c).

B. Defendant's Reputation to Prove Conduct in Criminal Case

§15.6 1. Information to Elicit

During trial, the defendant claims to be nonviolent and to have shot the victim in self-defense. See Evid C §§1102, 1324; *People v Aguilar* (1973) 32 CA3d 478, 108 CR 179. In the direct examination segment in §15.7, the character witness testifies to the following matters:

- States he knows defendant and identifies her in courtroom;
- Tells how he has known defendant long enough to know her reputation;
- Shows their common community (*e.g.,* neighbors, coworkers, college friends—see Evid C §1324);
- Specifies occasions when defendant's reputation was discussed, and with whom;
- Describes the relevant character trait and her reputation for truth and veracity; and
- Reports on defendant's reputation.

§15.7 2. Questions to Ask

Q: Mr. Character Witness, do you know Ms. Defendant?

Q: How long have you known her?

Q: Is she in the courtroom today?

Q: Where is she?

Proponent: Your Honor, may the record reflect that Mr. Character Witness has identified the defendant?

Q: How is it you are acquainted with Ms. Defendant?

Q: Do you know other persons who are acquainted with Ms. Defendant?

Q: How many persons do you know who are acquainted with Ms. Defendant?

Q: Have you ever discussed with any of these persons Ms. Defendant's reputation for nonaggressiveness, nonviolence, calmness, or passivity?

Q: When did you do so?

Q: How many times have you discussed that reputation?

Q: Have you ever heard others discuss her reputation for nonviolence, nonaggressiveness, calmness, and passivity?

PRACTICE TIP: This question might be considered "compound" and subject to objection. If such an objection is sustained, the proponent should choose which traits to emphasize, *e.g.,* reputation for nonviolence or reputation for nonaggressiveness, and then use separate questions for each character trait.

Q: When did you hear it discussed?

Court: How many times did you hear it discussed?

Q: Based on your conversations and those of others that you heard, do you know Ms. Defendant's reputation for nonviolence, nonaggressiveness, calmness, and passivity?

Q: What is that reputation?

C. Victim's Reputation to Prove Conduct in Criminal Case

§15.8 1. Information to Elicit

In the direct examination segment in §15.9, the defendant presents reputation evidence of the victim to show conduct in conformity with that reputation. See Evid C §§1103, 1324; *People v Castain* (1981) 122 CA3d 138, 142, 175 CR 651. To prove that the victim initiated the encounter that led the defendant to act in self-defense, the character witness testifies as follows:

- Identifies Mr. Victim from photo (alternative to identifying victim in court);
- States that he has known defendant long enough to know his reputation;
- Describes their common community (*e.g.,* neighbors, coworkers, college friends—see Evid C §1324);
- Enumerates times Mr. Victim's reputation for violence discussed; and
- Reports Mr. Victim's reputation for violence.

§15.9 2. Questions to Ask

Q: Mr. Character Witness, do you know Mr. Victim?

Q: This is a photograph that has been marked as People's Exhibit No. 1 for identification. Do you recognize the person in that photograph?

Q: Is that a photo of the person you know as Mr. Victim?

Q: How long have you known Mr. Victim?

Q: In what capacity do you know him?

Q: Do you know other persons who are acquainted with Mr. Victim?

Q: Have you ever discussed with any of these persons Mr. Victim's reputation for violence or nonviolence?

Q: With whom have you discussed it?

Q: Have you ever heard others discuss Mr. Victim's reputation for violence?

Q: Based on the conversations you had and the conversations you overheard, do you know what Mr. Victim's reputation is for violence?

Q: What is that reputation?

D. Reputation Evidence Used to Prove Character, When Character Itself Is in Issue

§15.10 1. Information to Elicit

In a wrongful death action, the extent of the surviving spouse's loss of comfort and society is determined by establishing the prior existence of a happy marital relationship. See Evid C §§1100, 1324; *Guardianship of Akers* (1920) 184 C 514, 518, 194 P 706. In the direct examination segment in §15.11, the witness testifies as follows:

- States that she knew Mr. Husband and identifies him;
- Shows she has known him an adequate length of time;
- Describes their common community (*e.g.,* neighbors, coworkers, college friends—see Evid C §1324);
- Tells about the occasions and persons with whom she has discussed Mr. Husband's reputation for the specified trait;
- Establishes a particular timeframe; and
- Reports on Mr. Husband's reputation for being an affectionate and loving husband.

§15.11 2. Questions to Ask

Q: Ms. Witness, did you know Mr. Husband before his death?

Q: This is a photograph that has been marked Plaintiff's Exhibit No. 1 for identification. Do you recognize the person in the photograph?

Q: How long did you know him?

Q: How were you acquainted with him?

Q: Did you know other persons who were acquainted with him?

Q: How many persons did you know who knew him?

Q: Did you ever discuss with them Mr. Husband's reputation for being or not being an affectionate and loving husband?

Q: Did you ever hear Mr. Husband's reputation for being an affectionate and loving husband discussed by them?

Q: During what time period did those discussions occur?

Q: Based on the conversations you had and the conversations you overheard, do you know whether Mr. Husband had a reputation in the community for being an affectionate and loving husband?

IV. COMMENT

§15.12 A. Using Character Evidence

The whole area of character evidence is confusing and often misunderstood. Before questioning a character witness, you should thoroughly review the law in the area and be clear on the purpose for which you are offering particular character evidence. The most common rules concerning reputation character evidence are discussed in §§15.13-15.17.

PRACTICE TIP: There is enough confusion concerning character evidence to allow you some freedom to be creative in using it. Remember that, if no objection is made, the evidence will be admitted. See Evid C §353. Some judges, however, freely use Evid C §352 to exclude character evidence.

For a list of steps to take in analyzing whether to use opinion character evidence, which is equally applicable to reputation character evidence, see §14.14. For discussion of other types of character evidence, see chaps 14 (opinion character evidence) and 16 (specific conduct character evidence). See also chap 19 (credibility).

§15.13 1. Reputation Evidence Concerning Truth and Veracity

In both civil and criminal cases, parties may introduce reputation character evidence concerning truth or veracity as circumstantial evidence to attack or rehabilitate a witness's credibility. Evid C §§780(e), 786.

PRACTICE TIP: The person whose credibility is attacked must either have testified or be a hearsay declarant. See Evid C §§780, 1202.

§15.14 2. Character Evidence in Civil Cases

In civil cases, evidence of a person's character trait is admissible as circumstantial evidence to prove that person's character when character itself is in issue. All three types of character evidence are admissible for this purpose. See Comment to Evid C §1100. There are limitations, however, on the use of certain kinds of character evidence concerning the plaintiff's sexual conduct. See Evid C §§783, 1106. Evidence of an individual's character trait to prove conduct is not admissible in civil cases. See Comment to Evid C §1101.

§15.15 3. Character Evidence in Criminal Cases

The defendant in a criminal case may introduce reputation or opinion evidence of his or her own character traits as circumstantial evidence to prove conduct. Evid C §1102; Jefferson's California Evidence Benchbook, chap 35 (4th ed CJA-CEB 2009).

EXAMPLE: A defendant who has never been arrested before and has an excellent reputation in the community might introduce this good character evidence to show that he or she would not have committed the crime charged. See Evid C §1102.

This remains true after passage of Cal Const art I, §28(f)(2) (part of Proposition 8). *People v Taylor* (1986) 180 CA3d 622, 225 CR 733 (Evid C §790, which prohibits admission of good character evidence unless bad character evidence has first been admitted, is no longer valid in criminal cases). See *People v Harris* (1989) 47 C3d 1047, 1081, 255 CR 352 (*People v Taylor, supra,* specifically approved).

In criminal cases (except specified sex cases), a defendant may also introduce evidence of a victim's character trait as circumstantial evidence to prove the victim's conduct in conformity with that trait. Evid C §1103; *People v Castain* (1981) 122 CA3d 138, 142, 175 CR 651. Reputation, opinion, and specific acts evidence may all be used for this purpose. Evid C §1103(a)(1). The prosecution may rebut such character evidence with the same three types of evidence. Evid C §1103(a)(2), (b); *People v Gurule* (2002) 28 C4th 557, 623, 123 CR2d 345 (when defendant did not offer evidence that victim acted in aggressive or confrontational manner, prosecution could not introduce evidence of his peaceful and nonviolent character and unfamiliarity with weapons).

PRACTICE TIP: An example of this type of evidence is introduction of a victim's reputation for violence when the defendant claims self-defense.

The procedures for determining the relevancy of this type of evidence in sex cases are set out in Evid C §782.

§15.16 4. Credibility Involving Sexual Issues

In criminal and civil cases, there are special restrictions on the use of character evidence to affect credibility in certain sex cases. See discussion of Evid C §§1103, 782 (criminal cases), 1106, 783 (civil cases) in chap 16.

PRACTICE TIP: Collateral information can be used to attack or support credibility. *People v Eisenberg* (1968) 266 CA2d 606, 72 CR 390 (left to court's discretion).

§15.17 B. Effect of Proposition 8 in Criminal Cases

Proposition 8 added Cal Const art I, §28(f)(2) (as currently numbered), called the "Right to Truth-in-Evidence Section," which states that relevant evidence must not be excluded in criminal proceedings except under Evid C §§352, 782, and 1103, and under the statutory rules relating to privilege and hearsay. The California Supreme Court has ruled that §28(f)(2) resulted in the exclusion of Evid C §§786-790 from use in criminal proceedings. *People v Harris* (1989) 47 C3d 1047, 1081, 255 CR 352 (decided before subdivisions of §28 were renumbered in 2008 by initiative measure). Evidence Code §1101 has been preserved because it was approved by more than a two-thirds vote in 1986, in compliance with §28(f)(2), which allowed an exception for any future statute enacted by a two-thirds vote in each legislative house. *People v Ewoldt* (1994) 7 C4th 380, 27 CR2d 646. For further discussion of the effect of Proposition 8, see §§16.19, 27.9-27.16.

§15.18 C. Witness Selection and Preparation

Witness selection and preparation are crucial in introducing character evidence. Some witnesses do not understand the difference between their opinion of a person and that person's reputation. You must be sure that the witness has in fact heard discussion of the person's reputation. Also, because you are calling witnesses to discuss *character,* you should be sure that they themselves will make a good impression on jurors. See 3 Witkin, California Evidence, *Presentation at Trial* §§243-249 (4th ed 2000) for discussion of attacking the credibility of character witnesses for defendants in criminal cases.

PRACTICE TIP: A person who does not personally know a witness cannot ask around and then testify to his or her reputation. *Orloff v Los Angeles Turf Club* (1951) 36 C2d 734, 739, 227 P2d 449.

§15.19 D. When to Call Character Witnesses

Assuming that you wish to call character witnesses, you must decide at what stage of the trial to call them, whether during your case-in-chief or during rebuttal. This tactical decision will be based to a large extent on the requirements of the particular Evidence Code section applicable.

PRACTICE TIP: Even if particular character evidence is ruled inadmissible during your case, it may become admissible on rebuttal or on cross-examination because of testimony or evidence brought out by an opposition witness. See, *e.g.*, *People v Clark* (1965) 63 C2d 503, 47 CR 382.

§15.20 E. Cross-Examination of Character Witnesses

Questions asked of character witnesses on cross-examination are typically phrased, "Have you heard that…," and "Do you know that…," *e.g.*, "there are rumors or reports that the defendant did a particular thing?" The courts generally require that the cross-examiner have a good faith basis for asking the question, but it is unsettled whether the cross-examiner may then ask the character witness, "If you had heard such a report, would your opinion of the defendant have changed?" Compare *People v Fowzer* (1954) 127 CA2d 742, 750, 274 P2d 471 (objectionable question because calls for opinion based on speculation), with *People v Malloy* (1962) 199 CA2d 219, 228, 18 CR 545, disapproved on other grounds in *People v Kelley* (1967) 66 C2d 232, 57 CR 363 (question acceptable).

§15.21 F. Jury Instructions

Relevant instructions in criminal cases are CALCRIM 351 (cross-examination of character witness concerning defendant), CALCRIM 350 (good-character evidence concerning defendant), and CALCRIM 333 (opinion testimony of lay witness). In civil cases, see CACI 107 (witnesses).

V. CHECKLISTS

§15.22 A. Checklist: Witnesses to Subpoena

- Witness who has discussed or heard others discuss a person's reputation.

§15.23 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1228; see chap 10.
- Community reputation concerning community history, public interest in property, boundaries, and land. Evid C §§1320-1323; see chap 18.
- Felony convictions. Evid C §1300; chaps 26-27.
- Habit or custom evidence. Evid C §1105; see chap 29.
- Opinion character evidence. See chap 14.
- Specific conduct character evidence. See chap 16.
- Statements and reputation concerning family history. Evid C §§1310-1316; see chap 25.

Source: Evidence/Effective Introduction of Evidence in California/15 Character: Reputation Evidence/ VI. SOURCES/ §15.24 A. Evidence Code

VI. SOURCES

§15.24 A. Evidence Code

Evid C §780. Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

….

(e) His character for honesty or veracity or their opposites.

NOTE: Evid C §780 is reproduced in full in §19.29.

Evid C §1100. Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.

Evid C §1101. (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Evid C §1102. In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

Evid C §1103. (a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

(1) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.

(2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

(b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).

(c)(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, 262, or 264.1 of the Penal Code, or under Section 286, 288a, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

(2) Notwithstanding paragraph (3), evidence of the manner in which the victim was dressed at the time of the commission of the

offense shall not be admissible when offered by either party on the issue of consent in any prosecution for an offense specified in paragraph (1), unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence shall make an offer outside the hearing of the jury. The court shall then make its determination and at that time, state the reasons for its ruling on the record. For the purposes of this paragraph, "manner of dress" does not include the condition of the victim's clothing before, during, or after the commission of the offense.

(3) Paragraph (1) shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.

(4) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.

(5) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided by Section 782.

(6) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this subdivision.

Evid C §1104. Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.

Evid C §1324. Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule.

See the following Evidence Code provisions, which are reproduced elsewhere in the book: Evid C §§782, 790 in §14.18; 785 in §5.15; 783, 786-787, 1106 in §16.24; 788 in §27.22; and 352 in §7.8.

NOTE: See §15.17 on the exclusion of Evid C §§786-790 from use in criminal proceedings.

§15.25 B. Other

For further discussion of character evidence, see Jefferson's California Evidence Benchbook, chap 29 (4th ed CJA-CEB 2009) (attacking and supporting credibility), Jefferson's Evidence Benchbook, chap 35 (evidence of character, habit, and custom); 1 Witkin, California Evidence, *Circumstantial Evidence* §§38-66 (4th ed 2000); 3 Witkin, California Evidence, *Presentation at Trial* §§280-291 (4th ed 2000); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, chaps 5-6 (3d ed 2000); Cotchett, California Courtroom Evidence, chap 19 (2008).

Source: Evidence/Effective Introduction of Evidence in California/16 Character: Specific Acts Evidence/Chapter Outline

16

Character: Specific Acts Evidence

Nancy M. Naftel

§16.1 I. SCOPE OF CHAPTER

Character evidence falls into three categories: reputation, personal opinion, and specific instances of conduct. See Evid C §1100. This chapter focuses on specific acts evidence. The rules on using character evidence for specific instances of conduct are particularly confusing; and the rules for civil cases differ from those for criminal cases. For further discussion of character evidence, see chaps 14 (opinion), 15 (reputation). On witness credibility, see chap 19.

Source: Evidence/Effective Introduction of Evidence in California/16 Character: Specific Acts Evidence/ II. REQUIREMENTS/ A. Criminal Cases/ 1. Using Specific Acts Against Defendant or Defense Witness or on Prosecution's Behalf/§16.2 a. To Admit

II. REQUIREMENTS

A. Criminal Cases

1. Using Specific Acts Against Defendant or Defense Witness or on Prosecution's Behalf

§16.2 a. To Admit

In criminal cases, the prosecution may introduce evidence of specific acts in the following situations:

- To prove the defendant's conduct when relevant to prove "some fact" other than the defendant's disposition to commit the act charged, *e.g.,* motive, knowledge, intent, absence of mistake or accident, or identity. Evid C §1101(b); see §16.17.

- To rebut character evidence introduced by the defendant to prove relevant conduct of the victim in conformity with that evidence under Evid C §1103(a)(1). Evid C §1103(a)(2), (b); *People v Daniels* (1991) 52 C3d 815, 883, 277 CR 122. Reputation and opinion evidence can also be offered. Evid C §1103(a).

- To attack or support credibility of a witness or hearsay declarant. Evid C §§780, 782, 1101(c), 1103(c)(5); *Piscitelli v Salesian Soc'y* (2008) 166 CA4th 1, 6, 82 CR3d 139; *People v Lankford* (1989) 210 CA3d 227, 240, 258 CR 322. Reputation and opinion evidence can also be offered. Evid C §1103(a). See chaps 14-15.

- To prove a defendant's disposition to commit sex offenses when charged with a sex offense. Evid C §1108; *People v Falsetta* (1999) 21 C4th 903, 89 CR2d 847; *People v Crabtree* (2009) 169 CA4th 1293, 1314, 88 CR3d 41; *People v Waples* (2000) 79 CA4th 1389, 95 CR2d 45. See also *People v Ruiloba* (2005) 131 CA4th 674, 31 CR3d 838 (evidence of uncharged sexual misconduct that is admissible under Evid C §1108 may be used to corroborate victim's allegation of sexual abuse described in Pen C §803(g)). See discussion in §16.18.

NOTE: A defendant accused of first degree felony murder, with rape the underlying felony, is accused of a sexual offense for purposes of Evid C §1108. *People v Story* (2009) 45 C4th 1282, 1285, 91 CR3d 709. Further, even if the defendant previously was convicted of a nonsexual crime, if the facts support an argument that the crime was sexual in nature, the court may properly admit evidence of that act as "propensity evidence" under Evid C §1008. *People v Lopez* (2007) 156 CA4th 1291, 1108, 68 CR3d 376.

- To prove a defendant's disposition to engage in domestic violence or acts of abuse against an elder or dependent person or a child when charged with an offense involving domestic violence or abuse of an elder or dependent person or a child. Evid C §1109(a); *People v Dallas* (2008) 165 CA4th 940, 957, 81 CR3d 521 (child abuse); *People v Johnson* (2008) 164 CA4th 731, 79 CR3d 568 (domestic violence); *People v Williams* (2008) 159 CA4th 141, 147, 70 CR3d 845 (elder abuse); *People v Rucker* (2005) 126 CA4th 1107, 25 CR3d 62 (domestic violence); CALCRIM 852.

NOTE: Admissibility of evidence of uncharged misconduct under Evid C §§1108 and 1109 is subject to Evid C §352. See *People v Falsetta* (1999) 21 C4th 903, 917, 89 CR2d 847 (relying on trial court's discretion to exclude unduly prejudicial evidence under §352 to uphold constitutionality of §1108). See also *People v Crabtree* (2009) 169 CA4th 1293, 1314, 88 CR3d 41; *People v Morton* (2008) 159 CA4th 239, 246, 70 CR3d 827; *People v Cabrera* (2007) 152 CA4th 695, 704, 61 CR3d 373. For further discussion, see §16.18.

- To rebut character evidence introduced as mitigation by a defense witness in the penalty phase of a capital trial. *People v Fierro* (1991) 1 C4th 173, 239, 3 CR2d 426.

- To attack credibility by showing prior convictions involving moral turpitude. Evid C §788 (felony convictions); Cal Const art I, §28(f)(2), (4); Evid C §452.5; *Piscitelli v Salesian Soc'y* (2008) 166 CA4th 1, 12 n17, 82 CR3d 139 (child molestation as crime of moral turpitude and relevant to credibility); *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418 (misdemeanors).

NOTE: Evidence Code §452.5(b) provides that certified records of criminal convictions are admissible "to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record." Consequently, whenever evidence of the defendant's commission of a criminal offense is otherwise admissible, the certified record of the conviction is admissible under Evid C §1280 (official records exception to hearsay rule) to prove it, whether the conviction is for a felony or a misdemeanor. See *People v Duran* (2002) 97 CA4th 1448, 119 CR2d 272. On

the types of evidence that may be used to show a conviction, see, *e.g.*, *People v Miles* (2008) 43 C4th 1074, 1082, 77 CR3d 270; *People v Delgado* (2008) 43 C4th 1059, 1070, 77 CR3d 259. For discussion of impeachment with prior convictions, see chaps 26-27.

Source: Evidence/Effective Introduction of Evidence in California/16 Character: Specific Acts Evidence/§16.3 b. To Object

§16.3 b. To Object

Defense counsel in criminal cases may object to evidence of specific acts on any of the following grounds:

- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352);
- Hearsay (Evid C §1200);
- Irrelevant (Evid C §350);
- Improper form of character evidence: Specific acts of conduct cannot be used under, *e.g.,* Evid C §1102, for this purpose (see *People v Fritz* (2007) 153 CA4th 949, 957, 62 CR3d 885 (attempt to introduce postarrest lie about prior shoplifting as consciousness of guilt evidence was improper "end-run" around court's Evid C §1101 ruling));
- No (improper) notice under Evid C §782;
- Witness lacks personal knowledge of the conduct (Evid C §702); and
- Witness lacks credibility, *e.g.,* by showing witness has prior felony convictions (Evid C §788) or has engaged in prior misdemeanor conduct involving moral turpitude (see *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418).

On improper character rebuttal during cross-examination, see *People v Loker* (2008) 44 C4th 691, 709, 80 CR3d 630.

Source: Evidence/Effective Introduction of Evidence in California/16 Character: Specific Acts Evidence/ 2. Using Specific Acts Against Prosecution Witness or on Defendant's Behalf/§16.4 a. To Admit

2. Using Specific Acts Against Prosecution Witness or on Defendant's Behalf

§16.4 a. To Admit

In criminal cases, defense counsel may introduce evidence of specific acts in the following situations:

- When relevant to prove some fact concerning the victim or other prosecution witness other than conduct on a certain occasion, *e.g.,* motive, knowledge, intent, absence of mistake or accident, or identity. Evid C §1101(b). See applicable discussion in §16.17.

- To prove relevant violent conduct of the defendant in conformity with character or character trait, but only after a showing is made that the victim had character trait for violence or a trait tending to show that violence had been adduced by the defendant. Evid C §1103(b).

- To prove relevant conduct of the victim in conformity with character or a character trait. Evid C §1103(a)(1). Opinion and reputation evidence can also be offered. Evid C §1103(a).

- To prove a victim's sexual conduct in criminal cases charging violation of Pen C §261, §264.1, §286, §288a, or §289 (including assault with intent to commit, attempt to commit, or conspiracy to commit these crimes, but excluding these crimes when they occurred in a local detention facility as defined by Pen C §6031.4 or in a state prison as defined by Pen C §4504), defense counsel may offer (Evid C §1103(c)):

- Evidence of character or character trait is not admissible to prove the victim's consent. Evid C §1103(c)(1).

- Evidence of the manner in which the victim was dressed is not admissible on the issue of consent unless the proponent first makes an offer of proof outside the hearing of the jury and the court states on the record why that evidence is relevant and admissible in the interests of justice. Evid C §1103(c)(2) ("manner of dress" does not include the condition of victim's clothing before, during, or after commission of the offense).

- Evidence of sexual conduct between the victim and defendant is admissible. Evid C §1103(c)(3).

- Evidence of otherwise inadmissible sexual conduct, if a prosecution witness gives testimony or evidence relating to such conduct; the evidence is limited to rebuttal of the prosecution evidence. Evid C §1103(c)(4).

NOTE: Before introducing character evidence (*i.e.,* opinion or reputation testimony or evidence of sexual acts of the victim) to attack the victim's credibility in any of the criminal cases set out in Evid C §1103(c), the proponent must make a written motion, accompanied by an offer of proof in an affidavit. Evid C §782. A hearing will be held outside of the presence of the jury to avoid unnecessarily embarrassing the victim. *People v Bautista* (2008) 163 CA4th 762, 781, 77 CR3d 824. Similar restrictions also apply in civil cases alleging sexual harassment or other wrongful sexual conduct. Evid C §§783, 1106.

- To attack or support credibility of a witness or hearsay declarant. Evid C §§780, 782. See Evid C §§1101(c), 1103(c)(5). Opinion and reputation evidence can also be offered. Evid C §780.

However, it is improper to ask vague and speculative questions on cross-examination of a noncomplaining witness in a sex crime case who may have been a victim of unwanted sexual attention or advances to suggest his or her testimony should be distrusted. See *People v Foss* (2007) 155 CA4th 113, 128, 65 CR3d 790. Also, a criminal defendant's due process or confrontation rights are not jeopardized if he or she is prevented from examining a sex crime victim on a subsidiary or minor matter that could involve prior sexual conduct. *People v Bautista* (2008) 163 CA4th 762, 783, 77 CR3d 824.

§16.5 b. To Object

The prosecution may object to evidence of specific acts on all of the same grounds as defense counsel (see §16.3).

NOTE: Only felony convictions are admissible for attacking credibility. If a misdemeanor case involves a crime of moral turpitude, the underlying facts may be admissible, but not the conviction itself. See §27.14.

B. Civil Cases

§16.6 1. To Admit

In civil cases, the proponent may introduce evidence of a person's specific acts in the following situations:

- When relevant to prove some fact *other* than the person's disposition to commit such acts. Evid C §1101(b). See, *e.g.*, *Hughes v Hughes* (2004) 122 CA4th 931, 19 CR3d 247 (in defamation case, evidence of specific examples of plaintiff's past conduct admissible to show that allegedly defamatory statements were true). Other examples are given in §16.4 under the discussion of Evid C §1101 in criminal cases.

NOTE: Admissibility of misconduct evidence under Evid C §1101 is subject to a prejudice analysis under Evid C §352; if an emotional response unrelated to the issue to be proved is likely, prejudice is likely. *People v Whisenhunt* (2008) 44 C4th 174, 204, 79 CR3d 125 (evidence of prior child abuse); *People v Garelick* (2008) 161 CA4th 1107, 1113 n5, 74 CR3d 815 (13 of 131 proffered pornographic images excluded as more prejudicial than probative); *People v Leon* (2008) 161 CA4th 149, 168, 73 CR3d 786 (juvenile offense should have been excluded); *People v Fritz* (2007) 153 CA4th 949, 958, 62 CR3d 885 (postarrest lie about prior shoplifting unduly prejudicial); *Austin B. v Escondido Union Sch. Dist.* (2007) 149 CA4th 860, 885, 57 CR3d 454.

- To attack or support the credibility of a witness or hearsay declarant. Evid C §§780, 783. See Evid C §1101(c).

CAUTION: Evidence Code §§786-787 generally preclude the use in civil cases of specific instances of conduct to prove a witness's character for honesty or veracity. But see Evid C §788 (evidence of felony conviction admissible). See §16.20.

- In civil cases alleging sexual harassment, assault, or battery, evidence of specific instances of the plaintiff's sexual conduct is admissible to rebut evidence offered by the plaintiff about the plaintiff's sexual conduct. Evid C §1106(c). Evidence of specific instances of the plaintiff's sexual conduct *with the defendant* is also admissible on the issue of consent. Evid C §1106(b). See *Rieger v Arnold* (2002) 104 CA4th 451, 462, 128 CR2d 295 ("sexual conduct" as used in Evid C §1106 includes "racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits").

NOTE: Before offering evidence of sexual conduct to attack the plaintiff's credibility, the proponent must file a written motion accompanied by an offer of proof in the form of an affidavit of relevancy concerning all proposed testimony. Evid C §783.

- To prove character when character itself is in issue. Evid C §1100. (Reputation and opinion evidence can also be offered. Evid C §1100.)

- To attack credibility by showing bias or improper motive, despite the strictures under Evid C §787. Evid C §§780(f), 788; *Piscitelli v Salesian Soc'y* (2008) 166 CA4th 1, 9, 82 CR3d 139 (child molestation conviction admissible to show priest's bias and motive to lie in tort action involving alleged sexual abuse by another priest).

- To attack credibility by showing prior felony convictions. Evid C §788; see chap 26.

Source: Evidence/Effective Introduction of Evidence in California/16 Character: Specific Acts Evidence/§16.7 2. To Object

§16.7 2. To Object

Opposing counsel may object to evidence of specific acts on the following grounds:

- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352);

NOTE: In evaluating an Evid C §352 claim against the introduction of a prior conviction under Evid C §788 (for impeachment purposes), the court may consider the remoteness in time of the conviction, whether the conviction shows a propensity for the witness to lie, or whether it involves a crime of moral turpitude. *Piscitelli v Salesian Soc'y* (2008) 166 CA4th 1, 11, 82 CR3d 139 (child molestation conviction admissible against priest witness in tort action alleging sexual abuse).

- Hearsay (Evid C §1200);
- Irrelevant (Evid C §350);
- Improper form of character evidence: Specific acts of conduct cannot be used for [*state purpose*] under, *e.g.,* Evid C §787;
- Witness lacks personal knowledge of the conduct (Evid C §702);
- Evidence of good character cannot be introduced until evidence of bad character has been admitted (Evid C §790); and
- No (improper) notice under Evid C §783.

III. SAMPLE QUESTIONS

A. Evidence of Specific Acts Concerning Witness's Honesty or Veracity

§16.8 1. Information to Elicit

In the cross-examination segment in §16.9, counsel wants to introduce evidence of specific acts that bear on the honesty and veracity of the witness. Counsel's purpose is to:

- Set up a situation to which character evidence will relate; and
- Ask questions concerning a specific act that relates to honesty.

§16.9 2. Questions to Ask

Q: Did you attend Edison High School?

Q: What years were you there?

Q: Is it true that you were kicked out of Edison High School twice for cheating?

PRACTICE TIP: If witness denies cheating, you can have a competent witness such as a high school administrator who took part in suspending the witness testify during the presentation of your case or in rebuttal. Your opponent, however, may object under Evid C §352 that this claim will confuse jurors and create a trial within a trial because of the need to call other witnesses.

Q: Where were you employed last year in February?

Q: Is it true that your employer fired you at the end of February for lying to him when you claimed to be sick?

B. Testimony About Victim's Character Trait of Aggressiveness

§16.10 1. Information to Elicit

To prove the victim's character trait of aggressiveness, defense counsel in the direct examination segment in §16.11 wants the witness to testify to the following matters:

- Witness knows victim and identifies him;
- Witness tells length of time he has known victim (to build up witness's credibility); and
- Witness discusses specific instances of conduct, detailing where and when.

§16.11 2. Questions to Ask

Q: Mr. Witness, do you know Mr. Victim?

Q: Is he in the courtroom today?

Q: Where is he?

Proponent: Your Honor, may the record reflect that the witness has identified Mr. Victim?

Q: How long have you known Mr. Victim?

Q: How are you acquainted with Mr. Victim?

Q: Have you ever seen Mr. Victim in a bar?

Q: How many times?

Q: When was that?

Q: Did you ever see Mr. Victim engage in an argument in a bar?

Q: How many arguments have you seen him engaged in?

Q: When and where did the first one occur?

Q: What happened?

Opponent: Objection, calls for a narrative answer.

Q: I'll rephrase that question. With whom was Mr. Victim arguing?

Q: Were you present at the beginning of the argument?

Q: How did it start?

Q: What did Mr. Victim say?

Opponent: Objection, hearsay.

Proponent: It's not offered for the truth, but only to show how the victim instigated the argument.

Court: Objection overruled. You may answer the question.

Q: What did he do?

Q: What did the other person say?

Q: Did you actually see Mr. Victim hit the other person?

Q: Did the other person ever hit Mr. Victim?

C. Proving Bad Character of Mother in Family Law Case in Which Custody Is in Issue

§16.12 1. Information to Elicit

In the direct examination segment in §16.13, counsel for the father wants the witness to testify to the following matters:

- Witness knows mother and identifies her;
- Witness tells length of time she has known mother (to build up witness's credibility); and
- Witness discusses specific instances of conduct, detailing where and when.

§16.13 2. Questions to Ask

Q: Are you acquainted with Mrs. Mother?

Q: Do you see her in the courtroom?

Proponent: Your Honor, may the record reflect that the witness has identified Mrs. Mother?

Q: How long have you known her?

Q: Where did you meet her?

Q: Do you still live next door to each other?

Q: Have you even seen Mrs. Mother drink alcoholic beverages?

PRACTICE TIP: When custody is disputed in family law cases, the parent's good or bad character is considered. See 1 Witkin, California Evidence, *Circumstantial Evidence* §45 (4th ed 2000).

Q: How did you know she was drinking alcoholic beverages?

Q: How often did you see her drinking?

Q: Did you ever see her drunk?

Opponent: Objection, speculation, improper opinion, irrelevant, and improper character evidence.

Proponent: Your Honor, a lay witness can testify to drunkenness. *People v Garcia* (1972) 27 CA3d 639, 104 CR 69, is authority for that proposition. So this is not speculation. And it is proper evidence of Mrs. Mother's alcoholism as it relates to her ability as a mother based on Evidence Code §1100 and *Feist v Feist* (1965) 236 CA2d 433 at page 435.

Court: I'll overrule the objections. This evidence is relevant to the ultimate issue of Mrs. Mother's ability to provide a good home for Child.

Q: Did you ever see Mrs. Mother drunk?

Q: How did she behave so that you concluded she was drunk?

Q: How close to Mrs. Mother were you when you made these observations?

Q: Where was Mrs. Mother's child at this time?

Q: Was there any interaction between Mrs. Mother and Child?

Opponent: Objection. Your Honor, this is completely irrelevant to whether or not Mrs. Mother drinks.

Court: No, I think this line of questioning is very relevant to the issue of custody. And it relates to the effect drinking has on Mrs. Mother's parenting ability.

Q: What happened between Mrs. Mother and Child?

D. Defendant's Prior Sexual Conduct With Plaintiff—Offered to Attack Plaintiff's Credibility in Sexual Harassment Case

§16.14 1. Information to Elicit

The plaintiff has denied ever dating, traveling with, or having a sexual relationship with the defendant. Defense counsel wants her client to testify to the following matters in the direct examination segment in §16.15.

- Specific instances of prior sexual conduct, detailing where and when (counsel has already complied with Evid C §783; see Practice Tip in §16.15); and
- Supporting physical evidence when possible.

§16.15 2. Questions to Ask

Q: Mr. Defendant, how long have you known Ms. Plaintiff?

Q: Where did you meet her?

Q: Did you ever date Ms. Plaintiff?

Q: Did you ever have a sexual relationship with Ms. Plaintiff?

Q: When did that relationship begin?

Q: How long did that relationship last?

Q: How did the relationship end?

Q: Did you initiate the breakup with Ms. Plaintiff or did she?

Q: During your relationship with Ms. Plaintiff, did you two ever travel together?

Q: Where did you go?

Q: How long were both of you in Hawaii?

Q: Where did you stay while you were there?

Q: Did you share a hotel room?

Proponent: Your Honor, I have a photograph which I would like marked as Defendant's Exhibit C for identification. May I approach the witness? Mr. Defendant, I am showing you the photograph that has been marked Defendant's Exhibit C for identification. Do you recognize this photograph?

Q: What does this photograph show?

A: This is a picture of Ms. Plaintiff and me taken in front of our hotel in Hawaii in October 1998.

PRACTICE TIP: Evidence Code §1106 allows evidence of the plaintiff's prior sexual conduct with the defendant to prove consent or lack of injury. In using the plaintiff's prior sexual conduct to attack credibility, as in this example, counsel must comply with Evid C §783, which provides for a written motion and a hearing outside the jury's presence.

IV. COMMENT

§16.16 A. When to Use Specific Acts Character Evidence

The following steps should help you analyze whether and how to use specific acts character evidence:

- Decide why you are using the evidence: To prove conduct? To prove knowledge, intent, motive, identity, or absence of mistake or accident? To prove character when character itself is in issue? To attack or support a witness's credibility?
- Determine which statutes and case law support or arguably support its admission. (You may want to prepare a short memorandum of points and authorities for the judge and opposing counsel.)

PRACTICE TIP: Most judges appreciate a well-drafted memorandum on this type of issue because of the complexity of the area.

- Decide whether the evidence can be used substantively or only to attack credibility.
- Consider whether your evidence may open the door to negative testimony about your client or one of your witnesses.
- Determine whether the witness for or against whom you wish to use character evidence must testify in order for the evidence to be admissible.
- If you cannot bring this evidence in during your case-in-chief, watch for an opening on cross-examination or during rebuttal. Another possible avenue is as the basis for an expert's opinion.
- If you are going to try to bring out the evidence through cross-examination, be prepared to prove the charge if the witness denies it. Proving the charge may also be required. See *People v Conover* (1966) 243 CA2d 38, 52, 52 CR 172, citing *People v Perez* (1962) 58 C2d 229, 23 CR 569, overruled on other grounds in *People v Poggi* (1988) 45 C3d 306, 335, 246 CR 886 (both cases deal with impeachment with prior felony convictions; their logic may apply to other specific acts evidence).
- If presenting a character witness, use one who can testify from first-hand knowledge of the specific instance of conduct. Proof of conviction or of a civil judgment is unacceptable for this purpose. (See chaps 26-27 on using prior felony convictions.)
- When specific acts character evidence is to be used *against* your client, consider requesting a limiting instruction. For example, civil practitioners might draft an instruction modeled on CALCRIM 351.

Source: Evidence/Effective Introduction of Evidence in California/16 Character: Specific Acts Evidence/ B. Criminal Cases/§16.17 1. To Prove Facts Other Than Disposition

B. Criminal Cases

§16.17 1. To Prove Facts Other Than Disposition

Specific acts of misconduct ordinarily may not be used to prove that the defendant was predisposed to commit the act with which he or she is charged. Evid C §1101(a). Evidence of uncharged misconduct may, however, be used when it is relevant evidence of "some fact" other than the defendant's disposition to commit the act charged. Evid C §1101(b). Examples of nondisposition facts are motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, and that a defendant being prosecuted for an unlawful sex act did not believe that the victim consented. Evid C §1101(b); *People v Lindberg* (2008) 45 C4th 1, 22, 82 CR3d 323.

A number of terms are used for such evidence, such as "uncharged misconduct," "similars," "other crimes," or "bad acts." Uncharged misconduct may be a crime, a civil wrong, or "other act." Evid C §1101(b). It is not necessary for the defendant or defense witness to have testified, or to have raised these issues, when they are part of the prosecution's burden, for these similar acts to be admitted. See *People v Archerd* (1970) 3 C3d 615, 639, 91 CR 397; *People v Poulin* (1972) 27 CA3d 54, 65, 103 CR 623.

Admissibility. Although uncharged misconduct may be used to show any material fact *other than* disposition, it is most frequently used to show intent, common design or plan, or identity. On the admissibility of other crimes evidence to show intent, knowledge, common design or plan, and identity, see, *e.g.*:

- *People v Lindberg* (2008) 45 C4th 1, 23, 82 CR3d 323 (prior, similar uncharged robberies properly admitted to show defendant's intent to rob murder victim);
- *People v Hovarter* (2008) 44 C4th 983, 1002, 81 CR3d 299 (evidence of kidnapping, rape, and attempted murder of teenager occurring after murder for which defendant was charged was properly admitted to show identity);
- *People v Whisenhunt* (2008) 44 C4th 174, 79 CR3d 125 (uncharged acts of defendant's prior child abuse were probative on defendant's intent and his absence of mistake in child murder-torture case);
- *People v Roldan* (2005) 35 C4th 646, 704, 27 CR3d 360, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209 (evidence of defendant's guilt in prior robbery admissible as evidence of defendant's participation in later, similar robbery);
- *People v Harrison* (2005) 35 C4th 208, 229, 25 CR3d 224 (evidence of defendant's attempt to kill witness to whom defendant had admitted two murders probative of consciousness of guilt);
- *People v Hughes* (2002) 27 C4th 287, 116 CR2d 401 (evidence that bag with distinctive logo containing credit cards stolen by defendant was found in defendant's apartment was admissible in murder case in which victim's credit cards were found in similar bag);
- *People v Catlin* (2001) 26 C4th 81, 109 CR2d 31 (evidence that defendant, charged with poisoning his mother, had used similar poison to murder ex-wife admissible to show common design or plan because charged and uncharged crimes bore number of highly distinctive common marks);
- *People v Ewoldt* (1994) 7 C4th 380, 27 CR2d 646 (evidence that defendant charged with sexually molesting step-daughter had molested victim's older sister inadmissible to show intent but admissible to show common design or plan) (decided before enactment of Evid C §§1108, 1109);
- *People v Daniels* (2009) 176 CA4th 304, 97 CR3d 659 (evidence of prior rape admitted to prove defendant's intent to commit rape);
- *People v Williams* (2009) 170 CA4th 587, 607, 88 CR3d 401 (evidence of three prior incidents involving drugs, firearms, and cash relevant to defendant's knowledge);
- *People v Garelick* (2008) 161 CA4th 1107, 1116, 74 CR3d 815 (118 pornographic photographs found on computer (as uncharged acts) offered in child sex case to prove knowledge of their existence and lack of inadvertence; not necessary to prove intent to violate law first);

- *People v Walker* (2006) 139 CA4th 782, 43 CR3d 257 (evidence of defendant's prior attacks on prostitutes admissible on issue of defendant's motive and intent during trial for murder of different prostitute);

- *People v Butler* (2005) 127 CA4th 49, 60, 25 CR3d 154 (evidence of defendant's fight with murder victim two days before murder admissible to show motive for shooting); and

- *People v Hawkins* (2002) 98 CA4th 1428, 121 CR2d 627 (evidence that defendant, charged with illicitly using employer's computer source code to create competing product, was in unauthorized possession of proprietary computer source code on another occasion was admissible to show common design or plan).

Inadmissibility. On the inadmissibility of other crimes evidence to show intent, common design or plan, and identity, see, *e.g.*:

- *People v Barnwell* (2007) 41 C4th 1038, 63 CR3d 82 (possession of unique gun a year before crime and similar to one used in crime was inadmissible "propensity" evidence);

- *People v Leon* (2008) 161 CA4th 149, 169, 73 CR3d 786 (evidence of juvenile robbery offense cumulative, unnecessary, and prejudicial and should have been excluded); and

- *People v Fritz* (2007) 153 CA4th 949, 957, 62 CR3d 885 (prosecution could not offer false denial to police of prior unrelated petty thefts as consciousness of guilt when defendant did not testify or put his credibility at issue).

Need for similarity between uncharged and charged conduct. While there must be some similarity between the uncharged and charged conduct to find it admissible under Evid C §1101(b), the degree of similarity required decreases based on whether the prosecution is trying to prove identity, common scheme or plan, or intent. A higher degree of similarity is required for admissibility to prove identity. Common features must be distinctive, amounting to a signature. Less similarity is required to establish a common scheme or plan; the plan must be clear but not necessarily distinctive or unusual. The least amount of similarity is required to show intent, in which there must be enough similarity between the charged and uncharged conduct to infer that the defendant acted with the same intent. *People v Lindberg* (2008) 45 C4th 1, 23, 82 CR3d 323; *People v Hovarter* (2008) 44 C4th 983, 1002, 81 CR3d 299. See *Alcala v Superior Court* (2008) 43 C4th 1205, 1222, 78 CR3d 272 (dicta evaluating severance and joinder issues under Pen C §954). See also *People v New* (2008) 163 CA4th 442, 469, 77 CR3d 503 (severance case).

Balancing required under Evid C §352. Admissibility of Evid C §1101(b) evidence is subject to a balancing test under Evid C §352. See, *e.g., People v Daniels* (2009) 176 CA4th 304, 316, 97 CR3d 659. A court should consider the following factors to determine if admission of an uncharged offense would be more prejudicial than probative:

- If a strong inference is established by the evidence (*People v Sullivan* (2007) 151 CA4th 524, 559, 59 CR3d 876);

- If the source of the evidence about the charged offense is unrelated to the source of information about the uncharged offense (*Sullivan,* 151 CA4th at 559 (different sources about facts involving robberies); see *People v Morton* (2008) 159 CA4th 239, 247, 70 CR3d 827 (no evidence that two domestic violence victims ever had relationship));

- If defendant was punished for the prior uncharged act (*Sullivan,* 151 CA4th at 559);

- If the uncharged offense is more "inflammatory" than the present, charged offense (see *Morton,* 159 CA4th at 247 (court properly limited facts of prior uncharged act of domestic violence to make it less inflammatory than charged act of domestic violence; construing probative value under Evid C §1109)); and

- If the uncharged offense occurred near in time to the charged offense (*Sullivan,* 151 CA4th at 559 (events within 10-week time period); but see *People v Whisenhunt* (2008) 44 C4th 174, 79 CR3d 125 (probative value of prior uncharged child abuse incident in charged child torture-murder case not lessened because it occurred 7-10 years earlier)).

NOTE: Other misconduct evidence is also admissible under Evid C §1101(b) in civil cases. See §16.20.

Source: Evidence/Effective Introduction of Evidence in California/16 Character: Specific Acts Evidence/§16.18 2. To Prove Defendant's Disposition to Commit Charged Offense

§16.18 2. To Prove Defendant's Disposition to Commit Charged Offense

Evidence Code §§1108-1109 permit the prosecution to use uncharged misconduct to prove the defendant's disposition to commit the charged offense or offenses under specified circumstances.

Uncharged sexual offenses. Under Evid C §1108, evidence that the defendant committed an uncharged sexual offense is admissible in a prosecution for a sexual offense to prove that the defendant committed the charged offense. The other offense may have occurred before or after the charged offense. See *People v Medina* (2003) 114 CA4th 897, 8 CR3d 158. Note, however, that Evid C §1108 "does not purport to make irrelevant evidence relevant." *People v Earle* (2009) 172 CA4th 372, 396, 91 CR3d 261 (defendant's commission of indecent exposure was simply irrelevant to charge of sexual assault and therefore inadmissible under Evid C §1108).

NOTE: If evidence of past sexual misconduct is admitted under Evid C §1108, it is error for the court to exclude evidence that defendant was acquitted of the past act of sexual misconduct. See *People v Mullens* (2004) 119 CA4th 648, 652, 14 CR3d 534. Also, Evid C §1108 does not violate the ex post facto clause of US Const art I, §10, cl 1, which bars criminalization of previous uncharged acts, for federal habeas corpus review of a state conviction. *Schroeder v Tilton* (2007) 493 F3d 1083, 1088.

Uncharged domestic violence, elder abuse, or child abuse. Similarly, under Evid C §1109, evidence of uncharged domestic violence is admissible without limitation in a prosecution for an offense involving domestic violence (Evid C §1109(a)(1)); evidence of uncharged acts of abuse of an elder or dependent person is admissible in a prosecution for abuse of an elder or dependent person (Evid C §1109(a)(2)); and evidence of uncharged acts of child abuse is admissible in a prosecution for child abuse (Evid C §1109(a)(3)). Acts admissible under Evid C §1109 that occurred more than 10 years before the charged offense are inadmissible unless the court finds that admission of the evidence is in the interest of justice. Evid C §1109(e). There is no similar limitation on the use of uncharged sex acts made admissible by Evid C §1108.

Balancing required under Evid C §352. Under both Evid C §§1108 and 1109, however, the other crimes evidence is subject to the weighing process of Evid C §352, and must be excluded if its probative value is substantially outweighed by its potential for undue prejudice, or if proof of the uncharged offense would be too time-consuming or would confuse the jury. *People v Leon* (2008) 161 CA4th 149, 168, 73 CR3d 786. See *People v Falsetta* (1999) 21 C4th 903, 917, 89 CR2d 847 (relying on trial court's discretion to exclude unduly prejudicial evidence under §352 to uphold constitutionality of §1108); *People v Pierce* (2002) 104 CA4th 893, 900, 128 CR2d 397 (affirming admission of evidence concerning 23-year-old rape conviction when trial court reviewed factors pertinent to exercising discretion under §352).

For an extensive analysis of the probative value of an uncharged, unproven prior domestic violence offense under Evid C §352 and *People v Ewoldt* (1994) 7 C4th 380, 404, 27 CR2d 646 (which was decided before enactment of Evid C §1109), see *People v Morton* (2008) 159 CA4th 239, 245, 70 CR3d 827.

PRACTICE TIP: Because proving the uncharged offenses can be as time-consuming as proving the charged offense, some defense attorneys have successfully opposed the admission of Evid C §§1108-1109 evidence on the ground that it consumed too much time.

§16.19 3. To Attack or Support Credibility

Under Evid C §§786-787 and 790, character evidence is inadmissible in a civil case to attack or support the credibility of a witness. See Evid C §§786 (character traits), 787 (specific instances of conduct), and 790 (good character, unless used to counter evidence of bad character). These provisions do not apply in criminal cases. *People v Harris* (1989) 47 C3d 1047, 1081, 255 CR 352 ("truth-in-evidence" provisions of Proposition 8 (now Cal Const art I, §28(f)(2)) effectively repealed §§786-787 and 790 in criminal cases).

Consequently, character evidence of all types, including evidence of specific acts or conduct, is admissible to attack or support the credibility of a witness in criminal case. *People v Lankford* (1989) 210 CA3d 227, 240, 258 CR 322. See also *People v Houston* (2005) 130 CA4th 279, 29 CR3d 818 (in trial of defendant charged with murdering his wife, evidence of defendant's extramarital affairs was relevant to defendant's credibility). The trial court retains wide latitude, however, to impose reasonable limits on cross-examination on the basis of concerns such as harassment, prejudice, confusion of issues, the witness's safety, repetition, or undue consumption of time on marginally relevant matters. Evid C §352. *People v Cooper* (1991) 53 C3d 771, 816, 281 CR 90; *People v Jennings* (1991) 53 C3d 334, 372, 279 CR 780. See *People v Stern* (2003) 111 CA4th 283, 296, 3 CR3d 479, for a thorough discussion of these rules and the trial court's discretion under Evid C §352. For further discussion, see §15.17. For rule in civil cases, see §16.20.

§16.20 C. Civil Cases

In civil cases, Evid C §§786-787 preclude attorneys from using specific instances of conduct to prove a witness's character for honesty or veracity, with the exception of prior felony convictions under Evid C §788. However, the proponent may be able to elicit evidence of specific instances of conduct under one of the subsections of Evid C §780 concerning credibility, *e.g.,* bias, interest, common plan or design, or other motive (Evid C §780(f)). For further discussion of credibility, see chap 19.

Furthermore, Evid C §1101 (see §16.17) is applicable in civil cases. *Holdgrafer v Unocal Corp*. (2008) 160 CA4th 907, 928 n10, 73 CR3d 216 (dissimilar acts inadmissible to support punitive damage claim). See also *Bowen v Ryan* (2008) 163 CA4th 916, 924, 78 CR3d 128 (prior alleged incidents of patient mistreatment not admissible in tort action because there were no similarities between conduct at issue and prior acts). Thus, as in criminal cases, counsel in civil cases may introduce evidence of specific acts when relevant to prove some fact concerning the witness other than conduct on a certain occasion, *e.g.,* intent, knowledge, absence of mistake, or accident. Evid C §1101(b). See applicable discussion in §16.17.

§16.21 D. Sexual Conduct Cases

Under Evid C §1103(c), a criminal defendant charged with a sex offense may not use evidence of the complaining witness's sexual conduct or manner of dress to show consent. Evidence Code §1106 imposes similar limits on the use a defendant can make of evidence of the plaintiff's sexual conduct in a civil case alleging sexual harassment or other sex-related misconduct. Such evidence is, however, admissible to support or attack the credibility of the complaining witness or plaintiff. Evid C §§1103(c)(6), 1106(d). Similar evidence may also be admissible as nonsexual conduct, *e.g.,* previous false rape complaints by the victim. See *People v Burrell-Hart* (1987) 192 CA3d 593, 237 CR 654.

The proponent of evidence of a victim's sexual conduct under Evid C §1103(c) or §1106(c) must file a written motion accompanied by an offer of proof in the form of an affidavit. Evid C §§782 (criminal), 783 (civil). See §16.4. On reputation evidence, see chap 15.

NOTE: It has been held that Evid C §1103 applies to the reasonable, good faith belief in consent defense (see *People v Mayberry* (1975) 15 C3d 143, 125 CR 745) as well as to the defense of actual consent. *People v Guthreau* (1980) 102 CA3d 436, 444, 162 CR 376.

V. CHECKLISTS

§16.22 A. Checklist: Witnesses to Subpoena

- None needed if you elicit the information on cross-examination, unless the witness denies the charge.
- Witness who can testify to first-hand knowledge of act.
- Witnesses to authenticate any documents to be admitted.

§16.23 B. Checklist: Alternative Methods of Admissibility

- Absence of similar accidents. See chap 8.
- Felony conviction. Evid C §788; see chaps 26-27.
- Habit or custom evidence. Evid C §1105; see chap 29.
- Opinion character evidence. See chap 14.
- Prior or subsequent accidents. See chap 9.
- Reputation character evidence. See chap 15.
- Statements and reputation concerning family history. See chap 25.
- Subsequent repairs or other remedial conduct. See chap 52.

Source: Evidence/Effective Introduction of Evidence in California/16 Character: Specific Acts Evidence/ VI. SOURCES/ §16.24 A. Evidence Code

VI. SOURCES

§16.24 A. Evidence Code

Evid C §783. In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780, the following procedures shall be followed:

(a) A written motion shall be made by the defendant to the court and the plaintiff's attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant.

(d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

Evid C §786. Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness.

Evid C §787. Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

Evid C §1106. (a) In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.

(b) Subdivision (a) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator.

(c) If the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff.

(d) Nothing in the section shall be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783.

See the following Evidence Code provisions, which are reproduced elsewhere in the book: Evid C §§780 in §19.29; 782, 790 in §14.18; 785 in §5.15; 786, 1100-1104 in §15.24; 788 in §27.22; and 352 in §7.8.

NOTE: See §15.17 on the exclusion of Evid C §§786-790 from use in criminal proceedings.

§16.25 B. Other

For further discussion of character evidence, see Jefferson's California Evidence Benchbook, chap 29 (4th ed CJA-CEB 2009) (attacking and supporting credibility), Jefferson's Evidence Benchbook, chap 35 (evidence of character, habit, and custom); 1 Witkin, California Evidence, *Circumstantial Evidence* §§38-66 (4th ed 2000); 3 Witkin, California Evidence, *Presentation at Trial* §§280-291 (4th ed 2000); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, chaps 5-6 (3d ed 2000); Cotchett, California Courtroom Evidence, chap 19 (2008).

17

Commercial Lists and the Like

Donald D. Howard

§17.1 I. SCOPE OF CHAPTER

This chapter discusses the admissibility of published tabulations, lists, directories, registers, and other compilations relied on by businesses as accurate, as an exception to the hearsay rule. Evid C §1340.

II. REQUIREMENTS

§17.2 A. To Admit

To admit commercial lists and the like, the proponent must show that:

- The evidence is part of a published tabulation, list, directory, register, or other compilation (Evid C §1340); and
- The document of which the evidence is a part is generally used and relied on as accurate in the course of business as defined in Evid C §1270 (Evid C §1340).

§17.3 B. To Object

Opposing counsel may object to the admission of commercial lists and the like on any of the following grounds:

- Hearsay (Evid C §1200);
- Opinion (Evid C §§800-801, 1340); or
- No foundation that the listing or portion of the listing to be introduced is used and relied on as accurate in the course of business (Evid C §1340).

III. SAMPLE QUESTIONS ON DIRECT EXAMINATION

A. Introducing Price Lists of Several Manufacturers in a Particular Industry

§17.4 1. Information to Elicit

To introduce manufacturers' price lists in the question segment in §17.5, counsel should take the following steps:

- Have item marked for identification (if not marked earlier);
- Show item to opposing counsel;
- Ask witness to identify and describe item;
- Elicit testimony that item is used and relied on in relevant business;
- Be sure witness specifies when item published;
- Move to have publication, or portion of it, admitted into evidence; and
- Read to jury from publication.

§17.5 2. Questions to Ask

Proponent: Your Honor, I have had the clerk mark several price lists as Plaintiff's Exhibits Nos. 101(a) through 101(k) for identification, and given opposing counsel a copy of each exhibit. I would like to show these documents to the witness and examine him.

Court: Proceed.

Q: What is your name?

Q: What is your occupation?

Q: As a wholesaler of plumbing supplies, what type of information do you receive on the pricing of materials?

Q: How do you use such information?

Q: Do you rely on the accuracy of this information in your business?

Q: Please review the documents marked Plaintiff's Exhibits Nos. 101(a) through 101(k) for identification.

Q: Please describe these documents.

Q: Do you use these price lists in your business?

Q: Do you rely on the accuracy of these prices when placing orders for customers?

Proponent: Your Honor, I ask that Plaintiff's exhibits, marked 101(a) through 101(k) for identification, be admitted into evidence as Plaintiff's exhibits next in order under Evidence Code §1340.

B. Introducing Component Equipment Catalog That Is Standard Throughout an Entire Industry

§17.6 1. Information to Elicit

To introduce a component equipment catalog in the question segment in §17.7, counsel should take the following steps:

- Have item marked for identification (if not marked earlier);
- Show item to opposing counsel;
- Ask witness to identify and describe item;
- Elicit testimony that item is used and relied on in relevant business;
- Be sure witness specifies when item published;
- Move to have publication or portion of it admitted into evidence; and
- Read to jury from publication.

§17.7 2. Questions to Ask

Proponent: Your Honor, I have had the clerk mark an equipment catalog as Plaintiff's Exhibit No. 105 for identification and have given opposing counsel a copy of the exhibit. I would like to have the witness review this document and examine her regarding it.

Court: Go ahead.

Q: Are you the person at your company who is responsible for ordering the products and equipment?

Q. Are you familiar with this equipment catalog, marked Exhibit 105 for identification?

Q: What do you use the catalog for?

Q: What information besides price of the standard items is published in this catalog?

PRACTICE TIP: Documents that give prices may be subject to objection based on relevance if they do not relate to the time period in question. See *Miller v Modern Bus. Ctr.* (1983) 147 CA3d 632, 195 CR 279.

Q: Are all options for each standard item available in the industry set forth in this catalog?

Q: Do you rely on this document as accurate when you use it in your business?

Proponent: Your Honor, I ask that Exhibit 105 be admitted into evidence as Plaintiff's Exhibit No. 105, under Evidence Code §1340.

IV. COMMENT

§17.8 A. Preliminary Fact Hearing

If your opponent challenges admission of the evidence, foundational requirements for hearsay exceptions are determined at an Evid C §405 hearing. Alternatively, you may choose to raise the issue during trial before introducing the evidence to the jury. See chap 4 on preliminary fact hearings.

§17.9 B. Published Compilations for Narrow Markets

When published compilations are used in a small and narrow market, the "generally used" requirement may be difficult to prove. On the other hand, the reliability of the information probably increases because there are few knowledgeable persons, and they probably recognize errors more readily.

§17.10 C. Listings That Rank Items

If a listing purports to rank items by anything other than objective criteria like price and total sales volume, it is objectionable as a statement of opinion. One source of such listings is the Consumers' Digest—Consumer Reports Buying Guide.

§17.11 D. Examples of Acceptable Items

Justice Jefferson lists the following examples of items admissible under this provision: market reports in trade journals and newspapers, telephone directories, price lists, and mortality and annuity tables. Jefferson's California Evidence Benchbook, chap 18 (4th ed CJA-CEB 2009). Other examples include:

- Reports of the prevailing price of goods regularly traded on commodities market (Com C §2724);
- Data from surveys conducted by a media research company, showing of magazine readership by age group (*People ex rel Lockyer v R.J. Reynolds Tobacco Co.* (2004) 116 CA4th 1253, 11 CR3d 317);
- Product label (*In re Michael G.* (1993) 19 CA4th 1674, 24 CR2d 260);
- Actuarial charts, showing present value of decedent's future earnings at various interest rates (*Emery v Southern Cal. Gas Co.* (1946) 72 CA2d 821, 165 P2d 695);
- Mortality tables, showing decedent's life expectancy (*Christiansen v Hollings* (1941) 44 CA2d 332, 339, 112 P2d 723).

V. CHECKLISTS

§17.12 A. Checklist: Witnesses to Subpoena

- Person to describe the evidence and testify that it is generally used and relied on as accurate in the course of business.

§17.13 B. Checklist: Alternative Methods of Admissibility

- Business record (at least for portion of listing dealing with individual business of the witness). Evid C §§1560-1566; see chap 13.
- Dispositive instruments and ancient writings. Evid C §§1330-1331; see chap 21.
- Expert testimony (have expert rely on it). Evid C §§720, 801; see chap 24.
- Judicial notice. Evid C §§450-460; see chap 31.
- Nonhearsay use. See chap 35.
- Official records and writings. Evid C §§1280-1281; see chap 36.
- Refresh recollection. Evid C §771; see chap 44.
- Stipulation. See chap 51.

VI. SOURCES

§17.14 A. Evidence Code

Evid C §1340. Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270.

§17.15 B. Other

For further discussion, see 1 Witkin, California Evidence, *Hearsay* §294 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 18 (4th ed CJA-CEB 2009).

18

Community History, Public Interest in Property, and Boundaries

Donald D. Howard

§18.1 I. SCOPE OF CHAPTER

This chapter discusses the admissibility of community reputation concerning community history, public interest in property, and boundaries or customs affecting land in the community, as well as statements by unavailable declarants concerning boundaries of land, as exceptions to the hearsay rule. Evid C §§1320-1323.

II. REQUIREMENTS

A. To Admit

§18.2 1. Community Reputation

The proponent may introduce hearsay statements concerning community reputation under the following conditions:

- **Historical event.** The statement is about an event that was (Evid C §1320):
- In the general history of a community; or
- In the general history of the state or nation of which the community is a part; and
- Important to the community.
- **Public interest in community property.** The statement is about (Evid C §1321):
- The interest of the public in property in the community; and
- The reputation preexisted the controversy.
- **Boundaries or customs affecting land.** The statement is about (Evid C §1322):
- Boundaries of land in the community; or
- Customs affecting land in the community; and
- The reputation preexisting the controversy.

§18.3 2. Statements

The proponent may introduce a witness's hearsay statement about boundaries of land, if the declarant who made the statement (Evid C §1323):

- Is unavailable;
- Had sufficient knowledge of the subject; and
- The statement was made under circumstances that indicate its trustworthiness.

§18.4 B. To Object

Opposing counsel may object on any of the following grounds:

- Hearsay (Evid C §1200);
- No foundation, *e.g.:*
- Event not important to the community (Evid C §1320),
- Reputation did not preexist controversy (Evid C §1321 or §1322), or
- Declarant is available (Evid C §1323).

III. SAMPLE QUESTIONS

A. Community Reputation Concerning Public Interest in Property

§18.5 1. Information to Elicit

In the direct examination segment in §18.6, the proponent who wants to introduce community reputation concerning the public's interest in property in the community should ensure that the witness:

- Identifies the community and property;
- Identifies the source of community reputation;
- States the community reputation; and
- Shows that this reputation preexisted the controversy.

§18.6 2. Questions to Ask

Q: Mr. Witness, please state your name.

Q: What is your occupation?

A: I am a licensed investigator.

Q: Did you do background research and conduct interviews in Smalltown at my request?

A: Yes.

Q: Please describe for the jury the information I asked you to acquire.

A: You asked me to find out as much as I could about the past uses of a parcel of land called Black Acre near Smalltown.

Q: What sources did you use to study Black Acre?

A: I read several books from the community library, and questioned a number of the older residents who have lived there since birth about what they remember of town history.

PRACTICE TIP: A witness can testify to community reputation through interviews with community "oldtimers." See, *e.g.,* *Jordan v Worthen* (1977) 68 CA3d 310, 316, 137 CR 282.

Q: Please describe Black Acre.

A: It's the five-acre parcel just behind the post office.

Q: Is there a community reputation concerning the use or uses to which Black Acre has been put?

A: Yes.

Q: What is that reputation?

PRACTICE TIP: As asked here, it is preferable to ask the witness first if there is a common reputation in the community for the information you wish. When the witness says "yes," you may then ask what that reputation is.

A: I found nothing in writing about Black Acre, but I talked to seven of the older townspeople who are all over 70 years old. They each said it is known as the local dump site, and has been since they were children. It has continued to be used exclusively as a dump until quite recently, when New Company put a fence around it.

PRACTICE TIP: It is important to distinguish between individual knowledge, which does not qualify as an exception to the hearsay rule, and common knowledge, which does. *Jordan v Worthen* (1977) 68 CA3d 310, 319, 137 CR 282. Opposing counsel might move to strike the witness's last sentence based on this objection.

Q: Are there any other dump sites in Smalltown?

A: No. Black Acre is the only one.

B. Community Reputation Concerning Customs Affecting Land

§18.7 1. Information to Elicit

In the direct examination segment in §18.8, the proponent who wants to introduce community reputation about a public easement, through customary travel across land, should ensure that the witness:

- Identifies the land and the custom;
- Identifies the source of the community reputation;
- States that reputation; and
- Shows that this reputation preexisted the controversy.

§18.8 2. Questions to Ask

Q: How long have you lived in the community of Smalltown?

A: Since I was born there 65 years ago.

Q: Have you become acquainted with the road known as "Black Road"?

A: Yes.

Q: Are you familiar with the reputed use of Black Road?

A: Yes.

Q: What is the reputation concerning the use of Black Road?

A: Ever since I was a child, it was common knowledge that if you were beyond Graham's orchard, you used Black Road to get to town.

Q: Has anyone other than the Smith family been reputed to haul or transport goods over that road?

A: Sure. Any farmer going from the other side of Graham's orchard to town could cut through on that road.

C. Statements Concerning Boundaries of Land

§18.9 1. Information to Elicit

In the direct examination segment in §18.10, the proponent who wants to introduce statements on land boundaries should ensure that the witness:

- Identifies the declarant;
- Establishes the declarant's unavailability;
- Identifies the stated land boundaries;
- Shows that declarant had sufficient knowledge of subject for statement to be trustworthy; and
- Testifies about any other evidence that demonstrates statement's trustworthiness.

§18.10 2. Questions to Ask

Q: When you arrived at the subject property were you able to find the southern boundary line?

A: Yes.

Q: How did you establish the location of the southeast corner since the tree described on the deed was gone?

A: Mr. Jones showed me where it was located.

Q: How were you acquainted with Mr. Jones?

A: The owner of the subject property introduced me to Mr. Jones, who owned the property that bordered on the east side of the subject property.

Q: Is Mr. Jones alive now?

Q: When did Mr. Jones die?

Q: How long had Mr. Jones lived on the east side of the subject property?

PRACTICE TIP: Your opponent might object that no showing has been made that the witness had personal knowledge of how long Mr. Jones lived there. You may rephrase the question, "How long did Mr. Jones tell you he had lived there?" or you might introduce a county record showing the date of purchase.

Q: How did Mr. Jones establish the property boundary?

Q: How long was Mr. Jones a surveyor before he surveyed his property boundaries?

PRACTICE TIP: If Mr. Jones had not been a surveyor or had not done the surveying himself, his statement might not be admissible. The declarant cannot be relying on hearsay. See *Almaden Vineyards Corp. v Arnerich* (1937) 21 CA2d 701, 706, 70 P2d 243.

Q: How many years ago did Mr. Jones establish his southwest corner?

Q: Was the southwest corner the same point as the southeast corner of the subject property according to Mr. Jones?

Q: Did he show you where the tree stood previously?

Q: How soon after the removal of the tree did Mr. Jones place the iron stake?

Q: Were you able to locate the large boulder described on the deed at the southwest corner of the subject property?

Q: From these points could you ascertain whether the structure was across the southern boundary line of the subject property?

IV. COMMENT

§18.11 A. Community Reputation Concerning Community History

Former CCP §1870(11) (now repealed) required that the common reputation precede the controversy, with respect to facts of a general interest more than 30 years old. It is no longer necessary for the community reputation to have preexisted the controversy from which the case arose or for the historical event to be more than 30 years old. "It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy." See Comment to Evid C §1320.

§18.12 B. Community Reputation Concerning Public Interest in Property in the Community

Reputation evidence can be used to prove that property belongs to the public. Evid C §1321. It can also be used to prove that an individual has a prescriptive right in public property. *Simons v Inyo Cerro Gordo Mining & Power Co.* (1920) 48 CA 524, 541, 192 P 144.

It is an open issue, however, whether *reputation* evidence is admissible to prove *private title* to property in which the *public* has an interest. Dicta in *Simmons* would argue for admissibility of such evidence. 48 CA at 532. Other authorities are silent on this precise issue. See the Comment to Evid C §638 (community reputation may not be used to prove ownership when the property issues at stake are solely private); 1 Witkin, California Evidence, *Hearsay* §288 (4th ed 2000) (private title to property having no public interest cannot be proved by reputation evidence); and Jefferson's California Evidence Benchbook, chap 18 (4th ed CJA-CEB 2009) (same).

NOTE: The reputation must have arisen before there was any controversy about the title. See Comment to Evid C §1321.

§18.13 C. Consider In Limine Motion

The proponent's direct examination may proceed more smoothly if the court has already been apprised of the issues in an evidentiary motion made before trial. However, when evidence of a "statement concerning land boundaries" made by someone now unavailable would not qualify as reputation evidence, you may wish simply to question the witness on the stand. It is not always clear how the law will be applied to a particular fact situation, and if there is no objection or if the judge allows the answers, you have been successful. See *Jordan v Worthen* (1977) 68 CA3d 310, 319, 137 CR 282 (court erred in overruling objections based on Evid C §§1320, 1322, but no prejudice). If your opponent's objections are sustained, be prepared to proceed based on another theory to gain admission of evidence. See §18.15.

V. CHECKLISTS

§18.14 A. Checklist: Witnesses to Subpoena

Community Reputation

- One or more people familiar with the relevant community reputation, *e.g.,* community residents, or an investigator or other qualified person who researched local records, newspapers, etc., and interviewed local residents.

Boundaries

- One or more people who heard declarant's statement.
- Witness to declarant's unavailability.

NOTE: It may be necessary to have someone testify to other facts about the declarant. For example, in the hypothetical in §18.10, evidence of Mr. Jones's death would be needed, such as introduction of his death certificate (Evid C §1281; see chaps 22 (dying declarations), 36 (official records)); evidence of his ownership of the adjacent property; and evidence that Mr. Jones was a surveyor.

§18.15 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §1220; see chap 10.
- Declaration against interest. Evid C §1230; see chap 20.
- Dispositive instruments and ancient writings. Evid C §§1330-1331; see chap 21.
- Dying declaration. Evid C §1242; see chap 22.
- Habit or custom evidence. Evid C §1105; see chap 29.
- Judicial notice. Evid C §§450-460; see chap 31. See also *Jordan v Worthen* (1977) 68 CA3d 310, 318, 137 CR 282.
- Official records and writings. Evid C §1532; see chap 36.
- Presumption of ownership. Evid C §638 (person who exercises acts of ownership over property is presumed to be the owner). See §18.12.
- Statement of declarant whose right or title is in issue. Evid C §1225; see chap 10.
- Statements and reputation concerning family history. Evid C §§1310-1311; see chap 25.
- Statements relating to wills and to claims against estates. Evid C §§1260-1261; see chap 53.
- Stipulation. See chap 51.
- Treatises, books, maps, and charts—to prove facts of general notoriety and interest. Evid C §1341; see chap 12.
- Undisputed fact. See chap 51.

VI. SOURCES

§18.16 A. Evidence Code

Evid C §1320. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community.

Evid C §1321. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns the interest of the public in property in the community and the reputation arose before controversy.

Evid C §1322. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy.

Evid C §1323. Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

See Evid C §1225 (statements and admissions of predecessors in interest to real property admissible against successor in interest illustrated in §10.15).

§18.17 B. Other

For further discussion of community reputation and statements concerning land, see 1 Witkin, California Evidence, *Hearsay* §§287-289 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 18 (4th ed CJA-CEB 2009).

Source: Evidence/Effective Introduction of Evidence in California/19 Credibility/Chapter Outline

19

Credibility

Donald D. Howard

§19.1 I. SCOPE OF CHAPTER

This chapter focuses on attacking and supporting witnesses' credibility. Any matter that has a reasonable tendency to prove or disprove the truthfulness or untruthfulness of a witness's testimony is admissible unless a statute provides otherwise. Evid C §780. The language of §780 seems clear, but the rules are somewhat convoluted. The following areas that may also bear on credibility are discussed elsewhere in the book: character evidence (see chaps 14-16), prior criminal convictions (see chaps 26-27), former testimony (see chap 28), past recollection recorded (see chap 38), and prior consistent and inconsistent statements (see chaps 40-41).

II. REQUIREMENTS

§19.2 A. To Admit

Evidence bearing on a witness's credibility is admissible, subject to the following rules:

- Any matter that has a reasonable tendency to prove or disprove the truthfulness or untruthfulness of a witness's testimony is admissible unless a statute provides otherwise (Evid C §780);
- The credibility of any witness can be attacked by any party, including the party who called the witness (Evid C §785; *Piscitelli v Salesian Soc'y* (2008) 166 CA4th 1, 6, 82 CR3d 139 (priest called as hostile witness by plaintiff could be impeached by conviction as child molester)); and
- In civil cases, evidence of a witness's good character cannot be introduced until bad character evidence is admitted (Evid C §790). (In criminal cases, see chaps 14-16 for discussion of using character evidence.)

NOTE: It is common, however, for counsel on direct examination to bring out information about the witness's background, *e.g.,* the witness's job and information relevant to his or her capacity to perceive and to lack of bias.

- The following types of evidence are admissible, when relevant, to support or attack the witness's credibility:
- Demeanor while testifying (Evid C §780(a)), character of the testimony (Evid C §780(b)), and attitude toward action and toward giving testimony (Evid C §780(j));
- The witness's capacity to perceive, recollect, and communicate (Evid C §780(c)-(d));
- The witness's opportunity to perceive matter on which he or she testifies (Evid C §780(c));
- The witness's character for honesty, veracity, or their opposites (Evid C §780(e); see chaps 14-16);
- The witness's bias, interest, or other motive for testifying that might affect credibility (Evid C §780(f); *Piscitelli v Salesian Soc'y* (2008) 166 CA4th 1, 6, 82 CR3d 139);
- The witness's prior inconsistent statement (Evid C §§780(h), 1235; see chap 41);
- The witness's prior consistent statement (Evid C §§780(g), 791, 1236; see chap 40);
- Existence or nonexistence of any fact testified to by the witness (Evid C §780(i));
- The witness's admission of untruthfulness (Evid C §780(k));
- Sexual conduct of a complaining witness in a criminal case (Evid C §782; see chap 16);
- The plaintiff's sexual conduct in a civil action alleging sexual harassment (Evid C §783; see chap 16);
- Specific instances of the witness's conduct to support or attack his or her credibility (see chap 16); and
- The witness's prior criminal conviction (Evid C §788; see chaps 26-27).

NOTE: CALCRIM 226, which points out that a witness may "sometimes" honestly forget or remember incorrectly, does not enhance a witness's credibility; it merely cautions against wholesale rejection of that testimony because of "inconsistencies or conflicts." *People v Anderson* (2007) 152 CA4th 919, 935, 61 CR3d 903.

Source: Evidence/Effective Introduction of Evidence in California/19 Credibility/§19.3 B. To Object

§19.3 B. To Object

Opposing counsel may object to the admissibility of impeachment evidence on any of the following grounds:

- Hearsay (Evid C §1200);
- Improper opinion (Evid C §800);
- Irrelevant (Evid C §351); or
- Improper character evidence:
- No evidence of personal knowledge (Evid C §702),
- Sexual conduct not in compliance with Evid C §782 (criminal), Evid C §783 (civil),
- Does not relate to honesty or veracity (Evid C §786) (but see §19.20),
- Prior conviction does not comply with Evid C §788 (see also chap 26 (civil), chap 27 (criminal)),
- Evidence of good character not admissible unless bad character admitted first (Evid C §790),
- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352),
- Collateral matter (see Comment to Evid C §780), or
- Cannot introduce prior consistent statement before prior inconsistent statement (Evid C §§791, 1236).

III. SAMPLE QUESTIONS

A. Supporting Credibility: Witness's Ability to Perceive and Lack of Bias

§19.4 1. Information to Elicit

Counsel supporting the credibility of a witness who testifies to delivering only a portion of goods ordered from the defendant wants to accomplish the following in the direct examination segment in §19.5:

- Ask questions demonstrating that the witness is unbiased and clarifying anything that might lead jurors to believe that the witness has a motive that might affect credibility;
- Show that the witness had an opportunity to personally perceive the matter on which he or she is testifying; and
- Introduce any written support for the witness's testimony.

§19.5 2. Questions to Ask

Q: Where are you employed?

Q: Where were you employed on June 2, 1996?

Q: Did your leaving Plaintiff Company have anything to do with the subject of your testimony today?

A: No. I wanted to switch from a warehouse job to secretarial work, which is what I did.

Q: Did Plaintiff Company support or oppose your change of employment in any way?

A: No one at Plaintiff Company knew I was getting a different job until I gave notice.

Q: And you appeared today to testify in response to a subpoena, is that correct?

A: Yes.

Q: Did an associate from my office meet with you to learn what information you had concerning this case before trial?

A: Yes. Ms. Associate called me in December, 1998, and I talked to her over the phone. She asked me what I knew about the widget shipment due June 2nd and I told her.

Q: At what location were you working on June 2, 1998?

Q: What was your job title then?

Q: What hours did you work that date?

Q: Did you receive any shipments from Defendant Company?

Q: Did you personally unload Defendant Company's truck?

Q: Did you make any written record of what you unloaded?

Q: I am showing you Plaintiff's Exhibit No. 35 for identification. Do you recognize this exhibit?

Proponent: Your Honor, I move to have this invoice admitted into evidence as Plaintiff's exhibit next in order.

Q: Please explain to the jurors what is on this invoice.

Q: So is it correct to say that Defendant Company delivered only 4 of 100 items on this invoice?

PRACTICE TIP: If your opponent has been making frequent objections, you might want to make this an open-ended question rather than a leading one, as here.

B. Attacking Credibility: Nonexistence of Fact Testified to by Witness

§19.6 1. Information to Elicit

In the sample question segment in §19.7, a witness has already testified that he saw the defendant break the plaintiff's window on July 1, 1999. Defendant's attorney calls Officer Patrol, who testifies that the witness was in jail on that date, and could not have seen the defendant break the window. Defense counsel wants to accomplish the following during direct examination:

- Have an independent witness testify to impeaching facts and identify the witness being impeached; and
- Introduce written evidence, if possible, to support the impeaching testimony.

§19.7 2. Questions to Ask

Q: Would you state what your assigned duties were on July 1, 1999?

Q: In the performance of those duties on July 1, 1999, did you have occasion to meet Witness?

Q: Can you point out Witness if you see him in this courtroom?

Proponent: May the record reflect that Officer Patrol has identified Witness?

Court: Yes.

Q: When did you first see Witness on July 1, 1999?

Q: How long did Witness remain in your custody that day?

[*Proponent then introduces copies of jail records showing witness's incarceration on the relevant date and further examines officer on supporting documentation*]

C. Attacking Credibility: Witness's Character for Honesty, Veracity, or Their Opposites

§19.8 1. Information to Elicit

The witness has testified that he saw the defendant strike the plaintiff on the head with a baseball bat. The defendant's attorney calls Mr. Neighbor to testify that he has known the witness for ten years and that in his opinion the witness is not truthful. In the sample question segment in §19.9, counsel wants the independent witness to testify to the following:

- Identify the witness being impeached;
- State the nature of their relationship;
- Relate the basis of his opinion of the witness's honesty and veracity; and
- Report his opinion.

§19.9 2. Questions to Ask

Q: Mr. Neighbor, when did you first meet Mr. Witness?

Q: What were the circumstances that led you to develop an association with Mr. Witness?

Q: How often in the last ten years have you been with Mr. Witness?

Q: Have you been able to form an opinion of Mr. Witness's character for truthfulness?

Q: What is your opinion in that regard?

D. Attacking Credibility: Prior Inconsistent Statement

§19.10 1. Information to Elicit

The plaintiff sues defendant for running a red light and hitting plaintiff's vehicle. The defendant testifies that the light was still green when he entered the intersection. The plaintiff calls Ms. Passerby, who testifies that she was at the scene and that the defendant told her, "I didn't see that the light was red until it was too late." Using the sample questions in §19.11, plaintiff's counsel wants the independent witness to testify as follows:

- Identify the witness being impeached;
- Tell where and when she heard the statement; and
- Report the statement.

§19.11 2. Questions to Ask

[*The proponent has already questioned the defendant on cross-examination about this statement; see Evid C §770*]

Q: After the vehicle came to rest, Ms. Passerby, what did you do first?

Q: After approaching the driver's window of the vehicle, did you hear the defendant say anything?

Q: What did you hear the defendant say?

E. Attacking Credibility: Witness's Bias, Interest, or Other Motive in Testifying

§19.12 1. Information to Elicit

The plaintiff sues the defendant for defamation of character. A witness testifies that the defendant told her that the plaintiff had syphilis and slept with prostitutes. Defendant denies the statement and calls Ms. Stranger, who testifies that she has known the witness for years, that the witness is the plaintiff's sister, and that the witness hates the defendant. Using the sample questions in §19.13, defense counsel wants the independent witness to testify as follows:

- Identify the witness being impeached;
- Describe the nature of their relationship; and
- Clarify the existence and nature of the witness's bias, interest, or motive.

§19.13 2. Questions to Ask

Q: Ms. Stranger, do you know Witness?

Q: How long have you been acquainted with Witness?

Q: What were the circumstances of your meetings?

Q: In those many times while at the home of Witness's family did you meet her brother, the plaintiff in this case?

Q: How long have you known that the plaintiff and Witness are brother and sister?

Opponent: Objection, assumes facts not in evidence.

Q: Let me rephrase that. Do you know whether the plaintiff is related to Witness?

Q: What is that relationship?

Q: Have you heard Witness express her feelings about the defendant's relationship with her brother?

Q: Where did you hear these statements?

Q: Did you hear these statements on more than one occasion?

Q: What words did Witness use when referring to the defendant?

F. Attacking Credibility: Witness's Opportunity to Perceive Matter on Which Testifying

§19.14 1. Information to Elicit

The witness testifies that she was 100 feet from the intersection when she saw the defendant run a red light and hit the plaintiff's vehicle. The defendant calls Mr. Alien, who testifies that the witness was looking in her trunk at the time of the accident and did not look up until after the sound of the crash. Through the sample questions in §19.15, defense counsel wants the independent witness to testify as follows:

- Identify the witness being impeached;
- Describe what the independent witness was doing at the time in question; and
- Show what happened, using a diagram or photos if they will support the independent witness's testimony.

§19.15 2. Questions to Ask

Q: Where were you standing just before the collision?

Q: Was any vehicle parked near the bus stop zone?

Q: Did you see any activity on the part of the driver of the vehicle parked next to the bus stop?

Q: While you were watching the driver looking in the trunk, did you hear anything unusual?

Q: In the minute before the sound of the crash, did the driver ever look up from her search of her trunk?

Q: Why were you watching her search her trunk?

Q: As she was throwing bags and suitcases on the pavement behind her car, did she ever appear to look forward, or move out from behind her car?

Q: Do you see the driver in the courtroom?

Proponent: May the record reflect that Mr. Alien has identified Witness?

Court: Yes.

G. Attacking Credibility: Using Prior Inconsistent Statement to Attack Credibility of Your Own Witness

§19.16 1. Information to Elicit

A witness who had previously told the defendant and Ms. Observer that the light was green testifies at trial that the light was red. The defendant's attorney calls Ms. Observer in order to impeach the witness. Through the sample questions in §19.17, defense counsel wants the independent witness to testify to the following:

- Identify the witness being impeached;
- Tell when and where the prior statement was made; and
- Report the statement.

§19.17 2. Questions to Ask

Q: Were you seated in the defendant's vehicle at the time of the accident?

Q: Where were you seated?

Q: Following the collision, did Witness approach the defendant's vehicle?

Q: Were you able to hear any words spoken by Witness?

Q: What did Witness say at that time?

A. The witness said, "I saw the light, and it was green."

Q: Do you see Witness in the courtroom?

Proponent: May the record reflect that Ms. Observer has identified Witness?

Court: Yes.

PRACTICE TIP: This question segment illustrates why it is important to be prepared to impeach every witness, if necessary, even your own. See Evid C §785.

IV. COMMENT

§19.18 A. General Scope of Credibility Evidence (Evid C §780)

Evidence Code §780 sets forth the general standard and criteria by which a witness's credibility may be evaluated by the trier of fact. In essence, §780 states that, unless otherwise provided by statute, the trier of fact may consider any matter that has a tendency in reason to prove or disprove a witness's truthfulness. Evid C §780. See, *e.g.*, *In re Freeman* (2006) 38 C4th 630, 42 CR3d 850. The criteria in §780 that may be considered in evaluating a witness's credibility are not exhaustive; Evid C §§782-795 and 1100 also provide for the admissibility of evidence on credibility.

PRACTICE TIP: Evidence introduced to attack a witness's credibility is often said to be used to "impeach" the witness. See 3 Witkin, California Evidence, *Presentation at Trial* §258 (4th ed 2000).

§19.19 1. Credibility Almost Always a Question of Fact for Jury

In jury trials, credibility is to be decided by the jury. A judge who tries to strike a witness's testimony, believing that the witness is lying, improperly invades the jury's province. See *Vorse v Sarasy* (1997) 53 CA4th 998, 62 CR2d 164. In *Vorse,* the trial judge had improperly struck the witness's testimony in reliance on Evid C §352, finding the testimony's probative value to be outweighed by its potential prejudice. The *Vorse* opinion contains a helpful summary of several cases in which arguably unbelievable evidence was held admissible, allowing the jury to assess witness credibility. 53 CA4th at 1009.

In criminal prosecutions for sexual assault crimes, evidence of the victim's past sexual conduct may be admissible to attack the victim's credibility only after the trial judge decides, under the procedure in Evid C §782, that the evidence is relevant and is not inadmissible under Evid C §352. In making the §352 determination, the judge may not evaluate the credibility of a witness whose testimony is proffered. See *People v Chandler* (1997) 56 CA4th 703, 65 CR2d 687.

§19.20 2. Character Evidence Is Not Limited to Honesty, Truthfulness, or Their Opposites

Although Evid C §786 provides that only evidence of a witness's character for dishonesty or untruthfulness may be used to attack that witness's credibility, other evidence *may* be admissible—both to support and to attack credibility. See, *e.g.*, *Piscitelli v Salesian Soc'y* (2008) 166 CA4th 1, 82 CR3d 139 (priest's conviction for child molestation held admissible to show bias and motive to lie in tort action involving alleged sexual abuse by another priest). Additionally, evidence of specific instances of a person's conduct is admissible to prove that person's character or a character trait. See Evid C §1100; *Kelley v Bailey* (1961) 189 CA2d 728, 11 CR 448 (proper for opposing counsel to prove that medical witness had changed his report in previous case after learning that he had been hired by defense rather than prosecution). See chaps 14-16 on character evidence, chaps 26-27 on prior convictions. See also the items listed in Evid C §780, set out in §19.2.

NOTE: Evidence of a witness's religious beliefs or lack of them is *not* admissible to attack his or her credibility. Evid C §789. Evidence of a plaintiff's citizenship or residency status is likewise inadmissible to attack credibility under Evid C §787. *Hernandez v Paicius* (2003) 109 CA4th 452, 460, 134 CR2d 756.

§19.21 3. "Opening the Door" to Impeaching Evidence

If counsel who calls a witness allows an unresponsive answer to a question to stand on direct examination, or allows a question and answer to stand on cross-examination, opposing counsel may claim that counsel "opened the door" to credibility evidence that was otherwise inadmissible. For example, in *People v Clark* (1965) 63 C2d 503, 47 CR 382, the child victim in a sex case claimed that she had never seen a male sex organ before she was raped. On appeal, the court ruled that this should have opened the door to testimony on her intimate sex play with four other boys before the alleged rape.

PRACTICE TIP: It is improper, however, to set up an issue during cross-examination, then impeach the witness. *People v Valentine* (1988) 207 CA3d 697, 254 CR 822.

§19.22 B. Rehabilitation

Witnesses may be rehabilitated only after evidence has been introduced attacking their credibility. See 3 Witkin, California Evidence, *Presentation at Trial* §§360-366 (4th ed 2000).

Under Evid C §790, evidence of good character may not be admitted until evidence of bad character is admitted. Similarly, a prior consistent statement is not admissible until a prior inconsistent statement is admitted. Evid C §§791, 1236. See chap 40 for discussion of introducing prior consistent statements.

NOTE: In criminal cases, a defendant may introduce evidence of good character without a particular showing of bad character. (Presumably, the fact that the defendant is charged with a crime is the equivalent of evidence of bad character.) See chap 16.

§19.23 C. Impeachment on Collateral Matters

The trial judge has discretion to permit or deny impeachment on collateral matters. See Comment to Evid C §780.

§19.24 D. Jury Instructions to Consider During Questioning

Consider using some of the language of relevant instructions in the questions you ask your witnesses. The judge will then seem to echo that language during closing instructions.

§19.25 1. Civil Jury Instructions

The following jury instructions are relevant to credibility in civil cases. When one or more of them are in your favor, it is to your benefit to request them.

- CACI 211 (witness was convicted of a felony);
- CACI 215 (no unfavorable inference from witness's exercise of a privilege);
- CACI 216 (no unfavorable inference from witness's exercise of right not to testify);
- CACI 107 (witnesses).

§19.26 2. Criminal Jury Instructions

The following jury instructions are relevant to credibility in criminal cases. When one or more of them are in your favor, it is to your benefit to request them.

- CALCRIM 105, 226 (what may be considered in ruling on a witness's credibility).
- CALCRIM 330 (evaluation of the testimony of a child age 10 or younger).
- CALCRIM 226, 302 (discrepancies in witness's testimony).
- CALCRIM 226 (witness willfully gave false testimony); see *People v Vang* (2009) 171 CA4th 1120, 1128, 90 CR3d 328 (unnecessary to modify CALCRIM 226 to inform jury how to weigh possibly inaccurate testimony for any reason other than deliberate lying).
- CALCRIM 302 (weighing witnesses' conflicting testimony).
- CALCRIM 316 (believability of witness—conviction of felony).
- CALCRIM 316 (believability of witness—past criminal conduct of witness amounting to a misdemeanor).
- CALCRIM 226 (believability of witness—evidence of character for honesty or truthfulness).
- CALCRIM 320 (refusal of witness to testify because of privilege against self-incrimination).
- CALCRIM 320 (refusal of witness to testify because of privilege other than that against self-incrimination).
- CALCRIM 301 (sufficiency of testimony of one witness).
- CALCRIM 350 (defendant's character when evidence of good character has been admitted).
- CALCRIM 351 (cross-examination of character witness: how jurors are to consider that information).
- CALCRIM 375 (when evidence of other crimes admitted, directions that it does not relate to bad character; specifies to what it does relate).

V. CHECKLISTS

§19.27 A. Checklist: Witnesses to Subpoena

- If credibility is supported or attacked with a document, a witness is needed to authenticate it.
- Any additional witness needed to support or attack credibility.

NOTE: No new witness is needed if witness was questioned on redirect or cross-examination.

§19.28 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1227. See chap 10.
- Character evidence. See chaps 14-16.
- Declaration against interest. Evid C §1230. See chap 20.
- Evidence offered for limited purpose. See chap 7.
- Former testimony. Evid C §§1290-1292. See chap 28.
- Nonhearsay. See chap 35.
- Past recollection recorded. Evid C §1237. See chap 38.
- Prior consistent statement. Evid C §1236. See chap 40.
- Prior felony conviction. Evid C §788. See chaps 26-27.
- Prior inconsistent statement. Evid C §1235. See chap 41.
- Refresh recollection. Evid C §771. See chap 44.
- Rehabilitation of lay witnesses. See chap 34.
- Spontaneous and contemporaneous statements. Evid C §§1240-1241. See chap 49.

VI. SOURCES

§19.29 A. Evidence Code

Evid C §780. Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

(a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

(d) The extent of his opportunity to perceive any matter about which he testifies.

(e) His character for honesty or veracity or their opposites.

(f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

§19.30 B. Other

For further discussion, see 3 Witkin, California Evidence, *Presentation at Trial* §§88-146, 258-366 (4th ed 2000); Jefferson's California Evidence Benchbook, chaps 29 (attacking and supporting credibility), 35 (character, habit, and custom) (4th ed CJA-CEB 2009); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, chap 5 (3d ed 2000).

Source: Evidence/Effective Introduction of Evidence in California/20 Declarations Against Interest/Chapter Outline

20

Declarations Against Interest

Holly J. Fujie

§20.1 I. SCOPE OF CHAPTER

This chapter discusses declarations against interest, which are admissible an exceptions to the hearsay rule under Evid C §1230. Testimony about statements of *nonparties* is allowed into evidence when those statements are contrary to an important interest of the declarants themselves at the time the statements were made. See Evid C §1230. On admissions offered against parties, see chap 10.

II. REQUIREMENTS

§20.2 A. To Admit

Declarations against interest are admissible when:

- The declarant had personal knowledge of the subject of the statement (Evid C §702; *Estate of Huntington* (1976) 58 CA3d 197, 129 CR 787);
- The declarant's statement conflicted with his or her interest in one of the following ways to such a degree that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true (Evid C §1230); and
- The declarant is unavailable as a witness (Evid C §1230) within the meaning of Evid C §240.

A statement conflicts with the declarant's interest when it is:

- Contrary to declarant's pecuniary or proprietary interest;
- Subjects the declarant to a risk of civil or criminal liability;
- Tends to invalidate a claim by the declarant against another; or
- Creates a risk of making the declarant an object of hatred, ridicule, or social disgrace in the community (see *People v Wheeler* (2003) 105 CA4th 1423, 1427, 129 CR2d 916).

To establish that the declarant is unavailable as a witness, the proponent of the statement must introduce evidence to show one of the following:

- Declarant is exempted or precluded on the ground of privilege from testifying about the matter to which his or her statement is relevant (Evid C §240(a)(1));
- Declarant is disqualified from testifying owing to incapacity under Evid C §701 because declarant is incapable of (1) expressing self or (2) understanding duty to tell truth (Evid C §240(a)(2));
- Declarant is dead (Evid C §240(a)(3));
- Declarant is incapable of attending, *e.g.,* because of physical or mental illness or fear of testifying (Evid C §240(a)(3); *People v Stritzinger* (1983) 34 C3d 505, 518, 194 CR 431);
- Declarant is not present, and court is unable to compel his or her attendance by its process (Evid C §240(a)(4)); or
- Declarant is not present and proponent has used reasonable diligence but has been unable to procure declarant's presence by the court's process (Evid C §240(a)(5)).

NOTE: In a criminal trial, when the declaration against interest was made in response to police interrogation, it may be necessary to establish that the defendant had an opportunity to cross-examine the declarant. *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 194, 124 S Ct 1354 (confrontation clause requires exclusion of testimonial hearsay unless declarant is unavailable as a witness *and* defendant had opportunity to cross-examine); *Davis v Washington* (2006) 547 US 813, 165 L Ed 2d 224, 236, 126 S Ct 2266 (circumstances under which statements made in course of police interrogation are testimonial). See §20.20B.

Source: Evidence/Effective Introduction of Evidence in California/20 Declarations Against Interest/§20.3 B. To Object

§20.3 B. To Object

The following objections may apply to declarations against interest:

- Hearsay (Evid C §1200);
- Declarant is available (Evid C §1230);
- Declarant is unavailable, but that unavailability was brought about by proponent's "procurement or wrongdoing" (Evid C §240(b));
- Declarant who is unavailable is a party who is invoking the Fifth Amendment (see Comment to Evid C §240);
- Proponent has not proved unavailability (Evid C §§1230, 240);
- Declarant lacked personal knowledge of subject of statement (Evid C §702);
- Statement not against declarant's interest (Evid C §1230);
- Statement is untrustworthy (*People v Frierson* (1991) 53 C3d 730, 745, 280 CR 440);
- Admission of statement violates confrontation clause (*Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 194, 124 S Ct 1354; *Davis v Washington* (2006) 547 US 813, 165 L Ed 2d 224, 236, 126 S Ct 2266, discussed in §20.20B);
- Irrelevant (Evid C §§210, 350).

If the statement is in writing, the following objections may also apply:

- Not authenticated (Evid C §§1400-1454);
- Inadmissible secondary evidence (Evid C §1521).

III. SAMPLE QUESTIONS

A. Testimony Reporting Declarant's Statement Against Interest

§20.4 1. Information to Elicit

To introduce a nonparty's declaration against interest in the sample question segments in §§20.5-20.8, counsel wants the witness who heard the declarant's statement to testify as follows:

- Identify declarant;
- Explain why statement was against declarant's interest;
- Show that declarant had personal knowledge of subject of statement;
- State why declarant is unavailable;
- State when and why was statement made; and
- Report statement.

2. Questions to Ask

§20.5 a. Adverse Pecuniary or Proprietary Interest

Q: Do you know Mr. Declarant?

Q: Did you hear Mr. Declarant say anything on or about December 26, 1999, about the Green Street property?

Q: What did Mr. Declarant say about his ownership of that property?

PRACTICE TIP: If there is no objection, the proponent of the evidence can elicit testimony from the proper witness concerning declarant's statement, why the declarant is not present or is otherwise unavailable, and any other testimony that makes the statement more credible to jurors. See *Perry v McLaughlin* (1931) 212 C 1, 6, 297 P 554 (specific objection must be made to inadmissible evidence; failure to object waives defect).

A: He told me that he sold his interest in that property a year before.

§20.6 b. Risk of Civil or Criminal Liability

Q: Did you ever discuss the automobile accident that is the subject of this civil lawsuit with Ms. Declarant?

Q: What did you discuss on that subject with her?

A: Ms. Declarant said that she did not understand why Ms. Plaintiff had sued defendant, because it was Ms. Declarant herself who ran over Ms. Plaintiff with her car.

PRACTICE TIP: On objection, when liability is not as clear as in this example, it may be necessary to provide, as part of the jury instructions or trial brief, statements of the law on when the declaration would give rise to the relevant liability.

§20.7 c. Declarant's Claim Would Be Invalidated

Q: Did Mr. Declarant say anything about having a contract with Enterprise Company?

Q: What did he say?

A: He said that he never had reached an agreement with Enterprise Company to enter into a contract.

PRACTICE TIP: The proponent should establish that the declarant had a claim against the company based on an alleged contract, which was pending at the time of the declaration.

§20.8 d. Risk of Hatred, Ridicule, or Social Disgrace

Q: Did you discuss the plaintiff's pregnancy with Mr. Declarant?

Q: What did he say?

A: He told me that he believed himself to be the father of plaintiff's child because he was having an affair with the plaintiff at the time the child was conceived.

PRACTICE TIP: If the declarant was married to someone other than the plaintiff when the child was conceived, establish that fact.

B. Testimony Showing Declarant Unavailable as Witness

§20.9 1. Information to Elicit

To introduce a nonparty's declaration against interest, counsel must show why the declarant is unavailable to testify. The sample question segments in §§20.10-20.16 illustrate different circumstances that cause declarant to be "unavailable" (*e.g.*, privilege, illness).

2. Questions to Ask

§20.10 a. Testimony Privileged

Q: Ms. Declarant, did you speak to Mr. A on March 1, 1999?

A: I claim the privilege against self-incrimination under Evidence Code §940 and the Fifth and Fourteenth Amendments of the United States Constitution.

Proponent: Your Honor, under Evidence Code §240(a)(1), this witness is "unavailable" to testify on the subject of her conversation with Mr. A, and I move that her statement on that subject be admitted at this time as a declaration against interest.

PRACTICE TIP: See discussion of claiming the privilege against self-incrimination in chap 43.

§20.11 b. Declarant Disqualified Because of Incapacity

Q: Dr. Practitioner, have you examined Ms. Declarant?

Q: When did you examine her?

Q: What did you do in conducting this examination?

Q: What is your general opinion of her physical and mental condition as it relates to her ability to express herself?

Q: In your professional opinion, is Ms. Declarant now capable of expressing herself on any matters before this court so as to be understood, either directly or through interpretation by one who could understand her?

Source: Evidence/Effective Introduction of Evidence in California/20 Declarations Against Interest/§20.12 c. Declarant Disqualified Because of Inability to Tell Truth

§20.12 c. Declarant Disqualified Because of Inability to Tell Truth

Q: Dr. Psychiatrist, in your professional opinion, is Child Declarant capable of understanding the duty of a witness to tell the truth?

Proponent: Your Honor, I move that Child Declarant be determined to be unavailable under Evidence Code §§701(a) and 240(a)(2), and that his declaration against interest be admitted into evidence.

PRACTICE TIP: The court may elect to hear the direct examination of the declarant outside the jury's presence before hearing argument and evidence on the witness's competence.

§20.13 d. Declarant Dead

Proponent: Your Honor, I have asked the clerk to mark a certified copy of this death certificate as Defendant's Exhibit H for identification, and I have given a copy to opposing counsel. I ask the court to admit it into evidence under Evidence Code §1281, the official records-hearsay exception, and under Health and Safety Code §103550.

Court: The death certificate is admitted into evidence.

Proponent: Would the court have the clerk read Mr. Declarant's statement to the jury?

[*Clerk reads Exhibit H to jury*]

Proponent: Your Honor, Mr. Declarant's death, as evidenced by Exhibit H, renders him unavailable to testify under Evidence Code §240(a)(3). I move that Mr. Declarant's declaration against interest be admitted into evidence.

§20.14 e. Declarant Ill

Q: Dr. Internist, what is your occupation?

[*Questions on medical background omitted*]

Q: Have you examined Mr. Declarant?

Q: When did you examine him?

Q: What did you do in the course of this examination?

Q: In your professional opinion, is Mr. Declarant able to attend or to testify at this hearing, given his current physical condition?

A: No. He is extremely weak and being fed intravenously. It would kill him to leave intensive care.

Proponent: Your Honor, I move that Mr. Declarant be determined to be unavailable under Evidence Code §240(a)(3), and that his declaration against interest be admitted into evidence.

PRACTICE TIP: Under Evid C §240(c) the expert testifying to a witness's unavailability owing to physical or mental trauma resulting from an alleged crime must be a physician, surgeon, psychiatrist, psychotherapist, or any person described in Evid C §1010(b)-(c), (e), including a clinical social worker or a marriage and family therapist.

§20.15 f. Declarant Cannot Be Located

Q: Ms. Investigator, what is your occupation?

[*Questions on background omitted*]

Q: Ms. Investigator, did you perform any work in connection with this case?

Q: What work were you asked to perform?

A: I was asked to locate Ms. Declarant.

Q: What did you do to attempt to locate Ms. Declarant?

Q: In what geographical areas did you attempt to locate Ms. Declarant?

Q: Did you in fact locate Ms. Declarant?

A: No.

§20.16 g. Declarant in Another State (Civil Case)

Q: Mr. Investigator, what is your occupation?

[*Questions on background omitted*]

Q: Mr. Investigator, did you perform any work in connection with this case?

Q: What work did you perform?

A: I was asked to locate Mr. Declarant?

Q: Did you locate him?

A: Yes, I located him in Texas. His mother told me he had joined the Army and had been stationed at Fort Worth. I contacted the Army and verified by phone that Mr. Declarant was there and would be there for six more months. I obtained this information one month ago.

Q: Do you have written confirmation of this information?

A: Yes. I have a certified copy of an Army record showing Mr. Declarant's transfer to Fort Worth, and the duration of his transfer there.

Proponent: This business record is marked as Plaintiff's Exhibit No. 18 for identification. It is accompanied by the affidavit of an army custodian of records. I move it into evidence as Plaintiff's exhibit next in order.

PRACTICE TIP: In criminal cases, attorneys *can* subpoena out-of-state witnesses under Pen C §§1334-1334.6. Also, a United States citizen or resident living abroad may be subpoenaed by a federal court under 28 USC §1783. Treaties and compacts with foreign countries may provide additional bases for compelling a witness's attendance.

Proponent: Your Honor, under Code of Civil Procedure §1989, a witness is not required to attend before any court, judge, justice, or any other officer when that witness is a nonresident of the state at the time of service. Because Mr. Declarant is a nonresident of California at this time and is not subject to the subpoena power of this court, he is unavailable to testify under Evidence Code §240(a)(5). I move that his declaration be admitted into evidence as a declaration against interest under Evidence Code §1230.

IV. COMMENT

§20.17 A. Burden on Opponent to Object

The proponent of a hearsay statement does not have the burden of establishing that it comes within a hearsay exception unless an objection is made. See *Perry v McLaughlin* (1931) 212 C 1, 6, 297 P 554 (failure to object waives defect in evidence). But see *Stardust Mobile Estates v City of San Buenaventura, LLC* (2007) 147 CA4th 1170, 1185, 55 CR3d 218 (hearsay objection not necessary in civil administrative hearing to preserve issue on appeal). On objection, however, the proponent must inform the court of the specific exception to the hearsay rule that applies and prove the necessary preliminary facts to the court's satisfaction before the court will admit the evidence. See *People v Rodriquez* (1969) 274 CA2d 770, 777, 79 CR 240. Objections to foundational matters on hearsay exceptions are determined at a preliminary fact-finding hearing. See chap 4.

WARNING: Declarations against interest apply only to declarations by *nonparties*. See Jefferson's California Evidence Benchbook, chap 6 (4th ed CJA-CEB 2009). The related hearsay exception for parties is an admission, discussed in chap 10.

B. Declarant's Statement

§20.18 1. Must Be Trustworthy

The crux of the hearsay exception for declarations against interest is trustworthiness, and the trial court may look at all circumstances surrounding the making of the statement to determine whether the statement is trustworthy. *People v Frierson* (1991) 53 C3d 730, 745, 280 CR 440.

§20.19 2. Must Expose Declarant to Civil or Criminal Liability

A declaration admitted because it exposes the declarant to civil or criminal liability must be one that, at the time it was made, *actually* exposed the declarant to potential civil or criminal liability. Prior release of the declarant from a claim for civil liability, or testimony under immunity from prosecution, will prevent such a declaration from coming within this exception. See, *e.g.,* *People v Rice* (1976) 59 CA3d 998, 131 CR 330.

A prior hearsay statement against penal interest may be admitted even if the declarant is physically available as a witness if the declarant refuses to testify based on the privilege against self-incrimination. See Evid C §§240(a)(1), 1230.

NOTE: When only a portion of a statement disserves the declarant's interest, only the "specifically disserving" portions are admissible; the remainder should be redacted. *People v Duarte* (2000) 24 C4th 603, 101 CR2d 701; *People v Leach* (1975) 15 C3d 419, 124 CR 752. See also *People v Smith* (2005) 135 CA4th 914, 38 CR3d 1. This is true even if the untrustworthy, redacted part of the statement exonerates a criminal defendant. *People v Dixon* (2007) 153 CA4th 985, 996, 63 CR3d 637.

§20.19A 3. Confrontation Clause Issues [Deleted]

The material formerly covered in this section has been moved to §20.20B.

§20.20 4. Must Be Against Declarant's Interests When Made

The statement must be specifically against the interest of the declarant, not just against the interest of a party with whom the declarant is friendly, or another nonparty. See *Estate of Huntington* (1976) 58 CA3d 197, 210, 129 CR 787. The statement must also have been against the interest of the declarant at the time the statement was made, not later. Evid C §1230. See §20.19.

§20.20A 5. May Be Against Declarant's Social Interest

California is among a minority of jurisdictions that recognize the "social interest exception." This exception provides that evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, created such a risk of making him or her an object of hatred, ridicule, or social disgrace that a reasonable person in that position would not have made the statement unless he or she believed it to be true. Evid C §1230; *People v Wheeler* (2003) 105 CA4th 1423, 1427, 129 CR2d 916 (proper to admit, under social interest exception, wife's statement that she committed adultery with man whom defendant killed shortly thereafter).

California adopted the social interest exception in 1965 as an integral part of the original Evidence Code. Stats 1965, ch 299, §2. The intent of the Law Revision Commission, which recommended legislative adoption of the new code, was to make the social interest exception "sufficiently broad" to admit previously inadmissible statements about illegitimacy, pregnancy out of wedlock, and impotency. 105 CA4th at 1427.

To make the original determination of whether a hearsay statement passes the required threshold of trustworthiness, trial courts may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. *People v Cudjo* (1993) 6 C4th 585, 607, 25 CR2d 390.

Source: Evidence/Effective Introduction of Evidence in California/20 Declarations Against Interest/ C. Criminal Cases/ §20.20B 1. Defendant's Right of Confrontation

C. Criminal Cases

§20.20B 1. Defendant's Right of Confrontation

Declarations against interest are admissible in criminal cases against the defendant (see §20.19), but may present confrontation clause problems if introduced against a codefendant.

The right of a criminal defendant to confront the witnesses against him or her requires exclusion of "testimonial hearsay" unless the declarant is unavailable as a witness *and* the defendant has had an opportunity to cross-examine the declarant. *Crawford v Washington* (2004) 541 US 36, 52, 158 L Ed 2d 177, 193, 124 S Ct 1354. As a result of the *Crawford* decision, an accomplice's statement to the police under the exception to the hearsay rule for declarations against penal interest will rarely be admissible when the accomplice invokes the privilege against self-incrimination or is otherwise unavailable, since the defendant will rarely have had an opportunity to cross-examine the accomplice.

The Supreme Court did not define the outer contours of the term "testimonial" in *Crawford*, but made it clear that under any definition of the term, responses to police interrogation (541 US at 52, 158 L Ed 2d at 198) and testimony at a preliminary hearing or trial or before a grand jury (541 US at 68, 158 L Ed 2d at 203) are testimonial. In *Davis v Washington* (2006) 547 US 813, 165 L Ed 2d 224, 126 S Ct 2266, the Court determined more specifically which police interrogations produce testimonial statements. Under *Davis,* statements made in the course of police interrogation are nontestimonial when the circumstances objectively indicate "that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." 547 US at 822, 165 L Ed 2d at 237. On the other hand, statements made in the course of police interrogation are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." 547 US at 822, 165 L Ed 2d at 237. On the particular facts before it, the Court concluded that a caller's statements to a 911 operator identifying the defendant as her assailant were nontestimonial, but in a separate case statements made to a police officer responding to a reported domestic disturbance were testimonial because it was clear from the circumstances that there was no emergency in progress and "that the interrogation was part of an investigation into possibly criminal past conduct." 165 L Ed 2d at 242.

NOTE: Under *Davis v Washington* (2006) 547 US 813, 165 L Ed 2d 224, 126 S Ct 2266, not all statements made during a 911 call are necessarily nontestimonial. The Court specifically noted that it was asked to classify as testimonial or nontestimonial only those statements made early in the 911 call in which the caller identified the defendant as her assailant. The Court indicated that once the purpose of determining the need for emergency assistance has been achieved, a 911 conversation could "'evolve into testimonial statements.'" 547 US at 828, 165 L Ed 2d at 241. But see *People v Brenn* (2007) 152 CA4th 166, 173, 60 CR3d 830 (victim's 911 call was held spontaneous, even though much of call was in response to questions from dispatcher, and nontestimonial).

In *People v Cage* (2007) 40 C4th 965, 984, 56 CR3d 789, the California Supreme Court further defined the distinction between testimonial and nontestimonial statements, establishing the following factors for "testimonial" statements:

- The statement must be hearsay;
- The statement must have been made under solemn and formal circumstances;
- The statement must be about past or historical criminal events;
- The court must objectively evaluate the purpose for which the statement was given and taken;
- If the statement is elicited by questions from law enforcement officials in a nonemergency situation, the fact that lying to an officer could be prosecuted lends the statement a requisite solemnity and formality; and
- Statements elicited by officials in order to enable them to handle an emergency are not testimonial.

The *Cage* court held that a battered child's statements both to an investigating police officer in an emergency room before medical treatment and in a taped interview in the sheriff's station after treatment were testimonial. 40 C4th at 975 (no contest on taped interview). However, a statement to the treating physician in answer to the question "What happened?" was held to be nontestimonial. 40 C4th at 986. All statements identified the victim's mother as having slashed him with a piece of glass. Although the emergency room interview was somewhat informal, an appropriate solemnity to the interrogation was established by the potential consequences of lying to a police officer. 40 C4th at 986. Further, the officer was not dealing with a contemporaneous

emergency, but interrogating the victim (who was safely in a hospital) about past events in contemplation of investigating a crime and developing potential testimony. 40 C4th at 985. In contrast, the physician was dealing with a contemporaneous medical problem and was attempting to determine if there was debris that needed to be removed from the wound. 40 C4th at 986. Thus, both the question "What happened?" and the answer were nontestimonial and properly admissible. 40 C4th at 986.

For additional cases in which courts have considered the testimonial nature of hearsay statements, see, *e.g.,* *People v Gutierrez* (2009) 45 C4th 789, 813, 89 CR3d 225 (statement by three-year-old to his aunt that implicated defendant was more like "a casual remark to an acquaintance" and was therefore nontestimonial); *People v Byron* (2009) 170 CA4th 657, 670, 88 CR3d 386 (domestic violence victim's statement to responding officer at hospital, her videotaped police interview 2 weeks later, and her preliminary hearing testimony were testimonial; her 911 call and statement to responding officer at scene were nontestimonial); *People v Garcia* (2008) 168 CA4th 261, 290, 85 CR3d 393 (implied hearsay in note written by codefendant's cellmate was nontestimonial).

On the applicability of *Crawford* to forensic analysis reports, see §23.16.

Exceptions. There are exceptions that allow admission of testimonial hearsay, however. A court may admit an unavailable declarant's testimonial hearsay (despite the inability of the defendant to confront the declarant), if the defendant bribed, intimidated, or killed the declarant with the specific design of preventing the declarant's testimony. *Giles v California* (2008) ___ US ___, 171 L Ed 2d 488, 496, 128 S Ct 2678. This narrow Sixth Amendment exception is supported by the necessity of protecting the integrity of court proceedings. 171 L Ed 2d at 504 n7. Also, inculpatory statements of a codefendant may be admitted at trial if those statements are scrupulously redacted to avoid any implication or mention of the other codefendant. Further, if a codefendant testifies and his or her inculpatory statement is also admitted, the confrontation clause is satisfied. *People v Stevens* (2007) 41 C4th 182, 198, 59 CR3d 196.

A defendant has no Sixth Amendment confrontation clause rights in a probation violation or revocation proceeding. Rather, a defendant has a limited right under the due process clause of the Fourteenth Amendment to cross-examine witnesses testifying against him or her. *People v Stanphill* (2009) 170 CA4th 61, 78, 87 CR3d 643 (because battery victim's statement to law enforcement officer identifying defendant's photograph was spontaneous statement, defendant's due process confrontation right was satisfied); *People v Abrams* (2007) 158 CA4th 396, 400, 69 CR3d 742 (reports not testimonial and had indicia of reliability; no cross-examination rights were afforded); *People v Shepherd* (2007) 151 CA4th 1193, 1198, 60 CR3d 616 (cross-examination rights upheld; no good cause shown to allow hearsay).

For a discussion of guidelines and issues related to parolees' confrontation rights see *Valdivia v Schwarzenegger* (ED Cal 2008) 548 F Supp 2d 852, 858.

The confrontation clause is inapplicable to civil commitment proceedings. *People v Sweeney* (2009) 175 CA4th 210, 221, 95 CR3d 557.

On the inapplicability of confrontation clause rights to adoptive admissions, see §10.25.

Limitations on cross-examination. Although the confrontation clause guarantees a criminal defendant's right to cross-examine a witness, that right is not unlimited. *People v Szadziewicz* (2008) 161 CA4th 823, 841, 74 CR3d 416. A court may properly limit cross-examination questions that seek to undermine a witness's credibility under an Evid C §352 and relevancy analysis, unless that prohibited testimony would have given the jury "a significantly different impression of the witness's credibility." 161 CA4th at 842. See *Holley v Yarborough* (2009) 568 F3d 1091 (limitation on cross-examination of victim unreasonable and harmful; habeas granted). Thus, a judge may call a halt to defense counsel's in-depth questions about a prior criminal conviction without violating the defendant's Sixth Amendment rights. 161 CA4th at 841.

NOTE: A Sixth Amendment confrontation clause objection must be expressly stated; simply objecting that the defendant did not have an opportunity to cross-examine a hearsay witness is not effective. *People v Chaney* (2007) 148 CA4th 772, 776, 56 CR3d 128.

Retroactivity of *Crawford*. Under the rules set out in *Teague v Lane* (1989) 489 US 288, 103 L Ed 2d 334, 109 S Ct 1060, the *Crawford* decision does not apply retroactively to cases in federal courts already final on direct review. *Whorton v Bockting* (2007) 549 US 406, 167 L Ed 2d 1, 6, 127 S Ct 1173. But *Teague* retroactivity limits do not bind state courts in postconviction proceedings. The United States Supreme Court has held that state courts may give broader retroactive effect to new federal constitutional criminal procedure rules than allowed to federal habeas courts under *Teague. Danforth v Minnesota* (2008) 552 US 264, 169 L Ed 2d 859, 871, 128 S Ct 1029. Thus, Minnesota courts may evaluate independently whether admission of a 6-year-old victim's videotaped testimony violated a defendant's Sixth Amendment confrontation clause rights under *Crawford,* even though *Crawford* was decided after the defendant's conviction became final. 169 L Ed 2d at 871. See *Delgadillo v Woodford* (9th Cir 2008) 527 F3d 919, 925.

Nontestimonial hearsay. Nontestimonial hearsay may be admitted in court without raising confrontation issues. Thus, for example, secret recordings of conversations between codefendants in a jail cell do not constitute police interrogation and

therefore are not subject to Sixth Amendment confrontation clause claims. *People v Jefferson* (2008) 158 CA4th 830, 842, 70 CR3d 451. In *Jefferson,* even though one codefendant did not testify, introduction of a taped jail cell conversation containing admissions and adoptive admissions was not improper. The statements were not made in a formal, solemn context to government officials, or for the purpose of describing historical facts for possible use in a criminal proceeding. 158 CA4th at 842. Instead, the statements were couched in profane ramblings between two friends who felt free to express themselves, seemingly without any witnesses. 158 CA4th at 841. For discussion of adoptive admissions and the confrontation clause, see §10.25.

§20.21 2. Expert Testimony May Be Required [Deleted]

Material formerly covered in this section has been moved to §20.22.

Source: Evidence/Effective Introduction of Evidence in California/20 Declarations Against Interest/§20.22 3. Establishing Declarant's Unavailability in Criminal Cases

§20.22 3. Establishing Declarant's Unavailability in Criminal Cases

When, as a prerequisite to introducing a declarant's out-of-court statement, the confrontation clause requires the prosecution to establish that the declarant is unavailable as a witness, the prosecution must show that it has made a "good-faith effort" to obtain the witness's presence at trial. *Barber v Page* (1968) 390 US 719, 725, 20 L Ed 2d 255, 88 S Ct 1318; *People v Smith* (2003) 30 C4th 581, 609 134 CR2d 1. If the witness is within reach of the trial court's process, Evid C §240(a)(5) requires the prosecution to establish that it has exercised "reasonable diligence" to secure the witness's testimony. The confrontation clause is ordinarily satisfied by a showing that the declarant is unavailable within the meaning of Evid C §240(a). *People v Bunyard* (2009) 45 C4th 836, 848, 89 CR3d 264; *Smith,* 30 C4th at 609; *People v Byron* (2009) 170 CA4th 657, 670, 88 CR3d 386. For discussion of Evid C §240, see §20.2.

CAUTION: The California Supreme Court has granted review in *People v Cogswell* (review granted Feb. 13, 2008, S158898; superseded opinion at 156 CA4th 698, 68 CR3d 28) to determine whether due diligence under Evid C §240 requires a prosecutor to take into custody an unwilling, out-of-state sexual assault victim under the Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Cases (Pen C §§1334-1334.6).

The prosecution has the burden of establishing unavailability by a preponderance of the evidence. *People v Winslow* (2004) 123 CA4th 464, 19 CR3d 872. For an example of a case in which the prosecution failed to show reasonable diligence, see *People v Cromer,* 24 C4th at 903. For an example of a case in which the prosecution proved reasonable diligence to the court's satisfaction, see *Martinez,* 154 CA4th at 324. See also *People v Jackson* (1980) 28 C3d 264, 168 CR 603, disapproved on other grounds by *People v Cromer,* 24 C4th at 901 n3.

Although the vast majority of the criminal cases dealing with absent witnesses involve an attempt by the prosecutor to introduce evidence against the defendant, Evid C §240 applies to the defendant as well. It has been suggested that in determining whether the defendant has exercised reasonable diligence, the trial court may take into account the "wide disparity" between the resources ordinarily available to the prosecution and those available to defense attorneys. *People v Randle* (1982) 130 CA3d 286, 296, 181 CR 745.

§20.23 D. Procedure to Determine Declarant's Competence [Deleted]

Material formerly covered in this section has been deleted.

V. CHECKLISTS

§20.24 A. Checklist: Witnesses to Subpoena

- Witness who heard declarant's statement and relates content of that statement.
- Witness on why the statement was against declarant's interest at the time it was made.
- Witness with proof that declarant had personal knowledge of the subject of the statement at the time he or she made the statement.
- Witness on why declarant unavailable.

NOTE: In some cases, one witness may be able to testify to all of the above points; in other cases, several witnesses may be necessary to fill in details and to meet the requirements for the admissibility of declarations against interest.

§20.25 B. Checklist: Alternative Methods of Admissibility

- Nonhearsay. Evid C §1200. See chap 35.
- Past recollection recorded. Evid C §1237. See chap 38.
- Spontaneous or contemporaneous declaration. Evid C §§1240-1241. See chap 49.

VI. SOURCES

§20.26 A. Evidence Code

Evid C §240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

Evid C §1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

§20.27 B. Other

For further discussion of declarations against interest, see 1 Witkin, California Evidence, *Hearsay* §§143-153 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 6 (4th ed CJA-CEB 2009).

21

Dispositive Instruments and Ancient Writings

William H. Armstrong

§21.1 I. SCOPE OF CHAPTER

This chapter discusses the following two exceptions to the hearsay rule:

- **Dispositive instruments.** Writings that purport to be determinative of an interest in real or personal property (*e.g.,* deeds of conveyance or wills) are considered reliable enough to be an exception to the hearsay rule when dealings with the property since the time of the writing have not been inconsistent with the writing. Evid C §1330.

- **Ancient writings.** Writings 30 years old and older, on any matter, are considered reliable when they have generally been acted on as true since the time of the writing by those with an interest in the matter. Evid C §1331.

II. REQUIREMENTS

A. Dispositive Instruments

§21.2 1. To Admit

The proponent of the evidence must show all the following:

- The statement is contained in a deed, will, or other writing purporting to affect an interest in real or personal property (Evid C §1330);
- The statement is relevant to the purpose of the writing (Evid C §1330(a));
- The matter stated is relevant to an issue concerning an interest in the property (Evid C §1330(b));
- Dealings with the property subsequent to the statement are not inconsistent with the truth of statement (Evid C §1330(c));
- The writing is properly authenticated (Evid C §1401); and
- The writing is the original or satisfies the secondary evidence rule (see Evid C §§1520-1523, 1550-1553; Pen C §872.5).

NOTE: To supplement discussion, Evid C §§1600-1605, concerning official records and documents that affect property, are reproduced in §21.16. On official records, see chap 36.

Source: Evidence/Effective Introduction of Evidence in California/21 Dispositive Instruments and Ancient Writings/§21.3 2. To Object

§21.3 2. To Object

Opposing counsel may object to the admissibility of a dispositive instrument on any of the following grounds:

- Inadmissible hearsay (Evid C §1200);
- Lack of foundation (Evid C §1330), *e.g.:*
- Document not a deed, will, or other dispositive writing,
- Statement has no relation to any interest in the property, or
- Subsequent dealings with the property are inconsistent with hearsay statement;
- Irrelevant (Evid C §§350-351);
- Not (properly) authenticated (Evid C §1401); or
- Inadmissible secondary evidence (see Evid C §1521).

PRACTICE TIP: If the proponent establishes that the document is a "dispositive writing," the exception to the hearsay rule permits use of the document. Opposing counsel should look for a second level of hearsay statements in the document to which no exception applies.

B. Ancient Writings

§21.4 1. To Admit

The proponent of the evidence must show all the following:

- The statement is contained in a writing more than 30 years old (Evid C §1331);
- The statement has since been generally acted on as true by persons having an interest in the matter (Evid C §1331);
- The writing is properly authenticated (Evid C §1401); and
- The writing is the original or satisfies the secondary evidence rule (see Evid C §§1520-1523, 1550-1553; Pen C §872.5).

NOTE: As an option for authenticating an ancient writing, see Evid C §643 and discussion in §21.11.

§21.5 2. To Object

Opposing counsel may object to the admissibility of an ancient writing on any of the following grounds:

- Inadmissible hearsay (Evid C §1200);
- Lack of foundation (Evid C §1331), *e.g.:*
- No showing as to age of writing, or
- No showing that anyone with an interest in the statement has acted on it;
- Not (properly) authenticated (Evid C §1401); or
- Inadmissible secondary evidence (see Evid C §1521).

PRACTICE TIP: If the proponent establishes that the document is an "ancient writing," the exception to the hearsay rule permits use of the document. But there may be a second level of hearsay statements in the document to which no exception applies.

III. SAMPLE QUESTIONS

A. Dispositive Instruments

§21.6 1. Information to Elicit

In introducing a decedent's will in the sample questions segment in §21.7, counsel wants the witness to testify as follows:

- Explain her relationship to the will;
- Identify (authenticate) the document;
- Show recognition of the signature; and
- State that the will has been admitted to probate.

NOTE: Counsel then asks to have the will admitted into evidence.

§21.7 2. Questions to Ask

Proponent: Your Honor, I have given a document titled "Last Will and Testament of Arthur Decedent" to the clerk. It is now marked Exhibit A for identification. I call Ms. Lawyer to the stand.

Q: Ms. Lawyer, are you an attorney?

Q: Ms. Lawyer, did you know Mr. Arthur Decedent?

Q: Did Mr. Decedent ever ask you to prepare a will for him?

Q: Do you recognize Exhibit A?

[*Showing her the document*]

Q: Please tell us whether you recognize the signature on this page.

Q: Whose signature is that?

PRACTICE TIP: Lay witnesses may testify to someone else's signature if they recognize it. Evid C §1416; see chap 32.

Q: Do you know whether this will was ever admitted to probate?

Q: Please tell us when and in what court the will was admitted to probate.

Proponent: I ask the court to admit Mr. Decedent's will into evidence under Evidence Code §1330.

Opponent: Objection. Hearsay and lack of foundation. There has been no showing that dealings with this property since the date of the will are consistent with the statement in the will.

Proponent: Your Honor, I am unaware of any real issue on this point, and while I am prepared to go into it, I would like to save time, if possible. Unless counsel has some contrary evidence, perhaps she would stipulate on this point.

PRACTICE TIP: Proponent's response is a good one if he or she is fairly certain that opposing counsel has no evidence of any contrary dealing with the property but is simply trying to put the proponent to additional trouble. Otherwise, the proponent should ask whatever questions are necessary to elicit the required information.

B. Ancient Writings

§21.8 1. Information to Elicit

Counsel wants to establish that a document over 30 years old contains a statement that Herbert Johnson had convinced Acme Company to start a company baseball team. Counsel shows the witness the document and wants him to testify to the following matters in the sample question segment in §21.9:

- Describe the document so that the jury knows what it is;
- Authenticate the document by recognizing it and the signature on it; and
- Report any hearsay statements that further corroborate the information in the ancient writing.

NOTE: Counsel then asks to have the will admitted into evidence.

§21.9 2. Questions to Ask

Proponent: I call Mr. Witness to the stand.

Q: Mr. Witness, what is your occupation?

Q: Where are you employed?

Q: How long have you worked for that company?

Q: Let me show you a document that has been marked as Defendant's Exhibit A. Do you recognize it?

Q: Would you please describe what it is?

Q: Do you recognize the signature at the bottom of the page?

Q: How are you able to recognize that signature?

Q: What is the date on the document?

PRACTICE TIP: A writing is presumed to have been accurately dated. Evid C §640. See Evid C §643.

Q: Please read aloud paragraphs two and three.

Q: In your 32 years with Acme, have you had occasion to discuss Herbert Johnson with your fellow employees?

Q: What was the substance of your discussions about Mr. Johnson?

Opponent: Objection. Hearsay.

Proponent: Your Honor, these discussions are not being offered for the truth of the matters stated, but merely to show that the employees said that Mr. Johnson was the one who got credit for the ball team. That would be an action by interested persons that was consistent with the proffered statement in the ancient document.

Court: Objection overruled.

Q: Have you ever played on the Acme Company baseball team?

Q: Have you attended any type of award ceremony for the team?

Q: On those occasions, did anything occur that involved the memory of Mr. Johnson?

Proponent: Your Honor, I ask the court to admit the Acme memo, marked as Defendant's Exhibit A, into evidence.

IV. COMMENT

§21.10 A. Dispositive Instruments

Evidence Code §1330 is rarely used, and few if any judges are familiar with it. It would probably be a good idea to advise the court in advance of your intent to use §1330 and to present a brief memorandum outlining the elements of the statute and how your proposed evidence conforms to it. The negative aspect of this approach from the proponent's view is that it allows the opponent to have the matter considered and ruled on out of the jury's presence.

Objections to requirements that allow a statement into evidence under Evid C §1330 as an exception to the hearsay rule, and authentication objections, are to be considered at a preliminary fact hearing. See chap 4. See discussion of any other applicable objection to the writing that may be made in the chapter concerning that matter, *e.g.,* relevance (Evid C §§210, 350-351), inadmissible secondary evidence (Evid C §1521), and probative value outweighed by prejudice, confusion, or time consumed (Evid C §352).

PRACTICE TIP: Most judges prefer being notified of unusual evidentiary problems like this one before the witness takes the stand.

§21.11 B. Ancient Writings

The major problem in using Evid C §1331 may be authenticating the ancient document. Refer to the discussion of authentication in chap 11, but particularly consider Evid C §§1417-1421. A possible option is using Evid C §643, which provides that an ancient document is presumed to be authentic if it meets the following conditions:

- Is a writing;
- Affects an interest in real or personal property;
- Is at least 30 years old;
- Does not, by its condition, give rise to a suspicion about the writing's authenticity;
- Was kept or found in a likely place; and
- Has generally been acted on as authentic by people with an interest in the matter.

As suggested in the sample questions in §21.9, proof that people have acted consistently with an ancient statement may be a good vehicle for the proponent to use to introduce much evidence that would otherwise be difficult to admit. Conversely, that issue may become so contentious that it distracts attention from the more important issue to which the ancient statement is relevant.

V. CHECKLISTS

§21.12 A. Checklist: Witnesses to Subpoena

Dispositive Instruments

- Witness or other evidence to authenticate document.
- Witness to satisfy secondary evidence rule, if objection raised.
- Witness to testify to dealings with property in question, if challenged on this issue.
- Witness to testify to purpose of writing, if not obvious from writing.

Ancient Writings

- Witness or other evidence to authenticate document and establish its age.
- Witness to satisfy secondary evidence rule, if objection raised.
- Witness to testify concerning whether people since then have acted on the statement in the document as true.

§21.13 B. Checklist: Alternative Methods of Admissibility

- Community reputation concerning land. Evid C §§1320-1324; see chap 18.
- Family history. Evid C §§1310-1316; see chap 25.
- Lost or destroyed public records. Evid C §1601; see chap 36.
- Miscellaneous official writings concerning property. Evid C §§1600, 1603-1605, set out in §21.16.
- Official writing. Evid C §§1280-1284, 1530-1532; see chap 36.
- Lost or destroyed records. CCP §§1953-1953.13.

VI. SOURCES

A. Evidence Code

§21.14 1. Dispositive Instruments

Evid C §1330. Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

§21.15 2. Ancient Writings

Evid C §1331. Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

§21.16 3. Official Records and Documents That Affect Property

Evid C §1600. (a) The record of an instrument or other document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

(1) The record is in fact a record of an office of a public entity; and

(2) A statute authorized such a document to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of proof.

Evid C §1601. (a) Subject to subdivisions (b) and (c), when in any action it is desired to prove the contents of the official record of any writing lost or destroyed by conflagration or other public calamity, after proof of such loss or destruction, the following may, without further proof, be admitted in evidence to prove the contents of such record:

(1) Any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person engaged in the business of preparing and making abstracts of title prior to such loss or destruction; or

(2) Any abstract of title, or of any instrument affecting title, made, issued, and certified as correct by any person engaged in the business of insuring titles or issuing abstracts of title to real estate, whether the same was made, issued, or certified before or after such loss or destruction and whether the same was made from the original records or from abstract and notes, or either, taken from such records in the preparation and upkeeping of its plant in the ordinary course of its business.

(b) No proof of the loss of the original writing is required other than the fact that the original is not known to the party desiring to prove its contents to be in existence.

(c) Any party desiring to use evidence admissible under this section shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use such evidence at the trial of the action, and shall give all such other parties a reasonable opportunity to inspect the evidence, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof.

Evid C §1603. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed. The presumption established by this section is a presumption affecting the burden of proof.

Evid C §1604. A certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

Evid C §1605. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this state, derived from the Spanish or Mexican governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-66, are admissible as evidence with like force and effect as the originals and without proving the execution of such originals.

See Evid C §643, which is similar to Evid C §1331.

§21.17 B. Other

For further discussion of dispositive instruments, see 1 Witkin, California Evidence, *Hearsay* §292 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 17 (4th ed CJA-CEB 2009).

For further discussion of ancient writings, see 1 Witkin, Evidence, *Hearsay* §293; Jefferson's Evidence Benchbook, chap 17.

22

Dying Declarations

Holly J. Fujie

§22.1 I. SCOPE OF CHAPTER

This chapter discusses the admissibility of statements concerning cause of death, made by the decedent when he or she knew death was imminent, as an exception to the hearsay rule. Evid C §1242.

II. REQUIREMENTS

§22.2 A. To Admit

To admit a statement concerning cause of death, the proponent must satisfy all the following requirements (Evid C §1242):

- The statement must relate to the cause and circumstances of the declarant's death;
- The declarant must have had personal knowledge of the cause and circumstances of his or her impending death;
- The declarant must have been aware of immediately impending death at the time he or she made the statement; and
- The declarant must now be dead.

§22.3 B. To Object

The party opposing the admission of a statement concerning cause of death may object on any of the following grounds:

- Hearsay (Evid C §1200);
- No foundation (Evid C §1242) because, *e.g.,* no showing was made that the declarant had personal knowledge of the cause and circumstances of own death;
- If the statement is in writing, the following objections may also be relevant:
- Not (properly) authenticated (see Evid C §1401), and
- Inadmissible secondary evidence (see Evid C §1521).

Forfeiting right to object by intentionally silencing potential witness. A defendant may forfeit the right to object to a dying declaration on hearsay grounds when that defendant caused the declarant's unavailability to testify by killing the declarant, but *only* if the defendant acted with the specific intention of stopping the witness from testifying and at the time of the statement the victim realized that he or she was about to die. *Giles v California* (2008) ___ US ___, 171 L Ed 2d 488, 496, 128 S Ct 2678.

III. SAMPLE QUESTIONS

§22.4 A. Information to Elicit

To introduce evidence of a dying declaration, the proponent wants to accomplish the following in the direct examination segments in §§22.5-22.7:

- Introduce the death certificate;
- Present testimony of a medical witness on the declarant's medical condition and his or her awareness of that condition when the declaration was made;
- Have the person who heard the dying declaration identify self and tell why he or she was present to hear it;
- Ask the witness to identify the declarant and testify that the declarant knew that death was imminent;
- Ask the witness to explain how the declarant had personal knowledge of the cause and circumstances of own death; and
- Ask the witness to report the dying declarant's statement.

B. Questions to Ask

§22.5 1. Introduction of Death Certificate

Proponent: I have had the clerk mark a certified copy of this death certificate as Defendant's Exhibit P for identification and have given a copy to opposing counsel. I ask the court to admit it into evidence under Evidence Code §1281, the official records-hearsay exception, and under Health and Safety Code §103550.

Court: The death certificate is admitted into evidence.

Proponent: Would the court have the clerk read the death certificate aloud to the jury?

NOTE: In most criminal cases, the proponent need not offer the death certificate into evidence. The coroner either testifies or counsel stipulate to the declarant's death.

§22.6 2. Examination of Medical Witness

Q: Dr. Internist, what is your occupation?

Q: Did you treat Ms. Decedent on September 7, 1998?

Q: Were you her doctor at that time?

Q: Where was Ms. Decedent when you treated her?

Q: What were you treating her for?

Q: Could you describe her condition at that time?

Q: Did you tell Ms. Decedent that she was dying?

PRACTICE TIP: Your opponent may object that the question calls for hearsay. You might respond that it goes to the declarant's state of mind at that time, and that you intend to prove that Ms. Decedent knew that she was dying and made a statement that is admissible as a dying declaration. The statement is therefore admissible under Evid C §1251. (See chap 50 for further discussion of the state of mind exception to the hearsay rule.)

Q: At approximately what date and time did you tell her she was dying?

Q: Was anyone else there when you told her?

§22.7 3. Examination of Witness Who Heard Declarant

Q: Mr. Witness, did you see Ms. Decedent on September 7, 1998?

Q: Where were you?

Q: What time was it?

Q: Why were you there?

Q: Was anyone else there at that time?

Q: Did you hear Dr. Internist say anything to Ms. Decedent?

Q: Did you remain after Dr. Internist left the room?

Q: In what unit of the hospital was Ms. Decedent at that time?

Q: Please describe Ms. Decedent's appearance at that time.

Q: Was any medical equipment being used on Ms. Decedent?

Q: Please describe in your own words what that equipment looked like.

PRACTICE TIP: To prove the declarant's sense of immediately impending death, witnesses may testify to the surrounding circumstances, such as the declarant's physical condition, the nature of any wounds or sores, the opinions of medical and other attendants stated to the declarant, and the declarant's conduct and statements. See *People v Tahl* (1967) 65 C2d 719, 725, 56 CR 318; *People v Cipolla* (1909) 155 C 224, 100 P 252.

Q: Did Ms. Decedent say anything to you?

Q: What did Ms. Decedent say?

IV. COMMENT

§22.8 A. Immediate Death Not Necessary for Admissibility

The dying declaration exception is available even if the declarant did not die immediately, as long as he or she believed death was imminent at the time of making the statement. *People v Monterroso* (2004) 34 C4th 743, 762, 22 CR3d 1; *People v Tahl* (1967) 65 C2d 719, 727, 56 CR 318; *People v Cord* (1910) 157 C 562, 108 P 511.

§22.9 B. Objection Required

If your opponent does not challenge admission of the dying declaration through an in limine motion or an objection, no hearing is required. See *Perry v McLaughlin* (1931) 212 C 1, 6, 297 P 554. You may then elicit the dying declaration and the preliminary facts that support its admission from the witness on the stand on direct examination. Dying declarations are admissible in both civil and criminal cases. See Jefferson's California Evidence Benchbook, chap 7 (4th ed CJA-CEB 2009).

§22.10 C. Foundation Issues

If the opponent challenges whether the declarant *actually made* the statement, the court's decision to admit the declaration is governed by Evid C §403. See Comment to Evid C §405. Usually, however, an opponent challenges the trustworthiness of the dying declaration, *e.g.,* whether the declarant was under a sense of impending death. This determination is made by the judge under Evid C §405. See Comment to Evid C §405. The proponent has the burden of producing evidence of the existence of the preliminary facts that support admission of the statement. See Comment to Evid C §405. See chap 4 for discussion of preliminary fact hearings.

D. Matters After Preliminary Fact Hearing

§22.11 1. Opponent May Still Discredit Dying Declaration

Even though the judge may rule that a dying declaration is admissible, opposing counsel may still seek to discredit it in one of several ways: By attacking the credibility of the declarant or the witness who claims to have heard the declaration, by casting doubt on the declarant's ability to communicate accurately or the witness's ability to perceive the statement correctly, or by disputing the weight that should be given to the statement. Evid C §406; see Jefferson's California Evidence Benchbook, chap 7 (4th ed CJA-CEB 2009).

§22.12 2. Proponent Should Provide Supporting Evidence

The proponent should introduce as much evidence as necessary to make the dying declaration credible to jurors. For example, if more than one person heard the dying declaration, consider having them all testify. Or if other testimony or evidence will corroborate the testimony of the witness who heard the dying declaration, present it to the court and jury.

V. CHECKLIST

§22.13 A. Checklist: Witnesses to Subpoena

- Person who can testify to the circumstances surrounding the making of the statement to show that the declarant believed that his or her death was imminent and had personal knowledge of the cause of death.
- Person who heard the statement.
- If statement is in writing, people to testify to authentication.

NOTE: No witness is needed to introduce a certified copy of the death certificate. See chap 36 (official records).

§22.14 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1227; see chap 10.
- Declaration against interest. Evid C §1230; see chap 20.
- Nonhearsay. Evid C §1200; see chap 35.
- Spontaneous or contemporaneous statement. Evid C §§1240-1241; see chap 49.
- Statement of state of mind or physical sensation. Evid C §§1250-1251; see chap 50.

VI. SOURCES

§22.15 A. Evidence Code

Evid C §1242. Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.

§22.16 B. Other

For further discussion of dying declarations, see 1 Witkin, California Evidence, *Hearsay* §§186-193 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 7 (4th ed CJA-CEB 2009). Introduction of death certificates is discussed in chap 36 and in Jefferson's Evidence Benchbook, chap 5.

23

Experiments and Scientific Tests

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§23.1 I. SCOPE OF CHAPTER

This chapter discusses the admissibility of experiments and scientific tests, which must be relevant, the conditions of which must be substantially similar to those in the case, and which must not be objectionable under Evid C §352. See *People v Bonin* (1989) 47 C3d 808, 847, 254 CR 298. In addition to relevance under Evid C §350, if the evidence depends on a new scientific technique, the technique must be demonstrated to be generally accepted by a typical cross-section of the relevant scientific community. *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663; *People v Kelly* (1976) 17 C3d 24, 130 CR 144. Other requirements vary, depending on the type of experiment or test, *e.g.,* jury views and exhibition of a portion of a party's body.

II. REQUIREMENTS

A. Experiments

§23.2 1. To Admit

To introduce an experiment into evidence, the proponent must meet the following requirements:

- The experiment must be relevant (Evid C §351);
- Conditions of the experiment must be substantially similar to those of the relevant activity (see *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 548, 138 CR 705, overruled on another ground in *Soule v General Motors Corp.* (1994) 8 C4th 548, 34 CR2d 607);
- Chain of custody must be shown if an item of real evidence is used as part of the experiment (see *People v Riser* (1956) 47 C2d 566, 580, 305 P2d 1, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201);
- If an expert is required, the expert must be qualified to conduct the experiment (see Evid C §801);
- If relevant, the experiment must meet the standard established in *People v Kelly* (1976) 17 C3d 24, 130 CR 144 (see *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663), or other reliability requirements (Evid C §801(b)); and
- If an experiment will be performed during trial, the court must be satisfied beforehand that the experiment will not be too time-consuming or confusing (see Evid C §352; *Hasson v Ford Motor Co., supra*).

Source: Evidence/Effective Introduction of Evidence in California/23 Experiments and Scientific Tests/§23.3 2. To Object

§23.3 2. To Object

The opponent may object to admissibility of an experiment on any of the following grounds:

- The experiment is irrelevant (Evid C §351);
- The conditions are not similar (*Andrews v Barker Bros. Corp.* (1968) 267 CA2d 530, 537, 73 CR 284);
- No chain of custody is shown (see *People v Riser* (1956) 47 C2d 566, 305 P2d 1, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201);
- The expert is not qualified (Evid C §801);
- The experiment fails to meet the *Kelly* test (*People v Kelly* (1976) 17 C3d 24, 130 CR 144) or satisfy other reliability requirements (Evid C §801(b); *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663);
- The experiment is too time-consuming, prejudicial, confusing, or misleading (Evid C §352);
- There are too many variables (*People v Skinner* (1954) 123 CA2d 741, 267 P2d 875); and
- The experiment is based largely on speculation and conjecture (see Evid C §801(b); *Long v California-Western States Life Ins. Co.* (1955) 43 C2d 871, 279 P2d 43).

B. Scientific Tests

§23.4 1. To Admit

To introduce a scientific test into evidence, the proponent must meet the following requirements:

- If a scientific test is new, it must be shown to be generally accepted by a typical cross-section of the relevant scientific community (Evid C §350; *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663);
- Correct scientific procedures must be used (*People v Kelly* (1976) 17 C3d 24, 130 CR 144);
- Conditions for the test must be substantially similar to conditions of the actual event (see *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 550, 138 CR 705, overruled on another ground in *Soule v General Motors Corp.* (1994) 8 C4th 548, 34 CR2d 607; *People v Wong* (1973) 35 CA3d 812, 111 CR 314);
- The expert witness must be qualified to give an opinion based on the test results (Evid C §801);
- If a writing is involved, it must be authenticated (see Evid C §1400); and
- If relevant, the chain of custody of the tested item must be shown (see *People v River* (1956) 47 C2d 566, 305 P2d 1, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201).

Source: Evidence/Effective Introduction of Evidence in California/23 Experiments and Scientific Tests/§23.5 2. To Object

§23.5 2. To Object

The opponent may object to admissibility of a scientific test on any of the following grounds:

- The experiment is unreliable (Evid C §801(b); *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663; *People v Kelly* (1976) 17 C3d 24, 130 CR 144);
- No showing was made that this witness is competent to interpret the test results (Evid C §801);
- The experiment is irrelevant; no showing was made that the test was administered correctly or that the circumstances were related to facts at issue (Evid C §351);
- The experiment is too time-consuming, prejudicial, confusing, or misleading (Evid C §352);
- If a writing is involved, it did not satisfy the secondary evidence rule (Evid C §1521);
- If a writing is involved, it was not properly authenticated (Evid C §§1400-1454); and
- The proponent has not shown that correct scientific procedures were used in the particular case (*People v Williams* (2002) 28 C4th 408, 414, 121 CR2d 854 (may be used even if technique qualified as scientifically valid under *People v Kelly* (1976) 17 C3d 24, 130 CR 144)).

PRACTICE TIP: Opposing counsel has the responsibility to make *Kelly* or other reliability objections; the trial court is not required to raise them sua sponte. *People v Kaurish* (1990) 52 C3d 648, 276 CR 788.

NOTE: The *Kelly* rule does not test the "degree of professionalism" with which a new scientific methodology is applied. Once a scientific method is accepted under *Kelly,* any variations in technique or procedure go to the weight of the evidence, not its admissibility. Similarly, carelessness in testing practices does not affect the admissibility of the evidence. Poor testing practices should be attacked on cross-examination or with expert testimony. *People v Cook* (2007) 40 C4th 1334, 1345, 58 CR3d 340; *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1398, 55 CR3d 551.

Availability of testing material. An additional basis for objection concerns the availability of samples of evidentiary material for testing by the prosecution and defense. A defendant's right to independent, confidential forensic tests of material, such as blood, would be restricted if a sample of the material would be destroyed in the process of testing it. In the view of one appellate court, if one single sample exists that would be destroyed in testing, the defendant has no independent, confidential right to test that sample. If two samples exist that would be destroyed in testing, the prosecution is entitled to test one and the defendant may test the other, but the defendant must share the test results with the prosecution. *People v Varghese* (2008) 162 CA4th 1084, 1092, 76 CR3d 449.

C. View by Trier of Fact

§23.6 1. To Admit

A proponent who wants the jury to view an item or place must meet the following requirements:

- Condition of item or place to be viewed must be relevant (CCP §651(a)—civil cases; Pen C §1119—criminal cases); and
- Condition of item or place to be viewed must be substantially similar to its condition at the time of the dispute (see *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 414, 82 CR 1).

PRACTICE TIP: Because the entire jury must be transported to the site, be sure to notify the court well in advance of your desire for a jury view and be sure to have a court reporter present.

Source: Evidence/Effective Introduction of Evidence in California/23 Experiments and Scientific Tests/§23.7 2. To Object

§23.7 2. To Object

The opponent may object to the jury's viewing an item or place on any of the following grounds:

- Irrelevant (CCP §651(a) or Pen C §1119);
- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352); or
- Not substantially similar (see *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 414, 82 CR 1).

NOTE: Code of Civil Procedure §651(b) requires that a court be "in session" during the jury's view of a place in a civil case. Penal Code §1119 requires that the jury in a criminal case be escorted by a sheriff or marshal, and that the defendant have the right to be present at the viewing. A failure to comply with these procedures is a ground for objection.

D. Exhibition of Person

§23.8 1. To Admit

A proponent who wants to exhibit a person, or some feature of a person, during trial must show that:

- The exhibition is relevant; and
- The present condition of the relevant body part is sufficiently similar to its condition at the time of the dispute to have probative value (see *People v Wong* (1973) 35 CA3d 812, 835, 111 CR 314).

§23.9 2. To Object

Opposing counsel may object to the exhibition of a person on any of the following grounds:

- Condition not similar enough (see *People v Wong* (1973) 35 CA3d 812, 835, 111 CR 314);
- Exhibition would subject person to undue embarrassment (Evid C §765(a)); or
- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352).

III. SAMPLE QUESTIONS

§23.10 A. Information to Elicit

To admit testimony regarding a scientific test, the proponent wants an expert to cover the following points in the direct examination segment in §23.11:

- Explain factors that make test reliable;
- Identify test used and that it is the correct test to use;
- Describe sample tested;
- Show chain of custody;
- Describe how test was done; and
- Report test results.

§23.11 B. Questions to Ask

Q: What is your name?

A: Dr. Science.

Q: What is your occupation?

A: I am a chemist, employed by Testing Laboratories.

Q: Dr. Science, did you perform any chemical tests on this bloodstained pillow?

A: Yes, I conducted electrophoretic testing, which involves typing of blood proteins and enzymes, as well as agglutination inhibition testing, which is a process that detects genetic markers in the bloodstream.

Q: Do you personally possess the appropriate knowledge and experience to conduct such tests?

Opponent: Your Honor, I will stipulate to the qualifications of this witness. My problem is with the testing process itself—I certainly have never heard of it, and I doubt that it is reliable.

PRACTICE TIP: Your opponent may offer to stipulate to your expert's qualifications to prevent the jury from hearing them. You should ordinarily refuse to stipulate so that you can impress the jury with the expert's qualifications. See discussion in California Expert Witness Guide §13.5 (2d ed Cal CEB 1991) and Effective Direct & Cross-Examination §7.3 (Cal CEB 1986).

Proponent: Let me address those concerns, Your Honor. Dr. Science, have the two methods you have described gained acceptance in your field as reliable tests?

A: Yes. Electrophoresis is the most commonly used method of blood typing. While there is always a minuscule potential for error resulting from contamination or spoilage, the method is well accepted in medical and legal circles as reliable. Agglutination inhibition testing has been around for years in the field of immunology; while its use in the criminal law field is perhaps novel, the test itself is not. It has been well accepted, respected, and used around the world for many years.

Q: Do you believe these two methods to be reliable?

A: Yes, I do, based on the fact that we have years of experience using these tests and they have been found time and again to be accurate. I am prepared to discuss the specifics if you like.

Court: I believe that this witness's testimony has amply satisfied the elements of *Kelly* and the requirements of Evidence Code §801(b).

NOTE: Your opponent will probably make an in limine motion to exclude this evidence before trial rather than objecting in front of the jury, as in this example.

Proponent: Your Honor, Mr. Opponent knows how well qualified Dr. Science is, but the jury does not. I would like to proceed with my questioning concerning her qualifications.

Court: Yes, go ahead.

[*Qualification questions omitted*]

Q: And do you know whether correct procedures were used in applying the tests in this case?

A: Yes. I have performed each of these tests thousands of times and am certified by the Board of Forensic Know-It-Alls as an expert in performing these tests.

[*Questioning on chain of custody, actual test, and test results omitted*]

IV. COMMENT

§23.12 A. Experiments

Experiments usually involve expert testimony and scientific equipment. Because they do not always work out as planned, most attorneys prefer to film them and show the film to jurors. Another advantage of filming is that the judge can preview the film to ascertain exactly how much time it will take.

Nonetheless, if you decide to have the experiment performed in court, be sure you have a capable person handling the equipment. Arrange for the equipment to be set up during a break so that the judge and jury are not inconvenienced (and possibly annoyed). Most important, try it in advance a few times to be sure it will achieve the desired result.

PRACTICE TIP: Be sure to comply with local rules. Have an alternative plan ready if the court does not allow your experiment or if the experiment for some reason does not go according to plan.

B. Scientific Techniques

§23.13 1. "General Acceptance" Test

In *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663, the California Supreme Court reaffirmed that, if a scientific test is new, its reliability must be established by a showing that the new test has been generally accepted by a typical cross-section of the relevant scientific community. This standard arose from *Frye v U.S.* (DC Cir 1923) 293 F 1013 and was endorsed in *People v Kelly* (1976) 17 C3d 24, 130 CR 144.

In *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, the Supreme Court held that *Frye* had been superseded by the adoption in 1975 of the Federal Rules of Evidence, in particular former Fed R Evid 702. Under *Daubert*, the federal judge has wide latitude in deciding reliability but should consider multiple factors, none of which are dispositive (*e.g.,* whether the technique can be or has been tested, whether the technique has been subject to peer review, the known or potential rate of error, and degree of acceptance in the relevant scientific community). Rule 702 was amended in 2000 to incorporate the factors the *Daubert* court instructed trial courts to consider.

In *Leahy,* however, the California Supreme Court found that the *Kelly* rule survived the *Daubert* decision because the state Evidence Code provisions (the functional equivalent of the federal rules in question) were adopted in 1965, 11 years before *Kelly* was decided. The California Supreme Court noted that in *Kelly* it was "presumably well aware" that Evid C §§720 and 801, like Fed R Evid 702, did not contain the "general acceptance" standard of *Frye*, but nevertheless found *Frye* compatible with §§720 and 801. 8 C4th at 599.

The "general acceptance" standard requires that the "relevant scientific community" include opponents of the scientific test, and courts are instructed to inquire *sua sponte* about the opinions of such opponents. See *People v Kelly,* 17 C3d at 37. In doing so, a court may appoint its own expert under Evid C §730. The existence of a bare minority of opposition to a scientific test is insufficient because courts must consider the "quality, as well [the] as quantity," of the views held by its proponents and opponents. See *Leahy,* 8 C4th at 612.

Evidence Code §801 requires that expert opinion be based on matters that can reasonably be relied on; if not, the opinion is not relevant and is inadmissible under both Evid C §§350 and 801. Whether the test is new or old, the proponent must show that correct procedures were followed and that the witness is qualified. See *People v Kelly, supra*.

NOTE: A trial court acted within its discretion in denying a *Kelly-Frye* hearing to the prosecution after the court considered conflicting evidence on the admissibility of scientific evidence in a rape case, and found there was no new scientific methodology at issue and that the methodology used was generally accepted in the scientific community. Even if the trial court decision was erroneous, it was not "in excess of jurisdiction" and, thus, writ review was not available to the prosecution. *People v Superior Court (Maldonado)* (2006) 137 CA4th 353, 356, 40 CR3d 365.

NOTE: A court may not as "a matter of law" resolve the scientific debate between testifying experts to determine which intellectual testing procedure and its result should prevail. *People v Superior Court (Vidal)* (2007) 40 C4th 999, 1012, 56 CR3d 851. Instead, the court's focus should be on the "principles and methodologies" underlying the test, not on the ultimate results. 40 C4th at 1014.

PRACTICE TIP: A *Kelly* inquiry is not required when a precedential published appellate opinion has endorsed the scientific test in question. See *People v Kelly,* 17 C3d at 32. Courts may also look to persuasive authority from other jurisdictions for endorsements of scientific tests. See *People v Allen* (1999) 72 CA4th 1093, 1099, 85 CR2d 655. But the California attorney must use care in citing out-of-state authority to endorse a specific test because that authority might be based on a standard that differs from *Kelly*. For a compilation of decisions from other jurisdictions regarding the admissibility of scientific evidence, see *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 ALR 5th 453.

§23.14 2. *Kelly* Rule Applies to New Scientific Techniques

The *Kelly* rule applies to new scientific techniques and whether those techniques are reliable. Courts have taken the position that a scientific test may unduly influence jurors compared with expert testimony because a scientific test has an "aura of infallibility," while an expert opinion will be heard by the jury with a "healthy skepticism born of their knowledge that all human beings are fallible." *In re Amber B.* (1987) 191 CA3d 682, 686, 236 CR 623. See *People v Sanchez* (1989) 208 CA3d 721, 735, 256 CR 446.

For example, testimony by physicians and psychologists is considered to be expert testimony, not scientific evidence. It is therefore not subject to the *Kelly* rule. *People v McDonald* (1984) 37 C3d 351, 372, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431. Similarly, an experienced expert's opinion that common, distinctive aspects of different crimes link them together as the signature offenses of one person is not based in scientific technical theory. *People v Prince* (2007) 40 C4th 1179, 1225, 57 CR3d 543. An expert's opinion on the fair rate of return for the rental of mobile homes based on facts from an almanac is not a scientific technique or process and thus is not subject to *Kelly* analysis. *TG Oceanside, L.P. v City of Oceanside* (2007) 156 CA4th 1355, 1383, 68 CR3d 320. See also *People v Hood* (1997) 53 CA4th 965, 62 CR2d 137 (computer-animated illustration of shooting not subject to *Kelly* test; animation was similar to witness making drawing for illustrative purposes). Expert testimony must satisfy the standards in Evid C §801. See §§24.25-24.30.

For extensive discussion of application of the *Kelly* rule in both civil and criminal cases, see California Expert Witness Guide §§4.12-4.35 (2d ed Cal CEB 1991).

PRACTICE TIP: The court can take judicial notice of earlier proceedings within the same trial court for purposes of establishing a foundation of reliability. *People v Smith* (1989) 215 CA3d 19, 263 CR 678.

§23.15 3. Criminal Cases: Effect of Cal Const art I, §28(f)(2) on Use of *Kelly* Rule

Passed as part of Proposition 8 in 1982, Cal Const art I, §28(f)(2), (formerly §28(d)) ("relevant evidence shall not be excluded in any criminal proceeding"), did not eliminate the *Kelly* requirements for scientific evidence in criminal cases because reliability is an aspect of relevance and the "general acceptance" standard of reliability determines whether the evidence is relevant and whether §28(f)(2) even applies. *People v Leahy* (1994) 8 C4th 587, 599, 34 CR2d 663 (horizontal gaze nystagmus (HGN) test); *People v Harris* (1989) 47 C3d 1047, 1093, 255 CR 352 (polygraph test).

NOTE: There is a growing, but by no means unanimous, body of literature on the effect that television and film depictions of the use of scientific evidence have on finders of fact. See, *e.g.,* Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal L Rev 721 (2007). While California courts have yet to mention the so-called "*CSI* Effect" in any published opinions, the reasoning put forward by proponents of the effect echoes language quoted by the California Supreme Court in *Kelly*: "… scientific proof may in some instances assume the posture of mystic infallibility in the eyes of a jury[.]" *U.S. v Addison* (DC Cir 1974) 498 F2d 741, 744.

Source: Evidence/Effective Introduction of Evidence in California/23 Experiments and Scientific Tests/§23.16 4. Examples: Scientific Tests That Have Been Specifically Approved

§23.16 4. Examples: Scientific Tests That Have Been Specifically Approved

The following have survived *Kelly* challenges and are no longer considered "new" for reliability purposes. The general acceptance of these may change; new evidence may modify old decisions, but principles of stare decisis apply.

- Fingerprint analysis (*People v Riser* (1956) 47 C2d 566, 589, 305 P2d 1, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201).
- Handwriting comparison (*People v Storke* (1900) 128 C 486, 60 P 1090).
- Ballistics analysis (*People v Trujillo* (1948) 32 C2d 105, 194 P2d 681).

NOTE: The National Research Council of the National Academies published a report in 2009 entitled, *Strengthening Forensic Science in the United States: A Path Forward*, which is critical of the reliability of forensic identification techniques and arguably opens the door to renewed *Kelly* challenges to such evidence. The report was referred to by Justice Scalia in *Melendez-Diaz v Massachusetts* (2009) ___ US ___, 174 L Ed 2d 314, 129 S Ct 2527, which confirmed the court's disapproval of *Ohio v Roberts* (1980) 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531, and held that sworn certificates of analysis were testimonial hearsay and the analysts, therefore, subject to confrontation.

- Radar speedmeter to determine vehicle speed (*People v MacLaird* (1968) 264 CA2d 972, 71 CR 191).
- Expert testimony regarding intimate partner battering and its effects in criminal cases (Evid C §1107(b); see *People v Riggs* (2008) 44 C4th 248, 292, 79 CR3d 648 (expert opinion proper to explain why abused woman did not stop victim's murder, leave abuser, or report crime); *People v Humphrey* (1996) 13 C4th 1073, 56 CR2d 142 (testimony relevant for deciding reasonableness of defendant's belief in need to kill in self-defense); *People v Morgan* (1997) 58 CA4th 1210, 68 CR2d 772 (testimony explained recanting witness/declarant's statements to police); *People v Erickson* (1997) 57 CA4th 1391, 67 CR2d 740 (testimony admissible on likely effect of syndrome on defendant's behaviors and beliefs but not on defendant's actual state of mind)).

NOTE: California appellate courts are split on whether expert testimony on intimate partner battering is admissible under Evid C §1107 without evidence of prior abuse. Compare *People v Williams* (2000) 78 CA4th 1118, 93 CR2d 356 (testimony admissible without evidence of prior abuse), with *People v Gomez* (1999) 72 CA4th 405, 85 CR2d 101 (testimony inadmissible without prior abuse). Although the California Supreme Court did not discuss admissibility under Evid C §1107, it concluded that the appellate court did not err in upholding the trial court's admission of expert testimony on the behavior of domestic violence victims, because such evidence was admissible under Evid C §801 to help the jury assess the credibility of the victim, even though there had been only one incident of violence. *People v Brown* (2004) 33 C4th 892, 895, 16 CR3d 447. Any language to the contrary in *Gomez* was disapproved. 33 C4th at 908. Therefore, under *Brown* and *Williams,* it appears that expert testimony on intimate partner battering and its effects will be admissible even if there has been only one incident of violence.

- Blood (*People v Zavala* (1966) 239 CA2d 732, 49 CR 129; *In re Newbern* (1959) 175 CA2d 862, 865, 1 CR 80), breath (*People v Williams* (2002) 28 C4th 408, 414, 121 CR2d 854; *People v Adams* (1976) 59 CA3d 559, 131 CR 190), and urine tests (see *Quesada v Orr* (1971) 14 CA3d 866, 92 CR 640) for intoxication.
- Horizontal gaze nystagmus (HGN) test (which measures ability of eyes to maintain visual fixation) for intoxication (*People v Joehnk* (1995) 35 CA4th 1488, 42 CR2d 6)).
- Agglutination inhibition test to detect specific genetic markers in blood (*People v Morganti* (1996) 43 CA4th 643, 50 CR2d 837; see also *Duncan v Ornoski* (9th Cir 2008) 528 F3d 1222, 1227 n5 (genetic markers would have established that blood at scene was not defendant's)).
- Hypnosis (limited admissibility of testimony from witnesses who have been hypnotized; the requirements are in Evid C §795).
- Blood tests for nonpaternity (*Cramer v Morrison* (1979) 88 CA3d 873, 153 CR 865).
- Odontology (matching bite on victim with defendant's teeth) (*People v Marx* (1975) 54 CA3d 100, 126 CR 350).
- Typing of bloodstains (*People v Nation* (1980) 26 C3d 169, 161 CR 299); electrophoretic testing of bloodstains (*People v Cook*

(2007) 40 C4th 1334, 1345, 58 CR3d 340; *People v Morris* (1991) 53 C3d 152, 206, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 38 CR2d 394).

- HLA test to establish paternity (*Cramer v Morrison, supra*), now referred to in Fam C §7551 as a "genetic" test rather than a blood test. Relevant sections of the Family Code are reproduced in §23.24.

- ADX Abbott Bench Analyzer urinalysis test (*People v Nolan* (2002) 95 CA4th 1210, 1212, 116 CR2d 331).

- DNA typing: Restriction fragment length polymorphism (RFLP) technique (*People v Soto* (1999) 21 C4th 512, 88 CR2d 34 (approving use of "unmodified product rule" for statistical calculation of probabilities); but see *People v Nelson* (2008) 43 C4th 1242, 1258, 78 CR3d 69 (quoting appellate court's statement that RFLP is obsolete DNA testing method)).

- DNA typing: Capillary electrophoresis to analyze DNA fragments (*People v Henderson* (2003) 107 CA4th 769, 773, 132 CR2d 255).

- DNA typing: Polymerase chain reaction (PCR) matching (*People v Wright* (1998) 62 CA4th 31, 34, 72 CR2d 246; see *People v Nelson* (2008) 43 C4th 1242, 78 CR3d 69; *People v Smith* (2003) 107 CA4th 646, 665, 132 CR2d 230 (RFLP and PCR technologies, including several PCR subtypes (known as DQ-Alpha, Polymarker, and short tandem repeats—STR), have gained general acceptance in relevant scientific community); also, the Identifiler DNA test kit is not materially different from other PCR-STR kits previously accepted under *Kelly* and thus no first-prong *Kelly* analysis is necessary (*People v Jackson* (2008) 163 CA4th 313, 324, 77 CR3d 474)).

- DNA profile probability analysis under the product rule (*People v Nelson* (2008) 43 C4th 1242, 1263, 78 CR3d 69).

NOTE: Not every method of DNA analysis has gained general acceptance. In *People v Pizarro* (2003) 110 CA4th 530, 609, 3 CR3d 21, overruled on other grounds in *People v Wilson* (2006) 38 C4th 1237, 1247, 45 CR3d 73, the court held that the band-intensity analysis procedure used in that case was materially distinct from other analytic procedures that have been held to have achieved general acceptance. Because the prosecution did not produce evidence that such analysis was generally accepted, the results were unreliable and inadmissible. For a detailed list of *Kelly*-approved DNA testing methods and techniques, see Scientific Evidence in California Criminal Cases §5.44 (Cal CEB 2008).

Forensic analysis reports and confrontation clause rights. The United States Supreme Court has held that the admission of sworn certificates of analysis in lieu of live testimony indicating that a seized substance was cocaine violated the defendant's right to confrontation. Because the certificates established a fact to be used against the defendant at trial, "the functional equivalent to what a witness does on direct examination," they were testimonial statements under *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 194, 124 S Ct 1354, and rendered the laboratory analysts witnesses for purposes of the Sixth Amendment. Absent a showing of the analysts' unavailability and the defendant's prior opportunity to cross-examine them, the certificates were inadmissible hearsay. *Melendez-Diaz v Massachusetts* (2009) ___ US ___, 174 L Ed 2d 314, 129 S Ct 2527.

Prior to *Melendez-Diaz*, the California Supreme Court had held that a DNA laboratory report was nontestimonial, and therefore exempt from confrontation clause considerations under *Crawford*. *People v Geier* (2007) 41 C4th 555, 605, 61 CR3d 580. Relying on what it understood to be "the crucial point" regarding testimonial evidence, the court noted that the report was a "contemporaneous recordation of observable effects" rather than a documentation of past events. 41 C4th at 605. The court also noted that the report, which was never admitted into evidence, was generated as part of a routine scientific protocol and to the extent it recounted the procedures used to analyze the DNA, was not in itself accusatory. Instead, the accusatory opinions were conveyed by a testifying expert who relied on the report to arrive at her conclusions. 41 C4th at 607.

The finding that the DNA report was nontestimonial cannot be considered sound in light of *Melendez-Diaz* and the U.S. Supreme Court's rejection for confrontation clause purposes of reasoning similar to *Geier*'s. See *Melendez-Diaz*, ___ US at ___, 174 L Ed 2d at 323. See also *People v Lopez* (2009) 177 CA4th 202, 208, 98 CR3d 825 (error under *Crawford* and *Melendez* to admit blood-alcohol report); *People v Dungo* (2009) 176 CA4th 1388, 98 CR3d 702 (given holding of *Melendez-Diaz*, autopsy report testimonial). However, the question remains whether the admission of live expert opinion testimony concerning lab results obtained by someone other than the testifying expert violates a defendant's Sixth Amendment right to confrontation. Compare *People v Rutterschmidt* (2009) 176 CA4th 1047, 1074, 98 CR3d 390 (Sixth Amendment jurisprudence does not preclude expert opinion testimony on laboratory results obtained by another scientist) with *People v Dungo*, 176 CA4th at 1401 (expert opinion is end-run around constitutional prohibition; when expert bases opinion on testimonial statements, *Crawford* requires defendant to have opportunity to confront individual who issued them).

For additional discussion of *Crawford* and confrontation, see §§20.20B, 49.4.

NOTE: The Supreme Court has announced that it will review a Virginia case, *Briscoe v Virginia* (cert granted 2009) 174 L Ed 2d 600, 129 S Ct 2858, to consider whether a state that allows the introduction of a certificate of forensic laboratory analysis, in lieu

of live testimony from the analyst who prepared it, can avoid a confrontation clause violation provided that the defendant has a right to call the analyst as his or her own witness.

§23.17 5. Examples: Scientific Tests That Have Been Specifically Disapproved

The following scientific tests have been specifically disapproved:

- Polygraph or lie detector (see *People v Wilkinson* (2004) 33 C4th 821, 16 CR3d 420; *People v Maury* (2003) 30 C4th 342, 413, 133 CR2d 561 (exclusion of lie detector evidence does not violate defendant's constitutional right to present defense)), although they are admissible on stipulation (Evid C §351.1). See also *Mancebo v Adams* (9th Cir 2006) 435 F3d 977 (failure to prevent introduction of improper polygraph evidence did not establish ineffective assistance of counsel when polygraph evidence played very small role in trial and was not harmful). But see *People v Fields* (2009) 175 CA4th 1001, 96 CR3d 668 (there appears to be no statutory or judicially created bar to polygraph evidence in civil proceedings).

NOTE: Most states still exclude polygraph tests, but since the decision in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, various state and federal courts have split on their admissibility. In *U.S. v Scheffer* (1998) 523 US 303, 140 L Ed 2d 413, 118 S Ct 1261, the court held a categorical ban on admissibility is constitutionally permissible (exclusion of polygraph evidence offered by defendant to show innocence did not violate Sixth Amendment right to present defense).

- Truth serum (see *People v Cullen* (1951) 37 C2d 614, 626, 234 P2d 1; *Ramona v Superior Court* (1997) 57 CA4th 107, 66 CR2d 766).

- Voiceprint identification (*People v Kelly* (1976) 17 C3d 24, 130 CR 144).

- Dog scent evidence based on "scent transfer unit" (*People v Willis* (2004) 115 CA4th 379, 9 CR3d 235; *People v Mitchell* (2003) 110 CA4th 772, 781, 2 CR3d 49. But see *People v Willis,* 115 CA4th at 386 (dog tracking evidence may be admissible).

- Child sexual abuse accommodation syndrome (CSAAS) as a means of proving that a child has been abused (see *People v Sanchez* (1989) 208 CA3d 721, 734, 256 CR 446).

NOTE: CSAAS evidence can be admitted to explain a child's *reaction* to sexual abuse; specifically, to rehabilitate a complaining witness's credibility when the defendant suggests that the child's conduct after the incident (such as a delay in reporting) is inconsistent with his or her testimony claiming molestation. See *People v McAlpin* (1991) 53 C3d 1289, 1300, 283 CR 382 (child's failure to report abuse).

§23.18 6. Use of In Limine Motions

To challenge the admission of scientific evidence on the ground that it lacks reliability (Evid C §801(b)) or general acceptance (*People v Kelly* (1976) 17 C3d 24, 130 CR 144), consider raising its admissibility before trial as an in limine motion. See chap 3 on in limine motions.

The reliability or general acceptance of a test or other basis of an opinion is a foundational fact whose existence may be contested in a separate hearing out of the jury's presence. On preliminary fact hearings, see chap 4. The burden is on the proponent to establish reliability, because, without reliability, the evidence is not relevant. See Evid C §403(a)(1); *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663.

The proponent should be prepared to present expert opinion that the test is generally accepted and that the procedures used were correct. *People v Joehnk* (1995) 35 CA4th 1488, 42 CR2d 6. Although the court is permitted to review published literature, it is questionable whether the literature would be reviewed without some expert to introduce it and vouch for its authenticity. The opponent to such evidence should attempt to demonstrate through expert testimony and published literature that scientists significant either in number or expertise publicly oppose the technique as unreliable. See *Leahy,* 8 C4th at 611. If the foundational evidence is disputed, the determination of the foundational facts may be so time-consuming that the opponent might consider an objection under Evid C §352.

§23.19 7. View by Trier of Fact

The proponent may want the jury to view a very large exhibit that is difficult or impossible to bring into the courtroom, *e.g.,* a horse, a car, or a location. In deciding whether to request a jury view, consider whether you also want to take testimony or conduct an experiment at the site. Be sure the court reporter is there to record what occurs. Ask the court to allow you to have the view videotaped and have the tape introduced in evidence so that it is available to jurors during their deliberations. Check local court rules for any special procedures. See, *e.g.,* Los Angeles Ct R 8.93.

§23.20 8. Exhibition of Person

When a person's body, or part of it, is relevant to the case, you may want jurors to see it. The relevance of the exhibition must be established by appropriate foundational evidence. See *People v Perez* (1989) 216 CA3d 1346, 265 CR 400. Because the exhibition of a portion of the body is not testimonial, no cross-examination is allowed. 216 CA3d at 1352.

Depending on the portion to be viewed and the purpose, you may want the person to exhibit himself or herself while on the witness stand. If the person will be embarrassed, you may ask to have the courtroom cleared or to have the jury as a group or individually view the person in chambers. Alternatively, photographs or a videotape of the person may be shown to the jury.

It is sometimes useful to request an opposing party's exhibition. For example, in a criminal case, the prosecutor may require the defendant to say or do something in court, such as say certain words or wear particular clothing. See *People v Turner* (1971) 22 CA3d 174, 181, 99 CR 186.

PRACTICE TIP: If the exhibition is live in court, have it photographed or videotaped, and make sure the court reporter reports that it took place.

§23.21 V. CHECKLIST: WITNESSES TO SUBPOENA

- Expert or other witness who conducted tests out of the jury's presence or in court. For example, the person who administered a blood, breath, or urine test must have been qualified and must testify. An exception is made in criminal cases in which blood was taken; under Evid C §712, the person who took the blood may testify by affidavit on proper notice unless an objection is made.

- Expert witness to interpret results. For example, blood, breath, and urine tests require two experts (in addition to the person who took the blood, breath, or urine): (1) the laboratory technician who did the test; and (2) a forensic pathologist or other expert qualified to interpret the test results.

- Expert to testify that the particular apparatus used was in proper working order.

- Witness to testify to chain of custody of evidence, *e.g.,* blood sample from drunk-driving defendant. See *Nichols v McCoy* (1952) 38 C2d 447, 240 P2d 569.

VI. SOURCES

§23.22 A. Evidence Code

Evid C §351.1. (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Evid C §712. Notwithstanding Sections 711 and 1200, at the trial of a criminal action, evidence of the technique used in taking blood samples may be given by a registered nurse, licensed vocational nurse, or licensed clinical laboratory technologist or clinical laboratory bioanalyst, by means of an affidavit. The affidavit shall be admissible, provided the party offering the affidavit as evidence has served all other parties to the action, or their counsel, with a copy of the affidavit no less than 10 days prior to trial.

Nothing in this section shall preclude any party or his counsel from objecting to the introduction of the affidavit at any time, and requiring the attendance of the affiant, or compelling attendance by subpoena.

Evid C §795. (a) The testimony of a witness is not inadmissible in a criminal proceeding by reason of the fact that the witness has previously undergone hypnosis for the purpose of recalling events that are the subject of the witness's testimony, if all of the following conditions are met:

(1) The testimony is limited to those matters that the witness recalled and related prior to the hypnosis.

(2) The substance of the prehypnotic memory was preserved in a writing, audio recording, or video recording prior to the hypnosis.

(3) The hypnosis was conducted in accordance with all of the following procedures:

(A) A written record was made prior to hypnosis documenting the subject's description of the event, and information that was provided to the hypnotist concerning the subject matter of the hypnosis.

(B) The subject gave informed consent to the hypnosis.

(C) The hypnosis session, including the pre- and post-hypnosis interviews, was video tape recorded for subsequent review.

(D) The hypnosis was performed by a licensed medical doctor, psychologist, licensed clinical social worker, or a licensed marriage and family therapist experienced in the use of hypnosis and not in the presence of law enforcement, the prosecution, or the defense.

(4) Prior to admission of the testimony, the court holds a hearing pursuant to Section 402 of the Evidence Code at which the proponent of the evidence proves by clear and convincing evidence that the hypnosis did not so affect the witness as to render the witness's prehypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness's prehypnosis recollection. At the hearing, each side shall have the right to present expert testimony and to cross-examine witnesses.

(b) Nothing in this section shall be construed to limit the ability of a party to attack the credibility of a witness who has undergone hypnosis, or to limit other legal grounds to admit or exclude the testimony of that witness.

§23.23 B. Code of Civil Procedure

CCP §651. (a) On its own motion or on the motion of a party, where the court finds that such a view would be proper and would aid the trier of fact in its determination of the case, the court may order a view of any of the following:

(1) The property which is the subject of litigation.

(2) The place where any relevant event occurred.

(3) Any object, demonstration, or experiment, a view of which is relevant and admissible in evidence in the case and which cannot with reasonable convenience be viewed in the courtroom.

(b) On such occasion, the entire court, including the judge, jury, if any, court reporter, if any, and any necessary officers, shall proceed to the place, property, object, demonstration, or experiment to be viewed. The court shall be in session throughout the view. At the view, the court may permit testimony of witnesses. The proceedings at the view shall be recorded to the same extent as the proceedings in the courtroom.

Source: Evidence/Effective Introduction of Evidence in California/23 Experiments and Scientific Tests/§23.24 C. Family Code

§23.24 C. Family Code

Fam C §7551. In a civil action or proceeding in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person who is involved, and shall upon motion of any party to the action or proceeding made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to genetic tests. If a party refuses to submit to the tests, the court may resolve the question of paternity against that party or enforce its order if the rights of others and the interests of justice so require. A party's refusal to submit to the tests is admissible in evidence in any proceeding to determine paternity. For the purposes of this chapter, "genetic tests" means any genetic test that is generally acknowledged as reliable by accreditation bodies designated by the United States Secretary of Health and Human Services.

Fam C §7552. The genetic tests shall be performed by a laboratory approved by any accreditation body that has been approved by the United States Secretary of Health and Human Services. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of the court, the results of which may be offered in evidence. The number and qualifications of these experts shall be determined by the court.

Fam C §7552.5. (a) A copy of the results of all genetic tests performed under Section 7552 shall be served upon all parties, by any method of service authorized under Chapter 5 (commencing with Section 1010) of Title 14 of the Code of Civil Procedure except personal service no later than 20 days prior to any hearing in which the genetic test results may be admitted into evidence. The genetic test results shall be accompanied by a declaration under penalty of perjury of the custodian of records or other qualified employee of the laboratory that conducted the genetic tests, stating in substance in each of the following:

(1) The declarant is the duly authorized custodian of the records or other qualified employee of the laboratory, and has authority to certify the records.

(2) A statement which establishes in detail the chain of custody of all genetic samples collected, including the date on which the genetic sample was collected, the identity of each person from whom a genetic sample was collected, the identity of the person who performed or witnessed the collecting of the genetic samples and packaged them for transmission to the laboratory, the date on which the genetic samples were received by the laboratory, the identity of the person who unpacked the samples and forwarded them to the person who performed the laboratory analysis of the genetic sample, and the identification and qualifications of all persons who performed the laboratory analysis and published the results.

(3) A statement which establishes that the procedures used by the laboratory to conduct the tests for which the test results are attached are used in the laboratory's ordinary course of business to ensure accuracy and proper identification of genetic samples.

(4) The genetic tests results were prepared at or near the time of completion of the genetic tests by personnel of the business qualified to perform genetic tests in the ordinary course of business.

(b) The genetic test results shall be admitted into evidence at the hearing or trial to establish paternity, without the need for foundation testimony of authenticity and accuracy, unless a written objection to the genetic test results is filed with the court and served on all other parties, by any party no later than five days prior to the hearing or trial where paternity is at issue.

(c) If a written objection is filed with the court and served on all parties within the time specified in subdivision (b), experts appointed by the court shall be called by the court as witnesses to testify to their findings and are subject to cross-examination by the parties.

Fam C §7553. The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in the proportions and at the times the court prescribes, or that the proportion of any party be paid by the county, and that, after payment by the parties or the county or both, all or part or none of it be taxed as costs in the action or proceeding.

Fam C §7554. (a) If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly.

(b) If the experts disagree in their findings or conclusions, or if the tests show the probability of the alleged father's paternity, the question, subject to Section 352 of the Evidence Code, shall be submitted upon all the evidence, including evidence based upon the tests.

Fam C §7555. (a) There is a rebuttable presumption, affecting the burden of proof, of paternity, if the court finds that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is 100 or greater. This presumption may be rebutted by a preponderance of the evidence.

(b) As used in this section:

(1) "Genetic markers" mean separate genes or complexes of genes identified as a result of genetic tests.

(2) "Paternity index" means the commonly accepted indicator used for denoting the existence of paternity. It expresses the relative strength of the test results for and against paternity. The paternity index, computed using results of various paternity tests following accepted statistical principles, shall be in accordance with the method of expression accepted at the International Conference on Parentage Testing at Airlie House, Virginia, May 1982, sponsored by the American Association of Blood Banks.

Fam C §7556. This part applies to criminal actions subject to the following limitations and provisions:

(a) An order for the tests shall be made only upon application of a party or on the court's initiative.

(b) The compensation of the experts shall be paid by the county under order of court.

(c) The court may direct a verdict of acquittal upon the conclusions of all the experts under Section 7554; otherwise, the case shall be submitted for determination upon all the evidence.

Fam C §7557. Nothing in this part prevents a party to an action or proceeding from producing other expert evidence on the matter covered by this part; but, where other expert witnesses are called by a party to the action or proceeding, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action or proceeding.

§23.25 D. Penal Code

Pen C §1119. When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal, as the case may be, to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

§23.26 E. Other

For further discussion of experiments, see 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§35-40 (4th ed 2000); California Trial Practice: Civil Procedure During Trial §§13.39-13.41, 13.109 (3d ed Cal CEB 1995); California Criminal Law Procedure and Practice §§31.12-31.15, 31.31, 33.12 (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009); California Expert Witness Guide, chaps 4-5, 9 (2d ed Cal CEB 1991); California Personal Injury Proof §8.36 (Cal CEB 1970).

On scientific tests, see 2 Witkin, Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§41-109; Wegner, Fairbank, & Epstein, California Practice Guide: Civil Trials and Evidence, *Scientific Evidence* §§8:563-8:616 (1993); Jefferson's Evidence Benchbook, chap 21.

On jury views, see 2 Witkin, Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§25-31; Civ Proc During Trial §§13.110-13.111, 17.9, 17.13, 18.2; Expert Witness §9.19; P I Proof §§8.16-8.19.

On exhibition of persons, see 2 Witkin, Evidence, *Demonstrative, Experimental, and Scientific Evidence* §33; Civ Proc During Trial §13.106.

For a general discussion of the use of scientific evidence, see Scientific Evidence in California Criminal Cases (Cal CEB 2008); Faigman, Kay, Saks, & Sanders, Modern Scientific Evidence: The Law and Science of Expert Testimony (2008).

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/Chapter Outline

24

Expert Witnesses

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§24.1 I. SCOPE OF CHAPTER

This chapter discusses the procedures for disclosing and examining expert witnesses during trial. Expert testimony is opinion testimony on a subject beyond the experience of ordinary witnesses, given by a person with the special skills necessary to qualify as an expert. Evid C §§720, 801.

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/ II. REQUIREMENTS/§24.2 A. To Admit

II. REQUIREMENTS

§24.2 A. To Admit

Expert testimony is admissible when:

- The subject on which testimony is desired is beyond the experience of ordinary witnesses (Evid C §801(a));
- The testimony will help the trier of fact (Evid C §801(a); *Avivi v Centro Medico Urgente Med. Ctr.* (2008) 159 CA4th 463, 470, 71 CR3d 707 (discussing need for expert testimony and ability of foreign national to testify on standard of care to establish medical malpractice); *Mardirossian & Assoc. v Ersoff* (2007) 153 CA4th 257, 272, 62 CR3d 665 (complexity of evaluating factors in attorney's quantum meruit action justified expert testimony); *Fergus v Songer* (2007) 150 CA4th 552, 578, 59 CR3d 273 (discussing expert testimony on standard of care to establish legal malpractice));
- The witness is qualified as an expert on that subject because of "special knowledge, skill, experience, training, or education" (Evid C §720(a); *In re Branden O.* (2009) 174 CA4th 637, 643, 94 CR3d 520);

NOTE: An expert witness who is also a party may testify, and the jury may weigh that fact in assessing the witness's credibility. *Douglas v Ostermeier* (1991) 1 CA4th 729, 2 CR2d 594.

- The expert's opinion is based on reliable information concerning the case itself, reliable texts, or tests conducted by the testifying expert or another expert (see Evid C §801(b); *People v Rutterschmidt* (2009) 176 CA4th 1047, 98 CR3d 390 (expert could testify about laboratory results obtained by another scientist); *TG Oceanside, L.P. v City of Oceanside* (2007) 156 CA4th 1355, 1382, 68 CR3d 320 (expert's use of almanac information in calculating rate of return was reliable); but see *People v Dungo* (2009) 176 CA4th 1388, 1403 n14, 98 CR3d 702 (when testimonial hearsay involved, confrontation clause trumps rules of evidence and "substituted" cross examination of opinion expert rather than expert who conducted tests constitutionally inadequate); Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009)), or on reliable information given him or her in the form of a hypothetical question (see *Guardianship of Jacobson* (1947) 30 C2d 312, 324, 182 P2d 537); and
- If the expert's opinion is based on a new scientific technique, it satisfies the general acceptance test of *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144.

NOTE: The *Kelly* rule applies to both criminal and civil cases. See *People v Kelly, supra* (criminal case); *Huntingdon v Crowley* (1966) 64 C2d 647, 51 CR 254 (civil case). See discussion in chap 23.

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/§24.3 B. To Object

§24.3 B. To Object

Grounds for objecting to the admissibility of an expert witness's opinion include:

- Expert not properly disclosed, or opinion beyond scope of expert declaration disclosing topics on which he or she will testify (see CCP §§2034.210-2034.730; *DePalma v Rodriguez* (2007) 151 CA4th 159, 164, 59 CR3d 479; see also *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289) (see §24.16);

- Expert opinion goes beyond opinions covered in deposition (*Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1598, 71 CR3d 361 (at discretion of trial court));

- Expert not qualified (opponent can ask for preliminary fact hearing; see chap 4) (*People v Watson* (2008) 43 C4th 652, 690, 76 CR3d 208 (criminologist not qualified to testify on psychological impact of capital defendant's background or ability to adjust to prison); *People v Chakos* (2007) 158 CA4th 357, 69 CR3d 667 (arresting officer not qualified to differentiate between lawful and unlawful possession of marijuana under Compassionate Use Act));

- Statutory qualifications relating to expertise could prevent an expert from testifying (*e.g.,* Health & S C §1799.110(c) requires 5 years' experience as emergency room physician to testify on standard of care) (see *Petrou v South Coast Emergency Group* (2004) 119 CA4th 1090, 15 CR3d 64);

- Subject not one beyond experience of ordinary witnesses (Evid C §801(a); *People v Curl* (2009) 46 C4th 339, 359, 93 CR3d 537 (witness credibility));

- Opinion is based on matter that may not be reasonably relied on (see Evid C §801(b));

- Expert is precluded by law from using such matter as basis for opinion (Evid C §801(b); *People v Dungo* (2009) 176 CA4th 1388, 1403 n14, 98 CR3d 702 (when testimonial hearsay involved, confrontation clause trumps rules of evidence); but see *People v Rutterschmidt* (2009) 176 CA4th 1047, 98 CR3d 390 (Sixth Amendment jurisprudence does not preclude expert opinion testimony on laboratory results obtained by another scientist));

- Expert did not supply basis for opinion before giving it (Evid C §802);

- Improper opinion about meaning of a statute or law, which usurps duty of trial court to instruct jury on applicable law (*Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1598, 71 CR3d 361; see *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1179, 78 CR3d 572).

- Improper or insufficient basis for opinion, *e.g.,*

- Speculative information (*Dee v PCS Prop. Mgmt., Inc.* (2009) 174 CA4th 390, 403, 94 CA3d 456; *Fry v Pro-Line Boats, Inc.* (2008) 163 CA4th 970, 976, 77 CR3d 622; *Redevelopment Agency v Mesdag* (2007) 154 CA4th 1111, 1129, 65 CR3d 372; *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 37 CR3d 9; *Bushling v Fremont Med. Ctr.* (2004) 117 CA4th 493, 11 CR3d 653; but see *Tyrone W. v Superior Court* (2007) 151 CA4th 839, 853, 60 CR3d 486 (expert opinions that injuries "likely indicative of child abuse" are not tentative or speculative and provide evidentiary support for court findings));

- Failure to provide factual basis underlying opinion (*Garibay v Hemmat* (2008) 161 CA4th 735, 741, 74 CR3d 715 (expert's summary judgment declaration based on factual assumptions without evidentiary support; opinion on standard of care lacked foundation and was based on inadmissible hearsay); *Johnson v Superior Court* (2006) 143 CA4th 297, 305, 49 CR3d 52 (medical expert's summary judgment declaration overly conclusory and neglected to provide necessary explanations or evidentiary support));

- Unsupported by facts in case (*Brown v Ransweiler* (2009) 171 CA4th 516, 530, 89 CR3d 801; *Eddins v Redstone* (2005) 134 CA4th 290, 35 CR3d 863);

- Conclusory, without a reasoned connection between the facts and the ultimate opinion (*Dina v People ex rel Dep't of Transp.* (2007) 151 CA4th 1029, 1049, 60 CR3d 559);

- Based on information immune from discovery, such as hospital peer review records (*Fox v Kramer* (2000) 22 C4th 531, 93 CR2d 497);

- Expert valuation opinion in condemnation proceeding not made according to methodology accepted under California law (*Inglewood Redev. Agency v Aklilu* (2007) 153 CA4th 1095, 1107, 64 CR3d 519 (in discretion of court));

- Invades province of jury to decide case (*People v Humphrey* (1996) 13 C4th 1073, 2088, 56 CR2d 142; *Piscitelli v Friedenberg* (2001) 87 CA4th 953, 971, 105 CR2d 88; *Summers v A.L. Gilbert Co.* (1999) 69 CA4th 1155, 1182, 82 CR2d 162);

- Irrelevant (Evid C §350);

- Will not help trier of fact (Evid C §801(a));

- Improper hypothetical question, *e.g.,* does not include all relevant facts, or assumes facts not in or inconsistent with evidence; or

- Too prejudicial, time-consuming, confusing, or misleading (Evid C §352; see *People v Partida* (2005) 37 C4th 428, 35 CR3d 644 (for further discussion of *Partida,* see §45.12); but see *Monroy v City of Los Angeles* (2008) 164 CA4th 248, 266, 78 CR3d 738 (court erred in limiting duplicative expert testimony to one party's expert; evidence not cumulative if subtleties exist between nearly identical expert testimony; different evidentiary weight may be given to each party's expert opinions)).

NOTE: So long as the decision is not arbitrary, the trier of fact may reject the uncontradicted testimony of any witness, including an expert. *Conservatorship of Amanda B.* (2007) 149 CA4th 342, 350, 56 CR3d 901.

III. SAMPLE QUESTIONS

A. Direct Examination of Forensic Economist

§24.4 1. Information to Elicit

Forensic economists are commonly used as experts in all types of tort and contract damage claims, as well as in family law matters, to establish the evaluation of lost earnings, lost earning capacity, loss of household services, and related economic consequences that flow from tort claims. In the direct examination segments in §§24.5-24.11, counsel wants the expert to cover the following points:

- Expert's profession and area of expertise;
- Topic on which expert will give an opinion so that jury knows why expert is testifying;
- Expert's education, including both formal education and any special classes or seminars, *e.g.,* through a professional organization;
- Expert's research or study on particular topic on which expert will testify;
- Expert's work experience relevant to topic of testimony;
- Explanation of significance of titles or other matters that jurors may not understand, *e.g.,* tenured professor or prestige of expert's employer;
- Publications by expert relevant to topic;
- If expert has qualified to testify in court in other cases;
- Courts in which expert previously testified as expert witness;
- Expert's experience testifying for both plaintiffs and defendants;
- Information on which expert's opinion is based;
- Expert's use of visual aids to clarify information and reinforce testimony; and
- Expert's summary of his or her opinion.

NOTE: During the examination, counsel should ask the court to qualify the witness as an expert. It is often a good idea to move for the expert's résumé to be admitted into evidence.

2. Questions to Ask

§24.5 a. Qualifying the Expert

Q: Dr. Economist, what is your profession?

A: I am a Professor of Economics at the University of California at Berkeley and a consulting forensic economist.

Q: Dr. Economist, have you come to court today prepared to state your opinion as a forensic economist on the extent and evaluation of the economic losses sustained by Joan Plaintiff as a result of the injuries she sustained in an automobile accident on June 1, 1997?

A: Yes.

PRACTICE TIP: It is appropriate to ask an expert witness leading and semileading questions. *People v Campbell* (1965) 233 CA2d 38, 44, 43 CR 237. See Comment to Evid C §767.

§24.6 b. Education

Q: Dr. Economist, could you give the jury a summary of your formal education?

A: Yes. I received my undergraduate degree in Business Administration from the University of California at Los Angeles in 1974. I pursued my graduate studies at the University of California at Berkeley where I received my M.A. in 1976 and my Ph.D. in 1983 in economics.

Q: Dr. Economist, was there a focus to your graduate work in the field of economics?

A: Yes. The principal focus was in microeconomic theory as well as significant work in quantitative economic analysis and statistics, economic development and history, industrial organization, and antitrust law concerning money and banking.

PRACTICE TIP: If the expert received any academic awards, grants, or honors, inquire about those.

§24.7 c. Work Experience

Q: Dr. Economist, before I have you describe the meaning of "microeconomic" theory, as well as your other areas of study and how they relate to the economic evaluation you have done in this case, I would like to ask you to tell the jury whether you have practical experience in this field.

A: Yes, I do.

Q: Dr. Economist, directing your attention to your experience since you obtained your Ph.D. in 1993, could you indicate the most significant elements of that experience?

A: Yes. I joined the faculty at the University of California at Berkeley after receiving my Ph.D. and have remained on the faculty since that date for the past 17 years.

PRACTICE TIP: Your opponent may offer to stipulate to your expert's qualifications. Insist on eliciting them to permit the trier of fact to assess those qualifications and, if relevant, to compare them with the qualifications of your opponent's expert.

Q: What academic rank do you hold?

A: I am a tenured professor.

Q: What is a tenured professor?

A: An individual who has passed peer review from the members of the faculty of the department and has been granted a permanent professorship at the University.

Q: How does the University of California at Berkeley rank among universities in the United States?

A: It has ranked in the top ten in the country for at least the last 10 years.

Q: Could you briefly give an overview of the courses you teach at the University?

A: My primary responsibility at the University is to teach both intermediate and advanced courses in what we call "microeconomics," and the applied statistics courses for the Department of Economics and School of Business at the University.

Q: Could you explain to the jury what you mean by "microeconomics"?

A: Economics is a discipline, basically divided into two major areas, macro and micro. Macroeconomics is aggregate and microeconomics is individual. The distinction is that in macroeconomics we are dealing with the total spending of all consumers, all governments, all businesses. Microeconomics, however, is economics of the individual. The individual businessperson, the individual farmer, the individual consumer, the individual worker, and how they make decisions and react to economic conditions.

§24.8 d. Publications

PRACTICE TIP: You should consider *why* the jurors might be interested in or impressed by any particular qualifications of an expert. In doing so, you should determine which publications by the expert (or other qualifications) provide him or her with a sound basis for rendering an opinion.

Q: Are you involved with academic research, Dr. Economist?

A: Yes. For the past 17 years I have been engaged in research focusing on economic projections. Several of my economic projection studies in methodology have been published.

Q: When you use the term "published," what do you mean?

A: The term "published" means that my work has been made part of the academic resource material used by others in the academic community whose area of focus is in the discipline of economics.

Q: Do you recognize this three-page document as your résumé, marked Plaintiff's Exhibit No. 52, which lists your educational background, experience, and publications?

A: Yes.

Q: Is it true, accurate, and up to date?

A: Yes.

Proponent: I move that Dr. Economist's résumé, Plaintiff's Exhibit No. 52, be admitted into evidence.

Court: Any objections?

PRACTICE TIP: Your opponent might object on hearsay, cumulative, and Evid C §352 grounds, which might be sustained. If it is, you may elicit the information through further direct examination. Note that some counsel would not initially seek admission of a résumé and instead would seek to establish the expert's background concerning publications only through oral examination.

Court: All right. Plaintiff's Exhibit No. 52 is admitted into evidence.

Q: Dr. Economist, I note on your résumé that it took three pages to list all your publications. Could you note the most significant article on your publication list that relates directly to this case?

A: Yes. It is "Life Expectancy and Actuarial Tables as Scientifically Valid Methods for Computing Loss of Earning Capacity."

Q: What is significant about that article?

A: This article was based on a study of 5000 disabled individuals and their pre- and postinjury earning patterns over a period of 10 years. The information on lost earnings and earning capacity from this study corroborated the theoretical model used for many years by forensic economists, which was based on Labor Department and Social Security Administration information.

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/§24.9 e. Qualification of Expert in Other Cases

§24.9 e. Qualification of Expert in Other Cases

Q: Have you been called on in the past to prepare economic analyses for legal cases?

A: Yes. I have provided economic analysis for cases that involve litigation for the past 12 years.

Q: Have you previously qualified as an expert witness in that area in other courts?

A: Yes, I have.

NOTE: The court does not have to rule that an expert is qualified to testify as an expert on a particular topic unless opposing counsel requests a ruling. *People v Rodriquez* (1969) 274 CA2d 770, 79 CR 240. It is not required that the expert have testified before. *McCleery v Bakersfield* (1985) 170 CA3d 1059, 1066, 216 CR 852.

Q: Could you briefly state which courts?

A: I have testified in Sonoma, Marin, Napa, Solano, Mendocino, San Francisco, Santa Clara, Stanislaus, Monterey, and Los Angeles superior courts as well as in federal court, both in San Francisco and Fresno.

Q: Are your services available to both plaintiffs' and defendants' attorneys?

PRACTICE TIP: This question may be dangerous if the expert has testified many times for one side and rarely for the other. Nevertheless, it is usually preferable to elicit on direct examination an expert's history of testifying for one or both sides, as well as testimony about the fees the expert charges to appear in court. A key aspect of that examination is how the expert views the facts being elicited. The expert's comfort or lack of comfort concerning, for example, facts about how much he or she charges, will be apparent to the jury, and therefore may be a factor in how the jury perceives the testimony given.

A: Yes. As a forensic economist, I am available to analyze economic losses for whoever wishes to retain me. I use the same methodology regardless of whether the party for whom I provide the analysis is a plaintiff or a defendant.

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/§24.10 f. Basis for Expert's Opinion

§24.10 f. Basis for Expert's Opinion

Q: Dr. Economist, you stated that you were retained to do an economic analysis of the losses sustained by Joan Plaintiff as a result of the injuries she sustained in an automobile accident on June 1, 1997. Did you do so?

A: Yes.

Q: Would you give an overview of what you did to perform that evaluation?

A: Yes. The first step was to gather basic statistical information on Ms. Plaintiff's date of birth, date of injury, her employment, the number of hours she worked, wages she earned, and any employment contracts under which she was working at the time of her injury.

Q: Your analysis is broken down into two broad areas: The first is the loss of wages from the date of the accident to the present time of trial; the second is lost earning capacity from this date forward over the course of Ms. Plaintiff's working life. Is that correct?

A: Yes.

Q: Dr. Economist, have you been able to complete the first part of your task of calculating her lost wages and other economic losses up to the present time?

A: Yes.

Q: Have you prepared a chart illustrating those losses?

A: Yes.

PRACTICE TIP: When presenting an economist or other expert who will be presenting information in summary form, it is essential to place prepared charts and diagrams into evidence so that the jury can consult them during deliberations. Consider how to combat possible objections to introducing the chart in evidence, *e.g.,* that the chart is cumulative, misleading, or confusing. Attempt to obtain a stipulation on the admissibility of those charts and diagrams. If your opposing parties refuse to so stipulate, consider making a motion under Evid C §402 for a ruling from the court regarding their admissibility, or at least regarding the right to display the materials as a demonstrative aid to assist the jury in comprehending the witness's testimony.

Q: Would you please identify the chart marked Plaintiff's Exhibit No. 65?

A: Yes, this chart is titled "Economic Losses to Date of Trial."

Q: Referring to Plaintiff's Exhibit No. 65, would you place it on the easel and show it to the jury?

A: Yes.

[*The witness leaves the stand and places the exhibit on the easel*]

Q: Dr. Economist, would you explain the numbers on the chart and their significance?

[*The witness picks up a pointer to indicate information for the jury*]

A: Yes. The first column of numbers is the amount of lost wages in each year from the accident up to the present. You will see that Ms. Plaintiff was making $12,000 a year in her part-time job as a teacher's assistant and that she was injured at the midpoint of the year and therefore, for 1997, lost wages are $6000. She has been disabled from that time to the present. In 1998, her salary would have been $12,000 and the trial is now taking place halfway through 1999, so her wage loss to date is $6000 for a total of $24,000.

Q: Would you explain the figures in the next column?

A: Yes, those are medical expenses. I reviewed her medical bills and placed them in that column on a year-by-year basis up to the present time, The total is $15,000.

Q: Dr. Economist, you stated earlier that your analysis was in two parts: One is an evaluation of Ms. Plaintiff's economic losses from the date of accident to the present, which we have just reviewed; the second is the economic losses she will incur from the present into the future. Is that correct?

A: Yes.

Q: Would you explain the methodology that you, as a forensic economist, used to establish the economic losses of Ms. Plaintiff in the future, and how those differ from the methods you used in calculating her losses from the date of accident to the present?

A: Yes. In calculating the losses from the date of accident to the present, a forensic economist simply looks at the lost wages and at the medical expenses Ms. Plaintiff incurred because of the accident. In looking at the future, we deal with several concepts that are different from dealing with past economic losses.

Q: What are those concepts?

A: The first is lost earning capacity, and the second concerns calculating the effects of inflation, interest rates, and wage gains as they would project over the work-life expectancy of the plaintiff.

Q: Have you made certain assumptions in analyzing future wage losses?

A: Yes.

Q: What are those assumptions, and what are they based on?

PRACTICE TIP: Your opponent might object to this question as compound.

A: The first assumption is based on my consultation with Dr. Rehabilitation Counselor, who, I am informed, previously testified that Ms. Plaintiff is totally and permanently disabled, as established by her doctors and by the vocational rehabilitation specialist, from ever returning to gainful employment in the competitive labor force. I have deferred to Dr. Rehabilitation Counselor on this issue because that is his profession, and he has testified that he has made an extensive review of Ms. Plaintiff's records as well as his own independent testing and evaluation of the plaintiff. Based on that information, he testified that she is totally and permanently disabled. I, therefore, have based this analysis on the assumption that Ms. Plaintiff will not return to gainful employment over her work-life expectancy.

PRACTICE TIP: If Dr. Economist's opinion is based upon information obtained outside of trial from Dr. Counselor, your opponent might object that the testimony on what Dr. Rehabilitation Counselor told him is hearsay. Based on Evid C §801(b), you can argue that this information does not have to be admissible as long as it of a type that may reasonably be relied on by an expert in forming an opinion.

Q: Dr. Economist, you previously calculated Ms. Plaintiff's lost wages. You indicated that for her future losses you were looking at her lost earning capacity. What do you mean by the phrase "lost earning capacity?"

A: The fundamental distinction is that "lost wages" would simply be a calculation of the future economic loss that comes from multiplying out Ms. Plaintiff's present wages over her work-life expectancy. A forensic economist looks at her "lost earning capacity," which is very different from "lost wages." Earning capacity is the capability an individual has to generate gainful employment in the marketplace. If, for instance, I was badly injured while on sabbatical and could never go back to work, the measure of my loss would not be the zero wages I was earning at the time of my sabbatical, but rather my capacity to earn an income as a tenured professor of economics. Likewise, Ms. Plaintiff's earning capacity at the time of her loss was not the wages she was earning but her capacity to enter the marketplace and generate income, which under the facts of this case far exceeds her lost wages.

Q: Could you explain that further?

PRACTICE TIP: Although leading questions are allowed in questioning expert witnesses, it is usually more effective to allow the expert to respond to short, direct questions.

A: Yes, at the time of the accident Ms. Plaintiff was running a part-time day care center out of her home while she was caring for her own two children. However, she had obtained an Associate of Arts degree in Early Childhood Development and had previous work experience as a teacher and director of a day care center. Dr. Rehabilitation Counselor told me that with this degree and work experience, she had the capacity to operate a full-time day care center at an annual salary at the time of the accident of $15,000 per year.

Q: What did you do with that number?

A: I took that number and, based on United States government information and wage increase data in the child care industry, projected that she would have certain periodic raises as a day care teacher/administrator from the date of the accident until the present time to reach a maximum salary of $20,000 per year, not adjusted for inflation. I then took this $20,000 number and adjusted it for inflation and reduced it to present value.

Q: Dr. Economist, have you prepared a second chart illustrating the future economic losses to Ms. Plaintiff?

A: I have.

Q: Let me direct your attention to the chart on "Future lost earnings from date of trial to end of work-life expectancy" marked Exhibit 60. Does this illustrate Ms. Plaintiff's future economic losses arising from the accident?

A: Yes.

Q: Could you explain the chart, Dr. Economist?

A: Yes. The first column shows lost earning capacity from the date of this trial through the next 27 years to be $640,000.

Q: What does the second column indicate?

A: The second column indicates the cost of future medical benefits.

Q: What did you base that on, Dr. Economist?

A: I based it on information supplied to me by Ms. Plaintiff's treating physicians of the cost of future care for her injuries.

Q: And, what is that figure, Dr. Economist?

A: That number is $1,600,000.

Q: What is the total of these numbers?

A: It is $2,240,000.

§24.11 g. Summary of Expert's Opinion

Q: Would you summarize for us your opinion of the economic losses sustained by Joan Plaintiff as a result of the injuries she suffered in an automobile accident on June 1, 1997?

A: Yes. Her lost wages and medical expenses to the time of trial are $24,000, and her lost earning capacity and future medical expenses are $640,000. The total economic loss she sustained as a result of the accident is $664,000.

B. Introducing Diagram

§24.12 1. Information to Elicit

To lay the foundation at trial and introduce into evidence a diagram of the intersection where the automobile crash occurred, counsel wants to cover the following matters in the direct examination segment in §24.13:

- Give copy of diagram to opposing counsel (unless local rule required earlier attorney exchange and court approval);
- Show the experience of the person who prepared the diagram (qualify witness as an expert, if necessary);
- List information used as basis for diagram (foundation);
- Show that diagram reflects same conditions as at time of the crash (relevance);
- Explain how diagram was constructed (authenticate); and
- Satisfy hearsay requirements, if necessary.

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/§24.13 2. Questions to Ask

§24.13 2. Questions to Ask

Clerk: Could you state your name and profession for the record?

A: Yes. I am Legal Investigator, an investigator.

Proponent: I am giving a copy of a street intersection diagram marked Plaintiff's Exhibit No. 14 to Opposing Counsel.

PRACTICE TIP: Be sure to check local rules on whether a diagram must be tendered along with other exhibits to opposing counsel and the court before trial.

Q: Mr. Investigator, did I ask you to prepare a diagram of the intersection of Main and First Street as it appeared on the date of the automobile accident in this case, July 1, 1997?

A: Yes.

Q: Have you prepared such diagrams in the past?

A: Yes, in the course of my work as a private investigator and in my previous job at the Centerville Police Department and my work for the district attorney, I have been asked to prepare and have prepared such diagrams many times over the last ten years.

Q: How did you prepare this diagram?

A: At your request, I photographed the intersection immediately after the accident and I went to the Public Works Department of the City of Centerville to obtain an engineering blueprint of the intersection.

Q: Mr. Investigator, did you review that blueprint to ascertain the date it was made?

A: Yes.

Q: Did you bring that blueprint with you today?

A: Yes.

Q: Directing your attention to the date of that blueprint, what date does it show it was prepared?

A: January 15, 1995.

Q: Did you compare your photographs and personal observations of the intersection to that of the engineering blueprint?

A: Yes.

Q: Are there any changes in the street that you noted from your observation or photographs that would indicate that it is other than as depicted in the engineering blueprints provided by the Public Works Department?

A: No.

Q: How did you use the blueprint to prepare the diagram?

A: I took measurements from the blueprints and projected the dimensions of the intersection onto the chart I provided for you.

PRACTICE TIP: Local rules may enumerate special requirements for diagrams. For example, Los Angeles Ct R 8.75 requires any map, plan, or diagram offered in evidence to indicate on its face if it is to scale, and if so, what scale was used.

Q: Mr. Investigator, is Plaintiff's Exhibit No. 14 an accurate diagram of Main and First Streets?

A: Yes.

Q: Do the dimensions on the diagram conform to those of the engineering blueprint?

A: Yes.

Q: What is the scale of the diagram relative to that of the engineering blueprint?

A: Once inch on the diagram equals two inches on the blueprint.

Proponent: Plaintiffs move at this time to introduce into evidence the diagram of Main and First Street marked for identification as Plaintiff's Exhibit No. 14.

Opponent: Objection. This witness is not properly qualified, hearsay, inadmissible secondary evidence, irrelevant, and improper authentication. This witness is not an engineer. He is not qualified to make a scale diagram based on an engineer's blueprint. And Proponent has not given me a clear, enlarged copy of the engineer's blueprint so I have no way of knowing how many mistakes he made in his diagram. Counsel should be using the city engineer's blueprint, not some amateurish version of it. Or, if counsel wanted a scale diagram, he should have hired a qualified expert to measure the intersection as a basis for a diagram.

Proponent: Your Honor, Opposing Counsel's objections are completely without merit. May I ask further questions to demonstrate Mr. Investigator's expertise?

Court: Yes.

PRACTICE TIP: Proponent might instead have argued that expert testimony is not required for this type of diagram; any problems are subject to being brought out on cross-examination. See California Personal Injury Proof §19.11 (Cal CEB 1970).

Q: Mr. Investigator, have you had any training in making diagrams?

A: Yes. When I was in the Centerville City Police Department, I attended an FBI class on evidence that covered maps and diagrams. I also attended several classes the Centerville City Police Department put on that had sessions on preparing diagrams to scale.

Q: What was your position with the Centerville City Police Department?

A: I was the Chief Investigator for the Department.

Q: How long did you work for the Centerville City Police Department?

A: Five years.

Q: While you were employed by the Centerville City Police Department, did you have occasion to also perform work for the Centerville District Attorney?

A: Yes.

Q: What experience have you had preparing scale diagrams?

A: I have made many of them. I don't have an exact figure—upwards of 40 or 50.

Q: For whom were those diagrams prepared?

A: For the Centerville City Police Department and the District Attorney's office.

Q: Have you ever enlarged an engineer's blueprint to scale?

A: Yes, several times.

Q: Is it difficult to prepare a scale diagram from an engineer's blueprint?

A: Not really. Just about anyone can do it. It's just a matter of measuring correctly, multiplying by a particular number, then using those figures as a basis for the enlarged diagram.

Q: Have you ever presented a scale diagram in court before?

A: Yes, three or four times. No one ever objected.

Q: Did the court admit the diagrams into evidence?

A: Yes.

Proponent: I offer Mr. Investigator as an expert in the field of drawing diagrams to scale, qualified to introduce a scale diagram based on enlargement of an engineer's blueprint.

Court: I will accept Mr. Investigator as qualified to prepare such a diagram. Would counsel approach the bench?

[*At bench conference*]

Court: Proponent, why are you offering this model?

Proponent: I am going to use it as demonstrative evidence, to aid my witnesses in testifying about the accident and to help jurors understand their testimony. Since Mr. Investigator has qualified as an expert, Evidence Code §801(b) allows him to base his opinion on matters that can reasonably be relied on by experts, such as a city engineer's blueprint. Also, since the diagram is not to be used as real evidence, there is no need to satisfy the hearsay rule.

Court: Based on those representations, I will allow Proponent to use the diagram as demonstrative evidence. As for authentication, I find that the witness's review of the scene itself, as memorialized in the photograph, and the witness's statement that the diagram is to scale, authenticate the diagram. For the same reasons, I find the diagram realistic enough to satisfy relevance requirements. Opposing counsel, you can bring out any discrepancies on cross-examination. Proponent, have Mr. Investigator give the same size copies of the city engineer's blueprint and the diagram that you are using to Opposing Counsel today. And keep Mr. Investigator on call in the event Opposing Counsel wishes to impeach him. Now, Proponent, conclude your examination.

C. Using Opposition Witness as Your Expert

§24.14 1. Information to Elicit

In the cross-examination segment in §24.15, defense counsel at an in limine hearing in a criminal case is questioning the police officer who took the defendant's confession on the admissibility of the confession. The issue is whether the defendant in his drug-induced state was capable of consenting to make a confession. Using leading questions to elicit information from this opposition witness, the proponent wants to establish the following matters:

- The witness's experience, education, and training;
- Facts on which the witness bases an opinion;
- The court's ruling that the witness qualifies as an expert; and
- As favorable an opinion as possible from the witness.

§24.15 2. Questions to Ask

Q: Did the defendant tell you he had smoked two PCP cigarettes right before you arrested him?

A: Yes.

NOTE: This hearsay statement is admissible as a declaration against interest. Evid C §1230. See chap 20.

Q: While you were questioning the defendant, did he have great difficulty speaking?

PRACTICE TIP: You are allowed to use leading questions on direct examination when questioning an adverse witness. Evid C §767(a); see discussion in chap 5.

A: He had some difficulty.

Q: It took the defendant four or five minutes just to tell you his name, didn't it?

A: Yes.

Q: That is typical of behavior while under the influence of PCP, isn't it?

A: It can be.

Q: As a police officer, you have received training in the recognition of the symptoms of persons under the influence of phencyclodine, commonly called PCP, isn't that true?

A: Yes.

Q: Would you describe your training in this area?

[*Officer describes his training*]

Q: You have participated in arrests of people who were under the influence of a drug, which you believed to be PCP, isn't that true?

A: Yes.

Q: How many such arrests have you participated in?

A: Ten or fifteen.

Q: Is it true that you have testified in court concerning the symptoms of a defendant under the influence of PCP?

A: Yes.

Q: The defendant was exhibiting symptoms consistent with PCP use, isn't that true?

A: He might have been, or he might have been faking it.

Q: If he were acting the same way on the street, would you consider him to be under the influence?

A: Maybe.

Q: You have referred to the Physician's Desk Reference for information on the symptoms and effects of PCP, isn't that true?

A: No.

Q: Isn't it true that portions of the Physician's Desk Reference are included in the manual used in the course you took with the City Police Department last year on intoxicants?

A: I don't remember.

Q: Isn't it true that several pages concerning the symptoms and effects of PCP are included in that booklet?

A: I don't remember.

Q: You did attend that class, didn't you?

A: Yes.

Q: And you did receive a copy of the booklet, didn't you?

A: Yes.

Q: You were required to read that booklet as part of the course, weren't you?

A: I guess so.

Defense Counsel: I ask the clerk to mark this booklet titled "City Police Department Intoxicant Course 1999" as Defense Exhibit 3 for identification. I am showing it to the prosecutor.

Q: Looking at Exhibit 3, do you recognize this booklet?

A: I guess so.

Q: This is the booklet used as program materials for the course you took earlier this year on intoxicants from City Police Department, isn't it?

A: Probably. It's been a long time.

Proponent: Ms. Prosecutor, do you want to stipulate that these are the course materials this officer received as part of the program he took on intoxicants from City Police Department, or should I call an officer to testify to that?

Opponent: Let me have a word with the officer.

[*Prosecutor confers with Police Officer*]

Opponent: Yes, I'll stipulate that these are the same materials, but I object on Evidence Code §352 grounds that this is going too far afield and taking up too much of the court's time.

Court: Defense Counsel, what are you trying to get at here?

Proponent: I want to introduce two pages from the Physician's Desk Reference, which are reprinted at pages five and six of the booklet used by Police Officer in his City Police Department training course on intoxicants. They are admissible under Evidence Code §1341. They detail the symptoms of PCP intoxication, which include those shown by the defendant.

Opponent: Your Honor, Police Officer is not a physician. He is only here to testify to the defendant's confession. Defense Counsel is calling for an opinion that Police Officer is not qualified to give, and medical books are not admissible under §1341. The cases specifically exclude medical books. If you give me a minute, I will be happy to find a case cite on that point.

Proponent: Your Honor, the prosecution can't have it both ways. They can't use this officer as an expert on PCP symptoms in one case and then claim he isn't an expert when it is to a defendant's benefit. The officer has testified that he has previously testified as an expert in court on PCP symptoms. He has testified to recognizing several symptoms of PCP abuse when he took the defendant's statement. It can be assumed that he read the Physician's Desk Reference pages on PCP as part of the course he took with City Police Department, so they are admissible as being a reliable basis for his opinion.

Court: I find the officer qualified to testify as an expert on the symptoms of PCP. You have what you want in the way of the officer's verification of some of the symptoms of PCP use, and the defendant's statement to him that he had just smoked PCP. The officer says he doesn't remember reading the pages from the Physician's Desk Reference on PCP use. The PDR is not admissible. Continue with your examination of Police Officer.

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/ IV. COMMENT/ A. Proponent's Pretrial Considerations/§24.16 1. Disclosure Requirements in Civil Cases

IV. COMMENT

A. Proponent's Pretrial Considerations

§24.16 1. Disclosure Requirements in Civil Cases

In civil cases, it is important to follow the discovery rules, particularly the rules on exchanging expert information on demand. See CCP §§2034.210-2034.730; see generally California Civil Discovery Practice, chap 11 (4th ed Cal CEB 2006). Except in cases of eminent domain proceedings under CCP §§1230.010-1273.050, any party may make a demand for the exchange of expert trial witness information without leave of court after the initial trial date is set. CCP §§2034.210, 2034.220. This demand must be made no later than the 10th day after the initial trial date is set or 70 days before the initial trial date, whichever is closer to that date. CCP §2034.220.

NOTE: The trial date from which this deadline is measured is the initial trial date, and if that trial date is continued, the date for exchange of expert witness information is not automatically extended. Even if the date is vacated rather than continued, it is the better practice to request that the court expressly state in its order vacating the original trial date that all pretrial dates, including that for the exchange of expert trial witness information, be based on the new trial date. In contrast, however, after a reversal of a prior judgment, discovery reopens and the parties are free to elect to use a different or new expert, even if they had not designated an expert before the initial trial date. *Hirano v Hirano* (2007) 158 CA4th 1, 9, 69 CR3d 646.

The demand must be in writing and served on all parties who have appeared in the action (CCP §2034.240); it also must identify, below the title of the case, the name of the party making the demand, and that the demand is made under CCP §§2034.010-2034.730. CCP §2034.230. The demand is required to specify the date of the exchange of lists of expert trial witnesses (which, under CCP §2034.210(a), must contain the name and address of any natural person, including one who is a party, whose expert oral or deposition testimony the party expects to offer at trial), expert witness declarations under CCP §2034.260, and all discoverable reports and writings, if any, used by the expert in preparing those reports under CCP §2034.210(c). If no timely demand is made under CCP §2034.210, however, parties are not obligated to exchange expert witness information under CCP §2034.260. *Hirano,* 158 CA4th at 8.

PRACTICE TIP: If you use a particular expert only as a consultant and do not intend to use him or her as an expert at trial, your opponent is not entitled to discover either the information given to that expert or the expert's opinion. See CCP §2034.210(a); California Expert Witness Guide §§8.16, 8.18, 8.20, 8.24, 8.40-8.40A, 10.6 (2d ed Cal CEB 1991). Therefore, until you have made a final determination that the expert's testimony will be helpful to your case—generally based on preliminary opinions and discussions—you should not indicate to the expert or to others that you will be using him or her at trial, and any initial retention agreement should only commit to retention as a consultant.

A disclosed expert's testimony may be excluded if counsel fails to make a timely disclosure as required by statute or if the expert refuses to cooperate in the discovery process. See *Basham v Babcock* (1996) 44 CA4th 1717, 52 CR2d 456 (court of appeal reversed defense verdict in personal injury action because defendant had violated former CCP §2034 by failing to properly designate orthopedist as supplemental expert). See also *Boston v Penny Lane Ctrs., Inc.* (2009) 170 CA4th 936, 952, 88 CR3d 707 (CCP §2034.300 authorizes court to exclude expert opinion offered by party who *unreasonably* fails to produce expert reports and writings as required by CCP §2034.270).

A party served with a demand to exchange expert witness information may "promptly" move for a protective order. The motion must be accompanied by a meet-and-confer declaration. CCP §2034.250(a). The court may, for good cause shown, make any order that justice requires to protect any party from "unwarranted annoyance, embarrassment, oppression or undue burden and expense," *e.g.,* quashing the demand as untimely, changing the date, place, terms, or time of exchange, or limiting the number of designated experts. CCP §2034.250(b). The court *must* impose a monetary sanction against the unsuccessful party on a motion for protective order under §2034.250, unless the court finds that party's position to have been taken with substantial justification or other circumstances that would render the imposition of such sanctions unjust. CCP §2034.250(d).

Counsel should ensure that the expert witness declaration under CCP §2034.260 includes "the general substance of the testimony that the expert is expected to give." A statement that the expert "may" testify to a wide variety of issues may be insufficient, especially if the expert at deposition does not know the matters about which he is to testify at trial. The California Supreme Court held that a trial court has the power to exclude expert testimony if the expert witness declaration is "grossly defective," *i.e.,* the declaration fails to provide opposing counsel "fair notice of the subject areas" that the expert will address at trial. *Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289. See *Jones v Moore* (2000) 80 CA4th 557, 95 CR2d 216 (if expert testified that he had expressed

all his opinions at deposition and would advise counsel if he subsequently formed additional opinions, it would be unfair to permit expert opinion at trial that was not given at deposition). Compare *Bonds* and *Jones* with *Easterby v Clark* (2009) 171 CA4th 772, 778, 90 CR3d 81 (error to exclude at trial expert opinion on causation not given at deposition when plaintiffs provided notice 3 months before trial that expert would so testify). Note that at least one appellate court has found no statutory authority for the imposition of monetary sanctions for disclosing for the first time at trial a theory not disclosed by the expert in the expert witness declaration. *Muller v Fresno Community Hosp. & Med. Ctr.* (2009) 172 CA4th 887, 905, 91 CR3d 617.

Because the demand for exchange of expert witness information includes all reports and writings on which the reports were based, it is important that you work closely with your expert on the presentation of the report and control which writings are used in its preparation.

PRACTICE TIP: When taking the deposition of an expert, it is crucial to ask whether the deponent has stated all of the opinions that he or she has formed about the litigation and, if not, to continue to ask the question until an affirmative answer is given. In *Jones*, the examiner did not ask the deponent this question; consequently, additional opinions that fell within the broad categories listed in the expert declaration were admissible.

§24.17 2. Controlling Expert's Time and Tasks

It is important to set limits for the expert. Counsel should set time and money limits so that the expert knows how much time to spend on the case. It is also good practice to specify how much time is to be given on each stage or document so that the expert does not use all the time you had budgeted on a fraction of the work to be done. Consider asking the expert to agree to work for a fixed fee. See California Expert Witness Guide §7.32 (2d ed Cal CEB 1991).

It should be kept in mind, however, that you do not want to limit the expert's ability to do whatever work is necessary to prepare an opinion that can withstand cross-examination. You should work with your expert from the beginning of the engagement to design a plan for the completion of the work, acknowledging that facts may arise that require additional investigation, at additional cost. You should meet at specified times with the expert during the work process and require periodic oral progress reports to ensure timely and thorough work.

PRACTICE TIP: You should work *with* the expert and not allow the expert to dictate the actions to be taken or the timing of them, and certainly you should not allow the expert to wait until after he or she has acted to inform you of what he or she has done.

§24.18 3. If Treating Physician Will Testify

A treating physician must be disclosed as an expert who will testify at trial but is not a "retained" expert for purposes of CCP §2034.260(c). Therefore, an expert witness declaration stating qualifications and expected testimony is not required. The treating physician's testimony is not limited to personal observations but may include both fact and opinion testimony on diagnosis, prognosis, causation, and standard of care. *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 91 CR2d 293. For further discussion, see California Civil Discovery Practice §11.20 (4th ed Cal CEB 2006).

§24.19 4. If Designated Expert Becomes Unavailable

If you need to substitute a new expert because the originally designated expert becomes unavailable, you must move under CCP §2034.610 to augment your list of experts. See *Richaud v Jennings* (1993) 16 CA4th 81, 19 CR 790. You should make this motion as soon as you learn that your expert will be unavailable at trial. In scheduling trial and retaining experts, you should keep your experts' availability for trial in mind. If your trial was set long before you made the motion and your trial experts were unavailable for that date when you retained them, the court may be less likely to grant a motion to augment your list of experts to replace them than if the trial is continued or the expert suddenly becomes unavailable.

It is error, however, for a court to find that a party is collaterally estopped from relitigating tort liability when a designated expert has become unexpectedly unavailable, no expert replaced him, and that expert is available for a later trial—because the party has been unable to have a full and fair litigation opportunity. Thus, in one case, a party in a personal injury action whose expert did not testify because his daughter died during trial was not estopped from presenting that expert's testimony on designated liability issues in a later wrongful death action. *Smith v ExxonMobil Oil Corp.* (2007) 153 CA4th 1407, 1419, 64 CR3d 69.

§24.20 5. Local Rule Requirements

Some counties have rules that affect the use of experts. See, *e.g.,* Contra Costa Ct R 12.7(C), 12.10(E). Be sure to follow local court rules.

B. Proponent's Trial Considerations

§24.21 1. Expert's Purpose at Trial

An expert may be useful to testify to facts about the case, to explain industry standards or custom and practice, or to explain scientific information to jurors, *e.g.,* eyewitness identification in a criminal case in which eyewitness testimony is crucial. Probably the most common use of experts is to give an expert opinion on some fact or piece of evidence in the case, or on how a particular type of business operates. See, *e.g., Powell v Kleinman* (2007) 151 CA4th 112, 123, 59 CR3d 618 (medical malpractice); *Fergus v Songer* (2007) 150 CA4th 552, 578, 59 CR3d 273 (legal malpractice). An expert may also help to evaluate opposition experts and their opinions. See California Expert Witness Guide §§1.1, 7.5 (2d ed Cal CEB 1991).

PRACTICE TIP: Review the proper topics for cross-examination in Evid C §721 so that you can prevent your opponent from engaging in improper cross-examination. See §24.35.

§24.22 2. Be Creative in Presenting Your Experts

Juries often pay more attention to information given to them by an expert. When planning your case, consider whether you might properly have an expert testify on any matter, and whether the opposing party may be retaining an expert and you will need one to prepare you for your cross-examination of that witness and to testify directly.

You should determine early in your case whether you may need an expert for pretrial or trial purposes. It is particularly important that you begin the search for qualified experts early if the area of expertise on which you may need testimony is one in which:

- There are few qualified experts;
- The other side has unique access to qualified experts (*e.g.,* it is a trade association);
- Qualified experts are likely to be unable to work with you because of conflicts of interest from testifying for your client; or
- Qualified experts are likely to appear biased in favor of your client (*e.g.,* your client retains them regularly to perform other work).

In searching for trial experts, you need to consider their:

- Expertise in the specific area on which you need testimony;
- Experience in deposition and trial;
- Demeanor under examination and cross-examination; and
- Past publications and testimony.

To evaluate a potential expert, you need to:

- Interview them extensively to determine expertise and ability to articulate relevant principles;
- Check all information on their CVs;
- Search on the Internet for any information about them;
- Obtain copies of all publications and transcripts of testimony at deposition and trial;
- Interview, when possible, prior counsel in cases in which they have testified; and
- Have a colleague conduct mock cross-examinations to determine their ability to maintain a calm and reasoned demeanor under hostile questioning.

You need to assess your potential experts' ability to explain difficult concepts clearly without condescension and to convince a jury that his or her opinions are credible and that he or she is "likeable" and has respectable credentials and work product.

PRACTICE TIP: Often, a jury is presented with "dueling experts" who reach diametrically opposed opinions based on the same facts. In such situations, you will sometimes question whether it would be better not to have an expert at all and to instead argue to the jury that expert opinion is meaningless in your case. This option should be weighed against the possibility that if the other side has the only expert, the jury will consider that you are acquiescing in that expert's opinion.

An interesting example of the use of expert testimony is described in *U.S. v Cordoba* (9th Cir 1997) 104 F3d 225. In *Cordoba,* the court upheld the admissibility of expert opinion that drug traffickers would not entrust 300 kilograms of cocaine worth millions of dollars to someone who does not know what he is transporting. The court held that evidence was relevant to the defendant's knowledge that he possessed narcotics.

It is also important to be creative in how you elicit the expert's testimony. If possible, make it dramatic so that it catches the jury's attention. Most courts now permit PowerPoint presentations to assist in the presentation of expert testimony. If these are not permitted, decide what hard copy graphics to use to illustrate the expert's testimony, and be sure they are big enough for jurors to

see clearly. Do not be duplicative in your graphics in order to avoid boring the jury, *e.g.*, graphs and charts showing the same information in different ways. Examples of graphics include photographs; charts that allow you to take words and move them from one area of the chart to another, or one chart to another; videotapes; audiotapes; diagrams; slides; documents shown on an overhead projector; models; and experiments. On physical evidence, see chap 39.

PRACTICE TIP: When planning presentations, graphs, and diagrams, consider how your opponent may use them on cross-examination. If a diagram is in evidence before cross-examination, object to having any further marks made on it.

§24.23 3. Points to Cover During Examination

Practitioners develop their own style for eliciting testimony from experts, and they vary that style depending on the type of testimony being introduced. Basically, the following general information should be elicited:

- The expert's credentials;
- An explanation of the theories on which the expert is relying;
- The facts of the case being considered;
- The expert's conclusion;
- The reasons for that conclusion; and
- Why the expert rejected other theories or conclusions.

PRACTICE TIP: Remember that you are trying to persuade the jury, not impress them. Ask your expert questions in the order and manner that not only make the information clear, but also that entertain and convince jurors. See California Expert Witness Guide, chap 13 (2d ed Cal CEB 1991).

§24.24 4. *Kelly* Rule

The rule of *People v Kelly* (1976) 17 C3d 24, 130 CR 144, discussed in §§23.12-23.17, does not apply to expert testimony as opposed to scientific evidence. *People v McDonald* (1984) 37 C3d 351, 372, 208 CR 236, overruled on other grounds in *People v Mendoza* (2000) 23 C4th 896, 914, 98 CR2d 431. Thus, there is no need for the proponent of expert testimony to establish general acceptance in the relevant scientific community. Nevertheless, an expert's opinion must be based on matter on which an expert can reasonably rely on. Evid C §801(b). Experts do not need personal knowledge of the facts; facts may be "made known" to them. Evid C §801(b). See Evid C §702(a). For further discussion, see California Expert Witness Guide, chap 4 (2d ed Cal CEB 1991).

NOTE: Although Evid C §801 and former Fed R Evid 702, on which the U.S. Supreme Court based its decision in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, are similar, the California courts seem to defer more to the expert witness's decision about what is an appropriate basis for an opinion in the expert's field (see, *e.g., People v Stoll* (1989) 49 C3d 1136, 1154, 265 CR 111) than federal courts do under *Daubert*'s "gatekeeper" standards.

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/§24.25 5. Basis for Opinion

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A party challenging the basis for an expert opinion may request a preliminary fact hearing under Evid C §405. The party offering the evidence must establish that the opinion is based on matter that may reasonably be relied on under the circumstances. See Evid C §801(b).The trial court's resolution of this question is within its discretion. *People v Mickey* (1991) 54 C3d 612, 687, 286 CR 801.

The proponent of expert testimony should make every effort to assure that the bases for the expert's opinion are well-founded and well-stated, and rely on the "professional art" concept only as a last resort. Although California courts have not adopted the "gatekeeper" function prescribed in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (*People v Leahy* (1994) 8 C4th 587, 34 CR2d 663), the courts of appeal have expressed differing views on the extent to which §801 should be used to exclude expert opinion. For example, in *Roberti v Andy's Termite & Pest Control, Inc.* (2003) 113 CA4th 893, 6 CR3d 827, the trial court excluded the causation testimony of the plaintiff's experts on the ground that the studies they relied on did not provide an adequate foundation for their opinion that the plaintiff's autism was caused by a pesticide used by the defendant. The court of appeal held this was error, finding that the *Kelly* test was not applicable and strongly suggesting that when experts rely on the kind of information that experts in the field commonly rely on, the trial court abuses its discretion when it excludes expert testimony on the ground that the foundational materials do not support the experts' conclusions. 113 CA4th at 902.

In contrast, in *Lockheed Litig. Cases* (2004) 115 CA4th 558, 563, 10 CR3d 34, the reviewing court upheld the trial court's ruling excluding expert causation testimony on the ground that the studies the experts relied on, although methodologically sound in themselves, did not form a reasonable foundation for the opinion the experts drew from them. See also *Kotla v Regents of the Univ. of Cal.* (2004) 115 CA4th 283, 289, 8 CR3d 898 (overruling admission of expert opinion on "indicators" of employment retaliation because it was not beyond common experience and lacked any reliable foundation); *Jennings v Palomar Pomerado Health Sys.* (2003) 114 CA4th 1108, 1116, 8 CR3d 363 (in medical malpractice suit, trial court did not err in excluding causation testimony that merely indicated that surgeon's negligent act was a possible cause of plaintiff's infection without offering reasoned explanation for opinion).

The courts agree that the opinion must satisfy the requirements of §801. The divergence relates to the extent to which the trial court may or must evaluate the details of the basis of the opinion. In *Roberti v Andy's Termite & Pest Control, Inc., supra,* the reviewing court found the opinion admissible because the expert relied on the "type" of material that an expert could reasonably rely on. That approach leaves to the jury the task of deciding whether and to what extent the particular studies support the particular opinion. In *Lockheed,* on the other hand, the reviewing court approved a more critical look at the basis for the expert's opinion, even though the expert in that case relied on studies that were clearly of a "type" that experts routinely rely upon. The California Supreme Court denied review of *Roberti* and declined a request to depublish *Lockheed*. For now, we must conclude that the degree to which the trial court may or must evaluate the details of the basis of an opinion depends on the particular facts of the case.

NOTE: The California Supreme Court granted review of a later decision in the *Lockheed* litigation, but the case was dismissed when a majority of the permanent justices recused themselves because of later-realized circumstances. See *Lockheed Litig. Cases* (review dismissed Nov. 1, 2007, S132167; superseded opinion at 126 CA4th 271, 23 CR3d 762). In *Lockheed,* the issue before the supreme court was whether Evid C §801(b) permits a trial court to review the evidence on which an expert relied to determine whether it provides a reasonable basis for that expert's opinion. For guidance on handling this issue until it is resolved in the courts, see Scientific Evidence in California Criminal Cases §3.11 (Cal CEB 2008).

Other representative California decisions that have reviewed the basis of an expert's opinion include:

- *Maatuk v Guttman* (2009) 173 CA4th 1191, 1197, 93 CR3d 381 (no basis for assumptions relied on by damages expert in legal malpractice action involving patents);
- *People v Ramirez* (2007) 153 CA4th 1422, 64 CR3d 96 (no error or confrontation clause violation to allow expert to rely in part on hearsay statements of gang members to support opinion that defendant acted to benefit gang);
- *People v Cooper* (2007) 148 CA4th 731, 746, 56 CR3d 6 (expert may rely on "testimonial" interviews of elder abuse victim and testify about victim's mental competence based in part on those interviews);
- *People v Dodd* (2005) 133 CA4th 1564, 35 CR3d 692 (reference in parole report to molestation incident was unreliable hearsay and trial court abused discretion in allowing experts to consider incident in forming opinions regarding pedophilia

diagnosis);

- *People v Thomas* (2005) 130 CA4th 1202, 30 CR3d 582 (gang expert may give opinion testimony that is based on hearsay, including conversations with gang members, as well as with defendant);
- *People v Thang Van Bui* (2001) 86 CA4th 1187, 1196, 103 CR2d 908 (reliance on scientific literature, statistical data, and epidemiological study held reasonable);
- *People v Castaneda* (1997) 55 CA4th 1067, 64 CR2d 395 ("profile" for drug dealer unreasonable basis for conclusion defendant was drug dealer);
- *People v Gardeley* (1996) 14 C4th 605, 618, 59 CR2d 356 ("any material that forms the basis of an expert's opinion testimony must be reliable");
- *Isaacs v Huntington Mem. Hosp.* (1985) 38 C3d 112, 133, 211 CR 356 (matters learned from unidentified contact in unidentified police department held unreliable); and
- *Buckwalter v Airline Training Ctr.* (1982) 134 CA3d 547, 553, 184 CR 659 (accident reconstruction expert permitted to rely on training records of pilots involved in accident).

§24.26 6. Admitting Evidence Relied on by Expert

Trial courts also have broad discretion in controlling the extent to which an expert may testify about the basis for an opinion. *People v Bell* (2007) 40 C4th 582, 608, 54 CR3d 453 (when limiting instruction is not enough, court may exclude from expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs probative value under Evid C §352); *People v Gardeley* (1996) 14 C4th 605, 619, 59 CR2d 356. See also *People v Pollock* (2004) 32 C4th 1153, 1172, 13 CR3d 34 (requiring defense counsel to ask drug addiction expert hypothetical questions, rather than eliciting opinion about defendant's addiction, was not abuse of discretion when expert's opinion was based on defendant's hearsay statements).

The expert may testify on direct examination to the bases for his or her opinion. Evid C §802. See also Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009). The court at its discretion may require a witness before giving opinion testimony to be first examined concerning the matters on which that opinion is based. Evid C §802. If the opinion is based on inadmissible hearsay, for example, the court may exclude the evidence. In one case, for instance, a court had discretion to exclude hearsay offered by an expert from scientific publications containing third parties' opinions and analyses of historical custom and practice about child sexual abuse. These publications did not fit within the ambit of "facts of general notoriety or interest" under Evid C §1341, which provides for a hearsay exception, and there is no established hearsay exception for custom and practice evidence. *Deutsch v Masonic Homes of Cal., Inc.* (2008) 164 CA4th 748, 767, 80 CR3d 368.

Further, it may be reversible error to permit an expert to testify over objection on direct examination about the details of an article or other hearsay if that testimony would be prejudicial. See *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 3 CR2d 833. See also Jefferson's Evidence Benchbook, chap 30. On cross-examination, the expert may be examined about those details (Evid C §721), but that may open the door to further inquiry on redirect.

PRACTICE TIP: Decide what to give the expert so that he or she does not waste time reviewing material that is not really useful. Do not disclose privileged or otherwise sensitive material to the expert that then may become discoverable at deposition or at trial. See California Expert Witness Guide, chaps 8, 10, 12 (2d ed Cal CEB 1991).

§24.27 7. Using Hypothetical Questions

During direct examination, the proponent can summarize the evidence for the expert, then ask the expert's opinion on the basis of those facts. The expert can express an opinion on the ultimate issue in the case (Evid C §805), but the expert "may not usurp the function of the jury" to decide the case. *People v Lindberg* (2008) 45 C4th 1, 49, 82 CR3d 323 (testimony on whether defendant was white supremacist in hate-murder prosecution); *People v Humphrey* (1996) 13 C4th 1073, 1099, 56 CR2d 142; *People v Garcia* (2007) 153 CA4th 1499, 1509, 64 CR3d 104 (gang expert's testimony in answer to hypothetical questions about gang's usual secrecy admissible for ultimate issue and sentencing enhancement for gang-related crime). See §24.30.

When formulating hypothetical questions, review California Expert Witness Guide §§13.9-13.12 (2d ed Cal CEB 1991), Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009), and 3 Witkin, California Evidence, *Presentation at Trial* §§194-196 (4th ed 2000), then write out your question. Review it to make sure it meets the requirements for hypothetical questions and yet is clear to jurors.

§24.28 8. Submitting Jury Instructions

Request relevant instructions to help jurors understand the nature of expert testimony. See CACI 219-221; CALCRIM 332.

C. Opponent's Considerations

§24.29 1. Requesting Preliminary Fact Hearing

The admissibility of expert testimony often depends on the proponent establishing preliminary facts (see Evid C §401), *e.g.,* the expert's qualifications or the reliability of the techniques the expert used. If counsel intends to challenge the admissibility of anticipated expert testimony on the basis of the proponent's failure to establish a preliminary fact, it is best to advise the court and opposing counsel of that intention and request a time for a preliminary fact hearing. Do not wait until trial is in progress to request a preliminary fact hearing unless absolutely necessary. *People v Lindberg* (2008) 45 C4th 1, 41, 82 CR3d 323 (Evid C §402 hearing revealed that expert testimony on white supremacist views, culture, and groups in hate-murder trial would be helpful to jury). See *People v Gonzalez* (2005) 126 CA4th 1539, 25 CR3d 124 (defense's midtrial Evid C §402 request for a continuance to obtain defense expert to countermand prosecution expert's testimony on jail gang violence denied; defense had ample pretrial notice of general tenor of prosecution expert's testimony, if not particulars). See Evid C §§402-403. See also chap 4.

Remember that the proponent has the burden of showing the existence of the preliminary facts, and that the court must find the evidence sufficient to sustain a finding of preliminary fact. If the court admits the proffered evidence after a hearing, be sure to request a limiting instruction. The court may, "and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds the preliminary fact does exist." Evid C §403. For further discussion of preliminary fact hearings, see chap 4.

NOTE: An objection on the ground that evidence is unreliable should be decided under Evid C §403(a)(1) (applicable when "the relevance of the proffered evidence depends on the existence of the preliminary fact") because unreliable evidence is irrelevant. The preliminary fact may be whether a test or an experiment is generally accepted by the relevant scientific community as required by *People v Kelly* (1976) 17 C3d 24, 130 CR 144. See §24.24. See also chap 23.

An uncontested scholarly report discrediting the prosecution expert's DNA testimony supported a successful due process habeas corpus appeal that resulted in reversal of the conviction. *Brown v Farwell* (9th Cir 2008) 525 F3d 787, 792 (court allowed defendant to expand record to include report; caution: case not final).

If the expert's opinions (or the bases for those opinions) are a surprise—in a criminal case, or in a civil case in which no expert disclosure was requested—the opponent may either ask for an offer of proof before the expert testifies, or, as soon as the objectionable testimony is given, object and move the trial court to strike the testimony. See *People v Seaton* (2001) 26 C4th 598, 642, 110 CR2d 441.

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/§24.30 2. Bases for Challenge

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In addition to challenging the qualifications of the expert and the reliability of the expert's techniques, the opponent of expert testimony might also object that the proposed opinion testimony is not related to a subject "sufficiently beyond common experience" as to make expert testimony necessary (Evid C §801(a)), or that it is based on matter that is not "of a type that reasonably may be relied upon" by the expert (Evid C §801(b)). These challenges may also call for a preliminary fact hearing.

"Profile evidence" or expert opinion that certain general characteristics are typical, or consistent with, a particular type of criminal behavior, has been excluded when it is used to suggest that a specific defendant is guilty because he or she shares some of those characteristics. *People v Prince* (2007) 40 C4th 1179, 1225, 57 CR3d 543. See *People v Robbie* (2001) 92 CA4th 1075, 112 CR2d 479; *People v Castaneda* (1997) 55 CA4th 1067, 64 CR2d 395. Evidence that particular criminal behavior has no profile, however, is admissible to rebut a suggestion that the defendant is not guilty because he or she (or the associated behavior) has (or lacks) a certain characteristic. See, *e.g., People v McAlpin* (1991) 53 C3d 1289, 1299, 283 CR 382; *U.S. v Beltran-Rios* (9th Cir 1989) 878 F2d 1208. The exclusion of "profile evidence" is based essentially on the fact that not everyone who possesses the profiled characteristics is a criminal; the behavior might be judged as either innocent or illegal. The evidentiary principles generally underlying the exclusion of profiling are summarized in *Prince,* 40 C4th at 1225: Such evidence is not relevant because it is not helpful to the trier of fact (Evid C §801(a)), because it lacks a foundation, particularly if it is not based on matters on which an expert might reasonably rely (Evid C §801(b)), or because any relevance is outweighed by the potential to confuse or mislead the jury (Evid C §352). Nevertheless, profiling is not always inadmissible. *Prince,* 40 C4th at 1225. In contrast to an expert's opinion that a defendant fits a particular criminal profile, an expert's "linkage" opinion finding common distinctive marks of a series of crimes to be one person's signature offenses, is admissible, subject to the usual tests of reliability. Such expert testimony is admissible so long as the defendant's characteristics are not mentioned. *Prince,* 40 C4th at 1226. A helpful linkage opinion is admissible even if judging similarities between the crimes is within the common experience of the fact finder (40 C4th at 1222) and it is an ultimate issue in dispute, so long as it truly assists the trier of fact (40 C4th at 1226).

PRACTICE TIP: When confronted with an expert opinion that certain facts in the case are "consistent with" or "typical of" some conclusion, the opponent may object on all the above grounds and focus the objection on the likelihood that the jury will erroneously perceive the testimony to be more conclusive than it really is, especially when the evidence is supposed to address causation. See Evid C §352; see also *Viner v Sweet* (2003) 30 C4th 1232, 135 CR2d 629; *Jones v Ortho Pharmaceutical Corp.* (1985) 163 CA3d 396, 402, 209 CR 456.

The introduction of an expert's opinion may also be challenged when it relates to a matter of law rather than a question of fact. *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 1598, 71 CR3d 361. See *Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1179, 78 CR3d 572. Thus, for example, expert testimony is usually inadmissible to explain the meaning of terms used in an insurance policy. See, *e.g., Jordan v Allstate Ins. Co.* (2004) 116 CA4th 1206, 11 CR3d 169, rev'd on other grounds (2007) 148 CA4th 1062, 56 CR3d 312 (when terms themselves are undisputed, it is court's job to interpret policy language).

A challenge may be brought when an expert's opinion is wholly speculative, and when a valid objection on this basis is made, the court under Evid C §803 must exclude the testimony. *Redevelopment Agency v Mesdag* (2007) 154 CA4th 1111, 1129, 65 CR3d 372 (goodwill value on condemned property improperly based on hypothetical "best" use of property, not actual use at time of condemnation). Although expert testimony is often admitted to be weighed against reasonable objections, courts in condemnation trials should be cautious in admitting expert opinions based on speculation, guesses, supposition, or conjecture. 154 CA4th at 1130.

That an expert's opinion encompasses the ultimate issue in the case is not a valid objection. Evid C §805. However, this rule does not give the expert "carte blanche to express any opinion he or she wishes." *Summers v A.L. Gilbert Co.* (1999) 69 CA4th 1155, 1178, 82 CR2d 162. An expert may not under the guise of opinion testify to legal conclusions. *Summers v A.L. Gilbert Co., supra.* For representative cases, see:

- *People v Prince* (2007) 40 C4th 1179, 1227, 57 CR3d 543 (expert's "linkage" opinion that one person committed six crimes did not preempt jury's decision on defendant's guilt for those crimes, especially when jury instructed on weighing credibility of expert opinion);
- *PM Group, Inc. v Stewart* (2007) 154 CA4th 55, 63, 64 CR3d 227 (even though expert's testimony on customs and practices in entertainment industry involved ultimate issues in case, it was admissible because it was outside jury's common experience);
- *In re Alexander L.* (2007) 149 CA4th 605, 611, 57 CR3d 226 (gang expert's simple statement that he "knew" gang crimes

had been committed, without specifying what crimes or when and how they were committed, or how he "knew," is insufficient basis for sentencing enhancement for gang-related crime);

- *Downer v Bramet* (1984) 152 CA3d 837, 841, 199 CR 830 (attorney's opinion in dissolution that specific property was community property held inadmissible); *Ferreira v Workmen's Compensation Appeals Bd.* (1974) 38 CA3d 120, 124, 112 CR 232 (physician's opinion that claimant's injury was not work-related was inadmissible).

In addition, an expert's opinions may not be used to usurp the function of the jury. *Summers v A.L. Gilbert Co.* (1999) 69 CA4th 1155, 1182, 82 CR2d 162. "[W]hen an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them." 69 CA4th at 1183. See *People v Killebrew* (2002) 103 CA4th 644, 651, 126 CR2d 876 (gang expert's opinion that, because defendant and occupants of car containing handgun were members of same gang, defendant knew about handgun, even though he was not passenger in car, was inadmissible); *Piscitelli v Friedenberg* (2001) 87 CA4th 953, 972, 105 CR2d 88 (expert's testimony that plaintiff would have prevailed had case been allowed to go to arbitration inadmissible).

§24.31 3. Cross-Examination of Expert (Evid C §721)

In cross-examining an expert witness, proceed with extreme caution. Most retained experts can be expected to advance their viewpoint, even under cross-examination. You are entitled to ask questions about the expert's qualifications, including any bias or propensity to testify for one side, any failure to review relevant material before reaching an opinion, and the basis for the opinion.

PRACTICE TIP: The courts generally allow rigorous cross-examination of an expert witness who based his or her opinion on factors other than actual personal knowledge of the facts of the case. See *Sinaiko v Superior Court* (2004) 122 CA4th 1133, 1142, 19 CR3d 371. You should carefully study the expert's prior publications and testimony, as well as the expert's current report, for inconsistent statements and points on which the expert may agree with your own position. You may be able to get the expert to concede points in your cross-examination. If the expert is unwilling to concede any points at all, regardless of those inconsistencies, the jury may perceive that the witness is biased and discount otherwise damaging testimony.

Before the 1997 amendment to Evid C §721, cross-examination of an expert about the content or tenor of publications by others was permitted only if the publication was in evidence or if the expert referred to, considered, or relied on it. Now an expert may also be cross-examined about such publications if "the publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." Evid C §721(b)(3). No definition of "reliable authority" is provided, but it presumably relates to language in Evid C §801(b) permitting an expert to base an opinion on a matter that "is of a type that reasonably may be relied upon by an expert." Until appellate courts provide further definition, counsel may expect that, if one party's expert relies on a particular publication, that expert will testify that the publication is a reliable authority, thus permitting counsel to cross-examine the opposing party's expert on its content.

NOTE: It may not be necessary to qualify a witness as an expert by voir dire before a prosecutor cross-examines him or her as an expert, so long as the witness has sufficient "special knowledge, skill, experience, training, or education" as specified under Evid C §720. *People v Loker* (2008) 44 C4th 691, 737, 80 CR3d 630 (no error to cross-examine defendant's former guidance counselor about admitted "important book in the field" even though he had not been qualified as expert; prosecutor has broad leeway to cross-examine expert to reveal "grounds and reliability of the expert's opinion").

PRACTICE TIP: Because the plaintiff's expert testifies first, if that expert has not referred to, considered, or relied on a publication and will not agree that an article is a reliable authority, the defendant must be prepared to make an offer of proof that the defense expert will testify that the publication is a reliable authority. This offer should be supported by a declaration or deposition testimony. Whether a publication is a "reliable authority" is a preliminary fact, and a preliminary fact hearing under Evid C §405 may be required. See chap 4.

§24.32 4. Prosecutorial Misconduct Involving Excluded Testimony

If the court limits the expert's testimony on the basis of the expert's opinion, it may be misconduct for the prosecutor to imply, in argument or cross-examination, that no basis exists. Whether misconduct exists will depend on the reasons the testimony was limited. For example, if the opinion's basis was excluded because it was deemed unreliable, then it may be appropriate to suggest that no reliable basis exists. However, if the opinion's basis was excluded because it was deemed time-consuming under Evid C §352, it would be inappropriate to suggest that no basis exists.

V. CHECKLISTS

§24.33 A. Checklist: Witnesses to Subpoena

- Expert.
- Witnesses to testify to information on which expert will base his or her opinion, if necessary.

NOTE: If expert's opinion is based on a writing, evidence may be required to authenticate it, to show that it is relevant, and to either demonstrate an exception to the hearsay rule or prove it reliable enough to qualify under Evid C §801(b). Depending on the circumstances, writings may be introduced through the expert or others. See California Expert Witness Guide, chap 4 (2d ed Cal CEB 1991).

§24.34 B. Checklist: Alternative Methods of Admissibility

- Lay opinion testimony (if it qualifies). Evid C §800; see chap 33.

Source: Evidence/Effective Introduction of Evidence in California/24 Expert Witnesses/ VI. SOURCES/§24.35 A. Evidence Code

VI. SOURCES

§24.35 A. Evidence Code

Evid C §720. (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

Evid C §721. (a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

(b) If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs:

(1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion; or

(2) The publication has been admitted in evidence.

(3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits.

Evid C §723. The court may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party.

Evid C §801. If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Evid C §802. A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

Evid C §803. The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

Evid C §804. (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.

(c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

Evid C §805. Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

See Evid C §§722 (credibility of experts), 730-733 (experts appointed by the court), 750-753 (interpreters), 754 (hearing impaired persons), and 810-823 (valuation of property). See also Fam C §§7551-7557 (genetic tests in paternity actions, reproduced in §23.24).

§24.36 B. Other

For further discussion of expert witnesses, see 1 Witkin, California Evidence, *Opinion Evidence* §§26-87 (4th ed 2000); 2 Witkin, California Evidence, *Witnesses* §§21-23 (4th ed 2000); 3 Witkin, California Evidence, *Presentation at Trial* §§189-201 (4th ed 2000); Jefferson's California Evidence Benchbook, chaps 27, 30 (4th ed CJA-CEB 2009); California Expert Witness Guide (2d ed Cal CEB 1991); Cotchett, California Courtroom Evidence, chaps 16-17, 28 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *Logical Relevance; Personal Knowledge and Authentication* §4.H, *Opinion Evidence* §8.C (3d ed 2000).

25

Family History: Statements, Reputation, and Records

William H. Armstrong

§25.1 I. SCOPE OF CHAPTER

This chapter covers evidence concerning family history as an exception to the hearsay rule when it is introduced in one of the following forms:

- Statements by an unavailable declarant about declarant's own history or the history of another to whom the declarant is related or with whom the declarant is intimately associated (Evid C §§1310-1311);
- Reputation evidence from family and community members (Evid C §§1313-1314); or
- Records such as those kept by family and church (Evid C §§1312, 1315), certificates, *e.g.,* of birth and marriage (Evid C §1316), or vital statistics such as births and deaths (Evid C §1281).

NOTE: The Evidence Code uses the specific terms "birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or similar fact of family history." See Evid C §§1310-1316. This chapter will refer to these terms as "family history."

II. REQUIREMENTS

A. To Admit

§25.2 1. Out-of-Court Statements

To introduce an out-of-court statement about family history into evidence, the proponent must meet the following requirements:

- The declarant is unavailable (Evid C §§1310-1311);
- The circumstances under which the statement was made indicate its trustworthiness (Evid C §§1310(b), 1311(b)); and
- The statement concerns the declarant's own family history (Evid C §1310(a)); or
- The statement concerns the family history of a person other than the declarant, and the declarant is related to the other either (Evid C §1311(a)):
- By blood or marriage, or
- Was so intimately associated with the other's family that the declarant is likely to have accurate information, and made the statement based on (1) information from the other or from a person related to the other by blood or marriage, or (2) common knowledge in the other's family; and
- If the evidence is in a writing, it must be authenticated (Evid C §1401).

Source: Evidence/Effective Introduction of Evidence in California/25 Family History: Statements, Reputation, and Records/§25.3 2. Reputation

§25.3 2. Reputation

To admit evidence of reputation concerning family history, the proponent must show that the evidence is of reputation:

- Among family members concerning family history (Evid C §1313); or
- In the community concerning the date or fact of birth, marriage, divorce, or death of a person residing in the community at the time of the reputation (Evid C §1314); and
- If the evidence is in a writing, it must be authenticated (Evid C §1401).

§25.4 3. Records

To introduce records of family history into evidence, the proponent must meet the following requirements:

Family records:

- The evidence is family history of a member of the family by blood or marriage (Evid C §1312);
- The evidence is an entry in a family Bible or other family book or chart, engraving on a ring, a family portrait, engraving on an urn, crypt, or tombstone, and the like (Evid C §1312);
- The record is authenticated if it is a writing (Evid C §1401);

Church records:

- The statement concerning family history is in a writing made as a record by a church or religious society or denomination (Evid C §1315);
- The writing was made as a record of an act, condition, or event and would be admissible as evidence of such act, condition, or event, under Evid C §1271 (Evid C §1315(a));
- The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing (Evid C §1315(b));
- The record is authenticated (see Evid C §1401);

Certificates of marriage or other ceremony:

- The statement concerning family history is in a certificate by the maker, who performed a marriage or other ceremony or administered a sacrament (Evid C §1316);
- The maker was a member of the clergy, a civil officer, or other person authorized to perform the act reported (Evid C §1316(a));
- The certificate was issued by the maker at the time and place of the ceremony or within a reasonable time thereafter (Evid C §1316(b));
- The certificate is authenticated (see Evid C §1401);

Public records:

- The record is of a birth, fetal death, death, or marriage required by law to be filed in a designated public office (Evid C §1281);
- The record is authenticated (Evid C §1401).

Source: Evidence/Effective Introduction of Evidence in California/25 Family History: Statements, Reputation, and Records/§25.5 B. To Object

§25.5 B. To Object

Grounds for objecting to the admissibility of evidence of family history include:

- Irrelevant (Evid C §350);
- Hearsay (Evid C §1200);
- No foundation, *e.g.,* declarant not unavailable (Evid C §§1310-1311), or statement does not meet Evid C §1271 requirements (Evid C §1315);
- If a writing:
- Not (properly) authenticated (Evid C §1401),
- Inadmissible secondary evidence (Evid C §1521); or
- Too time consuming, misleading, confusing, or prejudicial (Evid C §352).

III. SAMPLE QUESTIONS

A. Statements

1. Declarant's Place of Birth

§25.6 a. Information to Elicit

To introduce a statement that the declarant said he was born in New York City, the proponent wants the witness to testify to the following matters in response to the direct examination questions in §25.7:

- Identify himself and describe his relationship to declarant;
- Show personal knowledge of declarant's unavailability;
- Report statement declarant made; and
- Describe circumstances to establish trustworthiness.

NOTE: If the witness has no personal knowledge of the declarant's unavailability, the proponent must call an additional witness who is capable of proving that unavailability.

§25.7 b. Questions to Ask

Q: Mr. Witness, do you know Ms. Declarant?

Q: How are you acquainted with Ms. Declarant?

Q: Mr. Witness, do you know where Ms. Declarant is at the present time?

PRACTICE TIP: It may be necessary to have other witnesses testify to unavailability. If so, you may ask the judge to admit this witness's testimony subject to a motion to strike if unavailability is not proved later. Alternatively, you can put on the unavailability witnesses first. See §§20.9-20.16 for sample witness questioning on unavailability.

Q: Did the declarant ever say anything in your presence about where she was born?

Q: What did she say about her place of birth?

Q: What were the circumstances in which she made this statement to you?

2. Another's Place of Birth

§25.8 a. Information to Elicit

To prove that the declarant said his girlfriend was born in New York City, counsel wants the witness to testify to the following points in the direct examination segment in §25.9:

- Identify himself and his relationship to the declarant;
- Explain the declarant's relationship with his girlfriend;
- Report the statement the declarant made; and
- Describe the circumstances to establish trustworthiness.

§25.9 b. Questions to Ask

[*Witness has already testified to Ms. Witness's unavailability*]

Q: Mr. Witness, do you know Mr. Declarant?

Q: What is your connection with Mr. Declarant?

Q: Did Mr. Declarant ever say anything in your presence about where his girlfriend was born?

Q: What did he say about her place of birth?

Q: How did the topic of his girlfriend's birthday come up?

B. Reputation

§25.10 1. Information to Elicit

To admit reputation evidence that the defendant was married to another party in the case, counsel wants the witness to cover the following points in her testimony in response to the questions in §25.11:

- Identify herself and her connection with the defendant;
- Establish her relationship with the defendant's family;
- Show the basis of knowledge of the statements; and
- Testify about the statements.

§25.11 2. Questions to Ask

Q: Ms. Witness, do you know Mr. Defendant?

Q: How long have you known him?

Q: Have you met members of his family?

Q: How long did you live with Mr. Defendant's parents?

Q: Have you ever heard conversations among Mr. Defendant's family about his being married?

Q: When did those conversations occur?

Q: What statements were made?

A: That he was married to Mrs. Defendant.

Q: Who said that?

A: His parents and his sister and brother at different times.

NOTE: When a nonfamily member reports on reputation within the family, the basis of the knowledge is also hearsay, as in this example. This second level of hearsay is also exempt under Evid C §1313 or §1314.

C. Records

1. Church Record

§25.12 a. Information to Elicit

To admit the entry in a church record that the decedent was born in 1928, the proponent wants the witness in responding to the direct examination questions in §25.13 to testify to the following matters:

- Qualifications for testifying about record, *i.e.,* witness is custodian of records or other qualified witness;
- Facts showing that record complies with Evid C §1271:
- Made in regular course of business,
- Made at or near time of event, and
- Identity and mode of preparation;
- What such records customarily contain;
- Sources of information and method and time of preparation indicate trustworthiness; and
- What the record shows about the decedent.

§25.13 b. Questions to Ask

Q: Father Witness, are you the pastor at Local Church?

Q: How long have you been the pastor there?

Q: Does the church maintain baptismal records?

Q: Is it the regular practice to make a baptismal record whenever a baptism occurs?

Q: When is the record of baptism customarily prepared?

Q: By whom is it customarily prepared?

Q: Who is the custodian of those records?

Q: What information do baptismal records usually contain?

Q: Does the record normally indicate the birth date of the person being baptized?

Q: Do you have a record of Decedent's baptism?

Q: Was it made at or near the time of the baptism?

A: Yes. According to the book in which we record the baptisms, Father Minister performed the baptism August 4, 1928, and recorded it the same day.

Q: What does the record state is the year of Decedent's birth?

A: 1928.

2. Marriage Certificate

§25.14 a. Information to Elicit

To show that the plaintiff was once married to a specific person, the proponent wants to cover the following points in §25.15 in order to introduce the certificate of marriage into evidence:

- Make in limine motion:
- Have marriage certificate marked in evidence,
- Give copy to opposing counsel,
- Show that certificate satisfies Evid C §1316,
- Authenticate certificate, and
- Move certificate into evidence; and
- In court, read certificate or have it read to jury.

§25.15 b. Questions to Ask

[*In chambers*]

Proponent: Your Honor, I would like to move into evidence a marriage certificate, Defendant's Exhibit F for identification. It satisfies the hearsay exception of Evidence Code §§1281 and 1316, and is authenticated under Evidence Code §§1532 and 1453. I have given a copy to opposing counsel.

Court: Any objections?

Opponent: No.

Court: All right.

Proponent: Your Honor, I would like to read the marriage certificate into evidence after the recess.

Court: That would be fine.

[*In court*]

Proponent: Your Honor, I ask permission to read to the jury a marriage certificate, Defendant's Exhibit F in evidence, showing that Mr. Plaintiff was married to Mrs. Plaintiff in 1984.

Court: All right.

[*Proponent reads marriage certificate to jury*]

IV. COMMENT

§25.16 A. Authenticating Records

The proponent should ensure that any family history information that is in writing is properly authenticated. When the writing is not self-authenticating, *e.g.,* under Evid C §§1450-1454, witnesses must authenticate it before its contents can be relied on. That is, the proponent may not be able to rely on any information in the writing itself to authenticate it.

The more commonly used statutes for authenticating records are Evid C §§1530 (copy of writing in official custody that was published by a public entity is prima facie evidence of its existence and content), 1532 (record of office of public entity that is authorized to be recorded is prima facie evidence of existence and content of original recorded writing once authenticated under Evid C §1451 or §1453), 1451 (certificate of acknowledgment of writing other than a will or certificate of proof of such a writing is prima facie proof of signature and contents if certificate complies with CC §§1180-1207), and 1453 (signatures of public employees affixed in their official capacities and notaries public presumed genuine). For discussion of authentication, see chap 11.

§25.17 B. Admissible Secondary Evidence

Either the original or secondary evidence is admissible to prove the content of writings. Evid C §§1520-1521. The court will exclude secondary evidence only when the opponent shows that either a genuine dispute exists and justice requires the exclusion or admission of the secondary evidence would be unfair. Evid C §1521. See Evid C §§1552-1553 (printed representations of computer information and of images stored on video or digital mediums presumed to be accurate). Other provisions making copies admissible in lieu of an original writing to prove the content of that writing are, *e.g.,* Evid C §§1530 (copy of writing in official custody that was published by a public entity), 1532 (official record statutorily authorized to be recorded), and Health & S C §102245 (certified copy of record stored on permanent storage medium based on microfilm). For discussion of secondary evidence to prove the content of a writing, see chaps 47-48.

§25.18 C. Preliminary Fact Hearing Usually Desirable

Because of the detailed evidentiary requirements for introducing evidence of family history, the proponent will achieve a smoother presentation before the jury if the issue is raised first at a preliminary fact hearing out of the jury's presence. See chap 4.

V. CHECKLISTS

§25.19 A. Checklist: Witnesses to Subpoena

- Witness to meet statutory hearsay exception requirements and introduce statement or reputation; no witness usually necessary for records.
- Witness to authenticate family history that is in writing, if the writing is not self-authenticating.
- Witness to prove unavailability, if necessary.

§25.20 B. Checklist: Alternative Methods of Admissibility

- Judicial notice. Evid C §450; see chap 31.
- Nonhearsay. Evid C §1200; see chap 35.
- Spontaneous or contemporaneous declaration. Evid C §§1240-1241; see chap 49.
- Stipulation. Evid C §210; CCP §283(1); see chap 51.

VI. SOURCES

§25.21 A. Evidence Code

Evid C §1310. (a) Subject to subdivision (b), evidence of a statement by a declarant who is unavailable as a witness concerning his own birth, marriage, divorce, a parent and child relationship, relationship by blood or marriage, race, ancestry, or other similar fact of his family history is not made inadmissible by the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Evid C §1311. (a) Subject to subdivision (b), evidence of a statement concerning the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The declarant was related to the other by blood or marriage; or

(2) The declarant was otherwise so intimately associated with the other's family as to be likely to have had accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Evid C §1312. Evidence of entries in family Bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

Evid C §1313. Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

Evid C §1314. Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule.

Evid C §1315. Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history which is contained in a writing made as a record of a church, religious denomination, or religious society is not made inadmissible by the hearsay rule if:

(a) The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under Section 1271; and

(b) The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing.

Evid C §1316. Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

(a) The maker was a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and

(b) The certificate was issued by the maker at the time and place of the ceremony or sacrament or within a reasonable time thereafter.

§25.22 B. Other

For further discussion of statements and reputation concerning family history, see 1 Witkin, California Evidence, *Hearsay* §§275-286 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 16 (4th ed CJA-CEB 2009).

26

Felony Conviction: To Impeach in Civil Trials

William H. Armstrong

§26.1 I. SCOPE OF CHAPTER

This chapter discusses prior felony convictions, which are admissible in civil trials to impeach witnesses. Evid C §788.

II. REQUIREMENTS

§26.2 A. To Admit

To introduce a prior felony conviction into evidence, the proponent must meet the following requirements:

- Witness has testified at trial in person or by deposition (Evid C §788), or is a hearsay declarant (*People v Jacobs* (2000) 78 CA4th 1444, 93 CR2d 783);
- None of the following Evid C §788 exceptions exists that would preclude use of the prior conviction:
- Pardon based on innocence,
- Certificate of rehabilitation and pardon under Pen C §§4852.01-4852.21,
- Dismissal under Pen C §1203.4, or
- Conviction occurred in another state, and witness relieved of penalties and disabilities arising from it in a manner similar to Pen C §1203.4 or §§4852.01-4852.21;
- Ask witness whether he or she had a prior felony conviction; or
- Offer independent evidence of the prior conviction under Evid C §788 that proves that the witness is the person who suffered the conviction (see Evid C §403(a)(4); see §27.2 for summary of the form the record of judgment may take).

NOTE: Although Evid C §788 uses "or" between the choice of proof in the two items immediately above, there is no case law that forbids using both methods (witness's testimony *and* independent evidence of criminal judgment).

Source: Evidence/Effective Introduction of Evidence in California/26 Felony Conviction: To Impeach in Civil Trials/§26.3 B. To Object

§26.3 B. To Object

Opposing counsel may object to evidence of a prior felony conviction on the following grounds:

- Improper impeachment, *e.g.:*
- No proper evidence that the witness has been convicted of felony, *e.g.,* no judgment and witness denies conviction, or prior conviction is a misdemeanor or a juvenile offense (Evid C §788),
- Too prejudicial, confusing, misleading, or time consuming (Evid C §352); or
- Examination of witness is beyond permissible scope of examination (Evid C §§761, 773).

III. SAMPLE QUESTIONS

A. Surprise Impeachment

§26.4 1. Information to Elicit

Counsel who calls a witness to testify may be unaware that the witness has a prior felony conviction. The cross-examination segment in §26.5 is an example of a surprise impeachment in which opposing counsel attempts to accomplish the following:

- Have the witness admit the prior conviction in front of the jury; or
- Have the witness deny the prior conviction; and
- Establish the prior conviction by independent evidence, *e.g.,* a certified copy of the judgment of conviction.

NOTE: When introducing independent evidence of a prior felony conviction to impeach a witness, counsel should be sure to satisfy authentication requirements.

§26.5 2. Questions to Ask

Q: Is it true that on December 19, 2006, you were convicted in Fresno, California, of the felony of armed robbery?

PRACTICE TIP: You must have either a judgment of conviction or other reliable information that reasonably leads you to believe that the witness has suffered a conviction before posing this question. *Fortner v Bruhn* (1963) 217 CA2d 184, 188, 31 CR 503 (judgment reversed). See §26.12.

Opponent: Objection, improper impeachment. Your Honor, may we approach the bench.

Court: Yes, but let's make this brief.

Opponent: Your Honor, this is the first I have heard of a prior conviction. I want to see a copy of the judgment and excuse this witness until later for further cross-examination, so I can have time to find out whether this alleged prior conviction is constitutional or if it is invalid under one of the Evidence Code §788 exceptions.

Court: Ms. Proponent, did you give Opponent a copy of this judgment before this witness took the stand?

Proponent: Your Honor, there is no requirement that I help Opponent with his case, so I did not give him a copy of the judgment. I assumed he would pretry his own witnesses.

Court: Well, I won't allow this problem to lengthen the case.

PRACTICE TIP: At this point, the judge may allow the examination to continue immediately, subject to a later motion to strike, or may permit a recess for opposing counsel to review the judgment. The impact of the attempted surprise is now subject to the court's discretion in deciding how to proceed. Although the proponent is not required to provide opposing counsel with a copy of a prior conviction to be used to impeach a witness, the court may be annoyed by matters raised for the first time in trial that might have been brought up in chambers before trial started.

B. Impeachment Using Judgment of Conviction

§26.6 1. Information to Elicit

In the cross-examination segment in §26.7, counsel attempts to impeach the witness with the criminal judgment and accomplish the following:

- Have the witness admit the prior conviction in front of the jury; or
- Have the witness deny the prior conviction; and
- Establish the prior conviction by independent evidence, *e.g.,* a certified copy of the judgment of conviction.

NOTE: When introducing independent evidence of a prior felony conviction to impeach a witness, counsel should be sure to satisfy authentication requirements.

§26.7 2. Questions to Ask

Q: You have been convicted of a felony, have you not?

A: Yes, but I wasn't even sentenced to any jail time.

PRACTICE TIP: This answer includes information that counsel is not entitled to mention under the standard set forth in *People v Terry* (1974) 38 CA3d 432, 446, 113 CR 233, overruled on other grounds in *People v Gainer* (1977) 19 C3d 835, 139 CR 861. See *People v Allen* (1986) 42 C3d 1222, 1270, 232 CR 849. If the witness has volunteered the information, however, the proponent might be allowed to elicit more about the situation. Court and counsel have to decide how to address the problem. The standard is relevance, and Evid C §352 provides the test.

Proponent: Your Honor, I ask the clerk to mark as our next in order a certified copy of a record of criminal judgment in the Superior Court of Santa Clara County, and I offer it as our next exhibit in evidence.

Opponent: Objection, the prejudicial nature of this document far outweighs its probative value, and it should be excluded under Evidence Code §352. Also, Evidence Code §788 forces a choice: counsel either asks the witness to answer the question or introduces a judgment. She can't have it both ways.

PRACTICE TIP: Evidence Code §788 appears to be the only authority for the opponent's argument that counsel must choose only one course. See Note in §26.2. Objections unsuccessfully made in an in limine hearing in chambers must be renewed during trial, unless an order clearly makes it unnecessary. See Evid Code §353(a), and discussion in §3.12 on the "reiteration rule."

Court: It will be admitted over objection.

Q: Mr. Witness, you were convicted of a felony in Santa Clara County last year, is that true?

A: Yes.

Q: And was the felony of which you were convicted that of assault with a deadly weapon?

A: Yes.

Q: Is it correct that you were convicted of assaulting your grandmother with a baseball bat?

Opponent: Objection. Improper impeachment under §352, and it goes far beyond the scope of any possible relevance.

Court: Sustained.

PRACTICE TIP: At this point, the opponent might consider moving for a mistrial. The details of the felony, the sentence, and other particulars are not admissible under Evid C §788. See §26.8.

IV. COMMENT

§26.8 A. Find Out About Prior Convictions Before Trial

Before trial you should learn, through formal and informal discovery, whether anticipated opposition witnesses *and witnesses for your own side* have any felony convictions.

PRACTICE TIP: If you find a felony conviction, remember to inquire about pardons, certificates of rehabilitation, and the like, which may exempt the prior conviction under Evid C §788.

The historic reason for admissibility was a belief that any convicted felon was less believable simply by reason of the conviction. However, the details of the felony, the sentence, and other particulars are not admissible under Evid C §788. Those details may be admissible on some other theory, and one difficulty with prior conviction evidence is the possibility of "opening the door" to discussion of details that are not admissible in the first instance but, once mentioned, may permit follow-up questions until the court exercises its discretion under Evid C §352 to stop the diversion.

§26.9 B. When Your Witness Has Prior Felony Conviction

If your witness can be impeached with a prior felony conviction, you may prefer to bring the matter out on direct examination rather than allow your opponent to bring it out for the first time on cross.

PRACTICE TIP: If you are surprised during trial by attempted impeachment of your own witness with a prior felony conviction, request a preliminary fact hearing outside the jury's presence. See chap 4. If you are successful and the court rules that the prior should be kept out, consider requesting a mistrial.

C. When Opponent's Witness Has Prior Felony Conviction

§26.10 1. Consider Making In Limine Motion

If you anticipate impeaching a witness with a prior felony conviction, it is usually good practice to raise the matter in limine; impeachment with a prior requires meticulous care because of the obvious risk of serious prejudice. See, *e.g.,* *Fortner v Bruhn* (1963) 217 CA2d 184, 188, 31 CR 503 (judgment reversed because counsel impeached witness through questioning another witness about first witness's prior conviction without showing independent basis for the conviction).

§26.11 2. Be Cautious About Surprising Your Opponent

Attempting to surprise a witness with a prior felony conviction is risky. See the cross-examination segment in §26.5 as an example. The main purpose of the evidence is to attack the witness's credibility, not to play "gotcha" with opposing counsel. Using surprise is a gamble that the witness will behave suspiciously when confronted, and thus hurt his or her own credibility. If the witness denies the conviction, counsel must be ready to present independent evidence of the conviction, or the drama of surprise will be lost.

One risk of the surprise approach is that your opponent may be able to smother the surprise with objections that make you look bad in front of the jury. Another risk is that the witness will respond with a story that is technically irrelevant but compelling, and its recitation may neutralize the negative impact of the conviction evidence.

§26.12 3. Good Faith Basis Necessary Before Inquiring About Prior Felony Conviction

The proponent must have a good-faith basis for asking a witness about a prior conviction. Good faith includes having a copy of the judgment and perhaps other sources of information, such as a police record of convictions (called a "rap sheet"). *Fortner v Bruhn* (1963) 217 CA2d 184, 188, 31 CR 503. A good-faith basis is not required for asking a surprise witness if he or she has ever had a prior felony conviction. See 3 Witkin, California Evidence, *Presentation at Trial* §297 (4th ed 2000).

§26.13 4. Procedures for Proving Prior Conviction

To introduce a judgment of conviction, obtain the original or a certified copy of the docket or minute order entry from the court that rendered the prior judgment of conviction to assure that the judge in your case will accept it as properly authenticated. See *People v Vienne* (1973) 30 CA3d 266, 105 CR 584, disapproved on other grounds in *People v Sumstine* (1984) 36 C3d 909, 919, 206 CR 707. The constitutionality of the prior conviction is also a foundational matter that must be satisfied on objection. See 36 C3d at 924.

PRACTICE TIP: If proving the constitutionality of the prior conviction is too complicated, the court may be inclined to exclude the prior conviction under Evid C §352 as unduly time consuming. However, you do *not* need to prove that the prior felony was constitutional unless there is an objection and evidence of a constitutional defect. *People v Sumstine, supra*.

§26.14 D. Application of Criminal Law Rules on Use of Felony Convictions to Impeach in Civil Trials

Case law on the admissibility of felony convictions to impeach in criminal cases is not binding precedent in civil cases. Moreover, Cal Const art I, §28(f)(4) (formerly (§28(f)) does not apply to civil proceedings. *Robbins v Wong* (1994) 27 CA4th 261, 32 CR2d 337.

The rules applicable to civil cases are Evid C §788, which permits impeachment with prior felony convictions, and Evid C §352, which permits the court to exclude evidence if the probative value is outweighed by the possibility that its admission will take too much time, will be too prejudicial, or will confuse the issues or mislead the jury. *Robbins v Wong, supra*.

Case law concerning the admission of felony priors to impeach in criminal cases, although not binding in civil cases, may be looked to for guidance by civil trial judges in how to apply Evid C §352 to the admission of felony priors to impeach. *Robbins v Wong, supra*. On felony convictions used to impeach in criminal trials, see chap 27.

§26.15 E. Introducing Prior Felony Conviction at Deposition

If you are trying to force a settlement, you may wish to bring out an opposing witness's prior felony conviction when deposing the witness. If you expect to go to trial, however, you will probably not want to tip your hand and give your opponent more time to research a way of keeping the conviction out.

PRACTICE TIP: The party on whose behalf the witness is testifying will probably want to request an instruction that the prior conviction may be considered only as it relates to the witness's credibility. See CACI 211.

§26.16 F. Prior Felony Conviction Used to Prove Fact Necessary to Judgment

In addition to its possible use in impeaching a witness's credibility, a prior felony conviction is not made inadmissible by the hearsay rule if it is offered in a civil case to prove a fact essential to the judgment. Evid C §1300. For discussion of this use of prior felony convictions, see 1 Witkin, California Evidence, *Hearsay* §§270-274 (4th ed 2000).

V. SOURCES

§26.17 A. Evidence Code

The relevant Evidence Code sections are Evid C §§352 (reproduced in §7.8) and 788 (reproduced in §27.22). See Evid C §787 (reproduced in §16.24).

§26.18 B. Other

For further discussion of impeachment of a witness in a civil action with prior felony convictions, see Jefferson's California Evidence Benchbook, chaps 23, 29 (4th ed CJA-CEB 2009); 3 Witkin, California Evidence, *Presentation at Trial* §§292-314 (4th ed 2000); Cotchett, California Courtroom Evidence §16.51 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, chap 5 (3d ed 2000).

For discussion of felony convictions used to impeach witnesses in criminal cases, see chap 27.

Source: Evidence/Effective Introduction of Evidence in California/27 Prior Convictions: To Impeach in Criminal Trials/Chapter Outline

27

Prior Convictions: To Impeach in Criminal Trials

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VI. SOURCES

A. Evidence Code §27.22

B. California Constitution §27.23

C. Other §27.24

§27.1 I. SCOPE OF CHAPTER

Prior convictions may be admissible in criminal trials for several purposes: to impeach a witness, to elevate a misdemeanor to a felony charge, and to affect sentencing. Evid C §788 (felonies); Cal Const art I, §28(f)(4); Evid C §452.5; *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418 (misdemeanors). This chapter focuses on using prior convictions to impeach a witness. The theory behind impeachment with "priors" is that they reflect on a witness's credibility. See Comment to Evid C §788. The most common method of impeaching a witness with a prior conviction is to ask the witness whether he or she was convicted of a specified crime on a specified date.

NOTE: Impeachment evidence in general is admissible under Evid C §785. Before the adoption of the "Truth-in-Evidence" provision of Proposition 8 (Cal Const art I, §28(f)(2), as renumbered in 2008), Evid C §§787 and 788 together precluded the use of misdemeanor convictions for impeachment. In 1992, the California Supreme Court held that after enactment of Proposition 8, the facts underlying a misdemeanor conviction that involves moral turpitude can be used in a criminal case to impeach a witness, but that in the absence of a hearsay exception, the record of the conviction itself could not be used. *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418. See also *People v Lopez* (2005) 129 CA4th 1508, 29 CR3d 586. In 1996, the legislature enacted that hearsay exception. Evidence Code §452.5(b) provides that a certified record of conviction is admissible as a public record under Evid C §1280 and may be used to prove the commission of the offense. See *People v Duran* (2002) 97 CA4th 1448, 119 CR2d 272. Admissibility of prior convictions remains subject to challenge under Evid C §352 (exclusion of time-consuming, unduly prejudicial, confusing, or misleading evidence). See *People v Feaster* (2002) 102 CA4th 1084, 1091, 125 CR2d 896.

II. REQUIREMENTS

§27.2 A. To Admit

A prior conviction may be used to impeach any witness, including a defendant who testifies. *People v Castro* (1985) 38 C3d 301, 306, 211 CR 719. Impeaching a witness with prior convictions is customarily done by questioning the witness, but there is no bar to introducing a certified copy of the conviction. See Evid C §§788 (felony convictions), 452.5(b) (certified record of criminal conviction); §27.17. Under Evid C §452.5(a) any properly certified computer-generated record of a conviction is subject to discretionary judicial notice under §452(c) or (d).

NOTE: It is not clear whether out-of-state records are also subject to judicial notice. Under §452.5(a), to qualify, the records must be among those records "specified by the Judicial Council" and must be "certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry." This arguably suggests that the only qualifying records are records of California convictions. However, Evid C §452(b) and (c) pertain to records of the United States and any state government. Under §452.5, the conviction may be from California or another public entity. See Evid C §1530.

To introduce evidence of a prior conviction, counsel must meet the following requirements:

- Questions about the prior conviction must be asked in good faith (see §27.18);
- Witness may only be asked the name or type of crime and the date and place of conviction (*People v Schader* (1969) 71 C2d 761, 773, 80 CR 1; *People v Terry* (1974) 38 CA3d 432, 446, 113 CR 233, overruled on other grounds in *People v Gainer* (1977) 19 C3d 835, 139 CR 861; see *People v Johnson* (1991) 233 CA3d 425, 284 CR 579);
- Least adjudicated elements of crime must necessarily involve moral turpitude (*People v Castro* (1985) 38 C3d 301, 317, 211 CR 719);
- Documentary evidence of prior conviction must be authenticated (Evid C §§1401, 1530); and
- Evidence may be necessary to prove the witness is a person who was convicted (*People v Sarnblad* (1972) 26 CA3d 801, 805, 103 CR 211).

Admissibility remains subject to challenge under Evid C §352 (exclusion of time-consuming, unduly prejudicial, confusing, or misleading evidence). See *People v Feaster* (2002) 102 CA4th 1084, 1091, 125 CR2d 896.

§27.3 B. To Object

Grounds for objecting to the admissibility of a prior conviction include:

- Crime did not involve moral turpitude (*People v Castro* (1985) 38 C3d 301, 211 CR 719 (felonies); *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418 (misdemeanors));
- Defendant relieved from disability of prior conviction, *e.g.,* pardoned (Evid C §788);
- Conviction is constitutionally invalid (usually determined before trial; see §27.16);
- Question calls for inadmissible matters, *e.g.,* questioner tries to go behind conviction and elicit facts about crime (see §27.17);
- No foundation that record of conviction refers to witness in question (see §27.19);
- Record of conviction not properly authenticated (Evid C §1401 or §1530);
- Witness being impeached has not testified (see §27.13); and
- Evidence should be excluded under Evid C §352, *e.g.,* prior is old or too similar to charged offense, or priors are too numerous (see §27.12).

III. SAMPLE QUESTIONS

A. Questions to Use to Impeach Witness Who Is Testifying

§27.4 1. Information to Elicit

In impeaching the witness with a prior conviction, counsel asks about the following points in the cross-examination segment in §27.5:

- Type of crime and date of conviction; and
- Location of conviction.

§27.5 2. Questions to Ask

Q: Mr. Witness, were you convicted of robbery in December 1999?

Q: Did the conviction result from your taking property from a person by the use of violence?

Opponent: Objection, Your Honor. Under *People v Terry* (1974) 38 CA3d 432, 446, 113 CR 233, overruled on other grounds in *People v Gainer* (1977) 19 C3d 835, 139 CR 861, evidence that goes beyond the fact that the crime is a felony, the name and nature of the crime, and the date and place of conviction is inadmissible. I move for a mistrial.

Court: Counsel, as we discussed before trial, you are initially limited to the conviction, date, and location. Sustained; mistrial denied, however, because the question was definitional.

Q: Did that conviction occur in Los Angeles County?

B. Introducing Record of Judgment of Conviction

§27.6 1. Information to Elicit

To introduce the existence of a witness's prior felony conviction into evidence, counsel calls the witness's probation or parole officer to the stand and covers the following points in the direct examination segment in §27.7:

- Produces certified copy of minute order or abstract of judgment showing prior felony conviction;
- Authenticates the judgment; and
- Asks probation or parole officer to identify witness as person with the prior felony conviction.

§27.7 2. Questions to Ask

Proponent: Your Honor, I have a certified copy of a judgment in Case Number C123456, dated December 10, 1999, showing a conviction for robbery by Mr. Witness. May this document be marked People's Exhibit No. 1 for identification?

[*Prosecutor calls parole officer to prove that witness being impeached is one with prior conviction*]

Q: Mr. Parole Officer, by whom are you employed?

Q: What is your occupation?

Q: How long have you been employed as a parole officer?

Q: What are your duties as a parole officer?

Q: Mr. Parole Officer, I am showing you a document that has been marked as People's Exhibit No. 1 for identification. Do you recognize this document?

Q: How do you recognize this document?

Q: Are you acquainted with the person mentioned in this document as being convicted of robbery on December 10, 1999?

Q: Did you meet this person in the course of your employment as a parole officer?

PRACTICE TIP: Probation and parole officers are frequently transferred and their case loads rearranged. Make sure ahead of time that the witness can provide the necessary identification, from either personal experience or based on a photograph in the officer's file, and word your questions accordingly.

Q: Is that person in the courtroom today?

Q: Where is he?

Proponent: Your Honor, may the record reflect that Mr. Parole Officer has identified Mr. Witness. Also, Your Honor, may People's Exhibit No. 1 be admitted into evidence?

IV. COMMENT

§27.8 A. Preliminary Fact Hearing Usually Held

The prior felony convictions of any witness or prospective witness are subject to discovery. See *Hill v Superior Court* (1974) 10 C3d 812, 112 CR 257; *People v Santos* (1994) 30 CA4th 169, 35 CR2d 719. The attorney for whom a witness is testifying should ask for a preliminary fact hearing outside the jury's presence on the admissibility of the prior conviction. *People v Lewis* (1987) 191 CA3d 1288, 1296, 237 CR 64 (hearing required; asking for "ruling" is insufficient). On preliminary fact hearings, see chap 4.

§27.9 B. Effect of Proposition 8

California Constitution art I, §28(f)(4), passed as part of Proposition 8 in 1982, purported to eliminate all restrictions on impeachment with prior convictions. However, there are limits on the use of prior convictions to impeach; section 28(f)(4) does not mandate that the trial court admit all prior felony convictions on request to impeach a defendant or witness. *People v Castro* (1985) 38 C3d 301, 306, 211 CR 719. These rules are discussed in §§27.10-27.16. For more detailed discussion, see California Criminal Law Procedure and Practice §§24.45-24.51 (Cal CEB Annual).

§27.10 1. Prior Felony Convictions May Be Used to Impeach Any Witness

Prior felony convictions may be used to impeach *any* witness, *i.e.,* any prosecution witness and any defense witness, including the defendant. Cal Const art I, §28(f)(4); *People v Castro* (1985) 38 C3d 301, 306, 211 CR 719.

2. Trial Court Discretion to Exclude Prior Convictions

§27.11 a. Moral Turpitude Required

Moral turpitude requires either an element of dishonesty (*e.g.,* fraud, perjury) or a "general readiness to do evil" from which a readiness to lie can be inferred. *People v Castro* (1985) 38 C3d 301, 313, 211 CR 719. See *People v Maestas* (2005) 132 CA4th 1552, 34 CR3d 503 (willful failure to appear under Pen C §1320.5 is crime of moral turpitude); *People v Chavez* (2000) 84 CA4th 25, 28, 100 CR2d 680 (sexual battery (misdemeanor) is crime of moral turpitude). In determining whether the elements of a prior offense meet the test, the court may look at the totality of the circumstances; elements that would not involve moral turpitude if taken separately can, in combination, produce a crime of moral turpitude. See *People v Rivera* (2003) 107 CA4th 1374, 133 CR2d 176 (possessing deadly weapon with intent to assault another involves moral turpitude). It is the court, not the jury, that must determine whether a crime involves moral turpitude. *People v Gray* (2007) 158 CA4th 635, 640, 69 CR3d 876 (error to amend CALCRIM 316 to allow jury to decide that felony involved moral turpitude).

Only crimes *necessarily* involving moral turpitude may be used to impeach. *People v Castro* (1985) 38 C3d 301, 317, 211 CR 719 (felonies). See *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418 (misdemeanors). A crime necessarily involves moral turpitude only if "from the elements of the offense alone—without regard to the facts of the particular violation—one can reasonably infer the presence of moral turpitude." *People v Feaster* (2002) 102 CA4th 1084, 1091, 125 CR2d 896 (citations and internal quotation marks omitted).

Numerous examples of crimes of moral turpitude are listed in California Criminal Law Procedure and Practice §24.46 (Cal CEB Annual) and 3 Witkin, California Evidence, *Presentation at Trial* §§303-308 (4th ed 2000).

§27.12 b. Evid C §352 Considerations

Even if the offense necessarily involves moral turpitude, the trial court retains some discretion to exclude a prior conviction for impeachment under Evid C §352 if it concludes that the prior conviction is substantially more prejudicial than probative. *People v Castro* (1985) 38 C3d 301, 211 CR 719. In making that determination, the court should consider whether:

- The conviction reflects adversely on the witness's honesty or veracity;
- The conviction is near or remote in time;
- The prior conviction is for conduct substantially similar to that for which the defendant is standing trial; or
- Impeachment will cause the witness to refrain from testifying.

People v Collins (1986) 42 C3d 378, 391, 228 CR 899. These discretionary considerations are the same factors that required exclusion of a prior felony conviction before the enactment of Proposition 8. On the law before Proposition 8, see *People v Beagle* (1972) 6 C3d 441, 453, 99 CR 313.

NOTE: The trial court may "sanitize" a prior conviction by telling jurors that the defendant was convicted of a prior felony but not telling them the nature of the charge. *People v Gray* (2007) 158 CA4th 635, 642, 69 CR3d 876; *People v Massey* (1987) 192 CA3d 819, 825, 237 CR 734.

§27.13 c. Defendant Must Testify to Raise Error on Appeal

The denial of a motion to exclude a prior conviction for impeachment is not reviewable on appeal if the defendant refuses to testify. *People v Collins* (1986) 42 C3d 378, 228 CR 899; *People v Irvin* (1991) 230 CA3d 180, 187, 281 CR 195.

It is error for a trial court to refuse to exercise its Evid C §352 discretion concerning the admissibility of a prior conviction for impeachment. *People v Castro* (1985) 38 C3d 301, 306, 211 CR 719. However, the court is not required to detail the reasons for its exercise of discretion on the record. *People v Nguyen* (1988) 204 CA3d 181, 187, 251 CR 40 (trial court's statement on record that it has exercised discretion under §352 and that probative value of prior conviction outweighs prejudicial effect demonstrates exercise of discretion).

§27.14 3. Rules on Misdemeanor Prior Convictions

In 1992, the California Supreme Court held that after enactment of Proposition 8, the facts underlying a misdemeanor conviction involving moral turpitude can be used in a criminal case to impeach a witness, but that in the absence of a hearsay exception, the record of the conviction itself could not be used. *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418. See also *People v Lopez* (2005) 129 CA4th 1508, 29 CR3d 586. In 1996, the legislature enacted that hearsay exception. Evidence Code §452.5(b) provides that a certified record of conviction is admissible over a hearsay objection as a public record under Evid C §1280 and may be used to prove the commission of the offense or any "other act, condition, or event recorded by the record." See *People v Duran* (2002) 97 CA4th 1448, 119 CR2d 272.

Consequently, the rules governing the admissibility of convictions are the same as those applicable to felony convictions.

NOTE: Of course, a misdemeanor conviction is less likely than a felony conviction to involve moral turpitude. At the same time, the effect of admitting a misdemeanor conviction for impeachment is less likely to be seriously prejudicial within the meaning of Evid C §352.

§27.15 4. Juvenile Adjudications

Before Proposition 8, juvenile adjudications were not considered felony prior convictions for purposes of impeachment under Evid C §788. California Constitution art I, §28(f)(4), passed as part of Proposition 8, declared that both adult and juvenile felony convictions can be used to impeach a witness or to enhance a sentence.

Despite §28(f)(4), several appellate courts have continued to hold that juvenile adjudications are not felony convictions (priors) and so are not admissible for sentence enhancement. See, *e.g.*, *People v West* (1984) 154 CA3d 100, 201 CR 63. The same reasoning should apply to juvenile adjudications used to impeach, but there is no case law on this issue. Note that Evid C §452.5 is a hearsay exception for records of "criminal convictions" and thus by this reasoning does not apply to juvenile adjudications.

CAUTION: In *People v Rivera* (2003) 107 CA4th 1374, 133 CR2d 176, the appellate court upheld the use of a prior juvenile adjudication to impeach the defendant when he testified. The appellant argued that the offense did not involve moral turpitude. It does not appear that the appellant argued that the juvenile court adjudication should not have been used for impeachment because it was not a conviction.

§27.16 5. Challenging Prior Convictions on Constitutional Grounds

Prior convictions may still be challenged on constitutional grounds. Constitutionality is usually determined at a special hearing before trial. See California Criminal Law Procedure and Practice §§24.28-24.43 (Cal CEB Annual).

§27.17 C. Procedures for Impeaching Witness

The proper procedure for impeaching a witness with a prior conviction is either to ask the witness on cross-examination whether he or she was convicted of the crime or to introduce the record of conviction. Evid C §788. There is no need to ask the witness about the conviction before introducing the record of conviction. *People v Pike* (1962) 58 C2d 70, 93, 22 CR 664.

PRACTICE TIP: Although there appears to be no case authority that forbids counsel from introducing the record of conviction *and* asking the witness about it, the attorney for the witness might object under Evid C §352 to such a procedure as cumulative (see California Trial Objections §§31.6-31.10 (Cal CEB Annual)) and contrary to the express language of Evid C §788 (the two choices of proof are separated by "or"). See §27.22.

Questioning on the prior conviction is limited to the name or type of crime and the date and place of conviction. *People v Schader* (1969) 71 C2d 761, 773, 80 CR 1; *People v Terry* (1974) 38 CA3d 432, 446, 113 CR 233, overruled on other grounds in *People v Gainer* (1977) 19 C3d 835, 139 CR 861. See *People v Szadziewicz* (2008) 161 CA4th 823, 842, 74 CR3d 416; *People v Johnson* (1991) 233 CA3d 425, 284 CR 579. In addition, a court may properly limit cross-examination questions that seek to undermine a witness's credibility under an Evid C §352 and relevancy analysis, unless that prohibited testimony would have given the jury "a significantly different impression of the witness's credibility." *Szadziewicz,* 161 CA4th at 841. Thus, a judge may call a halt to defense counsel's in-depth questions about a prior criminal conviction without violating the defendant's Sixth Amendment confrontation rights. 161 CA4th at 841.

The proponent of the evidence could also ask the court to take judicial notice of the prior conviction under Evid C §452(c)-(d). See Evid C §452.5(a). See chap 31 on judicial notice. For further discussion of proving the prior conviction, see California Criminal Law Procedure and Practice §24.27 (Cal CEB Annual).

PRACTICE TIP: The party on whose behalf the witness is testifying will probably want to request an instruction that the prior conviction may be considered only as it relates to the witness's credibility. See CALCRIM 316. For a case finding error in amendments to CALCRIM 316, see *People v Gray* (2007) 158 CA4th 635, 640, 69 CR3d 876.

§27.18 1. Good Faith Questions About Prior Conviction Required

Questions about the existence of prior convictions must be asked in good faith. The proponent of the evidence must have a copy of the judgment of conviction or reliable information that the witness has suffered the conviction (see *People v Perez* (1962) 58 C2d 229, 238, 23 CR 569, overruled on other grounds in *People v Poggi* (1988) 45 C3d 306, 335, 246 CR 886), unless counsel had no knowledge that the witness would be called to testify (see 3 Witkin, California Evidence, *Presentation at Trial* §297 (4th ed 2000)).

§27.19 2. Proving Witness's Identity as Convicted Person

If the witness denies the prior conviction, you may need other witnesses to establish that the person shown by a record of the prior conviction to have been convicted is the witness before the court. Consider calling a probation, parole, or police officer who is familiar with the case and with the witness. See sample questions in §27.7.

If the witness served a prison term, a copy of the Department of Corrections records should contain photographs and fingerprints. See *People v Foster* (1988) 201 CA3d 20, 26, 246 CR 855 (photographs).

Certified copies of the records of a penitentiary or jail in which a person was imprisoned may be introduced as prima facie evidence of the fact that a person tried for a crime was convicted. Pen C §969b. The "969b package" usually contains court documents, fingerprints, and photographs.

PRACTICE TIP: Another method of establishing the identity of the witness as the convicted person is to have a fingerprint expert compare the booking fingerprints of the defendant on the prior case with the witness's prints. The witness can be fingerprinted while on the stand.

V. CHECKLISTS

§27.20 A. Checklist: Witnesses to Subpoena

- Witness to prove prior conviction if it must be shown independently.

NOTE: Otherwise, obtain certified copy of document that proves prior conviction.

§27.21 B. Checklist: Alternative Methods of Admissibility

- Admission or confession. Evid C §§1220-1228; see chap 10.
- Habit or custom. Evid C §1105; see chap 29.
- Reputation character evidence. See chap 15.
- Similar act of misconduct. See chap 16.
- Specific act character evidence. See chap 16.
- Statements of state of mind or physical sensation. Evid C §§1250-1252; see chap 50.

VI. SOURCES

§27.22 A. Evidence Code

Evid C 452.5. (a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

Evid C §788. For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

(a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.

(b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.

(d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).

§27.23 B. California Constitution

Cal Const art I, §28(f)(4). Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

§27.24 C. Other

For further discussion of using prior convictions to attack the credibility of witnesses in criminal cases, see Jefferson's California Evidence Benchbook, chaps 23, 29 (4th ed CJA-CEB 2009); California Criminal Law Procedure and Practice, chap 24 (Cal CEB Annual); 3 Witkin, California Evidence, *Presentation at Trial* §§292-314 (4th ed 2000); Cotchett, California Courtroom Evidence §§16.50-16.51, 21.01[4] (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *Limitations on Credibility Evidence* §5.J (3d ed 2000).

For discussion of felony convictions used to impeach witnesses in civil cases, see chap 26.

Source: Evidence/Effective Introduction of Evidence in California/28 Former Testimony/Chapter Outline

28

Former Testimony

Holly J. Fujie

§28.1 I. SCOPE OF CHAPTER

This chapter discusses the admissibility of former testimony, which may be used as substantive evidence in place of live testimony when the witness is unavailable to testify and certain other conditions are met. Evid C §§1290-1292. See CCP §2025.620(b) (former deposition testimony). Former testimony may also be used for impeachment purposes (see Evid C §§770, 780, 1235), a topic that is discussed in chaps 19 (credibility), 41 (prior inconsistent statements). On former testimony as past recollection recorded, see chap 38.

II. REQUIREMENTS

A. To Admit

§28.2 1. Any Person's Former Testimony

A person's former testimony may be used for any purpose if:

- It was given under oath in a proceeding that was any of the following (Evid C §1290(a)-(d)):
- Another legal action,
- A former hearing (*e.g.,* a preliminary hearing or deposition) or trial in the same action,
- A proceeding by an agency or public entity of the United States,
- A deposition taken in another case in compliance with the law, or
- A verbatim transcript of an arbitration proceeding; and
- The declarant is unavailable as a witness (Evid C §1291(a));
- If the testimony is written, it is authenticated (Evid C §1401); and
- It is offered against:
- A person who offered it in evidence on his or her own behalf, or against that person's successor in interest (Evid C §1291(a)(1)), or
- One who was a party to a former proceeding and who had the same right and opportunity to cross-examine and the same interest and motive in cross-examining when the former testimony was given as he or she would have at the present trial (Evid C §1291(a)(2)).

In a civil action, Evid C §1292 permits the use of former testimony against one who was *not* a party to the former proceeding, if the declarant is unavailable as a witness, and a party to the action in which the former testimony was taken had (Evid C §1292(a)):

- The right and opportunity to cross-examine the declarant; and
- An interest and motive similar to that of the party in the present proceeding against whom the evidence is being offered. See *Wahlgren v Coleco Indus., Inc.* (1984) 151 CA3d 543, 198 CR 715.

PRACTICE TIP: In criminal cases, the constitutional right to confront witnesses means that the prosecution may not use a witness's former testimony unless the witness is unavailable *and* the defendant had an opportunity to cross-examine. *Crawford v Washington* (2004) 541 US 36, 52, 158 L Ed 2d 177, 194, 203, 124 S Ct 1354 (discussed in §20.20B). See also *People v Gonzales* (2005) 131 CA4th 767, 32 CR3d 172 (trial court's admission of evidence of preliminary hearing transcript from one of defendant's prior cases, as part of record of his conviction of prior serious felony, did not violate *Crawford*). For further discussion of use of preliminary hearing testimony in criminal trials, see California Criminal Law Procedure and Practice §§8.47, 31.20-31.21 (Cal CEB Annual).

§28.3 2. Adverse Party's Deposition Testimony

The proponent may admit an adverse party's deposition testimony for any purpose if the following requirements are met:

- The deponent must be a party to the action or one who was an officer, director, managing agent, employee, agent, or designee under CCP §2025.230 at the time the deposition was taken, even if the deponent is available, and has testified or will testify (CCP §2025.620); and
- The deposition must be authenticated (Evid C §1401), *i.e.,* it must be either a certified deposition transcript or a copy of one under CCP §2025.540(a).

Source: Evidence/Effective Introduction of Evidence in California/28 Former Testimony/§28.4 B. To Object

§28.4 B. To Object

Counsel may object to the use of former testimony in evidence on any of the following grounds:

- Hearsay (Evid C §1200);
- Irrelevant (Evid C §350);
- Not (properly) authenticated (Evid C §1401), *e.g.*:
- Not a certified transcript or copy of one under CCP §2025.540(a), and
- The proffered transcript is actually a rough draft and not usable under CCP §2025.540(a);
- Inadmissible secondary evidence (Evid C §§1521-1523; Pen C §872.5);
- Declarant's unavailability not established (Evid C §§1291(a), 1292(a)(1), 240);
- No foundation under Evid C §1291 or §1292, *e.g.,* no opportunity or inadequate opportunity to cross-examine at former hearing.

PRACTICE TIP: In a criminal case, defense counsel may also object to the use of former testimony on the ground that its introduction infringes the right of confrontation. See *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 194, 124 S Ct 1354, discussed in §20.20B. The right of confrontation precludes admission of an out-of-court statement against the defendant unless the prosecution has made a good-faith effort to secure the attendance of the declarant (*Barber v Page* (1968) 390 US 719, 722, 20 L Ed 2d 255, 258, 88 S Ct 1318; *People v Cromer* (2001) 24 C4th 889, 898, 103 CR2d 23), *and* the defendant has had an adequate opportunity for cross-examination (541 US at 52).

In addition, the following objections to deposition testimony can be made when a party offers a deposition at trial, even though no objection was made at the deposition (CCP §2025.460(c)):

- Deponent incompetent;
- Privilege;
- Attorney work product; and
- Irrelevant.

When former testimony is offered against a party, most objections can be made that could be made if the witness were actually testifying, except that no new objections are allowed to the form of a question and objections based on competency and privilege are allowed only if the problem existed at the time the former testimony was given.

III. SAMPLE QUESTIONS

A. Party Same in Former Action

§28.5 1. Information to Elicit

Mr. Jones is a party to both the present action and the former action in which the deposition was taken. To introduce a portion of the transcript of Mr. Stevens's testimony in the former action against Mr. Jones, the proponent wants to cover the following points at the in limine hearing and the cross-examination segment in §28.6:

At in limine motion held in chambers:

- Authenticate deposition as a certified transcript or a copy of a certified transcript (CCP §2025.540(a));
- Prove that witness is unavailable;
- Satisfy foundational requirements of Evid C §1291 or §1292, or CCP §2025.620(b);
- Have judge rule on all objections to former testimony;
- Ask that all items be admitted into evidence;
- Agree on how and when testimony will be read to jury; and
- If desired, ask judge to read CACI 208 to jury before transcript is read to them.

In court before jury:

- Move that the prior testimony of witness be received in evidence;
- Ask the court's permission to read that testimony to the jury;
- Give jurors enough information so that they know:
- That testimony was given at a deposition,
- Date, place, and parties present,
- Who was deposed,
- That lawyers were representing parties,
- That witness was under oath,
- That court reporter was present who recorded words as spoken, and
- Why deponent is not present at trial to testify (when required);
- Request that judge read CACI 208 to jurors; and
- Have people from proponent's law office, or court personnel, read the parts of the lawyer and of the witness to the jury.

Source: Evidence/Effective Introduction of Evidence in California/28 Former Testimony/§28.6 2. Questions to Ask

§28.6 2. Questions to Ask

[*In limine motion held in chambers*]

Proponent: Your Honor, I have a packet of materials on the deposition testimony of one of Mr. Jones's bookkeepers, Mr. Stevens, taken in a related case involving Mr. Jones, *Smith versus Jones*. I want to use witness Stevens's deposition testimony as substantive evidence because he died six months ago.

[*Gives packets to judge and to opponent*]

Proponent: In this packet are a certified death certificate for Mr. Stevens and certified copies of the complaint and verified answer, notice of deposition, and deposition of witness Stevens from the case of *Smith versus Jones*. Opponent was the attorney for Mr. Jones in that case, and Mr. Stevens had the opportunity to correct the transcript under Code of Civil Procedure §2025.520. He made no corrections. I would like the court to take judicial notice of the pleadings, the deposition notice, and the deposition, under Evidence Code §452(d)(1), and admit the death certificate under Evidence Code §1281.

Court: Any objection?

Opponent: I object to taking judicial notice of the deposition; depositions aren't proper subjects under Evidence Code §452.

Court: Proponent, do you have any authority?

Proponent: If the court doesn't feel that depositions are part of the court records, I would ask Opponent to stipulate to the foundational requirement for the deposition transcript. Otherwise, I can ask Opponent's client, Mr. Jones, if he was "the" Jones in *Smith versus Jones*, then have the deposition reporter read the transcript, or call Opponent to the stand to authenticate it. A stipulation will save a lot of court time. After all, over a month ago I sent Opponent a copy of the deposition testimony I plan on using. I have a copy here of the letter that accompanied those materials.

[*Gives copies of letter to judge and to opponent*]

Proponent: The testimony I want to use is quite straightforward and only two pages long.

Court: Did you receive this letter and a copy of the material counsel wants to use?

Opponent: Yes.

Proponent: I would like to have the court admit the marked portions of witness Stevens's deposition testimony in evidence. I propose having personnel from my office read the questions and answers.

Opponent: Well, I object to that. You haven't said anything about showing a foundation for introducing the deposition.

Court: I don't see any point in wasting the reporter's time. But I don't want objections to material in the deposition made for the first time in front of the jury. Let's go through the portion of the deposition Proponent wants to use. We'll take it one response at a time and you tell me if you have any objections.

[*They go through the deposition one response at a time*]

Court: All right. Proponent, you prepare revised excerpts of deposition testimony to be moved into evidence that reflect the deletions we have made at this hearing. Submit them to me and Opponent by tomorrow morning. Opponent, let us know in writing by the following morning of any corrections you may have.

[*Proponent introduces deposition testimony at trial*]

Proponent: Your Honor, I now offer the testimony of Mr. Jones's bookkeeper, Mr. Stevens. Although Mr. Stevens died six months ago, we have his deposition testimony under oath on the issue of Mr. Jones's billing procedures for the year 1997. The clerk has marked in evidence Plaintiff's Exhibit Nos. 75-79 to establish the foundational requirements for using the deposition. They show that Mr. Stevens was questioned, under oath, by Mr. Jones's lawyer in another case, *Smith versus Jones*. The deposition took place in Los Angeles on March 5, 1999. Two associates of mine will read the testimony. The person reading Mr. Stevens's testimony will sit in the witness chair and the person reading the questions asked by Mr. Jones's lawyer will stand at

counsel's table. Before they begin, will Your Honor instruct the jurors on the use to make of this deposition testimony?

Court: Yes.

[*Judge reads CACI 208*]

Court: You may proceed with Mr. Stevens's testimony.

[*Associates then read from redacted portion of transcript*]

B. Party Different in Former Action

§28.7 1. Information to Elicit

To introduce a portion of the deposition transcript of Ms. Witness against Mr. Jones from an earlier case in which Mr. Jones was not a party to the action in which the deposition was taken, the proponent wants to cover the following points in the cross-examination segment in §28.8:

- Move the deposition testimony into evidence;
- Give the jury enough information so that they know:
- That testimony was given at a deposition,
- The date, place, and parties present,
- Who was deposed,
- The lawyers representing the parties,
- That the witness was under oath,
- That a court reporter was present who took down words as they were spoken, and
- Why the deponent is not present at trial to testify (when required); and
- Show that the interests of the persons with the right and opportunity to cross-examine the witness were the same as those held by the party to the current action.

PRACTICE TIP: Evidence Code §1292 is not applicable in criminal actions. Evid C §1292(a)(2). See *People v Johnson* (1968) 68 C2d 646, 653, 68 CR 599, overruled on other grounds in *California v Green* (1970) 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930. Because a defendant in a criminal case has a constitutional right to confront witnesses, the *defendant* must have had the opportunity to cross-examine the witness. See *Crawford v Washington* (2004) 541 US 36, 52, 158 L Ed 2d 177, 194, 124 S Ct 1354 (discussed in §20.20B).

§28.8 2. Questions to Ask

Proponent: Your Honor, I have given an original deposition transcript of Ms. Witness, taken in the case of *Smith versus Stanton*, to the clerk. It is marked Plaintiff's Exhibit No. 15 for identification. I have given a copy of it to opposing counsel. I ask the court to take judicial notice under Evidence Code §452(d)(1) of certain pleadings in the case in which this deposition was taken. I have given certified copies of the complaint and Mr. Stanton's verified complaint to the clerk, marked, respectively, Plaintiff's Exhibits Nos. 16 and 17 for identification. I have also given copies to opposing counsel. I call Mr. Stanton to the stand.

Q: Mr. Stanton, were you a defendant in the case of *Smith versus Stanton*?

PRACTICE TIP: The most frequent objection to the use of deposition testimony in a case in which the party against whom it is being offered was not a party to the former action is that the interests of the persons with the right and opportunity to cross-examine the witness were not the same as those of the party to the current action. The proponent should ask questions that establish the present party's parallel interest in the former action.

Q: Did that case involve a determination of the validity of a contract dated June 15, 1990, between Mr. Smith and Mr. Jones?

Q: What was your position on the validity of that contract?

Q: Was Mr. Baldwin your attorney in that case?

Q: In the case of *Smith versus Stanton*, was Mr. Baldwin representing your interest at the deposition of Ms. Witness?

Q: I show you a transcript marked Plaintiff's Exhibit No. 15 for identification. Is that the transcript of the deposition taken of Ms. Witness on April 17, 1998?

Proponent: I ask the court to admit the transcript of Ms. Witness's deposition into evidence as former testimony under Evidence Code §1292.

Court: The transcript is admitted into evidence.

C. Deposition Used to Impeach Party

§28.9 1. Information to Elicit

Defense counsel wants to impeach the plaintiff in a personal injury case with plaintiff's deposition testimony without the issue's having been raised before trial in an in limine motion. The segment in §28.10 begins after some cross-examination has already occurred. Counsel wants to cover the following matters during the next part of the cross-examination:

- Elicit information to be impeached;
- Authenticate deposition through:
- Testimony of witness being impeached,
- Testimony of another witness present at the deposition,
- Stipulation or judicial notice, or
- Deposition reporter's testimony;
- Impeach witness:
- Ask witness to tell jurors what said on former occasion,
- If witness does not remember, have witness read from former testimony,
- After witness testifies, and having satisfied Evid C §770, have impeaching testimony read to jury; and
- Admit deposition testimony into evidence.

§28.10 2. Questions to Ask

Q: Did you have anything of an alcoholic nature to drink during the four hours immediately before the accident?

A: No.

Q: Do you remember testifying at a deposition held in your attorney's office on January 12 of this year?

A: Yes.

Q: Was a court reporter there to take down everything that was said?

A: Yes.

Proponent: I would like the clerk to mark this deposition transcript as Defense Exhibit next in order, and I would like the record to reflect that I am giving opposing counsel a copy of the deposition pages I will be using.

Q: Do you remember being asked the following question? Reading from Defense Exhibit F for identification, page 153, starting with line 5:

[*Proponent pauses to give opposing counsel time to find the place*]

Q: The question was: "Had you consumed any alcoholic beverages that night, during the four hours immediately preceding the accident?"

A: No, I don't remember that.

PRACTICE TIP: Counsel is not required to show impeaching documents to witnesses. Evid C §768(a).

Proponent: Your Honor, I ask opposing counsel to stipulate that this is an excerpt from a deposition of Mr. Plaintiff taken on January 12, 2000; that opposing counsel was present representing Mr. Plaintiff; that a court reporter was also present who reported what was said; that the court reporter later transcribed the tape from that deposition; that both Mr. Plaintiff and his lawyer obtained a copy of this deposition transcript and indicated their acceptance of its accuracy by signing their names at the end of the deposition; and that the portion of the deposition I just referred to on page 153 is in fact an accurate transcription of what was said at that deposition.

PRACTICE TIP: If the witness responded that he did remember the question and provides his answer, you can show him the deposition transcript and have him authenticate it for you. You would then just skip to the last few questions in this segment.

Court: Counsel, approach the bench.

Court: Mr. Opposing Counsel, I assume that you will stipulate to the authenticity of this deposition.

Opponent: I will so stipulate.

Court: Fine. My court reporter has taken that down. Proponent, you may proceed with your questioning.

PRACTICE TIP: The only reason not to raise this foundation issue earlier would be to surprise the witness and opposing counsel. It is usually preferable to ask opposing counsel at a pre-trial in limine hearing to either file copies of any depositions you wish to use during trial so that the court can take judicial notice of them or stipulate to the foundational requirements for using the depositions during trial. This approach will result in a smoother presentation before the jury. If opposing counsel refuses to comply with either request, you can argue that the deposition is self-authenticating under Evid C §§1452-1453 and CCP §2025.540(a). If none of these options is successful, you will still have time to arrange to have the deposition reporter be present to provide authenticating testimony. See §28.15.

Proponent: Mr. Plaintiff, I am handing you a copy of page 153 from the transcript of the deposition taken of you on January 12, 2000, in your lawyer's office. Your lawyer has stipulated that it accurately reflects what was said on that date. Please read to yourself the four lines beginning on line 5.

Proponent: Do you remember being asked the following question: "Had you consumed any alcoholic beverages that night, during

the four hours immediately preceding the accident?"

A: No.

Q: Do you remember what you said after the question?

A: No.

Proponent: Your Honor, I would like to read verbatim to the jury the deposition question just read to the witness, and his answer at the deposition.

Court: Proceed.

Q: Reading from Defense Exhibit F for identification, the deposition of Mr. Plaintiff taken in Los Angeles on January 12, 2000, reading on page 153, line 5: "Question: Had you consumed any alcoholic beverages that night, during the 4 hours immediately preceding the accident? Answer: I had only one beer."

Q: Was that the question was asked of you, and was that your answer?

A: I guess so.

Q: Do you remember being asked at the beginning of the deposition if you had any physical, mental, or emotional problem that would interfere with your ability to understand and respond to questions at that time?

A: Yes.

Q: Did you respond at that time that you had no problem and were able to proceed?

A: Yes.

Q: At the beginning of the deposition, did your lawyer tell you to let him know right away if any question was unclear?

A: Yes.

Q: Is it also true that before being asked questions at the deposition, you took an oath to tell the truth?

A: Yes.

Q: You later received a copy of a written transcription of this deposition, didn't you?

A: Yes.

Q: And you were asked to read and sign it if you found no mistakes, isn't that true?

A: Yes.

Q: I am showing you page 252 from that deposition transcript, marked Defense Exhibit F for identification. Is that your signature at the bottom of the page?

A: Yes.

PRACTICE TIP: Some lawyers try to make the damage even clearer by asking questions such as, "When you signed off on that transcript, you did so because you knew you had told the truth at the deposition; is that so?" It is usually safer, however, to wait until closing argument to expound on discrepancies in the testimony, thereby depriving the witness of the opportunity to explain contradictory testimony or engage in a debate with you that diverts jurors' attention from the witness's prevarications.

IV. COMMENT

§28.11 A. Admissible Former Testimony

Under Evid C §1290, former testimony includes testimony given in another proceeding in the action in which it is offered (*e.g.,* at a deposition or preliminary hearing) and testimony given in another action. When former testimony is offered against a party to the proceeding in which the testimony was given, it may be used in either a civil or criminal action if the requirements of Evid C §1291 are met. See, *e.g., People v Malone* (2003) 112 CA4th 1241, 1244, 5 CR3d 741 (when criminal defendant elects not to testify at a retrial, defendant's testimony at first trial is admissible under §1291). Evidence Code §1292, which permits the introduction of testimony given in a former action against one who was not a party to that action in some circumstances, does not apply in criminal cases. Evid C §1292(a)(2). *People v Johnson* (1968) 68 C2d 646, 653, 68 CR 599, overruled on other grounds in *California v Green* (1970) 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930. See *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354 (discussed in §20.20B).

In civil actions, the use of testimony taken in the same action is governed by the Civil Discovery Act (CCP §§2016.010-2036.050). The Interstate and International Depositions and Discovery Act (CCP §§2029.100-2029.900), operative January 1, 2010, covers discovery in out-of-state actions. The use of testimony taken in another action is governed by Evid C §§1290-1292. A witness in a criminal case may be examined and his or her testimony recorded under the circumstances described in Pen C §§1335-1336. The use of depositions and video-recordings of testimony, and two-way video conference examination in criminal cases, is governed by Pen C §§686, 1340, and 1345, and Evid C §1291. On conditional examinations generally, see Pen C §§1335-1345.

Testimony from certain specified administrative and arbitration proceedings is covered by Evid C §§1290-1292. Evid C §1290(b), (d).

Former testimony can be used in connection with summary judgment motions if a statutory basis circumvents a hearsay objection. The use of deposition testimony is governed by CCP §2025.620, but the proponent should also meet Evid C §§1291-1292 requirements. *Le3B Real Estate v Superior Court (Schwab)* (1998) 67 CA4th 1342, 79 CR2d 759; *Gatton v A.P. Green Servs.* (1998) 64 CA4th 688, 75 CR2d 523.

NOTE: Former testimony of a complaining witness who is a minor child, taken at a preliminary hearing, is not inadmissible hearsay at a Welf & I C §300 hearing concerning that minor when the requirements of Evid C §1293 are satisfied.

§28.12 1. Obtain Ruling on Objections to Former Testimony

It is most expedient to handle objections to questions and answers in former testimony before trial. To provide a smooth presentation of former testimony to jurors, you should usually raise the foundational issues first at an in limine hearing (see chap 4), unless the former testimony is to be used for impeachment of a live witness and you believe there is a surprise element that will enhance the impeachment value.

PRACTICE TIP: Local rules may require you to raise such issues before trial begins. See, *e.g.,* Los Angeles Ct R 7.9(h), 8.92 (motions in limine must be heard at status conference held before trial date, on proper notice).

Even if the trial is underway, it is generally a good idea to let opposing counsel know outside the jury's presence what testimony you wish to use in place of a live witness and have the judge rule on any objections at that time. Your goal is to present a coherent, uninterrupted reading of the witness's testimony.

When former testimony is offered against a party to the former proceeding, all objections may be made except (1) objections to the form of the question; (2) for deposition testimony, errors such as administration of the oath that might have been cured if it had been properly presented; and (3) objections to competency or privilege that existed at the time the former testimony was given. Evid C §1291; CCP §2025.460; see California Civil Discovery Practice §6.136 (4th ed Cal CEB 2006).

When, in a civil action, the former testimony is offered against a person who was not a party to the former proceeding, all objections may be made, except that objections to competency or privilege may be made only if the evidentiary problem existed at the time the former testimony was given. Evid C §1292(b). Objections actually made at the former hearing may be renewed or waived at trial. California Trial Practice: Civil Procedure During Trial §12.77 (3d ed Cal CEB 1995).

PRACTICE TIP: Counsel frequently stipulate at the deposition that no objection is waived except objections to the form of the question by failure to object at the deposition.

§28.13 2. Meet Burden of Presenting Evidence

The burden is on the proponent of former testimony to convince the judge that the requirements of Evid C §§1290 and 1291 or §1292, or of CCP §2025.620(b), have been met and that the former testimony, if written, has been properly authenticated. *People v Masters* (1982) 134 CA3d 509, 527, 185 CR 134 (unavailability and due diligence with regard to using preliminary hearing transcript at trial). It is important that the proponent develop as much evidence as possible to support the requirements for introducing the evidence. Foundational evidence is particularly necessary when you must prove that the party against whom the former testimony is being offered has a similar interest in the current case to that of another party to that prior action at the time that testimony was taken.

§28.14 3. Present Evidence on Unavailability of Witness

Unless a witness is dead, do not underestimate the showing you must make concerning the witness's unavailability when that must be demonstrated.

In a criminal case, for example, although the prosecution need not track the availability of every material witness (unless there is a substantial flight risk), if a former witness unexpectedly moves to another country after the crime and before trial, extensive, prompt action must be taken to secure the witness's testimony at trial. Financial arrangements must be made, treaties consulted, Homeland Security and immigration paperwork executed, visas extended, the witness and other relevant persons must be interviewed, and if there is a delay, unavailability must be reconfirmed immediately before trial. *People v Martinez* (2007) 154 CA4th 314, 324, 64 CR3d 580 (preliminary hearing testimony admissible because, in returning to U.S. to testify, witness would have lost asylum status and become "stateless" person).

NOTE: Under Evid C §240(a)(5), a proponent of former testimony must show "reasonable diligence" in trying to obtain direct testimony from a witness. The California Supreme Court has granted review in *People v Cogswell* (review granted Feb. 13, 2008, S158898; superseded opinion at 156 CA4th 698, 68 CR3d 28) to determine whether due diligence requires a prosecutor to take into custody an unwilling, out-of-state sexual assault victim under the Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Cases (Pen C §§1334-1334.6).

Be prepared to present expert testimony at the in limine hearing if medical or mental problems prevent a witness from testifying. See, *e.g.*, *People v Winslow* (2004) 123 CA4th 464, 471, 19 CR3d 872 (minor witness with cerebral palsy who was sodomized by defendant properly found unavailable and preliminary hearing testimony properly admitted after expert medical testimony that witness suffered from post-traumatic stress syndrome that would be seriously aggravated if the witness were required to testify in open court).

On establishing unavailability in criminal cases, see §20.22.

§28.15 4. Satisfy Authentication Rules

If the former testimony is in a transcript, the easiest way to satisfy authentication requirements is obtain the opponent's stipulation that the transcript is a certified transcript or a copy of one. You will have to provide opposing counsel with a copy of the proffered transcript at some point and preview any objections to be resolved by the court. If you have the original transcript with the reporter's notarial certification, it is presumed to be authentic under Evid C §§1452-1453. If the opponent refuses to stipulate, and there is no valid reason for that refusal, you may be able to have the judge press for a stipulation or require the opponent to show some evidence to counter the presumption of authenticity or to raise a "genuine dispute" as to the accuracy of the copy for purposes of the secondary evidence rule. See Evid C §1521. If all else fails, the court reporter or any other witness to the deposition should be able to authenticate the transcript. See §28.18. See also chaps 11 (authentication), 47 (secondary evidence), 51 (stipulations).

PRACTICE TIP: The attorney who noticed the deposition is supposed to have custody of the original (see CCP §2025.550(a)), but in practice the parties often stipulate otherwise, and the stipulation as to custody of the original may or may not be in the transcript. It is prudent to locate the original deposition transcript well before you plan to use it at trial.

§28.16 5. Lodge Transcript With Court

There is some confusion about whether the transcript itself may be received in evidence like any other document. The common practice is that the transcript is not received in evidence. The witness's testimony is the evidence; the transcript is merely the memorialization of that testimony. Especially when the prior testimony is lengthy, most courts will ask for (and receive) a stipulation of counsel that the trial court reporter be excused from transcribing the reading, and that a copy of the prior transcript be the official record.

PRACTICE TIP: The proponent should prepare and lodge a document that accurately reflects the pages and lines of prior testimony that are read to the jury to provide a record of the testimony.

Even if the transcript is admitted, it may not be sent into the jury room. CCP §612; Pen C §1137. The legitimate concern is that giving the jury a written transcript of some testimony unduly emphasizes that testimony over that which is given live during trial. In *People v Stevenson* (1978) 79 CA3d 976, 990, 145 CR 301, the court applied that logic to rule that preliminary hearing transcripts may not be taken into the jury room, nor may copies of the transcript be given to jurors while that testimony is being read to them. The *Stevenson* court analogized its reasoning to the rule prohibiting the proponent from introducing into evidence the writing that constitutes past recollection recorded (Evid C §1237(b)).

NOTE: Most trial judges also prohibit giving jurors transcripts from prior trial testimony, daily transcripts of certain witnesses, or any other transcript that would emphasize some testimony over other testimony.

§28.17 B. Same Standard for Taped Testimony

Deposition testimony recorded by audiotape or videotape is as admissible as a transcription of the deposition if you have complied with CCP §2025.620, with the notice requirements of CCP §2025.220(a)(5), and with the procedural requirements of CCP §§2025.330-2025.340. See California Trial Practice: Civil Procedure During Trial §§12.16-12.31, 12.78-12.88 (3d ed Cal CEB 1995).

NOTE: In a criminal prosecution, when a witness who has been conditionally examined is unavailable within the meaning of Evid C §240, a party may introduce a videotape of the testimony, if one is available. Pen C §1345. Note that the provision does not authorize the introduction of an audio recording. In *People v Moran* (1974) 39 CA3d 398, 114 CR 413, the court held that a videotape of the preliminary hearing testimony of a witness who died before trial was admissible at trial.

§28.18 C. Former Testimony Need Not Be in Writing

Former testimony need not be the official transcript of the former hearing. A person who witnessed the declarant's testimony in a previous action may be used as a witness to that testimony. See *Meyer v Foster* (1905) 147 C 166, 81 P 402. A video- or audiotape may also be used as former testimony. *People v Moran* (1974) 39 CA3d 398, 406, 114 CR 413.

§28.19 D. Ineffective Assistance of Counsel at Previous Hearing

Ineffective assistance of counsel during an earlier proceeding does not necessarily render former testimony inadmissible. To show that the admission of former testimony violated either the Evidence Code or the confrontation clause of the Sixth Amendment, the defendant must show that counsel's ineffectiveness actually affected the cross-examination. *Mancusi v Stubbs* (1972) 408 US 204, 33 L Ed 2d 293, 92 S Ct 2308. See *People v Ceja* (1994) 26 CA4th 78, 31 CR2d 475, disapproved on other grounds in *People v Blakely* (2000) 23 C4th 82, 96 CR2d 451 (trial court did not err in admitting preliminary hearing testimony without holding hearing on allegation that preliminary hearing counsel was ineffective, because record indicated that counsel conducted effective cross-examination and trial counsel could not specify anything that should have been done differently); *People v Jones* (1998) 66 CA4th 760, 78 CR2d 265 (denial of right of self-representation did not require exclusion of former testimony of unavailable witnesses because record showed that defendant's court-appointed counsel effectively cross-examined witnesses).

§28.20 E. Using Former Testimony to Impeach

You may either elicit former testimony during cross-examination of the witness being impeached or have it read to jurors as independent testimony. If you do not elicit it during cross-examination, you must comply with Evid C §770: Either the witness must be given a chance to explain or deny the statement while testifying or the witness must not have been excused from testifying further. The court may make an exception in the interests of justice.

It is imperative that attorneys unfamiliar with impeaching witnesses with written material think through how it will be done. This is an area in which many attorneys become bogged down and lose jurors' interest. It is also an area in which more experienced opposing counsel can raise a number of objections and witnesses can give denials or "I don't remember" responses, making it more difficult for you to lay a proper foundation for impeachment with former testimony. If possible, have the former testimony marked for identification and a decision made on foundational matters outside the jury's presence unless surprise is a factor in your tactical plan. For further discussion of impeaching witnesses, see chaps 19, 41.

PRACTICE TIP: If you select impeaching material out of context, remember that your opponent has the right to request that other parts be admitted as well. CCP §2025.620(e) (depositions); Evid C §356 (rule of completeness).

§28.21 F. Opponent May Attack Former Testimony Even If Admitted

Even though the judge may rule that former testimony is admissible, opposing counsel may still seek to discredit it when it is presented to the jury by attacking the witness's credibility, disputing the way the hearing was reported, or arguing any weakness that might have been argued if the witness had testified live at trial.

V. CHECKLISTS

§28.22 A. Checklist: Witnesses to Subpoena

- Witness to testify to unavailability (except CCP §2025.620(b)).
- Testimony or other evidence to authenticate former testimony, if in writing.
- If testimony oral, witness must show relevance (that it is of witness and part of hearing you claim it to be).
- Witness to meet requirements of Evid C §1291 or §1292 or of CCP §2025.620(b).

NOTE: You may be able to satisfy all requirements without calling witnesses.

Source: Evidence/Effective Introduction of Evidence in California/28 Former Testimony/§28.23 B. Checklist: Alternative Methods of Admissibility

§28.23 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1227. See chap 10.
- Declaration against interest. Evid C §1230. See chap 20.
- Past recollection recorded. Evid C §1237. See chap 38.
- Present recollection refreshed. Evid C §771. See chap 44.
- Prior consistent or inconsistent statement. Evid C §§1235-1236. See chaps 40-41.
- Testimony of expert who relies on the former testimony. Evid C §801(b). See California Expert Witness Guide §§4.1-4.2 (2d ed Cal CEB 1991).

VI. SOURCES

§28.24 A. Evidence Code

Evid C §1290. As used in this article, "former testimony" means testimony given under oath in:

(a) Another action or in a former hearing or trial of the same action;

(b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States;

(c) A deposition taken in compliance with law in another action; or

(d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.

Evid C §1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:

(1) Objections to the form of the question which were not made at the time the former testimony was given.

(2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

Evid C §1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

(1) The declarant is unavailable as a witness;

(2) The former testimony is offered in a civil action; and

(3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections based on competency or privilege which did not exist at the time the former testimony was given.

See also Evid C §1280, reproduced in chap 36, and Evid C §240, reproduced in chap 20.

§28.25 B. Other

For further discussion of former testimony, see Jefferson's California Evidence Benchbook, chap 8 (4th ed CJA-CEB 2009); 1 Witkin, California Evidence, *Hearsay* §§255-269 (4th ed 2000). For discussion of using the preliminary hearing transcript in a criminal case, see California Criminal Law Procedure and Practice §§8.47, 31.20-31.21 (Cal CEB Annual).

29

Habit or Custom Evidence

Jan Nielsen Little
E. Stewart Moritz

§29.1 I. SCOPE OF CHAPTER

This chapter discusses the admissibility of habit or custom to prove how a person acted on a specific occasion. Although evidence of specific acts revealing a person's character is generally not admissible to prove that person acted consistently with that character trait, evidence of conduct that is repeated systematically enough to be considered a *habit* or *custom* is admissible to prove that conduct on a particular occasion. See Comment to Evid C §1105.

II. REQUIREMENTS

§29.2 A. To Admit

To admit evidence of a person's habit or custom, the proponent must meet the following requirements:

- The practice is at issue in the case (see Evid C §351);
- The witness has had the opportunity to observe the practice, or the witness is testifying to his or her own habit or custom (see Evid C §780(d)); and
- That observation provides sufficient basis to establish the practice as habitual or customary (Evid C §1105).

Source: Evidence/Effective Introduction of Evidence in California/29 Habit or Custom Evidence/§29.3 B. To Object

§29.3 B. To Object

Grounds for objecting to evidence of a person's habit or custom include the following:

- Irrelevant (Evid C §351);
- Hearsay (Evid C §1200);
- No personal knowledge (Evid C §780(d));
- Insufficient foundation that conduct is a "habit" (Evid C §1105);
- Conduct is inadmissible evidence of character, not habit (see Comment to Evid C §1105; *Bowen v Ryan* (2008) 163 CA4th 916, 926, 78 CR3d 128 (proffered evidence of dentist's alleged mistreatment of nine patients out of 45,000 was not habit or custom evidence, but inadmissible character evidence)); and
- Conduct was too remote in time or space (see *Webb v Van Noort* (1966) 239 CA2d 472, 48 CR 823).

III. SAMPLE QUESTIONS

§29.4 A. Information to Elicit

In an assault and battery action, the plaintiff wants to introduce evidence that the defendant gets drunk every night and that he was drunk on the night the assault and battery occurred. In the direct examination segment illustrated in §29.5, the plaintiff's witness testifies to the following points:

- Describes the defendant's behavior in question (alternatively, counsel's questions could establish habit foundation first);
- Shows personal knowledge of the behavior;
- Explains how he had the opportunity to observe; and
- Ties the habit to the behavior involved.

§29.5 B. Questions to Ask

Q: Mr. Witness, do you know whether Mr. Drunk was intoxicated on the night that Mrs. Victim was shot?

A: No, I didn't see him that night. But I'm sure he was drunk.

Opponent: I object and move to strike. There is no foundation for this inflammatory remark.

PRACTICE TIP: As the proponent of this evidence, you should be sure it is admissible, or raise it at an in limine motion, to avoid a possible mistrial if the judge excludes the evidence. There are fact situations like this one in which different judges will rule differently. In general, lay witnesses are allowed to testify concerning intoxication. See *People v Garcia* (1972) 27 CA3d 639, 643 n3, 104 CR 69. Evidence similar to that in this question segment was ruled admissible on appeal in *People v Bennett* (1969) 276 CA2d 172, 80 CR 706. See Jefferson's California Evidence Benchbook, chaps 29, 35 (4th ed CJA-CEB 2009).

Q: I will establish the proper foundation, Your Honor. Mr. Witness, have you had occasion to observe Mr. Drunk in an intoxicated state on prior occasions?

A: Yes, he is an alcoholic.

Opponent: I again object and move to strike. This is inadmissible character evidence under Evidence Code §1101(a).

PRACTICE TIP: Defense counsel might also have objected that Mr. Witness is not qualified as an expert on alcoholism (see Evid C §720) and that the answer was nonresponsive (Evid C §766).

Court: I think he's right this time, counsel.

Proponent: I am offering this evidence as habit or custom evidence under Evidence Code §1105. May I proceed with additional foundation questions?

Court: Briefly.

Q: Mr. Witness, where do you work?

A: The Acme Factory.

Q: Is that near the After Work Bar?

A: Yes.

Q: Did you ever see Mr. Drunk at the After Work Bar?

A: Yes. I used to go there almost every night from 6 to 7 p.m., and have a beer or two with my coworkers. Mr. Drunk was also there every night. He got off work at 5, and was usually fairly intoxicated by the time I would arrive at 6. By the time I left at 7 p.m., he was usually quite drunk.

Q: Did you see Mr. Drunk at the After Work Bar on the night Mrs. Victim was shot?

A: No, that was my wedding anniversary so I wasn't there that night. But I've seen Mr. Drunk there, intoxicated, every other weeknight for the past year.

Opponent: I continue to object, Your Honor, and move to strike.

Court: Based on what I have heard, counsel, this is evidence of habit or custom, properly admissible under Evidence Code §1105.

IV. COMMENT

§29.6 A. Character Versus Custom

Character evidence, in the form of reputation, opinion, or specific acts, is admissible for some purposes but inadmissible for other purposes in both civil and criminal cases. Character evidence is discussed in chaps 14-16. Habit or custom evidence sometimes overlaps character evidence, *i.e.,* a character trait may manifest itself by habitual behavior. It is important to distinguish them, however, when a particular piece of information is admissible as habit evidence but inadmissible as character evidence.

For example, evidence that an employee was generally conscientious and orderly would not be admissible to prove that her floor was free of banana peels on a given day; however, evidence that the employee regularly tidied her office space and swept the floor every day at 10 a.m. *would* be admissible to show that a banana peel was unlikely to be on the floor on a given day at 10:10 a.m.

In general, habit evidence should show conduct so regular as to be considered a "habit" or "custom," and therefore a reliable basis on which to evaluate a person. Habit evidence is generally defined as "[e]vidence of one's regular response to a repeated specific situation." Black's Law Dictionary (8th ed 2004). At least one court has stated that custom or habit involves a "consistent, semi-automatic response to a repeated situation." *Bowen v Ryan* (2008) 163 CA4th 916, 926, 78 CR3d 128 (proffered evidence of dentist's alleged mistreatment of nine patients out of 45,000 was not habit or custom evidence, but inadmissible character evidence). The focus for admissibility is similarity between the acts. See *Holdgrafer v Unocal Corp.* (2008) 160 CA4th 907, 928, 73 CR3d 216 (evaluating punitive damages).

PRACTICE TIP: Evidence Code §1105 permits introduction of habit evidence only if it is "otherwise admissible." Thus, other evidence exclusion rules, *e.g.,* no personal knowledge or hearsay, may still prevent the admission of such evidence.

§29.7 B. Habit Evidence in Criminal Cases

Habit evidence may be used in criminal as well as civil cases. See *People v Memro* (1995) 11 C4th 786, 47 CR2d 219 (defendant should have been allowed to discover habit evidence concerning police who took defendant's confession); *People v McPeters* (1992) 2 C4th 1148, 1178, 9 CR2d 834, superseded by statute on other grounds as stated in *Verdin v Superior Court* (2008) 43 C4th 1096, 1107, 77 CR3d 287 (evidence of robbery victim's habit of placing money in envelopes properly admitted). However, prosecutors rarely introduce habit evidence of a criminal defendant's behavior because it usually constitutes improper character evidence. For example, the court might be inclined to view evidence that a criminal defendant had a habit of robbing banks as an attempt to smear the defendant's character, and rule it inadmissible under Evid C §1101(a).

A criminal defendant will likely not need to resort to introducing habit evidence because criminal defendants *are* permitted to introduce character evidence. Evid C §1102(a).

WARNING: A criminal defendant's presentation of evidence of good character, however, opens the door for the prosecution to offer contrary character evidence. Habit evidence may be the more appropriate course when relevant to the defense case in other ways. See, *e.g., People v Cabral* (1983) 141 CA3d 148, 190 CR 194 (exclusion of proffered defense habit evidence resulted in reversal of defendant's conviction).

V. CHECKLISTS

§29.8 A. Checklist: Witnesses to Subpoena

- Witness who has sufficient familiarity with conduct in question to establish it as "habitual" or "customary."

§29.9 B. Checklist: Alternative Methods of Admissibility

- Character evidence. Evid C §§786-787, 1100-1106; see chaps 14-16.
- Similar act evidence. Evid C §1101(b); *Huddleston v U.S.* (1988) 485 US 681, 686, 99 L Ed 2d 771, 780, 108 S Ct 1496; see chap 16.

VI. SOURCES

§29.10 A. Evidence Code

Evid C §1105. Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

On character evidence to prove conduct, see Evid C §1101-1102, reproduced in §15.24.

§29.11 B. Other

For further discussion of habit and custom evidence, with examples, see Jefferson's California Evidence Benchbook, chap 35 (4th ed CJA-CEB 2009); 1 Witkin, California Evidence, *Circumstantial Evidence* §§41, 67-73 (4th ed 2000); Effective Direct & Cross-Examination §8.13 (Cal CEB 1986).

Source: Evidence/Effective Introduction of Evidence in California/30 Judgments Offered in Civil Cases/Chapter Outline

30

Judgments Offered in Civil Cases

Richard P. Caputo
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A. Evidence Code §30.19

B. Other §30.20

§30.1 I. SCOPE OF CHAPTER

This chapter discusses three types of final judgments that may be introduced in civil cases to prove facts essential to the case: prior criminal convictions punishable as felonies that are offered to prove any fact essential to the judgment (Evid C §1300); prior judgments offered by judgment debtors concerning indemnity or warranties (Evid C §1301); and prior judgments offered to prove liability of third persons when their liability is at issue (Evid C §1302).

II. REQUIREMENTS

A. Criminal Conviction Punishable as Felony

§30.2 1. To Admit

To introduce a judgment of conviction into evidence, the proponent must prove that the judgment:

- Was by plea of guilty or no contest—or by guilty finding by trier of fact—to a crime punishable as a felony (Evid C §1300);
- Was final (Evid C §1300);
- Is offered in a civil case (Evid C §1300);
- Is offered to prove any fact that was essential to the judgment (Evid C §1300); and
- Is authenticated by one of the following methods:
- The proponent presents a certified copy of the court minute order or the abstract of judgment (*People v Brucker* (1983) 148 CA3d 230, 241, 195 CR 808);
- At the proponent's request, the court takes judicial notice of its own records (Evid C §452; see *Pease v Pease* (1988) 201 CA3d 29, 246 CR 762);
- At the proponent's request, the court takes judicial notice of the record of any California state court (Evid C §452(d)); or
- The proponent presents a certified copy of the record of conviction from the custodian of records of the penal institution (Pen C §969b).

NOTE: If necessary, the proponent must prove the identity of the person named in the judgment. See Evid C §403(a)(4).

§30.3 2. To Object

Grounds for objecting to the admissibility of a judgment of conviction include:

- Hearsay (Evid C §1200);
- Not (properly) authenticated (Evid C §1401);
- Inadmissible secondary evidence (Evid C §1521);
- Irrelevant (Evid C §350); and
- No foundation (Evid C §1300), *e.g.*:
- Crime not a felony but a misdemeanor,
- Defendant acquitted or found factually innocent,
- Judgment not final,
- Judgment not offered to prove fact essential to present case, and
- Judgment offered to prove fact not determined in former case.

B. Judgment Offered in Indemnity or Warranty Action

§30.4 1. To Admit

To introduce a prior judgment in a current action for indemnity or warranty, the proponent (the judgment debtor) must prove that the judgment:

- Was final (Evid C §1301);
- Is offered in evidence in a civil case by the judgment debtor (Evid C §1301);
- Is offered to prove any fact essential to the judgment (Evid C §1301); and
- Is authenticated (Evid C §1401).

As the judgment debtor in the present action, the proponent must seek (see Evid C §1301):

- To recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;
- To enforce a warranty to protect the judgment debtor against liability determined by the former judgment; or
- To recover damages for breach of warranty, as long as the warranty was substantially the same as the warranty determined by the judgment to have been breached.

NOTE: If necessary, the proponent must prove the identity of the person named in the judgment. See Evid C §403(a)(4).

Source: Evidence/Effective Introduction of Evidence in California/30 Judgments Offered in Civil Cases/§30.5 2. To Object

§30.5 2. To Object

Grounds for objecting to the admissibility of a judgment of indemnity or warrant include:

- Hearsay (Evid C §1200);
- Not (properly) authenticated (Evid C §1401);
- Inadmissible secondary evidence (Evid C §1521); and
- Irrelevant (Evid C §350).

C. Judgment of Third Person's Liability, Obligation, or Duty

§30.6 1. To Admit

To introduce a judgment of a third person's liability, obligation, or duty into evidence, the proponent must prove that the judgment:

- Was final (Evid C §1302);
- Is offered to prove a third person's liability, obligation, or duty when it is at issue in the present civil case (Evid C §1302); and
- Is authenticated (Evid C §1401).

NOTE: If necessary, the proponents must prove the identity of the person named in the judgment. See Evid C §403(a)(4).

§30.7 2. To Object

Grounds for objecting to the admissibility of a judgment of a third person's liability include:

- Hearsay (Evid C §1200);
- Not (properly) authenticated (Evid C §1401);
- Inadmissible secondary evidence (Evid C §1521); and
- Irrelevant (Evid C §350).

III. SAMPLE QUESTIONS

A. Offered to Prove Fact Essential to Judgment

§30.8 1. Steps to Take

Based on an example in the Comment to Evid C §1300, the segment in §30.9 shows the proponent introducing a conviction of felony battery during a liquor store robbery. To prove facts relevant to the civil plaintiff's right to obtain the reward posted by the liquor store, the proponent needs to take the following steps:

- Authenticate judgment;
- Argue why relevant to instant case;
- Move judgment into evidence; and
- Have judgment read to jury.

§30.9 2. Questions to Ask

Proponent: Your Honor, I have obtained certified copies of an Abstract of Judgment of Criminal Defendant for violation of Penal Code §243(d), marked Plaintiff's Exhibit No. 27 for identification. I have given a copy of this judgment to opposing counsel. The judgment recites that Criminal Defendant was convicted by a jury of violating Penal Code §243 subdivision (d) in that he shot a uniformed police officer, causing serious bodily injury. I wish to have the judgment marked plaintiff's exhibit next in order and offer it into evidence at this time. I offer it as proof that Criminal Defendant was in fact convicted of robbing The Liquor Store, one of the facts essential to proving plaintiff's right to obtain the reward posted by The Liquor Store.

Opponent: Your Honor, I object. The judgment states that the defendant received a misdemeanor sentence of 1 year in the county jail. The judgment is therefore hearsay because it does not qualify as an exception under Evidence Code §1300.

Proponent: Your Honor, to be admissible as an exception to the hearsay rule, the judgment must be punishable as a felony. Penal Code §243(d) provides that a violation of this section is punishable by imprisonment in the county jail for no more than 1 year, or, alternatively, by imprisonment in the state prison for 2, 3, or 4 years. Thus the crime is punishable as a felony and qualifies as an exception to the hearsay rule under Evidence Code §1300. The Comment to §1300 makes it clear that the test is not the actual punishment, but what the punishment might have been according to the statute under which the conviction was obtained.

PRACTICE TIP: Your opponent may object that the Penal Code is not properly before the court. You can point out that judicial notice of California statutes is mandatory under Evid C §451(a). It is a good idea to bring a current copy of the Penal Code with you.

Court: Objection overruled.

Proponent: Your Honor, I move that this Abstract of Judgment be admitted into evidence and ask that the clerk be asked to read it aloud to the jury.

Court: All right.

[*Clerk states number of item in evidence, then reads judgment contents aloud*]

B. Offered to Prove Liability

§30.10 1. Steps to Take

To prove liability in a civil automobile accident case, the proponent wants to introduce evidence of the defendant's felony drunk driving conviction. In §30.11, the proponent needs to take the following steps:

- Authenticate judgment;
- Argue why relevant to instant case;
- Move judgment into evidence; and
- Have judgment read to jury.

§30.11 2. Questions to Ask

Proponent: Your Honor, I wish to have marked and offer as evidence a certified copy of a judgment of a felony conviction of Ms. Defendant on March 2, 2005, of violating Vehicle Code §23153, felony drunk driving. This conviction is offered to prove the following facts essential to the plaintiff's case: that Ms. Defendant was driving the vehicle involved in the accident in question; that she was under the influence of alcohol at that time; and that she did an act forbidden by law at that time—speeding—which was a proximate cause of Mr. Plaintiff's injuries.

Opponent: Your Honor, I object on hearsay grounds. The judgment recites that the defendant was convicted after pleading nolo contendere, so it does not qualify as an exception to the hearsay rule under Evidence Code §1300. In addition, counsel cannot suggest that the jury must give conclusive effect to this information.

Proponent: Your Honor, Evidence Code §1300 provides that such judgments are admissible whether or not based on a plea of nolo contendere, and I am not asking that it be given conclusive effect. Jurors can give the evidence any weight they wish.

Court: Objection overruled. The conviction is accepted in evidence.

Proponent: Your Honor, would you ask the clerk to read the judgment to the jury?

[*Clerk reads judgment to jurors*]

IV. COMMENT

§30.12 A. Prior Conviction Must Be Punishable as Felony Under Hearsay Exception

Evidence of a judgment of conviction of a felony is admissible in a civil case to prove any fact essential to the judgment, even if that judgment was based on a plea of no contest. Evid C §1300.

For example, in a personal injury case in which the plaintiff claims that his alcohol addiction was caused by the automobile accident in issue, the defense would be able to bring in any prior felony drunk-driving convictions that were incurred before the accident.

Felonies are crimes punishable by imprisonment in state prison or by death; misdemeanors are all other crimes except lesser crimes classified as infractions. Pen C §17(a). Misdemeanors are usually punishable by incarceration in county jail.

NOTE: The person punished need not have *received* a felony sentence (state prison); it is enough that the crime *allowed* imposition of a felony sentence. See Comment to Evid C §1300.

Crimes punishable as misdemeanors or infractions are not admissible under Evid C §1300. *Manes v Wiggins* (1967) 247 CA2d 756, 56 CR 120. It appears, however, that felonies reduced to misdemeanors under Pen C §17(b) are admissible under Evid C §1300. See Comment to Evid C §1300.

Many arrests result in dispositions other than a plea or a finding of guilty, *e.g.,* dismissal, acquittal, and finding of factual innocence.

PRACTICE TIP: It is unlikely, under this hearsay exception, that the proponent can go beyond the face of the abstract of judgment, *e.g.,* to the transcript of the defendant's guilty plea or a trial transcript, for more information on the case. But the proponent may be able to have admitted police reports from misdemeanor cases with details of the arrest under Evid C §§1270-1272. See *Rousseau v West Coast House Movers* (1967) 256 CA2d 878, 886, 64 CR 655.

§30.13 B. Judgment Must Be Final

A judgment of conviction of a felony must be final to be used. Evid C §1300. For purposes of §1300, a judgment is final when it becomes final in the trial court, even when an appeal of that judgment is pending. *Principal Life Ins. Co. v Peterson* (2007) 156 CA4th 676, 693, 67 CR3d 584.

Note, however, that not all statutory provisions that use the term "final" are consistent with the above principle. For example, under Prob C §254, the term "final judgment of conviction" does not include a judgment that is on appeal. 156 CA4th at 685.

Source: Evidence/Effective Introduction of Evidence in California/30 Judgments Offered in Civil Cases/§30.14 C. Preliminary Fact Hearing

§30.14 C. Preliminary Fact Hearing

If challenged, hearsay exceptions are foundational problems about which the court makes its findings at a preliminary fact hearing under Evid C §405. See chap 4.

§30.15 D. Exception Not Applicable If Matter Is Res Judicata or Collaterally Estopped

The Evid C §1300 hearsay exception does not apply when the judgment has either res judicata or collateral estoppel effect. See *Mueller v J.C. Penney Co.* (1985) 173 CA3d 713, 219 CR 272; 1 Witkin, California Evidence, *Hearsay* §§272 (4th ed 2000). Because the judgment does not have a conclusive effect as it would if the matter were res judicata, the jurors can give the evidence whatever weight they wish. On judgments admitted by operation of res judicata or collateral estoppel, see 7 Witkin, California Procedure, *Judgment* §§334-482 (5th ed 2008). On res judicata and collateral estoppel in criminal cases, see California Criminal Law Procedure and Practice §§26.29-26.33 (Cal CEB Annual).

§30.16 E. Exception Not Applicable in Criminal Cases

Evidence Code §1300 does not apply to prior felony convictions in criminal cases. Prior felony convictions, however, may be admissible for other reasons in criminal cases: to impeach witnesses, as evidence of similar acts of misconduct, to elevate the charged crime to a felony, to enhance sentence, and as rebuttal. See California Criminal Law Procedure and Practice, chap 24 (Cal CEB Annual).

V. CHECKLISTS

§30.17 A. Checklist: Procedures for Admitting Judgments

- Obtain certified copy of prior judgment to be offered in civil action that proves fact essential to prior conviction. Evid C §1300.
- Obtain certified copy of prior judgment concerning indemnity or warranty that proves fact essential to judgment in present case. Evid C §1301.
- Obtain certified copy of prior judgment that proves fact concerning third person's liability, obligation, or duty at issue in present case. Evid C §1302.

PRACTICE TIP: Usually no witness is needed, because either judgments are self-authenticating or the court can judicially notice them. Public record information, such as court filings and vehicle and driver records, are available for a fee through various online data base services.

§30.18 B. Checklist: Alternative Methods of Admissibility

- As admission. Evid C §§1220, 1224; see *Atlas Assur. Co. v McCombs Corp.* (1983) 146 CA3d 135, 194 CR 66; 1 Witkin, California Evidence, *Hearsay* §99 (4th ed 2000). See also chap 10.
- Business records. Evid C §§1270-1272; see *Rousseau v West Coast House Movers* (1967) 256 CA2d 878, 886, 64 CR 655 (police reports of plaintiff's public drunkenness introduced). See also chap 13.
- Character evidence. Evid C §1100; see chaps 14-16.
- Collateral estoppel. See *Pease v Pease* (1988) 201 CA3d 29, 246 CR 762; *Mueller v J.C. Penney Co.* (1985) 173 CA3d 713, 219 CR 272; *Miller v Superior Court* (1985) 168 CA3d 376, 214 CR 125. See also 7 Witkin, California Procedure, *Judgment* §413 (5th ed 2008).
- Felony conviction of witness used in civil trial to impeach. Evid C §788; see chap 26.
- Former testimony. Evid C §§1290-1292; see chap 28.
- Nonhearsay. Evid C §1200; see chap 35.
- Res judicata. See 7 Witkin, Procedure, *Judgment* §334.

VI. SOURCES

§30.19 A. Evidence Code

Evid C §1300. Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere.

Evid C §1301. Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

(c) Recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached.

Evid C §1302. When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.

§30.20 B. Other

For discussion in this book of the admissibility of prior felony convictions to impeach a witness, see chaps 26 (in civil cases), 27 (in criminal cases).

For discussion of the use of criminal judgments punishable as felonies in civil cases, see Jefferson's California Evidence Benchbook, chap 9 (4th ed CJA-CEB 2009). For discussion of using prior convictions in criminal cases, see California Criminal Law Procedure and Practice, chap 24 (Cal CEB Annual).

For discussion of judgments admitted by operation of res judicata or collateral estoppel, see 7 Witkin, California Procedure, *Judgment* §§334-482 (5th ed 2008).

Source: Evidence/Effective Introduction of Evidence in California/31 Judicial Notice/Chapter Outline

31

Judicial Notice

William H. Armstrong

§31.1 I. SCOPE OF CHAPTER

This chapter discusses judicial notice, a procedure that has the same effect as a stipulation: The court instructs the jury to accept certain matters as true. Some matters *must* be judicially noticed by the court (Evid C §§451-453), while judicial notice of other matters is permissive (Evid C §452). On stipulations, see chap 51.

II. REQUIREMENTS

A. Mandatory Judicial Notice (Evid C §§451-452)

§31.2 1. To Admit

The court must take judicial notice when the proponent:

- Shows that the matter is one the court must notice under Evid C §451; or
- Shows that the matter is one the court may notice under Evid C §452; and
- Gives adverse parties sufficient notice (Evid C §453(a));
- Furnishes the court with sufficient information to enable it to act (Evid C §453(b));
- Provides copies of the matter to be judicially noticed to the court and to each party (Cal Rules of Ct 3.1306(c)); and
- If the material to be judicially noticed is part of a file in the court in which the matter is being heard, the proponent must (1) specify in the writing the portion for which judicial notice is being requested, and (2) arrange with the clerk to have the file in the courtroom at the time of the hearing (Cal Rules of Ct 3.1306(c)).

NOTE: In accordance with Evid C §453, judicial notice of a permissive matter under Evid C §452 is mandatory if the proponent meets the requirements of Evid C §453(a)-(b) listed above. The court must take judicial notice of Evid C §451 matters, whether there is a request to do so not. As with other matters of fact and law, however, it is good advocacy for counsel to call the court's attention to such matters. See §31.17.

Source: Evidence/Effective Introduction of Evidence in California/31 Judicial Notice/§31.3 2. To Object

§31.3 2. To Object

The opponent may object to the court's taking judicial notice on any of the grounds noted below.

For matters to be given mandatory judicial notice under Evid C §451 or §452:

- Irrelevant (Evid C §350; *People v Superior Court (Vidal)* (2007) 40 C4th 999, 1013 n7, 56 CR3d 851 (request for judicial notice of scientific works that were not before trial court or relied on by experts denied as irrelevant));
- Privileged (Evid C §§900-1070);
- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352);
- Not proper matter for judicial notice under Evid C §450, §451, §452, or §453 (see *Laabs v City of Victorville* (2008) 163 CA4th 1242, 1265, 78 CR3d 372 (judicial notice granted on existence of records in court file but not on truth of facts within them); *Aquila, Inc. v Superior Court* (2007) 148 CA4th 556, 569, 55 CR3d 803 (judicial notice taken of regulatory and contractual documents, but interpretation and truth of facts contained within them is disputable); *Fremont Indem. Co. v Fremont Gen. Corp.* (2007) 148 CA4th 97, 113, 55 CR3d 621 (judicial notice of existence of letter proper, but its interpretation and enforceability could be reasonably disputed); *L.B. Research & Educ. Found. v UCLA Found.* (2005) 130 CA4th 171, 180 n2, 29 CR3d 710 (printouts from UCLA and University of California websites not subject to judicial notice because information was plainly subject to interpretation)); or
- Not properly authenticated (see *Pastoria v Nationwide Ins.* (2003) 112 CA4th 1490, 1495, 6 CR3d 148).

For matters to be given mandatory judicial notice under Evid C §452:

- Insufficient notice given to adverse party (Evid C §453(a));
- Court not given sufficient information to act (Evid C §453(b));
- Copies of material to be judicially noticed not provided to court, counsel, or party (Cal Rules of Ct 3.1306(c));
- If the matter concerns the law of an organization of nations or a foreign nation under Evid C §452(f), court did not receive the advice of experts either in open court or in writing (Evid C §454);
- Court has not given opponent a reasonable opportunity to present information on "propriety" of taking judicial notice or on "tenor" of the matter to be judicially noticed (Evid C §455(a));
- If court relied on information or advice not received in open court, either (1) the information and its source was not made part of the record or (2) court did not give opponent a reasonable opportunity to meet such information before taking judicial notice (Evid C §455(b));
- If the material to be judicially noticed is part of a file in the court in which the matter is being heard, the proponent did not (1) specify in the writing the portion for which judicial notice is being requested or (2) arrange with the clerk to have the file in the courtroom at the time of the hearing (Cal Rules of Ct 3.1306(c)); or
- Not properly authenticated (see *Pastoria v Nationwide Ins.* (2003) 112 CA4th 1490, 1495, 6 CR3d 148).

NOTE: The hearsay rule applies to statements contained in judicially noticed documents, precluding consideration of those statements for their truth unless an independent hearsay exception exists. *North Beverly Park Homeowners Ass'n v Bisno* (2007) 147 CA4th 762, 778, 54 CR3d 644. See *Poseidon Dev., Inc. v Woodland Lane Estates, LLC* (2007) 152 CA4th 1106, 1117, 62 CR3d 59 (facts in recorded property document were hearsay, but court could consider legal effect of document). A court may therefore take notice of the existence of court records under Evid C §452 but not of the truth of hearsay statements in those records. See *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1405, 55 CR3d 551; *Day v Sharp* (1975) 50 CA3d 904, 914, 123 CR 918, referring to first edition material now in Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009). If the only relevance of the court record is the truth of hearsay statements, then the record is irrelevant unless the proponent has a proper method of showing the truth of those statements.

B. Permissive Judicial Notice (Evid C §452)

§31.4 1. To Admit

The court may take judicial notice of a matter if the proponent:

- Requests judicial notice of a specific matter; and
- Shows that the matter is one the court may notice under Evid C §452.

NOTE: The proponent may state appropriate reasons for the court to take judicial notice and provide sufficiently persuasive information that the matter is common knowledge or not reasonably subject to dispute under Evid C §452(g)-(h).

Source: Evidence/Effective Introduction of Evidence in California/31 Judicial Notice/§31.5 2. To Object

§31.5 2. To Object

The opponent may object to the court's taking permissive judicial notice under Evid C §452 on any of the following grounds:

- Irrelevant (Evid C §350);
- Privileged (Evid C §§900-1070);
- Not proper matter for judicial notice (Evid C §452; see, *e.g.,* *Guimei v General Elec. Co.* (2009) 172 CA4th 689, 705, 91 CR3d 178 (declining to judicially notice declarations supporting and opposing motion); *Unruh-Haxton v Regents of Univ. of Cal.* (2008) 162 CA4th 343, 365, 76 CR3d 146 (improper judicial notice of extensive publicity to impute knowledge of wrongdoing to plaintiffs); *Searles Valley Minerals Operations, Inc. v State Bd. of Equalization* (2008) 160 CA4th 514, 519, 72 CR3d 857 (no legal authority to judicially notice websites and, in particular, their factual content); *Islas v D & G Mfg. Co.* (2004) 120 CA4th 571, 15 CR3d 559 (court improperly took judicial notice of fact that was properly for jury to decide));
- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352); or
- Not properly authenticated (see *Pastoria v Nationwide Ins.* (2003) 112 CA4th 1490, 1495, 6 CR3d 148).

III. SAMPLE REQUESTS

§31.6 A. Steps to Take

In requesting the court to take judicial notice of various matters, the proponent takes the following steps in §§31.7-31.10:

At in limine hearing:

- Informs the court that a request for judicial notice will be made;
- Describes what is to be judicially noticed;
- Gives the court sufficient information on which to act, *e.g.,* brings the statute book itself to court for the judge to review;
- Gives court and opposing counsel copies of the material to be judicially noticed; and
- Requests the court to take judicial notice of the matter.

During trial (if court has taken judicial notice):

- Reads judicially noticed material to jurors or has it read it to them;
- Prepares a jury instruction and asks the court to read it to the jurors twice:
- After they hear judicially noticed material, and
- During jury instructions that the court gives before the jury retires to deliberate.

B. Matters to Be Judicially Noticed

§31.7 1. California Statute (Evid C §451(a))

Proponent: Your Honor, under Evidence Code §451(a), we ask the court to take judicial notice of Code of Civil Procedure §13, which states that, when the day on which legally required acts are to be performed falls on a holiday, the act may be performed on the next business day.

§31.8 2. Dictionary Definition (Evid C §451(e))

Proponent: Your Honor, under Evidence Code §451(e), we request the court to take judicial notice of The American Heritage Dictionary's definition of "reasonable," which is listed as "within the bounds of common sense."

Opponent: Objection, Your Honor. This matter is not an appropriate matter for judicial notice under §451(e). The jury will be instructed on the legal definition of this word; a dictionary definition of this legal term of art is not an appropriate application of judicial notice.

Court: Objection sustained.

Source: Evidence/Effective Introduction of Evidence in California/31 Judicial Notice/§31.9 3. Another State's Statute (Evid C §452(a))

§31.9 3. Another State's Statute (Evid C §452(a))

Proponent: Your Honor, under Evidence Code §452(a) we ask the court to take judicial notice of the Indiana Code §34-9-3-5, a copy of which I am handing to the clerk.

Opponent: Objection. Plaintiffs have not received the necessary advance notice under Evidence Code §453.

Proponent: Your Honor, I am handing the clerk and counsel each a copy of a letter sent to counsel two months ago informing the plaintiffs of our intended request. That letter included a copy of the provision for which we are requesting judicial notice.

Court: I see the copy of your letter. That seems to be sufficient notice under Evidence Code §453. Counsel, do you claim you did not receive this letter?

Opponent: No, Your Honor. Seeing this refreshes my memory on that point. Your Honor, we also object on the ground that neither the Indiana Code nor the letter has been introduced into evidence.

Proponent: Your Honor, Evidence Code §454 states that the court can use any pertinent information in making a judicial notice determination. Exclusionary rules of evidence do not apply.

PRACTICE TIP: Only Evid C §352, relevance, and privilege are proper evidentiary objections. See Evid C §454(a)(2).

Court: Unless you have another objection, I will rule that the copy of the Indiana Code section provides the court with "sufficient information." Therefore, this motion is granted under Evidence Code §453.

§31.10 4. Official Court Record (Evid C §452(d))

Proponent: Your Honor, we request under Evidence Code §452(d) that the court judicially notice this official record of the superior court in XYZ County, a certified copy of the declaration by Dr. Jones filed in another action, which I am handing to the clerk.

Opponent: Objection, Your Honor. We were not given any advance notice, as required by Evidence Code §453.

PRACTICE TIP: Judges do not like to get last-minute requests for judicial notice. Try to notify opposing counsel as early as possible and to raise these issues in chambers before trial begins. On in limine motions, see chap 3.

Proponent: Your Honor, we did not anticipate the need until this morning. My assistant drove an hour to the XYZ County courthouse to obtain this certified copy. The requirement is to provide notice sufficient to enable the adverse party to prepare to meet the request and we believe counsel needs no more time than he has had since we brought this up this morning.

Court: Counsel, do you believe that with additional time you might be able to find something to defeat this request?

Opponent: Well, no, Your Honor.

Court: Then additional notice is not required. Evidence Code §453 requires only "sufficient notice." If extra time would be of no use, then making the request at trial is "sufficient notice." Objection overruled.

Opponent: Your Honor, we further object to the court's taking judicial notice of the truth of the contents of Dr. Jones' declaration.

Court: That objection is sustained. The court will judicially notice only the fact that this declaration was filed on the date indicated. Its contents are hearsay and inadmissible. The document is not in evidence.

IV. COMMENT

§31.11 A. Benefits of Judicial Notice

Judicial notice provides a means of establishing undisputed facts without having to present evidence to prove them. Although the judge's instruction that the fact is indisputably true may have a favorable effect on the jury, counsel does not spend as much trial time emphasizing the point through testimony, documentation, exhibits, and argument. It is a good idea, then, to reserve judicial notice for matters that are supportive but not crucial to the case. It is also good practice to try to bring matters important to the opponent's case within the judicial notice criteria; this avoids putting on witnesses and precludes the opponent from focusing the jury's attention on the issue. See particularly Evid C §§451(f) and 452(g)-(h), which are fairly broad concerning matters universally known, of common knowledge, or immediately verifiable, and not subject to reasonable dispute.

NOTE: Judicial notice may also be used to support pretrial motions and demurrers. For example, the grounds of a demurrer may be matters of which the court may take judicial notice. See *Alfaro v Community Hous. Improvement Sys. & Planning Ass'n*(2009) 171 CA4th 1356, 1391, 89 CR3d 659. Such matters should be specified in the demurrer or in the supporting points and authorities in order to invoke judicial notice. CCP §430.70. Note, however, that although the existence of certain documents may be judicially noticeable at the demurrer stage, the content of those documents may not be judicially noticeable. See *C.R. v Tenet Healthcare Corp.* (2009) 169 CA4th 1094, 1104, 87 CR3d 424.

§31.12 B. Mandatory Judicial Notice (Evid C §451)

Courts are required to take judicial notice of the matters listed in Evid C §451, even without a request. Failure to judicially notice a mandatory matter is error, but it may not be reversible error. See Comment to Evid C §451. There is usually little chance of a reversal on appeal based solely on the trial court's failure to unilaterally take judicial notice of a listed matter.

Although counsel need not formally request mandatory judicial notice, good advocacy demands that counsel call attention to matters that the court must judicially notice under Evid C §451. Doing so is usually accomplished in the normal course of representation by citing the statutory and decisional laws that apply to the case in memorandums and other supporting papers, and during oral argument at hearings or conferences with the court. Counsel who wishes a specific matter to be judicially noticed under §451 should make a request and present the material in such a way that the court will be satisfied that it comes within that section.

PRACTICE TIP: When information might come under either Evid C §451 or §452, it is treated as mandatory under §451. See Comment to Evid C §452. If the proponent gives sufficient notice to the adverse parties and furnishes the court with sufficient information to act, notice of a permissive matter under Evid C §452 becomes mandatory. Evid C §453.

§31.13 C. Permissive Judicial Notice (Evid C §452)

Judicial notice may be based, according to the Comment to Evid C §450, on matters including material based on other statutes or decisional law; common knowledge that is certain and indisputable; and information necessary for the court to construe statutes, determine constitutional issues, and formulate rules of law. See *Preserve Shorecliff Homeowners v City of San Clemente* (2008) 158 CA4th 1427, 1434, 71 CR3d 332 (demographic facts judicially noticed).

A court may also take judicial notice of the public and private official acts of any of the branches of the state government under Evid C §452. See *In re A.B.* (2008) 164 CA4th 832, 839, 79 CR3d 580 (dependency court's judicial notice of official parental notification form regarding sibling filed in different dependency action); *Casella v SouthWest Dealer Servs., Inc.* (2007) 157 CA4th 1127, 1137, 69 CR3d 445 (legislative history of several bills and article by DMV on payment packing); *De Asis v DMV* (2003) 112 CA4th 593, 597 n3, 5 CR3d 231 ("excerpts from the Assembly Daily Journal…, the Complete Bill History… , and an excerpt from The Constitution of the State of California, edited by Edward F. Treadwell (5th ed. 1923)").

The court must refuse to judicially notice a matter that is not authorized by law. Evid C §450. For example, a judge who has personal knowledge of certain facts may not take judicial notice of those facts unless they fall into a permissible category under Evid C §§451-452.

Additionally, a court may also refuse to take judicial notice of an uncertified complaint from another state. See Evid C §452(d)(2); *Ross v Creel Printing & Publishing Co.* (2002) 100 CA4th 736, 743, 122 CR2d 787. Because the document offered was neither certified nor provided under subpoena, the court had no assurance of its authenticity. Further, even if the document were properly certified, the court would take judicial notice only as to the existence of the complaint, not as to the truth of any of the allegations contained in it. *Ross v Creel Printing & Publishing Co., supra*.

PRACTICE TIP: It is proper for a court to take judicial notice of earlier proceedings from within the same trial court for purposes of establishing the foundational requirements of the *Kelly* rule. *People v Smith* (1989) 215 CA3d 19, 263 CR 678. See *People v Kelly* (1976) 17 C3d 24, 130 CR 144; discussion in chap 23.

§31.14 D. Computer-Generated Official Court Records of Criminal Convictions (Evid C §452.5(a))

Evidence Code §452.5(a) authorizes a court to take judicial notice of computer-generated court records that relate to criminal convictions, under the official acts and records of Evid C §§452(c)-(d), when the court clerk certified those records at the time of the computer entry.

NOTE: Under Evid C §452.5(b) an official record of conviction certified in accordance with Evid C §1530 is admissible under Evid C §1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event in the record. See discussion in chap 36 (official records). On the use of criminal convictions for impeachment, see chaps 26-27.

E. Procedures for Requesting Judicial Notice

§31.15 1. Raise Matter In Limine

As the proponent of evidence to be judicially noticed, you must decide whether to raise the issue in or out of the jury's presence. See discussion of these considerations in chaps 3-4.

PRACTICE TIP: Many judges prefer that judicially noticed matters be raised in limine to make the trial run more smoothly; sometimes local rules require counsel to do so. See §31.16.

§31.16 2. Comply With Local Court Rules

Local rules of court may impose particular requirements on procedures for obtaining judicial notice. See, *e.g.,* Los Angeles Ct R 9.2 (setting out requirements for requesting judicial notice of information in superior court files) and Los Angeles Ct R 8.92 and 7.9(h) (requiring parties to file all motions in limine and submit briefs on all major evidentiary issues at pretrial status conference).

§31.17 3. Provide "Sufficient Information" to Support Request

Although the requirement to provide "sufficient information" pertains only to matters under Evid C §452, it is good practice to provide the court with necessary information even for matters that mandate notice under Evid C §451.

The burden of presenting evidence to support a request that judicial notice be taken under Evid C §452 is on the requesting party. Evid C §453; see Comment to Evid C §452. That burden is met by providing "sufficient information" to support your request for judicial notice. Evid C §453(b).

EXAMPLE: Providing sufficient information to support a request for judicial notice may also allow the court of appeal to assume that the request was granted when the record on appeal does not contain an order either granting or denying the request. For example, in *Aaronoff v Martinez-Senftner* (2006) 136 CA4th 910, 918, 39 CR3d 137, the court of appeal could assume that the trial court granted judicial notice of the record in a prior action, although the clerk's transcript did not contain such an order, because defendants gave plaintiff sufficient notice of the request and provided the trial court with sufficient information to enable it to take judicial notice of the matter. In addition, the record contained no indication that the request for judicial notice had been denied.

Because there are no clear guidelines on the form that "sufficient information" may take, absent local rules, the proponent should provide the most credible information possible. When the requesting party cites no evidence of the facts of which it requests judicial notice, the court is likely to refuse the request. See *City of Morgan Hill v Bay Area Air Quality Mgmt. Dist.* (2004) 118 CA4th 861, 13 CR3d 420.

EXAMPLE: If requesting the court to take judicial notice of another state's statute, bring both the book from which the statute was taken and a photocopy of the statute. Or you may locate the statute online and deliver a printout to the court, leaving time for the opponent to see whether anything is amiss. If asking the court to take judicial notice of a scientific matter of generalized knowledge that is so universally known that it cannot reasonably be the subject of dispute, present the major books recognized as authorities on the topic and an affidavit from an expert in the area confirming that fact, in addition to copies of the information to be judicially noticed. See chaps 23-24.

Source: Evidence/Effective Introduction of Evidence in California/31 Judicial Notice/§31.18 4. When Requesting Judicial Notice of Court Records

§31.18 4. When Requesting Judicial Notice of Court Records

If the proponent is requesting judicial notice of material in a file of the same court in which the matter will be heard, Cal Rules of Ct 3.1306(c) requires that the proponent:

- Specify in writing the part of the court file to be judicially noticed; and
- Arrange with the clerk to have the file in the courtroom at the time of the hearing.

PRACTICE TIP: Be sure to check local rules for additional requirements for requesting judicial notice of records in the court's own files. See, *e.g.,* Los Angeles Ct R 9.2 (separate document must be filed 5 days before hearing, with request to department clerk to order delivery of file 2 days before hearing date). In the absence of a court rule, the clerk will appreciate knowing as early as possible before the hearing that another court file will be required.

§31.19 5. Request Applicable Jury Instruction

If the court grants a request for judicial notice on a matter that would otherwise have been determined by the jury, you have the right under Evid C §457 to request a jury instruction that the jury must accept as fact the matter that was so noticed.

PRACTICE TIP: You may ask the judge to read the instruction to the jury immediately before or after reading the judicially noticed matter, in addition to giving the instruction at the close of the case as part of the formal jury instructions.

§31.20 6. Consider Court Order Prohibiting Opposing Parties From Presenting Evidence on Judicially Noticed Matter

The proponent may want to request an order prohibiting adverse parties from introducing any evidence concerning or contrary to the judicially noticed matter. After the matter is judicially noticed, it is no longer a disputed fact, and evidence on the matter is irrelevant. See California Trial Practice: Civil Procedure During Trial, chap 14 (3d ed Cal CEB 1995); 1 Witkin, California Evidence, *Judicial Notice* §3 (4th ed 2000) (mandatory judicial notice amounts to conclusive presumption). If proffered evidence is relevant to another issue that remains in dispute, requesting a limiting instruction should be considered after the evidence has been admitted.

F. Court's Ruling

§31.21 1. Court May Rely on Any "Pertinent Information"

The court may consult any source of information, including the advice of persons learned in the subject matter, whether or not provided by the proponent of the evidence, in deciding whether to take judicial notice. Evid C §454. The court by request or on its own motion can arrange to hear expert testimony on the subject to be judicially noticed. Evid C §460. See also Comment to Evid C §453.

If the matter concerns the law of a foreign nation and the court relies on the advice of experts, that advice, if not received in open court, must be in writing. Evid C §454.

Source: Evidence/Effective Introduction of Evidence in California/31 Judicial Notice/§31.22 2. Matters of 'Substantial Consequence'

§31.22 2. Matters of "Substantial Consequence"

If a party requests or the court proposes to take judicial notice of a matter "that is of substantial consequence to the determination of the action" and that matter falls under Evid C §451(f) (universally known matters) or under any category of Evid C §452, the court must (Evid C §455):

- Give each party a reasonable opportunity to present information on the propriety of taking judicial notice of the matter and the tenor of the matter to be noticed; and
- If any source of information (including the advice of experts) that the court resorted to was not received in open court, make that information and its source part of the record and give the parties a reasonable opportunity to meet the information.

§31.23 3. Court's Refusal to Take Judicial Notice

When denying a request to take judicial notice, a trial court must (Evid C §456):

- Advise the parties at the earliest practicable time; and
- Indicate for the record that the request was denied (see *Aaronoff v Martinez-Senftner* (2006) 136 CA4th 910, 918, 39 CR3d 137).

This requirement was imposed to give the parties an adequate opportunity to submit evidence on a matter for which judicial notice was anticipated but not taken. See Comment to Evid C §456.

V. CHECKLISTS

§31.24 A. Checklist: Procedures for Providing Court With Sufficient Information

- Present necessary documentation, *e.g.,* statute book or printout from online service, almanac showing time sun rose on a certain day.
- Present affidavit to support request, if necessary. See Comments to Evid C §§451-454.
- Ask expert witness to take stand, if necessary, *e.g.,* law professor to testify to laws of a foreign nation. See Evid C §452(f).
- Provide court and counsel for each party with a copy of the material to be judicially noticed. Cal Rules of Ct 3.1306(c).
- If requesting judicial notice of material in a file from the same court in which the matter will be heard, specify in writing the part of the court file to be judicially noticed, and arrange with clerk to have the file in the courtroom at the time of the hearing. Cal Rules of Ct 3.1306(c).

NOTE: It is rarely necessary to put witnesses on the stand in order to convince the trial court to take judicial notice of a matter.

§31.25 B. Checklist: Alternative Methods of Admissibility

- Expert witness. Evid C §§720, 801. See chap 24.
- Present the information through the testimony of a qualified witness.
- Stipulation. See chap 51.
- Treatises, books, maps, and charts. Evid C §1341. See chap 12.

Source: Evidence/Effective Introduction of Evidence in California/31 Judicial Notice/ VI. SOURCES/§31.26 A. Evidence Code

VI. SOURCES

§31.26 A. Evidence Code

Evid C §450. Judicial notice may not be taken of any matter unless authorized or required by law.

Evid C §451. Judicial notice shall be taken of the following:

(a) The decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution.

(b) Any matter made a subject of judicial notice by Section 11343.6, 11344.6, or 18576 of the Government Code or by Section 1507 of Title 44 of the United States Code.

(c) Rules of professional conduct for members of the bar adopted pursuant to Section 6076 of the Business and Professions Code and rules of practice and procedure for the courts of this state adopted by the Judicial Council.

(d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

(e) The true signification of all English words and phrases and of all legal expressions.

(f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

Evid C §452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Evid C §452.5. (a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

Evid C §453. The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to

prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Evid C §454. (a) In determining the propriety of taking judicial notice of a matter, or the tenor thereof:

(1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(2) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

(b) Where the subject of judicial notice is the law of an organization of nations, a foreign nation, or a public entity in a foreign nation and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, shall be in writing.

Evid C §455. With respect to any matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action:

(a) If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

Evid C §456. If the trial court denies a request to take judicial notice of any matter, the court shall at the earliest practicable time so advise the parties and indicate for the record that it has denied the request.

Evid C §457. If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the trial court may, and upon request shall, instruct the jury to accept as a fact the matter so noticed.

See also Evid C §§458 (when trial court can take judicial notice in subsequent proceedings), 460 (court appointment of experts, discussed in §31.21).

§31.27 B. Other

For further discussion of judicial notice, see Jefferson's California Evidence Benchbook, chap 49 (4th ed CJA-CEB 2009); California Trial Practice: Civil Procedure During Trial, chap 14 (3d ed Cal CEB 1995).

Source: Evidence/Effective Introduction of Evidence in California/32 Lay Witnesses: Competence and Qualification/Chapter Outline

32

Lay Witnesses: Competence and Qualification

Donald D. Howard

B. California Rules of Professional Conduct §32.21

C. Other §32.22

§32.1 I. SCOPE OF CHAPTER

This chapter discusses the competency and qualification of witnesses. Every person is qualified to be a witness, regardless of age, unless precluded by some statutory provision. Evid C §700. Special rules apply to judges, jurors, and attorneys who are witnesses. See Evid C §§703-704; Cal Rules of Prof Cond 5-210.

II. REQUIREMENTS

A. To Admit

§32.2 1. Lay Witnesses

Lay witnesses who testify at trial must:

- Have personal knowledge of the matter to which they will testify (Evid C §702(a));
- Be capable of expressing themselves to the trier of fact so they can be understood, either directly or through an interpreter (Evid C §701(a)(1)); and
- Understand the duty of a witness to tell the truth (Evid C §701(a)(2)).

NOTE: Every person, regardless of age, is competent and qualified to be a witness unless precluded by some statutory provision. Evid C §700.

§32.3 2. Judges

A judge presiding over a trial is not precluded, as such, from giving testimony, although doing so is rare. However, a judge who is presiding at trial may not testify in the matter if any party objects. Evid C §703. See also *U.S. v Berber-Tinoco* (9th Cir 2007) 510 F3d 1083, 1091 (construing nearly parallel rule under Fed R Evid 605; no objection required).

If the judge is called to testify but a party raises an objection, the objection is deemed a motion for mistrial. If there is no objection, the judge may testify. Evid C §703.

A judicial officer or arbitrator who presides at a judicial or quasi-judicial proceeding may not testify about that proceeding in a subsequent civil proceeding unless the testimony concerns matters that could give rise to civil or criminal contempt, constitute a crime, be the subject of investigation by the State Bar or Commission on Judicial Performance, or give rise to disqualification proceedings under CCP §170.3. Evid C §703.5. This provision is not applicable to mediators. Evid C §703.5. But see Evid C §§1119-1128 (confidentiality in mediation). See also *Saeta v Superior Court* (2004) 117 CA4th 261, 267, 11 CR3d 610 (retired judge who sat on termination review board compelled to answer deposition testimony because proceeding was not judicial or quasi-judicial).

NOTE: Unless subpoenaed, judges are also precluded by the California Code of Judicial Ethics from testifying as character witnesses. Code of Judicial Ethics, Canon 2(B)(2).

§32.4 3. Jurors

A juror sworn and impaneled in a trial may testify, but not over the objection of a party. If a juror is called over objection, that objection is deemed a motion for mistrial. Evid C §704.

§32.5 4. Lawyers

A lawyer for a party usually may not testify without repercussions on continuing representation. Cal Rules of Prof Cond 5-210; see California Trial Practice: Civil Procedure During Trial §§16.38-16.40 (3d ed Cal CEB 1995); 2 Witkin, California Evidence, *Witnesses* §§54-58 (4th ed 2000).

§32.6 B. To Object

The opponent may object to a witness's testifying on any of the following grounds:

- Witness is incompetent because he or she lacks capacity to:
- Express self on subject matter of proposed testimony so as to be understood by trier of fact either directly or through interpreter (Evid C §701(a)(1)), or
- Understand duty of witness to tell truth (Evid C §701(a)(2));
- Witness has no personal knowledge of facts to which he or she testifies (Evid C §702);
- Proposed testimony is protected by a privilege (Evid C §§900-1070) (see chap 43);
- Witness is trial judge (Evid C §703(b));
- Witness was judge, arbitrator, or mediator at previous proceeding, and testimony limited by Evid C §703.5;
- Witness is lawyer for a party (Cal Rules of Prof Cond 5-210);
- Witness is juror in case (Evid C §704(b)); or
- Proposed testimony would be too prejudicial, confusing, misleading, or time consuming (Evid C §352).

III. SAMPLE QUESTIONS

A. Lay Witnesses Must Understand Duty to Tell the Truth

§32.7 1. Information to Elicit

When a witness's competence is in issue, the party opposing the admissibility of the witness's testimony has the burden of proof. In the preliminary fact hearing illustrated in §32.8, the opponent of the evidence wants to ask questions to prove that the trial witness—whom the proponent wants to examine about what he saw while sitting on a park bench—is incapable of understanding his duty to tell the truth.

§32.8 2. Questions to Ask

[*In chambers*]

Opponent: I ask the Court to take judicial notice of the court files regarding the competency hearing and the appointment of a guardian of the person and estate of Mr. Witness. I have the court file here.

Court: [*after reviewing file*] All right.

Opponent: I call Mr. Witness, Jr., to the stand.

Q: What is your relationship to Mr. Witness?

Q: Over the past year how often have you seen Mr. Witness?

Q: What was the average length of each weekly visit?

Q: During these one-hour visits what did the two of you do?

Q: During these conversations did you observe whether Mr. Witness could differentiate between truth and fiction?

Q: How much of the time during your visits with Mr. Witness over the past year has Mr. Witness confused things that happened with things he only imagined to have happened?

PRACTICE TIP: Your opponent may object to use of the word "imagined" as calling for speculation. You could reword it to say "with things that did not happen" instead of saying "with things that he only imagined to have happened."

Q: Does Mr. Witness have an understanding of the difference between what he observed and what he only imagined to have happened once that is called to his attention?

PRACTICE TIP: If a state-appointed psychiatrist had examined Mr. Witness for the competency hearing, and if any other expert were available to testify, they could be called by either side. The opponent could also examine the witness himself on voir dire, particularly if the opponent knew several subjects on which Mr. Witness's clarity or confusion between fiction and truth could be easily demonstrated. Following this hearing, if the court overrules the objection, the credibility of Mr. Witness could still be attacked with similar evidence and then argued to the jury. However, only Mr. Witness's credibility would be subject to attack. The jury would not decide his competency; that issue is decided only by the court under Evid C §405. See §32.12.

B. Lay Witness Must Have Personal Knowledge

§32.9 1. Information to Elicit

When a witness's personal knowledge is in issue, the party seeking admissibility of the witness's testimony has the burden of proof. In the trial segment in §32.10, the proponent of the evidence wants to ask questions that require the witness to have had personal knowledge of the matters to which he will testify. The witness, who had received a head injury in an accident and claimed to have no memory of any event occurring on the day of the accident, must now show through his own and an expert's testimony that he has recovered his memory.

§32.10 2. Questions to Ask

Q: What was the grader doing earlier that morning, before the accident?

Opponent: Objection, lack of personal knowledge.

Court: Counsel, approach the bench.… What is the basis of this objection?

Opponent: At his deposition, the plaintiff stated that he had a complete memory loss concerning these events.

Proponent: Last week, plaintiff suddenly regained his memory. His doctor will testify that this memory recovery is typical of the type of injury the plaintiff suffered.

Court: Based on plaintiff's counsel's representations I will allow him to proceed.

PRACTICE TIP: Following a foundational showing such as that in §32.8, the plaintiff may now testify, subject to being impeached by his earlier testimony at his deposition. The foundational requirement of personal knowledge may be satisfied by the witness himself. The effect of the earlier testimony will depend on the expert testimony regarding the reasonableness of his returned memory in light of his injury, recovery, and the timing of his regained memory. Lack of personal knowledge is usually determined in a hearing under Evid C §403. See §32.13.

IV. COMMENT

§32.11 A. Different Standards for Ruling on Competence and on Personal Knowledge

Objections to lay witnesses based on competence and on lack of personal knowledge are decided under different standards. Competence is defined as the ability to communicate and to understand the duty to tell the truth. See Comment to Evid C §701. A witness's personal knowledge must be shown before the witness may testify about a matter. Evid C §702(a). For a detailed discussion of preliminary fact hearings, see chap 4.

The witness must be allowed to testify unless he or she (1) cannot communicate intelligibly, (2) does not understand the duty to testify truthfully, or (3) lacks personal knowledge of the events to be recounted. The court alone determines the first two matters. A witness challenged for lack of personal knowledge must be permitted to testify if there is evidence from which a rational trier of fact could find that the witness accurately perceived and recollected the subject of his or her testimony. If that threshold is met, then the jury must determine the credibility of the witness's perceptions and recollections. *People v Anderson* (2001) 25 C4th 543, 574, 106 CR2d 575.

§32.12 1. Competence Determined Under Evid C §405

An objection that a witness is incompetent to testify is determined under Evid C §405. That means that the court determines incompetence based on a finding that the witness is more probably than not incompetent to testify. The objecting party has the burden of proof. Two of the most common reasons for challenging competence are youth and mental disability.

PRACTICE TIP: In determining competence, the court is not to determine whether the witness did in fact perceive and does recollect. See Comment to Evid C §701.

The Comment to Evid C §700 makes it clear that nonstatutory grounds may not be used to attack the competence of witnesses.

§32.13 2. Personal Knowledge Decided Under Evid C §403

Objections to a lay witness based on the witness's lack of personal knowledge, either in the ability to have perceived or to recollect particular facts, are decided under Evid C §403(a)(2). The court may exclude testimony for lack of personal knowledge only if no jury could reasonably find that the witness had personal knowledge. See Comment to Evid C §403. On objection, the burden is on the party calling the witness to present evidence of personal knowledge. See Comment to Evid C §701. Lack of personal knowledge is usually determined out of the jury's presence.

PRACTICE TIP: On objection, the court may not receive testimony subject to the condition that personal knowledge be shown later. See Evid C §§403(b), 702(a).

§32.14 3. Hearing in or out of Jury's Presence

In some instances, opponents challenge a witness's competence or qualification to testify as soon as the witness is called to the stand, as in §32.8. In that event, judges usually conduct a hearing on the preliminary facts at issue out of the jury's presence, whether the challenge is to competency, personal knowledge, or another objection.

Counsel might argue that the questioning may take place in the jury's presence only if competence is at issue. See Evid C §403. If requested, the judge may permit examination of the witness based on counsel's representation that the pending testimony will demonstrate the witness's competence. See Comment to Evid C §701.

PRACTICE TIP: The rules regarding the competence of witnesses are the same in criminal as in civil cases unless specially excepted. Pen C §1321.

§32.15 4. Evidence to Support Competence and Personal Knowledge

Counsel who foresees that a witness's competency or qualification to testify will be challenged should be prepared to support the witness in every way possible. If the witness's personal knowledge is challenged, counsel may present lay or expert witnesses who can testify to a witness's ability to perceive or recollect particular facts or events. Counsel may call other appropriate persons to give supporting testimony when a witness's mental competence or ability to communicate is challenged. Counsel can strengthen the evidence of a lay witness's testimony by presenting testimony of other observers who saw the same event, introducing an earlier consistent statement of the witness when permissible (see chap 40), documenting similar events that occurred earlier or later, or offering a reconstruction of the events to which the witness testified.

PRACTICE TIP: You can ask the court to reserve a ruling on your opponent's challenge to competence and allow you to question the witness. See Evid C §701(b)).

§32.16 B. Lawyer's Testimony: Cal Rules of Prof Cond 5-210 Applies Only to Jury Trials

California Rules of Professional Conduct 5-210 is intended to apply to situations in which the lawyer knows or should know that he or she ought to be called as a witness in litigation in which there is a jury; it is not intended to include situations in which a lawyer is representing a client in an adversarial proceeding and is testifying before a judge. See Cal Rules of Prof Cond 5-210: ("A member shall not act as an advocate *before a jury*…" (emphasis added)).

§32.17 C. Children's Testimony: Criminal Jury Trials

Children may take an oath to tell the truth rather than the oath adults take. See *People v Berry* (1968) 260 CA2d 649, 652, 67 CR 312. The court need not, on voir dire of children, tell them that they will be punished for lying; it is enough for the court to determine that they can distinguish between truth and lies and that they understand the importance of telling the truth. *People v Mincey* (1992) 2 C4th 408, 6 CR2d 822. In criminal cases, on request, the court must instruct the jury on how to consider the testimony of a child age ten or younger. Pen C §1127f (wording of instruction set out in statute).

PRACTICE TIP: In presenting a child witness, it may be to the client's advantage to have the judge voir dire the child in front of the jury; the child's spontaneous responses may show the sincerity of the child's desire to tell the truth to the jury.

In a criminal case charging a sexual offense or a violent felony as defined in Pen C §667.5(c), in which the victim is a child under age 13, the court has discretion to permit the child to testify by way of closed-circuit television. Pen C §1347. A prosecutor who wants to examine the child in this manner must file a written motion requesting the court to authorize the procedure at least 3 days before the child witness is scheduled to testify. Pen C §1347(b).

V. CHECKLISTS

§32.18 A. Checklist: Witnesses to Subpoena

- Witnesses who will testify.
- Other witnesses to prove foundational facts on objection, *e.g.,* absence of privilege, witness's personal knowledge or competence.

§32.19 B. Checklist: Alternative Methods of Admissibility

- Another witness who is competent and qualified to testify.
- Information relied on by an expert. See chap 24.
- In criminal cases, statutory exceptions for certain child victims and adult victims with disabilities. See Pen C §§1347, 1347.5.

VI. SOURCES

§32.20 A. Evidence Code

Evid C §700. Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.

Evid C §701. (a) A person is disqualified to be a witness if he or she is:

(1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or

(2) Incapable of understanding the duty of a witness to tell the truth.

(b) In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness.

Evid C §702. (a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.

Evid C §703. (a) Before the judge presiding at the trial of an action may be called to testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, the judge shall declare a mistrial and order the action assigned for trial before another judge.

(c) The calling of the judge presiding at a trial to testify in that trial as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a judge shall be deemed a motion for mistrial.

(d) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.

Evid C §703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement, conduct, decision or ruling, that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section shall not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Evid C §704. (a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, the court shall declare a mistrial and order the action assigned for trial before another jury.

(c) The calling of a juror to testify before the jury as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a juror shall be deemed a motion for mistrial.

(d) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness.

§32.21 B. California Rules of Professional Conduct

Cal Rules of Prof Cond 5-210. A member shall not act as an advocate before a jury which will hear testimony from the member unless:

(A) The testimony relates to an uncontested matter; or

(B) The testimony relates to the nature and value of legal services rendered in the case; or

(C) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

§32.22 C. Other

For further discussion of competence and qualification of lay witnesses, see 2 Witkin, California Evidence, *Witnesses* §§37-58 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 27 (4th ed CJA-CEB 2009); Cotchett, California Courtroom Evidence §§16.01-16.07 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, chap 3 (3d ed 2000).

Source: Evidence/Effective Introduction of Evidence in California/33 Lay Witnesses: Opinion Testimony/Chapter Outline

33

Lay Witnesses: Opinion Testimony

Nancy M. Naftel

§33.1 I. SCOPE OF CHAPTER

Opinion testimony must usually be given by an expert witness. This chapter discusses the exceptions that allow lay witnesses to state an opinion. See Evid C §800. For examples of topics on which lay witnesses may give an opinion, see §33.17.

II. REQUIREMENTS

A. Lay Testimony Generally

§33.2 1. To Admit

The proponent introducing the opinion of a lay witness must show that the opinion offered is:

- Permitted by law (Evid C §800);
- Rationally based on the witness's perception (Evid C §800(a)); and either
- Helpful to a clear understanding of the witness's testimony (Evid C §800(b)); or
- Permitted by case law that preceded the present Evid C §800, in which event it does not have to meet the Evid C §800 requirements (see Comment to Evid C §800).

§33.3 2. To Object

The opponent may object to a lay witness's stating an opinion on any of the following grounds:

- Improper opinion evidence (explain why, *e.g.,* requires an expert opinion; see Evid C §801; *People v Riggs* (2008) 44 C4th 248, 300, 79 CR3d 648 (noting that prosecutor may not express opinion on defendant's guilt by alluding to information not disclosed at trial; doing so suggests to jury that prosecutor is privy to information not developed at trial));

- No foundation that witness has personal knowledge of the facts (Evid C §800(a); but see *Riggs, 44* C4th at 300 (after Proposition 8, undecided whether proper to exclude lay opinion on veracity of another witness testifying about events as speculative because lay witness has no personal knowledge of events));

- No foundation that opinion would be helpful in understanding witness's testimony (Evid C §800(b)); or

- Improper opinion about meaning of a statute or law (*Amaral v Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1179, 78 CR3d 572).

B. Lay Testimony on Sanity

§33.4 1. To Admit

To introduce a lay witness's opinion on the sanity of another person, the proponent must satisfy the following requirements:

- The opinion offered concerns the sanity of a person (Evid C §870); and
- The witness is an intimate acquaintance of the person (Evid C §870(a)); or
- The witness was a subscribing witness to a disputed writing, and the opinion relates to the sanity of the person who signed the document at the time the writing was signed (Evid C §870(b)).

§33.5 2. To Object

The opponent may object to a lay witness's opinion concerning the sanity of another person on any of the following grounds:

- Irrelevant (Evid C §§210, 351);
- No foundation that witness:
- Is an intimate acquaintance (Evid C §870(a)); or
- Was a subscribing witness (Evid C §870(b)).

III. SAMPLE QUESTIONS

A. Lay Witness's Opinion on Speed and Distance

§33.6 1. Information to Elicit

In the trial of an automobile personal injury case, the proponent wants to ask questions that establish the following points:

- Identity of cars involved;
- Location of cars;
- Witness's opportunity to see cars; and
- Witness's opinion of cars' distance and speed.

§33.7 2. Questions to Ask

Q: Mr. Witness, did you observe an accident on June 1, 1998, at the corner of First and Main in Los Angeles?

Q: How many vehicles were involved?

Q: Can you describe the vehicles involved?

PRACTICE TIP: Without these two questions, your opponent might object that the next question assumes facts not in evidence.

Q: Did you see either car before the collision?

Q: Where was the red car when you first saw it?

Q: How long did you see that car before the accident?

Q: Did you continuously observe that car from the time you first saw it until the collision?

Q: Approximately how far from the scene of the collision was the red car when you first saw it?

Q: From where you were standing, could you tell how fast the red car was going?

Q: In your opinion, how fast was the red car going immediately before the collision?

B. Lay Witness's Opinion on Description and Identity in Criminal Case

§33.8 1. Information to Elicit

In a criminal trial, the prosecutor wants the lay witness who saw the defendant commit a grocery store robbery to testify in §33.9 to the following matters:

- Distance from gunman;
- Opportunity to view gunman;
- Description of gunman; and
- Identification of gunman in the courtroom.

§33.9 2. Questions to Ask

Q: Ms. Witness, were you present on May 4, 1998, when a gunman entered the Grocery Store?

Q: Did you actually see the man who entered the store with a gun?

Q: How close were you to him?

Q: Did anything or anyone block your view of him?

Q: Did you see his face?

Q: How long did you look at him?

Q: Can you describe him?

Q: What was he wearing?

Q: Was he holding anything?

Q: Do you see the man who entered the store with a gun in the courtroom today?

Q: Where is he?

Q: Your Honor, may the record reflect that the witness has identified the defendant?

PRACTICE TIP: If the witness is not absolutely positive that the person she identifies in court is the person she observed during the commission of the crime, be sure to bring out any uncertainties on direct to avoid the appearance of trying to hide something that your opponent may elicit during cross-examination. A witness's uncertainty goes to the weight of the opinion evidence, not to its admissibility. See *People v Pena* (1972) 25 CA3d 414, 101 CR 804, disapproved on other grounds in *People v Duran* (1976) 16 C3d 282, 292, 127 CR 618. See also California Criminal Law Procedure and Practice, chap 22 (Cal CEB Annual).

C. Intimate Acquaintance's Opinion on Sanity

§33.10 1. Information to Elicit

To introduce a lay witness's opinion about another person's sanity, the proponent wants to ask questions in §33.11 that cover the following points:

- Frequency and length of time of contact;
- Intimate nature of acquaintanceship; and
- Witness's opinion of person's sanity.

Source: Evidence/Effective Introduction of Evidence in California/33 Lay Witnesses: Opinion Testimony/§33.11 2. Questions to Ask

§33.11 2. Questions to Ask

Q: Mrs. Witness, are you acquainted with Mrs. Loony?

Q: How long have you known her?

Q: How often do you see her?

Q: How much time do you spend with her during an average month?

Q: What do you and Mrs. Loony do together?

PRACTICE TIP: If opposing counsel objects that Mrs. Witness is not an "intimate" acquaintance of Mrs. Loony, as required by Evid C §870(a), this is a preliminary factual issue for the judge to decide under Evid C §405. See chap 4.

Q: Do you have an opinion on whether Mrs. Loony is sane?

Q: What is your opinion?

D. Subscribing Witness's Opinion on Sanity

§33.12 1. Information to Elicit

In introducing a lay witness's opinion on a person's sanity at the time the person signed a document, the proponent wants to ask questions in §33.13 that cover the following points:

- Identity of document;
- Identity of signature of person whose sanity is at issue;
- Circumstances under which person signed document;
- Identity of subscribing witness's own signature; and
- Subscribing witness's opinion about person's sanity.

§33.13 2. Questions to Ask

Q: Mr. Witness, I am showing you the document that has been marked Plaintiff's Exhibit No. 1 for identification. Do you recognize it?

Q: I would like to direct your attention to the fifth line on page three. Do you recognize that signature?

Q: Whose signature is that?

Q: Were you present when Mrs. Loony signed this document?

Q: Did you see her sign it?

Q: When did she sign it?

Q: Directing your attention to the last line on page three, do you recognize that signature?

Q: Whose signature is that?

Q: When did you sign it?

Q: Do you have an opinion on Mrs. Loony's sanity on the date this document was signed?

Q: What is that opinion?

IV. COMMENT

§33.14 A. Determining Whether Lay Opinion Is Permitted

Generally, there are two types of opinion testimony: expert and lay testimony. Lay opinion testimony is admissible if it satisfies the requirements of Evid C §800 or if it was made admissible by case law before enactment of the present Evid C §800. See Comment to Evid C §800 and examples in §33.17.

One prerequisite for determining if a lay opinion is permitted is to decide whether expert testimony is required on that issue. Is the subject matter sufficiently beyond common experience so that expert testimony is needed to help a jury understand it? See Evid C §801. If not, a lay witness may give opinion testimony if the opinion meets the requirements of subsections (a) and (b), that is, the opinion is "rationally based on the perception of the witness" and is "helpful to a clear understanding of his testimony." See *People v Maglaya* (2003) 112 CA4th 1604, 1608, 6 CR3d 155. In addition, a lay witness may give an opinion even though the requirements of Evid C §800 are not met, if such lay opinion testimony was made admissible by prior case law. See Comment to Evid C §800. See also California Expert Witness Guide §§2.6-2.7 (2d ed Cal CEB 1991).

A lay opinion is only as good as the reasoning employed and factors considered in rendering the opinion. An opinion offered without reasons or explanations provides no evidentiary support. *Cates v California Gambling Control Comm'n* (2007) 154 CA4th 1302, 1309, 65 CR3d 513 (summary judgment improper based on declaration of lack of general delinquency in payments when audit of only one tribe done).

§33.15 B. Witness Must Have Personal Knowledge of Facts

A witness may not have the necessary personal knowledge of the facts to be able to give an opinion. For example, a witness to an accident may not have actually seen the involved vehicles before the collision. The witness's opinion may be based on what he or she was told by other witnesses.

§33.16 C. Jury Instructions

A proponent who presents the opinion of a lay witness may wish to request a jury instruction. See, *e.g.,* CALCRIM 333 (criminal cases). *People v Golde* (2008) 163 CA4th 101, 120, 77 CR3d 120 (lay witness may give opinion so long as basis of opinion is developed at trial; denying challenge to CALCRIM 333).

Source: Evidence/Effective Introduction of Evidence in California/33 Lay Witnesses: Opinion Testimony/§33.17 D. Examples: Topics on Which Lay Witnesses Have Been Allowed to Give Opinion

§33.17 D. Examples: Topics on Which Lay Witnesses Have Been Allowed to Give Opinion

Specific areas in which lay witnesses have been allowed to give an opinion include:

- Sanity. Evid C §870.
- A party's own intent, motive, and knowledge—civil cases. See *Cope v Davison* (1947) 30 C2d 193, 200, 180 P2d 873.
- A party's own intent, motive, and knowledge—criminal cases. *People v Gaines* (1951) 106 CA2d 176, 180, 234 P2d 702.
- Estimates of time, speed, distance, and size. See 1 Witkin, California Evidence, *Opinion Evidence* §10 (4th ed 2000).
- A person's age. See *People v Caldwell* (1921) 55 CA 280, 296, 203 P 440.
- Intoxication. See *People v Garcia* (1972) 27 CA3d 639, 643, 104 CR 69.
- Identity. See *People v Perry* (1976) 60 CA3d 608, 612, 131 CR 629.
- Handwriting. Evid C §1416.
- Shoeprint comparison. See *People v Taylor* (1935) 4 C2d 495, 497, 50 P2d 796; *People v Maglaya* (2003) 112 CA4th 1604, 1608, 6 CR3d 155.
- Whether a witness has a particular illness or injury. See *Frederick v Federal Life Ins. Co.* (1936) 13 CA2d 585, 589, 57 P2d 235.
- A witness's parentage. See *Estate of Ganes* (1931) 114 CA 17, 19, 299 P 550.
- A witness's ownership or possession of property and its value, including the value of abstract rights. Evid C §813; *OCM Principal Opportunities Fund, L.P. v CIBC World Markets Corp.* (2007) 157 CA4th 835, 876, 68 CR3d 828 (investment fund managers could properly value registered and nonregistered notes); *People v Prosser* (2007) 157 CA4th 682, 68 CR3d 808 (uncorroborated victim testimony on value of stolen items is prima facie evidence of value for restitution; burden to refute then shifts to defendant). See *People v Henderson* (1965) 238 CA2d 566, 48 CR 114.
- The value of services performed by a witness. See *OCM Principal Opportunities Fund,* 157 CA4th at 876; 1 Witkin, Evidence, *Opinion Evidence* §16.

For further discussion, see generally 1 Witkin, Evidence, *Opinion Evidence* §§1-25; Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009); California Expert Witness Guide §§2.6-2.7 (2d ed Cal CEB 1991).

V. CHECKLISTS

§33.18 A. Checklist: Witnesses to Subpoena

- Lay witness who has requisite personal knowledge of facts and who meets statutory or case law requirements.

§33.19 B. Checklist: Alternative Methods of Admissibility

- If opinion of a lay witness is not admissible, it may be possible to secure an expert witness to give an opinion, because an expert is not required to have personal knowledge of the facts on which his or her opinion is based. See chap 24.
- Admission. Evid C §§1220-1228. See chap 10.
- Declaration against interest. Evid C §1230. See chap 20.
- Prior consistent or inconsistent statement. Evid C §§1235-1236. See chaps 40-41.
- Prior identification. Evid C §1238. See chap 42.
- Spontaneous statement. Evid C §1240. See chap 49.

VI. SOURCES

§33.20 A. Evidence Code

Evid C §800. If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony.

Evid C §870. A witness may state his opinion as to the sanity of a person when: (a) The witness is an intimate acquaintance of the person whose sanity is in question; (b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or (c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.

§33.21 B. Other

For further discussion of opinion testimony of lay witnesses, see 1 Witkin, California Evidence, *Opinion Evidence* §§1-25 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009); Cotchett, California Courtroom Evidence §§17.01, 17.03, 17.23 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *Opinion Evidence* §§8.A-8.B (3d ed 2000).

34

Lay Witnesses: Rehabilitation

Donald D. Howard

§34.1 I. SCOPE OF CHAPTER

This chapter discusses the rehabilitation of witnesses whose testimony has been discredited during cross-examination. There are three primary ways to rehabilitate lay witnesses: (1) re-examine the witness to explain any contradictions or inconsistencies; (2) introduce a prior consistent statement made before a prior inconsistent statement that was introduced against the witness; and (3) introduce evidence of the witness's reputation for honesty and truthfulness, if those character traits were attacked on cross-examination.

II. REQUIREMENTS

§34.2 A. To Admit

The following methods may be used to introduce evidence tending to rehabilitate a witness:

- Redirect examination of a witness to explain an apparent inconsistency, misrecollection, or other deficiency elicited in cross-examination.

NOTE: A witness may not simply be re-examined on the same subjects already testified to on direct examination without leave of court. Evid C §774.

- Introduction of a prior consistent statement:
- Following the admission of an inconsistent statement made after the consistent statement; and
- After an express or implied charge has been made that the witness's testimony was recently fabricated, or influenced by bias or other improper motive, when the statement was made before such fabrication, bias, or improper motive is alleged to have arisen. Evid C §§791, 1236. See chap 40.
- Evidence of the witness's reputation for honesty and truthfulness. Evid C §790. See chaps 14-16.

NOTE: This approach may be taken only after an attack on a witness's credibility by the introduction of that witness's reputation for dishonesty and untruthfulness.

§34.3 B. To Object

The opponent may object to the admission of testimony aimed at rehabilitating a lay witness on any of the following grounds:

- Asked and answered (see Evid C §§352, 765, 774);
- Hearsay (Evid C §1200);
- Irrelevant (Evid C §350);
- A witness's credibility may not be bolstered with a prior consistent statement if no prior inconsistent statement has been introduced (Evid C §791); or
- A witness's good character may not be shown in a civil case if not previously attacked (Evid C §790; see §5.15 for rule in criminal cases).

III. SAMPLE QUESTIONS

§34.4 A. Information to Elicit

On cross-examination in an automobile accident personal injury case, defense counsel impeached the plaintiff with a statement he made to police concerning who was with him in his car at the time of the accident. During the redirect examination segment in §34.5, plaintiff's counsel wants to ask her client questions that will allow him to explain discrepancies in his testimony.

§34.5 B. Questions to Ask

Q: Do you know how long it was after the accident that you gave police the statement defense counsel showed you?

A: It seemed like a long time because I was in so much pain. The police came at the same time as the ambulance.

Q: Did you receive any relief for your pain before you made the statement to the police?

A: No.

Q: Can you describe how you felt when you made that statement?

A: I was in so much pain I could barely see, and I couldn't help screaming sometimes. I was shaking uncontrollably, which made my broken ribs hurt even more. I don't think I heard more than half of what that officer said, and I can't stand a hundred percent behind my responses. The only statement I made that day when I was in a mental state to understand the questions and tell what really happened was the one I gave police at the hospital after I had been treated.

[*Plaintiff's counsel then shows plaintiff the prior consistent statement he made in the hospital, and has him authenticate it and read from it*]

IV. COMMENT

§34.6 A. Prevention Is Better Than Cure

The best approach to the possibility of "mistestimony" by a witness is prophylactic. Be sure you have prepared your client adequately. For example, review any conflicting statements, possible bias, motive to lie, or difficulties in observation of the events to which the witness will testify. Otherwise, on redirect the explanation for the "mistestimony" may seem like "I'm sorry for being caught" instead of an "upfront" explanation. Not all problems can be foreseen, however, and redirect examination and other rehabilitation methods can be useful tools in taking the sting out of cross-examination. See chap 19 on credibility, and the cross-references in §34.9 to other chapters in this book that discuss other ways of rehabilitating witnesses.

§34.7 B. Criminal Cases: Using Expert to Rehabilitate Witness

Expert opinion may be presented to explain prior inconsistent statements and support the witness's trial testimony. For example, in an incest child abuse case, an expert might be able to explain why the victim had lied about the crime at some point in time or had waited a long time before reporting the crime to the police. Similarly, expert testimony that parents of child molestation victims often fail to report such crimes is admissible to rehabilitate a witness's credibility if the defendant suggests that the witness's failure to report is inconsistent with the occurrence of the molestation. *People v McAlpin* (1991) 53 C3d 1289, 1300, 283 CR 382; *People v Humphrey* (1996) 13 C4th 1073, 1088, 56 CR2d 142. See cases on intimate partner battering and its effects discussed in chap 23.

V. CHECKLISTS

§34.8 A. Checklist: Witnesses to Subpoena

- Witness to introduce prior consistent statement or past recollection recorded.
- Person to testify to witness's reputation for honesty and truthfulness.

§34.9 B. Checklist: Alternative Methods of Admissibility

- Documentation that is otherwise admissible and is consistent with the witness's testimony.
- Expert opinion to explain apparent contradictions in witness's statements and to support credibility of witness's story. See §34.7.
- Former testimony. Evid C §1290. See chap 28.
- Good character evidence. See chaps 14-16. See also chap 19.
- Past recollection recorded. Evid C §1237. See chap 38.
- Physical evidence that is otherwise admissible and that is consistent with the witness's testimony. See chap 39.
- Prior consistent statement. Evid C §1236. See chap 40.
- Prior identification. Evid C §1238. See chap 42.
- Refreshing recollection. Evid C §771. See chap 44.
- Remainder offered to explain the part admitted. See chap 46.
- Testimony of other witnesses that is consistent with the witness's testimony.

§34.10 VI. SOURCES

For further discussion of rehabilitation of lay witnesses, see 3 Witkin, California Evidence, *Presentation at Trial* §§360-366 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 29 (4th ed CJA-CEB 2009); California Trial Objections, chaps 22-23 (Cal CEB Annual); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *Limitations on Credibility Evidence* §§5.A, 5.N, 5.P (3d ed 2000).

35

Nonhearsay

William H. Armstrong

§35.1 I. SCOPE OF CHAPTER

This chapter discusses evidence of out-of-court statements that are not hearsay. Such statements can be admitted into evidence even if they do not fit within one of the exceptions to the hearsay rule. The most common category of nonhearsay consists of out-of-court statements that are offered to prove something other than the truth of the matter asserted. These statements would be hearsay if admitted for a hearsay purpose, but are admissible as circumstantial evidence of some other fact relevant to the facts at issue. See Comment to Evid C §1200.

An out-of-court statement is nonhearsay when used to prove, when relevant to the case:

- Information, knowledge, or belief on the part of the person to whom the statement was made;
- The declarant's state of mind; the fact that the statement was made; and
- Nonassertive nonverbal conduct.

Recent decisions suggest another category of nonhearsay: out-of-court statements that may be considered nonhearsay because they do not implicate the concerns for reliability that the hearsay rule addresses. These decisions are discussed in §35.1A.

On hearsay and nonhearsay generally, see Jefferson's California Evidence Benchbook, chap 1 (4th ed CJA-CEB 2009).

§35.1A II. MISCELLANEOUS NONHEARSAY

The distinction between evidence that may be hearsay if used for a hearsay purpose and evidence that is simply not hearsay is usually quite apparent, although when the statement consists of conduct rather than words, it is not always easy to differentiate assertive conduct (hearsay if offered for the truth of the implied assertion) from nonassertive conduct (nonhearsay). See, *e.g.*, *People v Snow* (1987) 44 C3d 216, 227, 242 CR 477 (defendant's silence when learning of murder of witness in case against him was nonassertive conduct); *In re Cheryl H.* (1984) 153 CA3d 1098, 1126, 200 CR 789, disapproved on other grounds in *People v Brown* (1994) 8 C4th 746, 764, 35 CR2d 407 (child's play with anatomical dolls not assertive conduct). On nonassertive nonverbal conduct, see Evid C §225; Comment to Evid C §1200.

In *Correa v Superior Court* (2002) 27 C4th 444, 117 CR2d 27, the prosecution presented evidence of statements made by the Spanish-speaking victim and witnesses to a crime, which had been contemporaneously translated into English by a bystander. The victim and witness statements were admissible under the hearsay exception for preliminary hearings enacted by Proposition 115. Cal Const, art I, §30(b); Pen C §872(b). However, the defendant argued that the translation itself was hearsay and inadmissible because it did not come within a hearsay exception. The California Supreme Court disagreed, holding that when a translator is unbiased and adequately skilled, he or she is not a hearsay declarant but simply a "language conduit," and that the translation was nonhearsay. Although *Correa* involved a preliminary hearing, the decision suggests that the "language conduit" approach is equally valid at trial. See 27 C4th at 454.

In *People v Hawkins* (2002) 98 CA4th 1428, 121 CR2d 627, the court of appeal used a similar reasoning process to conclude that a computer's report of its own internal operations was nonhearsay. The evidence at issue in *Hawkins* was a computer printout reporting the time and date on which certain files had been accessed. Such a report, which is generated by the computer itself, is not hearsay, "because it is not a statement by a person." 98 CA4th at 1449. This reasoning does not apply to computer records output of data entered by a human operator. For admissibility of computer output under the business records exception to the hearsay rule, see §§13.5-13.6A.

In *Ampex Corp. v Cargle* (2005) 128 CA4th 1569, 1573 n2, 27 CR3d 863, computer printouts from a website and a message board were offered to show that they existed in the public eye, not for the truth of the matter asserted and, thus, were not hearsay statements.

III. REQUIREMENTS FOR INTRODUCTION OF OUT-OF-COURT STATEMENT FOR NONHEARSAY PURPOSE

§35.2 A. To Admit

An out-of-court statement offered for a nonhearsay purpose, *i.e.,* not to prove the truth of the statement but to prove another relevant fact, is admissible. An out-of-court statement is nonhearsay when its purpose is to show:

- Information, knowledge, or belief on the part of the person to whom the statement was made (see *Holland v Union Pac. R.R. Co.* (2007) 154 CA4th 940, 947, 65 CR3d 145 (quoting second edition material now in Jefferson's California Evidence Benchbook, chap 1 (4th ed CJA-CEB 2009)); 1 Witkin, California Evidence, *Hearsay* §§40-45 (4th ed 2000));
- Declarant's state of mind (see *People v Mendibles* (1988) 199 CA3d 1277, 1304, 245 CR 553);
- That the statement was made (see *People v Burnham* (1986) 176 CA3d 1134, 1144, 222 CR 630); or
- Nonverbal conduct when it is not a substitute for verbal expression (see Evid C §225; Comment to Evid C §1200).

The out-of-court statement must have some tendency in reason to show the nonhearsay fact to be admissible. If the jury is likely to misinterpret the statement by accepting the facts it asserts as true, the proponent of the evidence may have to persuade the trial court that the nonhearsay fact is important to the proponent's case and that the probative value of the evidence on that fact outweighs the prejudice that may be caused if the jury accepts the evidence for the truth of the matter asserted. See Evid C §352. If the issue is close, the proponent may want to suggest the use of a limiting instruction.

If the statement is a writing, it must be authenticated. Evid C §1401. On authentication, see chap 11.

Source: Evidence/Effective Introduction of Evidence in California/35 Nonhearsay/§35.3 B. To Object

§35.3 B. To Object

The opponent may object to an out-of-court statement that the proponent claims will not be offered to prove the truth of the statement, but to prove some other relevant fact, on the following grounds:

- Inadmissible hearsay, *e.g.,* the hearsay statement *is* being offered to prove its truth (Evid C §1200); and
- Irrelevant (Evid C §350); or

NOTE: To make the evidence admissible, the proponent must show a relevant nonhearsay purpose. If not relevant, the proffered evidence remains hearsay, so it is best to combine irrelevance with hearsay as grounds for objection.

- The fact that the statement is offered to prove is undisputed (Evid C §§210, 350).

NOTE: This is another form of relevance objection and, as in the previous Note, should be used in conjunction with a hearsay objection.

- Probative value of nonhearsay use of statement is outweighed by prejudice, confusion, or undue consumption of time that will result if it is admitted (Evid C §352).
- If written, the statement is:
- Not (properly) authenticated (Evid C §1401), or
- Inadmissible secondary evidence (Evid C §1521).

III. SAMPLE QUESTIONS

§35.4 A. Information to Elicit

In introducing evidence in a wrongful termination action that defendant's business associate discriminated against the plaintiff, plaintiff's counsel wants to ask the questions in §35.5 so that the witness can bring out the following points:

- Witness is a responsible person worthy of belief;
- Witness is an unbiased observer who knows both Mr. Business Associate and defendant;
- Witness is unbiased toward plaintiff and does not even know her;
- Reasons for witness's presence at conversation; and
- Statement about plaintiff that Mr. Business Associate made.

§35.5 B. Questions to Ask

Q: What is your occupation?

Q: Where are you employed?

Q: How long have you worked there?

Q: In what capacity do you now work there?

Q: What other duties have you had at X Company?

Q: Are you acquainted with Mr. Business Associate?

Q: How long have you known him?

Q: In what capacity do you know him?

Q: Have you ever met Mr. Defendant?

Q: Have you ever met Ms. Plaintiff?

Q: Do you remember having a conversation with Mr. Business Associate and defendant on June 3, 1999?

Q: Where did that conversation take place?

Q: Why were you talking with Mr. Business Associate and Mr. Defendant at that time?

Q: What was the main topic of the conversation?

Q: Did Mr. Business Associate say anything to Mr. Defendant about Ms. Plaintiff during that conversation?

Opponent: Objection, hearsay.

PRACTICE TIP: Instead of arguing the objection in front of the jury, your opponent may request a preliminary fact hearing out of the jury's presence. See chap 4.

Proponent: Your Honor, we are not offering the statement to prove its truth, but to establish Mr. Business Associate's attitude toward Ms. Plaintiff.

Court: What is the nature of the statement you expect to elicit?

Proponent: Mr. Business Associate said Ms. Plaintiff was "a fraud who had cheated three other people in the same way in the past six months." We are not offering this to establish that it was true, but to show Mr. Business Associate's attitude toward my client.

Opponent: Then I object on the ground that Mr. Business Associate's attitude toward Ms. Plaintiff is not relevant. If it has any relevance, its probative value is outweighed by the prejudicial impact of the statement and by the undue consumption of time that would be required to explore the other transactions to which Mr. Business Associate's statement refers.

Proponent: Your Honor, Mr. Business Associate's statement in the presence of Mr. Defendant is relevant because it may bear on the illegal reason for which Ms. Plaintiff claims that Mr. Defendant fired her.

Court: I will admit this testimony subject to tying it into the case later. If that is not done, Opponent, I will entertain a motion to strike at that time.

NOTE: It may also be possible to bring the declarant to court to testify to the relevance issue, thus avoiding the hearsay problem entirely. For example, in the sample questions above, Mr. Business Associate could be called as a witness to testify that he does not like the plaintiff. The relevance issue remains the same whether the declarant testifies or not. If Mr. Business Associate denies that he dislikes the plaintiff, the proponent can attempt to impeach him with the out-of-court statement based on Evid C §1202 (prior inconsistent statement). The opponent can counter that the statement does not necessarily demonstrate that Mr. Business

Associate dislikes the plaintiff but is merely a statement of fact, and offer evidence to prove that contention.

IV. COMMENT

§35.6 A. Show That Statement Is Nonhearsay and Relevant

In addition to establishing that the out-of-court statement is not within the definition of hearsay, the proponent must also be able to show to the court's satisfaction that the nonhearsay reason for using the statement is relevant to the case. See *People v Scalzi* (1981) 126 CA3d 901, 179 CR 61.

§35.7 B. Opponent May Request Limiting Instruction

If the statement is admitted, the opponent may request a limiting jury instruction. See CACI 206 (general limiting instruction), 213 (adoptive admission), 214 (admissions by silence); CALCRIM 303 (general limiting instruction).

V. CHECKLISTS

§35.8 A. Checklist: Witnesses to Subpoena

- Witness who heard out-of-court statement.
- If written, witness to authenticate document containing statement.
- Witness who can testify to relevance of statement, if different from witness who heard out-of-court statement.

PRACTICE TIP: Have necessary witnesses readily available to overcome objections such as ones based on Evid C §352.

Source: Evidence/Effective Introduction of Evidence in California/35 Nonhearsay/§35.9 B. Checklist: Alternative Methods of Admissibility

§35.9 B. Checklist: Alternative Methods of Admissibility

- A hearsay exception may be available instead. The more common ones that may qualify include:
- Accidents: absence of similar ones. Evid C §§210, 350, 352, 402. See chap 8.
- Accidents: prior or subsequent ones. Evid C §§210, 351. See chap 9.
- Admission. Evid C §§1220-1228. See chap 10.
- Business record. Evid C §§1271-1272. See chap 13.
- Character evidence. Evid C §§1100-1106. See chaps 14-16.
- Declaration against interest. Evid C §1230. See chap 20.
- Dying declaration. Evid C §1242. See chap 22.
- Former testimony. Evid C §§1290-1292. See chap 28.
- Habit or custom evidence. Evid C §1105. See chap 29.
- Official record or writing. Evid C §§1280-1284, 1530-1532. See chap 36.
- Past recollection recorded. Evid C §1237. See chap 38.
- Prior consistent statement. Evid C §1236. See chap 40.
- Prior inconsistent statement. Evid C §1235. See chap 41.
- Prior identification. Evid C §1238. See chap 42.
- Refreshing recollection. Evid C §771. See chap 44.
- Spontaneous and contemporaneous statement. Evid C §§1240-1241. See chap 49.
- Statement of state of mind or physical sensation. Evid C §1250. See chap 50.
- Statement of unavailable witness in criminal proceeding. Evid C §1350.
- Subsequent repairs or other remedial conduct. Evid C §1151. See chap 52.
- Remainder offered to explain part admitted. Evid C §356. See chap 46.
- Stipulation. CCP §283(1); Evid C §§210, 352. See chap 51.

VI. SOURCES

§35.10 A. Evidence Code

Evid C §1200. (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

Evidence Code §§210, 350 are reproduced in chap 45.

§35.11 B. Other

For further discussion of nonhearsay, see Jefferson's California Evidence Benchbook chap 1 (4th ed CJA-CEB 2009); 1 Witkin, California Evidence, *Hearsay* §§5, 31-50 (4th ed 2000); Cotchett, California Courtroom Evidence §§21.02, 21.09, 21.28, 21.31, 21.38 (2008).

Exceptions to the hearsay rule are discussed in the following chapters in this book: chaps 10, 12-13, 17-18, 20-22, 25-28, 30, 36, 38, 40-42, 49-50, 53.

Source: Evidence/Effective Introduction of Evidence in California/36 Official Records and Writings/Chapter Outline

36

Official Records and Writings

Donald D. Howard

§36.1 I. SCOPE OF CHAPTER

Official records discussed in this chapter include records made by public employees (Evid C §1280), records of vital statistics (Evid C §1281), statements of opinion in public records (see §36.6), and evidence of the absence of a public record (Evid C §1284). This evidence is excepted from the hearsay rule (Evid C §1200) when the statutory requirements are met. Admission of such records often prevents unnecessary testimony of public employees.

II. REQUIREMENTS

A. Record Made by Public Employee

§36.2 1. To Admit

For the proponent to admit a record made by a public employee, the record must be:

- A writing (Evid C §1280);
- Made as a record of an act, condition, or event (Evid C §1280);
- Offered to prove the occurrence of such act, condition, or event (Evid C §1280);
- Made by a public employee within the scope of duty (Evid C §1280(a));
- Made at or near the time of the act, condition, or event (Evid C §1280(b); see *People v Martinez* (2000) 22 C4th 106, 91 CR2d 687; *Miyamoto v DMV* (2009) 176 CA4th 1210, 98 CR3d 459);
- Derived from a source of information for the entries in the writing, and a method and time of preparation of the writing, that indicate the writer's trustworthiness (Evid C §1280(c); see *Hildebrand v DMV* (2007) 152 CA4th 1562, 1569, 62 CR3d 234 (otherwise hearsay statements of fire captain repeated in official police report admissible in administrative driving-under-the-influence hearing)); and
- Properly authenticated, usually by providing a certified copy (Evid C §§1401, 1452-1453; see chap 11).

§36.3 2. To Object

The opponent may object to the admissibility of a record made by a public employee on any of the following grounds:

- Irrelevant (Evid C §350);
- Hearsay (Evid C §1200; see *Melendez-Diaz v Massachusetts* (2009) ___ US ___, 174 L Ed 2d 314, 129 S Ct 2527 (forensic analysts' reports));
- Improper foundation (Evid C §1280), *e.g.:*
- Writing not within scope of employee's duty,
- No personal knowledge (*Harris v Alcoholic Beverage Control Appeals Bd.* (1963) 212 CA2d 106, 28 CR 74),
- Writing fails to identify source of information;
- Not recorded at or near the time of act, condition, or event;
- Not (properly) authenticated (Evid C §1401);
- Inadmissible secondary evidence (Evid C §1521);
- Official information privilege (Evid C §1040);
- Violates Public Records Act (Govt C §§6250-6265) (see, *e.g.*, *Dixon v Superior Court* (2009) 170 CA4th 1271, 1275, 88 CR3d 847 (coroner and autopsy reports in suspected homicide case constituted "investigatory files" for law enforcement purposes and were exempt from disclosure under Govt C §6254(f)); and
- Violates Information Practices Act of 1977 (CC §§1798-1798.78); usually waived if opponent has a copy.

NOTE: Given the presumption under Evid C §604 that an official performs his or her duties regularly, the burden shifts to an objecting party to show that an official record under Evid C §1280 is not trustworthy or reliable. *People v Morris* (2008) 166 CA4th 363, 373, 83 CR3d 253 (certified California Law Enforcement Telecommunications System (CLETS) "rap sheet" admissible as official record for sentencing purposes and is not testimonial hearsay subject to confrontation clause rights).

B. Record of Vital Statistics (Birth, Death, Marriage)

§36.4 1. To Admit

For the proponent to admit a record of vital statistics, the record must be:

- A writing (Evid C §1281);
- A record of a birth, fetal death, death, or marriage (Evid C §1281);
- Made by a person required by law to file the writing in a designated public office (Evid C §1281);
- Made and filed as required by law (Evid C §1281); and
- Properly authenticated, usually by providing a certified copy (Health & S C §103550; Evid C §§1401, 1452-1453); see chap 11).

§36.5 2. To Object

The opponent may object to the admissibility of a record of vital statistics on any of the following grounds:

- Hearsay (Evid C §1200);
- Improper foundation (Evid C §1281):
- Maker not required by law to file writing,
- Writing not made as required,
- Writing not filed as required;
- Not (properly) authenticated (Evid C §1401); and
- Inadmissible secondary evidence (Evid C §1521).

C. Statement of Opinion in Official Record

§36.6 1. To Admit

For the proponent to admit a statement of opinion in an official record, the statement of opinion may be admissible if:

- The information was required to be entered on the requisite form (see *Romero v Volunteer State Life Ins. Co.* (1970) 10 CA3d 571, 88 CR 820); or
- The matter comes within Health & S C §10577 and is based on personal observation (see *McClaflin v Bayshore Equip. Rental Co.* (1969) 274 CA2d 446, 455, 79 CR 337).

NOTE: There is a division of opinion over whether opinions in official records are admissible. See §36.19.

Source: Evidence/Effective Introduction of Evidence in California/36 Official Records and Writings/§36.7 2. To Object

§36.7 2. To Object

The opponent may object to the admissibility of a statement of opinion in an official record on any of the following grounds:

- Hearsay (Evid C §1200);
- Improper opinion (Evid C §800);
- Information not required to be written on form (see *Romero v Volunteer State Life Ins. Co.* (1970) 10 CA3d 571, 88 CR 820); and
- Not based on personal observation (see *McClaflin v Bayshore Equip. Rental Co.* (1969) 274 CA2d 446, 455, 79 CR 337).

D. Absence of Public Record

§36.8 1. To Admit

For the proponent to admit a writing into evidence that shows the absence of a public record, that writing must be:

- Made by public employee who is official custodian of records in a public office reciting diligent search and failure to find record (Evid C §1284); and
- Properly authenticated, usually by providing a certified copy (Evid C §§1401, 1452-1453; see chap 11).

§36.9 2. To Object

The opponent may object to the admissibility of a writing purportedly showing the absence of a public record on any of the following grounds:

- Hearsay (Evid C §1200);
- Improper foundation (Evid C §1284):
- Writing not made by public employee,
- Writing not made by official custodian, and
- No diligent search;
- Not (properly) authenticated (Evid C §1401); and
- Inadmissible secondary evidence (Evid C §1521).

III. SAMPLE QUESTIONS

A. Record Made by Public Employee

§36.10 1. Steps to Take

In a case in which property owners seek damages from a heavily insured hiker alleged to have started a forest fire, the proponent wants to introduce a report by the Forest Service, which conducted the principal investigation, and to question an expert on the cause and origin of fires. In the sample questions in §36.11, the proponent takes the following steps:

- Has writing marked for identification;
- Asks expert to:
- Identify writing,
- Show that public employee is required to make writing,
- Testify that writing recorded acts, conditions, or event,
- State time that report was made,
- Describe procedures for preparing Forest Service records, and
- Establish writer's trustworthiness (writer not required to testify if sufficient independent evidence of writing's trustworthiness; see Comment to Evid C §1280);
- Offers certified copy of writing (see Evid C §§1451-1453);
- Moves writing into evidence; and
- Has desired portions of writing read aloud to the jury.

§36.11 2. Questions to Ask

[*Opponent failed to request preliminary fact hearing; questions on expert's qualifications omitted*]

Q: Are you familiar with records generated by the U.S. Forest Service relating to forest fires?

Q: In what circumstances are Forest Service employees required to make such reports?

Q: Did those circumstances exist in this case?

Q: Did Forest Service employees make a report recording acts, conditions, or events relating to this fire?

Q: Who made the report?

Q: What was his title?

Q: When was the report made?

Q: Where was the report filed?

PRACTICE TIP: Mark the certified copy of the report for identification if it has not been already marked.

Q: By whom were the acts, events, or conditions observed that are reported in this report?

Q: Are any of the reported observers public employees?

A: Yes. Q. Were the public employees acting within the scope of their duties?

Q: Have you relied on the information in this report in formulating your opinion in this case?

Proponent: Your Honor, I ask that Plaintiff's Exhibit No. 18 for identification be admitted into evidence.

B. Statement of Opinion in Official Record

§36.12 1. Information to Elicit

In the same Forest Service example as in §§36.10-36.11, the proponent in §36.13 wants a public employee to:

- State that the author of a public record is qualified to testify to an opinion on the topic;
- Confirm that the author's opinion is based on personal knowledge; and
- State the author's opinion.

§36.13 2. Questions to Ask

Q: Are you familiar with the job requirements and qualifications of a Forest Service Ranger, grade 4?

Q: Did the author of the report marked Plaintiff's Exhibit No. 18 have such rank?

Q: Did the author of Plaintiff's Exhibit No. 18 express an opinion in his report as to the cause and origin of the fire?

Q: Do departmental regulations require the author to render such an opinion, if possible?

Q: Does the report reflect the basis of the author's opinion?

Q: Is the opinion based on anything other than the author's personal observations?

Q: What was the author's opinion on the origin of the fire?

C. Record of Vital Statistics

§36.14 1. Steps to Take

The proponent in §36.15 wants to take the following steps in order to introduce a death certificate into evidence:

- Establish that death certificate is the type of record that fits within Evid C §1281; and
- Introduce a certified copy that makes it unnecessary to present other witnesses.

§36.15 2. Questions to Ask

Proponent: Your Honor, I ask the court to take judicial notice of the death certificate marked Defendant's Exhibit A for identification. It is a certified copy as required by Health and Safety Code §103550. The death certificate qualifies as an exception to the hearsay rule under Evidence Code §1281.

Court: Are there any objections? Since there are none, I will take judicial notice of Defendant's Exhibit A.

Proponent: Your Honor, I move Defendant's Exhibit A into evidence as defendant's next in order, and ask that the court have the clerk read it aloud to the jury.

Clerk: Defendant's Exhibit A states as follows:

[*Clerk reads death certificate aloud*]

D. Absence of Public Record

§36.16 1. Step to Take

In §36.17, the proponent wants to introduce into evidence a document that was signed by the custodian of records proving the absence of a public record.

§36.17 2. Questions to Ask

Proponent: Your Honor, I would like to have a certified copy of X document, marked as Defendant's Exhibit B for identification, moved into evidence. This document was prepared by Mr. Recordkeeper, the custodian of records of Public Office. In Defendant's Exhibit B, Mr. Recordkeeper recites his diligent search for Y document and his failure to find it. Defendant's Exhibit B is admissible as an exception to the hearsay rule under Evidence Code §1284. Mr. Recordkeeper's signature is presumed to be genuine and authorized under Evidence Code §1453(b) because he is an employee of a public entity in the United States.

Opponent: Your Honor, I object to introduction of this document into evidence. We have no way of knowing that this is in fact Mr. Recordkeeper's signature. The document is not notarized, and his statement that he is the custodian of records is self-serving. Proponent should be required to produce Mr. Recordkeeper for cross-examination. Also, this is not an original document nor admissible secondary evidence to prove the content of a writing.

Proponent: Your Honor, there is no requirement that a writing attesting to an absent public record introduced under Evidence Code §1284 be notarized. Nor has Opponent offered any evidence that a genuine dispute exists concerning this writing under the secondary evidence rule of Evidence Code §1521. It is obvious that Opponent has no valid objection to this evidence and just wants to keep it from the jury.

Court: Counsel, if you want to cross-examine Mr. Recordkeeper, it is up to you to subpoena him. I will put this motion over until tomorrow for a ruling. If you have not introduced any evidence to contradict the information in Defendant's Exhibit B, I will grant Proponent's motion.

PRACTICE TIP: Judges presume that official documents are authentic unless the opponent raises a serious question about their authenticity. See Comment to Evid C §1452. Even if your opponent does raise a substantial question about authenticity, some judges shift the burden to the opponent to prove lack of authenticity. If there is a real dispute, it is determined under Evid C §604. See Comment to Evid C §1452. Other options open to the judge are to rule immediately in the proponent's favor or to allow the record to be conditionally admitted, subject to striking it later. In such situations, when both Evid C §403 issues (the authenticity of the writing) and Evid C §405 issues (the hearsay exception and admissible secondary evidence) are involved, judges often do not distinguish clearly which party has the burden and what that burden is.

IV. COMMENT

§36.18 A. Record Made by Public Employee

Official records that qualify under Evid C §1280 are excepted from the hearsay rule. Evid C §1280. The foundational requirements for an official record made by an employee are virtually the same as for any business record with one significant difference: The court may admit an official record without testimony as to its identity and mode of preparation if the court takes judicial notice of the record or sufficient independent evidence exists to assure that it is trustworthy. See Comment to Evid C §1280. See also *Jazayeri v Mao* (2009) 174 CA4th 301, 318, 94 CR3d 198; *Bhatt v State Dep't of Health Servs.* (2005) 133 CA4th 923, 35 CR3d 335.

PRACTICE TIP: Care must be taken to ensure that the recorded observations are those of the author or other public employees who had the duty to observe and report and not of third parties who had no official obligation to report accurately. Public records based on third party statements are inadmissible. *People v Ramos* (1997) 15 C4th 1133, 64 CR2d 892. See, *e.g.*, *Shea v DMV* (1998) 62 CA4th 1057, 72 CR2d 896 (status of individual executing official record did not meet requirements to make record "official," barring admissibility of blood sample analysis as official record). Similarly, if the proponent of evidence does not establish that an individual who prepared an official document had an official duty to do so, the document is hearsay and not admissible under the official records exception. *Furman v DMV* (2002) 100 CA4th 416, 422, 122 CR2d 520 (forensic alcohol analysis prepared by DMV criminalist).

The court may take judicial notice of the identity of the record and its method of preparation by judicially noticing a statute or regulation that requires the report to be made. See Comment to Evid C §1280. Alternatively, the court may admit the record after proof by sufficient independent evidence that the record complies with Evid C §1280.

Effect of official judgment form or abstract of judgment. An official judgment form or abstract of judgment, prepared contemporaneously with the judgment by a public official who has the duty to do so, is evidence of a conviction for sentence enhancement, absent a defendant's rebuttal. *People v Miles* (2008) 43 C4th 1074, 1082, 77 CR3d 270 (involving federal judgment). But see *People v Delgado* (2008) 43 C4th 1059, 1070, 77 CR3d 259 (unrebutted abstract of judgment is prima facie evidence that conviction occurred for sentence enhancement, but will not prevail over conflicting oral judgment).

Although experts may base their opinions on matters on which experts in their field normally rely (see Evid C §801(b)), such as the Forest Service report in §36.11, an expert's testimony does not make the report itself admissible. The report must satisfy relevant evidentiary requirements to be admissible. On admissibility of opinions in official records, see §36.19.

§36.19 B. Statement of Opinion in Official Record

Some cases have allowed opinions in official records to come into evidence if the requisite form required the information to be entered. See *Romero v Volunteer State Life Ins. Co.* (1970) 10 CA3d 571, 88 CR 820. See also *Bryson v Manhart* (1936) 11 CA2d 691, 54 P2d 778. Other courts, particularly in criminal cases, have held such opinion statements to be inadmissible. See *People v Holder* (1964) 230 CA2d 50, 55, 40 CR 655 (death certificate's conclusionary statements drawn from autopsy or investigation are impermissible hearsay that would deprive defendant of opportunity to confront and cross-examine witnesses against him). For a civil case, see *McClaflin v Bayshore Equip. Rental Co.* (1969) 274 CA2d 446, 79 CR 337 (entry in death certificate that decedent fell when stepladder broke held inadmissible conclusion).

PRACTICE TIP: There is often a fine line between opinions and statements of fact. See *People v Holder* (1964) 230 CA2d 50, 54, 40 CR 655.

§36.20 C. Record of Vital Statistics

The fact of a birth, death, or marriage may be crucial to a case, yet many persons who file such information with public agencies are not public employees; they are often doctors and clerics. The admissibility of such a record, however, does not depend its on having been prepared by a public official. The record's admissibility is established by the fact that a filing was made with the appropriate official and that the proper information was provided at the time it was filed. *Romero v Volunteer State Life Ins. Co.* (1970) 10 CA3d 571, 88 CR 820.

A copy of the record may be authenticated under Health & S C §103550 by presenting a copy properly certified by the state or local registrar or county recorder, if the event recorded was registered within one year of the date of the event. Otherwise, the record must be authenticated in the same manner as any writing. See discussion in chap 11.

§36.21 D. Absence of Official Record

Sometimes the absence of an official record may be a significant issue, particularly if the event claimed to have occurred should have been recorded in "the official record." The absence of the recorded entry is established with a written statement by the official custodian of the public records in question, which recites that a diligent search failed to reveal the record. Such a written "statement of nonexistence" is admissible. Evid C §1284. Authenticity can be supplied in the same manner as for other public records. See §36.23.

For example, a certificate of nonexistence of record, submitted by the government to prove that the defendant had not received consent from the Attorney General to reenter the United States (see 8 USC §1326(a)(2)(A)), was properly admitted as nontestimonial hearsay under *Crawford v Washington* (2004) 541 US 36, 52, 158 L Ed 2d 177, 193, 124 S Ct 1354. *U.S. v Cervantes-Flores* (9th Cir 2005) 421 F3d 825, 830. For discussion of *Crawford,* see §20.20B.

§36.21A E. Computer Records

If the official record (see Evid C §1280) is a computer-generated document, additional trustworthiness issues may arise. The business records exception (see Evid C §1271) includes an identical trustworthiness requirement. For discussion, see §13.29.

§36.22 F. Authentication

Authenticity of an official seal may be established under Evid C §1452 (official seals presumed genuine). Authenticity of the signature of a United States public employee, a public employee of a public entity in the United States, or a notary public may be established under Evid C §1453 (signatures of certain public employees and of notary publics presumed genuine and authorized). See Evid C §1454 (signatures of certain foreign employees presumed genuine). Otherwise, authenticity is established as with any writing. Evid C §1401. See chap 11.

PRACTICE TIP: Authenticating certified copies of public writings is seldom a problem, because a certified copy usually needs no other authentication. Evid C §1451.

§36.23 G. Admissible Secondary Evidence

Admissible original or secondary evidence must be used to prove the content of a writing. See Evid C §§1520-1567; Pen C §872.5. In particular, see Evid C §§1530-1531 (copy of writing in official custody), 1532 (official record of recorded writing). See chaps 47-48 for discussion of secondary evidence rule.

V. CHECKLISTS

§36.24 A. Checklist: Admissibility of Public Records

Record Made by Public Employee

- Witness to meet requirements of Evid C §1280.
- Witness to authenticate writing if authentication not automatic under Evid C §§1452-1453 (seal, public employee signature).
- Witness to establish admissibility compliance with secondary evidence rule under Evid C §1523(c).

Record of Vital Statistic

- No witness usually needed because certified copy usually sufficient.

Statement of Opinion in Official Record

- Proof that public employee made statement from his or her personal knowledge.
- Proof that public employee would be qualified to testify to the opinion if present in court.

Absence of Public Record

- No witness needed for hearsay exception when custodian of records provides writing.
- No witness usually needed to authenticate certified copy of writing with official seal.

§36.25 B. Checklist: Alternative Methods of Admissibility

These alternatives may apply to introduction of an entire document, or to just a portion of it. Some of the statutory provisions allow the document itself to be introduced into evidence while others do not. See cross-references for further discussion.

- Admission. Evid C §§1220-1227; see chap 10.
- Business record. Evid C §1271; see Comment to Evid C §1280; chap 13.
- Declaration against interest. Evid C §1230; see chap 20.
- Dispositive instrument or ancient writing. Evid C §§1330-1331; see chap 21.
- Judicial notice. Evid C §§450-460; see Comment to Evid C §1280; chap 31.
- Lost documents relating to real property. Evid C §1601; see chap 21.
- Marriage, baptismal, and similar documents. Evid C §1316; see chap 25.
- Past recollection recorded. Evid C §1237; see chap 38.
- Prior identification. Evid C §1238; see chap 42.
- Prior inconsistent or consistent statement. Evid C §§1235-1236; see chaps 40-41.
- Refreshing recollection. Evid C §771; see chap 44.
- Remainder of writing offered to explain part admitted. Evid C §356; see chap 46.
- Statement of unavailable witness in criminal proceeding. Evid C §1350.
- Treatises, books, maps, and charts to prove facts of general notoriety and interest. Evid C §1341; see chap 12.

VI. SOURCES

§36.26 A. Evidence Code

Evid C §1280. 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; and

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Evid C §1281. Evidence of a writing made as a record of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law.

Evid C §1284. Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office.

Evidence Code §§1600-1605 on official records and documents that affect property are reproduced in chap 21 (dispositive instruments and ancient writings).

§36.27 B. Health and Safety Code

Health & S C §103550. Any birth, fetal death, death, or marriage record which was registered within a period of one year from the date of the event under the provisions of this part, or any copy of such record of part thereof, properly certified by the State Registrar, local registrar, or county recorder, is prima facie evidence in all courts and places of the facts stated therein.

Health & S C §102875. The certificate of death shall be divided into two sections.

(a) The first section shall contain those items necessary to establish the fact of the death, including all of following and such other items as the State Registrar may designate:

(1) Personal data concerning decedent including full name, sex, color or race, marital status, name of spouse, date of birth and age at death, birthplace, usual residence, and occupation and industry or business.

(2) Date of death, including month, day, and year.

(3) Place of death.

(4) Full name of father and birthplace of father, and full maiden name of mother and birthplace of mother.

(5) Informant.

(6) Disposition of body information including signature and license number of embalmer if body embalmed or name of embalmer if affixed by attorney-in-fact; name of funeral director, or person acting as such; and date and place of interment or removal.

(7) Certification and signature of attending physician or certification and signature of coroner when required to act by law.

(b) Date accepted for registration and signature of local registrar. The second section shall contain those items relating to medical and health data, including the following and such other items as the State Registrar may designate:

(1) Disease or conditions leading directly to death and antecedent causes.

(2) Operations and major findings thereof.

(3) Accident and injury information.

(4) Information indicating whether the decedent was pregnant at the time of death, or within the year prior to the death, if known, as determined by observation, autopsy, or review of the medical record. this paragraph shall not be interpreted to require the performance of a pregnancy test on a decedent, or to require a review of medical records in order to determine pregnancy.

§36.28 C. Other

For further discussion, see 1 Witkin, California Evidence, *Hearsay* §§244-254 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 5 (4th ed CJA-CEB 2009); Cotchett, California Courtroom Evidence §§2.20, 12.03-12.04, 15.38, 21.40-21.43, 22.02, 22.04, 22.19-22.21, 23.00, 23.05, 23.07, 24.02, 24.04 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *Logical Relevance; Personal Knowledge and Authentication* §4.F, *Official Records* §9.E (3d ed 2000).

37

Parol Evidence

Holly J. Fujie

§37.1 I. SCOPE OF CHAPTER

The parol evidence rule, codified in CC §1625 and CCP §1856, is a rule of substantive law, not a rule of evidence. *Casa Herrera, Inc. v Beydoun* (2004) 32 C4th 336, 343, 9 CR3d 97; Restatement (Second) of Contracts §213, comment a (1981). This chapter is included, however, because the parol evidence rule touches on evidence law and affects what is admissible at trial.

The parol evidence rule applies to deeds, wills, and contracts. CCP §1856(h). The rule makes inadmissible extrinsic evidence of prior or contemporaneous agreements offered to alter or modify a writing that was intended as a final expression of the parties' agreement. CCP §1856. See Com C §2202.

Listed in CCP §1856 are several exceptions and qualifications to the parol evidence rule. See §37.2. See also CC §1698. This complex area of substantive law cannot be discussed in detail here. See §37.17 for references to complete discussions of this rule in other texts.

Source: Evidence/Effective Introduction of Evidence in California/37 Parol Evidence/ II. REQUIREMENTS/§37.2 A. To Admit

II. REQUIREMENTS

§37.2 A. To Admit

To admit parol evidence concerning a written deed, will, or contract, the proponent must show that:

- The writing was not intended to be an integration, *i.e.,* a complete and exclusive statement of the terms of their agreement (CCP §1856(a)), and any one of the following:
- The terms set forth in the parol evidence are consistent with the terms in the writing (CCP §1856(b));
- The parol evidence explains or supplements the writing through course of dealing, usage of trade, or performance (CCP §1856(c); *Employers Reinsurance Co. v Superior Court* (2008) 161 CA4th 906, 921, 74 CR3d 733 (error to exclude course-of-performance extrinsic evidence to interpret insurance contract));
- A mistake or imperfection in the writing is an issue in the pleadings, and the parol evidence is relevant to that issue (CCP §1856(e));
- The validity of the agreement is the fact in dispute, and the parol evidence is relevant to that issue (CCP §1856(f));
- The parol evidence relates to the circumstances under which the agreement was made, explains an extrinsic ambiguity, interprets the terms of the agreement, or establishes illegality or fraud (CCP §1856(g); *McClain v Octagon Plaza, LLC* (2008) 159 CA4th 784, 794, 71 CR3d 885 (misrepresentations about size of leased space properly admitted through parol evidence)); or

NOTE: If written extrinsic evidence is offered to prove that the original writing was not intended to be the complete and final agreement, it must be authenticated (Evid C §1401). However, such extrinsic evidence does not itself violate the parol evidence rule. See *Versaci v Superior Court* (2005) 127 CA4th 805, 814, 26 CR3d 92.

- The writing is patently ambiguous or susceptible to alternative meanings, and extrinsic evidence is offered to establish a latent ambiguity or to explain a patent or latent ambiguity, or both (CCP §1836(g); *Wolf v Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1126, 76 CR3d 585).

Construction of CCP §1856. "Ambiguous terms," as used in CCP §1856(g), means terms that are reasonably susceptible to alternative meanings. *Bernard v State Farm Mut. Auto. Ins. Co.* (2007) 158 CA4th 304, 308, 69 CR3d 700 (agency agreement); *Bill Signs Trucking, LLC v Signs Family Ltd. Partnership* (2007) 157 CA4th 1515, 1524, 69 CR3d 589 (lease agreement); *Fremont Indem. Co. v Fremont Gen. Corp.* (2007) 148 CA4th 97, 114, 55 CR3d 621 (letter agreement). Some courts have held that if the language is clear on its face, then no extrinsic evidence about the parties' intentions should be considered. *EFund Capital Partners v Pless* (2007) 150 CA4th 1311, 1322, 59 CR3d 340. See also CCP §1638. In contrast, other courts have held that a court should "provisionally" evaluate extrinsic evidence of intent in determining if a "latent" ambiguity exists. If a latent ambiguity is found, the court will admit the extrinsic evidence to aid in the interpretation of the document. *Wolf,* 162 CA4th at 1126; *Bernard,* 158 CA4th at 308; *Fremont Indem. Co.,* 148 CA4th at 114. See CCP §1856(g).

NOTE: Law Revision Commission Comments to CCP §1856, quoting *PG&E v G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 37, 69 CR 561, state that extrinsic evidence should be admitted if it is "relevant to prove a meaning to which the language of the instrument is reasonably susceptible"—even if the language appears plain and clear on its face. See also *DVD Copy Control Ass'n v Kaleidescape, Inc.* (2009) 176 CA4th 697, 712, 97 CR3d 856.

Deed descriptions. A party may "always" use extrinsic evidence to interpret the descriptions or "calls" in a deed to make certain that the proper effect is given to the intentions of the parties. *People ex rel Brown v Tehama County Bd. of Supervisors* (2007) 149 CA4th 422, 569, 56 CR3d 558.

Interpretation of wills. Probate Code §6111.5 specifically allows extrinsic evidence to determine if a document is intended to be a will or, if a will is unclear, to discern the meaning intended. See *Estate of Williams* (2007) 155 CA4th 197, 206, 66 CR3d 34.

Source: Evidence/Effective Introduction of Evidence in California/37 Parol Evidence/§37.3 B. To Object

§37.3 B. To Object

Grounds for objecting to the admissibility of parol evidence include:

- Hearsay (Evid C §1200);
- The terms set forth in the parol evidence are inconsistent with the terms in the writing (CCP §1856(b));
- The parol evidence neither explains nor supplements the writing through course of dealing, usage of trade, or course of performance (CCP §1856(c));
- No mistake or imperfection in the writing is at issue in the pleadings (CCP §1856(e));
- The parol evidence is irrelevant to the issue of any purported mistake or imperfection in the writing (CCP §1856(e));
- The validity of the agreement is not in dispute (CCP §1856(f));
- The parol evidence is not relevant to the issue of validity of the agreement (CCP §1856(f));
- The parol evidence does not relate to the circumstances in which the agreement was made, to explain an extrinsic ambiguity, to interpret the terms of the agreement, or to establish illegality or fraud (CCP §1856(g); *Qualcomm, Inc. v Certain Underwriters at Lloyd's, London* (2008) 161 CA4th 184, 200, 73 CR3d 770 (courts do not strain to find ambiguity; if term or clause has been judicially construed, that construction should rule, unless context differs)); and
- If a writing is offered, it:
- Was not (properly) authenticated (Evid C §1401), or
- Is inadmissible secondary evidence (Evid C §1521).

III. SAMPLE QUESTIONS

A. Written Modification of Contract Made in Concurrent Agreement

§37.4 1. Information to Elicit

To introduce written changes to a written contract made in a concurrent agreement, the proponent in §37.5 wants to cover the following matters:

- Have the witness testify to the existence of written extrinsic evidence concerning the contract;
- Ask the witness to identify the extrinsic written evidence; and
- Move the concurrent written agreement into evidence.

§37.5 2. Questions to Ask

Q: Directing your attention to Exhibit X, what is this document?

A: It is an agreement that I entered into with Mr. Y on the same day that we entered into the contract at issue in this lawsuit.

Q: I direct your attention to Exhibit A. Is this the contract to which you refer as the contract in issue in this lawsuit?

[*Proponent shows Exhibit A to witness*]

A: Yes.

Q: What does Exhibit X say?

PRACTICE TIP: Extrinsic evidence may be used to prove that an original contract was not intended to be the complete and final agreement. *Spurgeon v Buchter* (1961) 192 CA2d 198, 13 CR 354.

Opponent: Objection, counsel appears to be attempting to use this document to modify the terms of the written agreement in issue in this case, which is a violation of the parol evidence rule.

Proponent: Your Honor, I am prepared to show that the subject contract, Exhibit A for identification, was not intended by the parties to constitute an integration or a final, complete expression of their agreement. Exhibit X is a document that would not in ordinary circumstances be included in the terms of the original contract and would be made as a separate agreement by parties in this situation. By reviewing the written instrument itself and the facts and circumstances surrounding its preparation and execution of the written instrument as previously testified to, we believe that this court will reach the conclusion that there is an absence of integration so as to permit proof of this collateral agreement.

B. Prior Written Modification of Contract

§37.6 1. Information to Elicit

To introduce evidence of a prior modification of a written contract, the proponent in §37.7 wants to cover the following matters:

- Have the witness testify to the existence of evidence of a prior modification of the written contract;
- Ask the witness to identify the written modification; and
- Move the writing into evidence.

§37.7 2. Questions to Ask

Q: Before you signed the contract at issue in this case with Mr. Defendant, did you have any additional agreement with him?

A: Yes. We entered into another agreement, which we wrote and signed, that changed our printed contract from 2 years to 1 year.

Q: I direct your attention to Plaintiff's Exhibit No. 2. Is this the separate agreement to which you just testified?

A: Yes.

PRACTICE TIP: If no objection is made, the proponent of the evidence may elicit testimony from the appropriate witness concerning the written or oral extrinsic evidence to allow the trier of fact to determine the effect of such evidence on the meaning of the contract.

C. Oral Modification of Contract

§37.8 1. Information to Elicit

To introduce evidence of an oral modification of a written contract, the proponent in §37.9 wants to cover the following matters:

- Have the witness testify to the existence of evidence of an oral modification of the contract; and
- Ask the witness to describe the oral modification.

§37.9 2. Questions to Ask

Q: Before you executed the written contract, Plaintiff's Exhibit No. 1, with Ms. Plaintiff, had you reached any other agreement with her that is not reflected in that document?

A: Yes. We agreed orally that if I would give her one of the two briefcases I had purchased, the term of the contract would be reduced from 4 years to 3 years.

Q: Did you give her one of the two briefcases?

A: Yes.

PRACTICE TIP: If a contract contains an integration clause (see CCP §1856(a)), objection to the use of parol evidence to alter the terms of the contract is proper. See *250 LLC v PhotoPoint Corp.* (2005) 131 CA4th 703, 725, 32 CR3d 296; *Salyer Grain & Milling Co. v Henson* (1970) 13 CA3d 493, 501, 91 CR 847. Without such a clause, the court will decide admissibility on the basis of the likelihood that the additional terms would have been in a separate agreement. *Masterson v Sine* (1968) 68 C2d 222, 226, 65 CR 545. However, a court may find the integration clause itself to be ambiguous and thus may evaluate other ambiguities about the intention of the parties through extrinsic evidence. See *Huong Que, Inc. v Luu* (2007) 150 CA4th 400, 412, 58 CR3d 527.

IV. COMMENT

§37.10 A. Parol Evidence and Statute of Frauds

The parol evidence rule is sometimes confused with the statute of frauds. See 2 Witkin, California Evidence, *Documentary Evidence* §63 (4th ed 2000). The statute of frauds requires a writing as evidence of certain kinds of contract. CC §1624. The parol evidence rule and the statute of frauds both render inadmissible certain oral testimony regarding contracts. Satisfaction of the parol evidence rule, however, does not necessarily satisfy the statute of frauds, and vice versa.

For example, unless a contract otherwise expressly provides, parol evidence of an oral agreement may be admissible as evidence of a modification of some written agreements if it is supported by new consideration. CC §1698(c). If the written agreement is among those covered by the statute of frauds in CC §1624, however, the same oral agreement would not be admissible, because it would be in violation of the statute of frauds. Therefore, testimony that would otherwise be admissible under the parol evidence rule to modify the terms of a written agreement may not be admissible if the contract is one that is governed by the statute of frauds, *e.g.,* a 5-year contract (which by its terms is not to be performed within a year after its making; see CC §1624(a)(1)). Conversely, a writing may satisfy the statute of frauds, but it may preclude the admission of parol evidence, because the contract that it purports to modify is deemed a final and complete integration of the parties' agreement.

§37.11 B. Statutes That Supersede CCP §1856

The applicability of the parol evidence rule to written instruments is subject to express statutory provisions relating to the admissibility of extrinsic evidence. See Comment to CCP §1856. For example, Prob C §6130 provides that a writing in existence at the time a will is executed may be incorporated by reference into that will only if the language of the will manifests this intent and describes the writing sufficiently to permit its identification. Thus, mere compliance with the parol evidence rule would not satisfy Prob C §6130 if the extrinsic evidence were not referred to in the will itself. See also Com C §§2201-2202, containing specific requirements for the admission of parol or extrinsic evidence relating to contracts for the sale of goods.

The parol evidence rule does not affect any statute requiring that the terms of a contract be in writing. See, *e.g.,* CC §§1803.1-1803.8 (setting specific requirements for writings in retail sales contracts), 1812.52 (dance lesson contracts).

§37.12 C. Procedure for Deciding Parol Evidence Issue

On objection, the procedure to be followed to determine whether extrinsic evidence is admissible differs according to whether it is a jury or nonjury (court) trial. In a nonjury trial, the court may admit extrinsic evidence conditionally, subject to a motion to strike after the admissibility of the evidence has been considered. *PG&E v G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 69 CR 561.

In a jury trial, a determination of ambiguity should be made at a hearing outside the jury's presence during which the court provisionally evaluates all credible extrinsic evidence presented by the parties. If the court determines at this hearing that the extrinsic evidence is admissible to show a document's susceptibility to more than one meaning, by finding a latent ambiguity, the evidence may be introduced to the jury to help it interpret the document. *Wolf v Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1126, 76 CR3d 585; *Bill Signs Trucking, LLC v Signs Family Ltd. Partnership* (2007) 157 CA4th 1515, 1521, 69 CR3d 589. See *Brawthen v H&R Block, Inc.* (1972) 28 CA3d 131, 136, 104 CR 486.

Similarly, the court, as a matter of law, decides the issue of a document's integration. If there is a dispute on this issue, the court again will hold a hearing out of the jury's presence. In the case of a disputed agreement, for example, if the court decides the document is not integrated, it may then allow admission of extrinsic, collateral documents or oral agreements in order to aid the jury in deciding the contours of the complete agreement that the parties intended. The opponent, however, is permitted to present evidence to the jury that contradicts the proponent's extrinsic evidence on the integration of the written instrument. CCP §1856; *Brawthen*, 28 CA3d at 137.

It is reversible error for a trial court to refuse to consider extrinsic evidence on the basis of its own conclusion that contractual language is clear and unambiguous. Rather, when contractual terms are in dispute, the court must provisionally receive relevant extrinsic evidence to show whether the contract is reasonably susceptible to a particular meaning. *Circle Star Ctr. Assocs., L.P. v Liberate Technols.* (2007) 147 CA4th 1203, 1211, 55 CR3d 232. See also *Supervalu, Inc. v Wexford Underwriting Managers, Inc.* (2009) 175 CA4th 64, 72, 96 CR3d 316.

Judges must interpret a document if the dispute is "based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence." In all other instances, juries properly may be asked to interpret a document. *City of Hope Nat'l Med. Ctr. v Genentech, Inc.* (2008) 43 C4th 375, 395, 75 CR3d 333 (interpretation of royalty agreement). See *Wolf v Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1126, 76 CR3d 585 (court interprets contract if no material conflict in extrinsic evidence, even if undisputed extrinsic evidence would support conflicting inferences); *Cohen v Five Brooks Stable* (2008) 159 CA4th 1476, 1483, 72 CR3d 471 (if no conflicting parol evidence, court interprets contract provisions); *Richeson v Helal* (2007) 158 CA4th 268, 276, 70 CR3d 18 (document interpretation is question of law except when credibility of extrinsic evidence is at issue).

§37.13 D. Possible Actions by Opponent to Combat Parol Evidence

If the use of parol evidence to vary the terms of a contract is a major issue in a case and its exclusion would be dispositive to an entire cause of action, the opposing party should seriously consider a motion for summary adjudication of issues before trial (CCP §437c(f)) or a motion in limine at trial (*Helfend v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 1, 84 CR 173) to prevent the testimony from coming before the court or the jury. Among other bases for arguing that parol evidence should be excluded as immaterial is that the issue is not properly presented by the pleadings. See *FPI Dev., Inc. v Nakashima* (1991) 231 CA3d 367, 282 CR 508. The court may desire a full evidentiary hearing on the admissibility of the parol evidence, an issue that should be resolved before trial. *PG&E v G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 40, 69 CR 561. Appellate courts have held that extrinsic evidence should not be used to add to, vary, or delete terms in a written, integrated contract. With an integrated contract, extrinsic evidence should only be used to establish an ambiguity or interpret the contract, or both. *Wolf v Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1126, 76 CR3d 585; *Bernard v State Farm Mut. Auto. Ins. Co.* (2007) 158 CA4th 304, 309, 69 CR3d 700.

§37.14 V. CHECKLIST: WITNESSES TO SUBPOENA

- Person who signed or witnessed signing of writing to be used as parol evidence, or who made or heard oral agreement to be used as parol evidence.
- Person to testify to other relevant information, *e.g.,* that writing was not integrated, that the prior or contemporaneous agreement would naturally be made as a separate agreement, or to a course of dealing, usage of trade, or course of performance.
- Expert to testify to particular types of contracts as they relate to relevant legal concepts involved in parol evidence rule, *i.e.,* a course of dealing or usage of trade. CCP §1856(c); Evid C §§800-801.

VI. SOURCES

§37.15 A. Code of Civil Procedure

CCP §1856. (a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.

(b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement.

(c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance.

(d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement.

(e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue.

(f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue.

(g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an intrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.

(h) As used in this section, the term agreement includes deeds and wills, as well as contracts between parties.

§37.16 B. Civil Code

CC §1698. (a) A contract in writing may be modified by a contact in writing.

(b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.

(c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.

(d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.

§37.17 C. Other

For further discussion of parol evidence, see 2 Witkin, California Evidence, *Documentary Evidence* §§59-112 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 34 (4th ed CJA-CEB 2009). See also the Law Revision Comment to the 1978 amendment to CCP §1856.

38

Past Recollection Recorded

Nancy M. Naftel

§38.1 I. SCOPE OF CHAPTER

This chapter discusses past recollection recorded as an exception to the hearsay rule. A statement written down when the incident it concerns was fresh in the witness's memory is considered reliable enough to be an exception to the hearsay rule. See Comment to Evid C §1237. The written statement can be read to jurors, but the writing itself is inadmissible when offered by its proponent. Evid C §1237(b). The writing *is* admissible, however, when offered by the adverse party. Evid C §1237(b).

II. REQUIREMENTS

§38.2 A. To Admit

To introduce a statement that is a witness's past recollection recorded, the proponent must satisfy the following requirements:

- Statement would have been admissible if witness had been able to testify to statement from his or her independent recollection (Evid C §1237(a));
- Witness has insufficient present recollection about statement to be able to testify fully and accurately about it (Evid C §1237(a));
- Statement is in a writing that was made when the fact recorded in the writing actually occurred or was fresh in the witness's memory (Evid C §1237(a)(1));
- Witness testifies that statement he or she made was a true statement of the facts (Evid C §1237(a)(3));
- Writing is authenticated as an accurate record of such statement (Evid C §1237(a)(4)); and
- Writing was made:
- By the witness personally (Evid C §1237(a)(2)),
- Under the witness's supervision (Evid C §1237(a)(2)), or
- By someone else for the purpose of recording the witness's statement at the time it was made (Evid C §1237(a)(2)).

§38.3 B. To Object

Any objection may be made to past recollection recorded that could have been made if the witness had remembered the events and testified from his or her independent recollection. Examples include:

- Hearsay (Evid C §1200), specifically, statement contains second level of hearsay of a third party;
- Improper foundation (Evid C §1237), *e.g.:*
- Witness has present recollection, or
- No showing of that writing made when the fact recorded occurred or was fresh in witness's memory;
- Not (properly) authenticated as accurate record of witness's statement (Evid C §1237(a)(4));
- Lack of personal knowledge (Evid C §702); and
- Witness not qualified to give an opinion (Evid C §§800-801).

III. SAMPLE QUESTIONS

§38.4 A. Information to Elicit

In the direct examination segments in §§38.5-38.9, the proponent should take the following steps to introduce the statement of the witness—who has no present recollection of the facts but who recorded the statement shortly after the event:

- Have the witness relate what event was recorded, by whom, why, and when;
- Show the witness's personal knowledge of the event;
- Ask the witness to inform the jury that the statement made is a true statement of the facts;
- Demonstrate that the witness has no, or insufficient, present recollection to testify;
- If not premarked, have statement marked for identification;
- Show statement to opposing counsel;
- Authenticate statement through the testimony of this witness or another witness; and
- Request witness to read statement aloud to jury.

§38.5 B. Questions to Ask

Q: Ms. Witness, were you present at the Acme Liquor Store on May 24, 1998?

Q: At what time of day were you there?

Q: Did anything unusual occur at that time?

Q: What occurred?

NOTE: Assume at this point that the witness states that she cannot remember what happened. Depending on whether she recorded her own statement or a third person recorded it, the proponent should ask one of the sets of questions in §§38.6-38.9.

§38.6 1. Witness Recorded Own Statement

[*Witness testifies to recording her own statement*]

Q: At the time of the incident, did you actually see what occurred?

Q: Did you write a description of what you saw?

Q: When did you write down what you saw?

Q: When you wrote down what you saw, was the incident still fresh in your memory?

Q: Did you write down the truth regarding the incident?

Q: Ms. Witness, I am showing you a one-page document that has been marked People's Exhibit No. 1 for identification. Do you recognize this document?

Q: What is it?

Q: How do you recognize this document?

Q: Is this the statement you wrote out shortly after the incident?

Q: Could you please read it to yourself?

Q: Does reading this document refresh your recollection of the events of May 24, 1998?

PRACTICE TIP: If the witness says that looking at the statement refreshes her recollection, then the proponent should question the witness directly about the incident. See chap 44 on refreshing recollection. If she says no, ask the following question.

Q: Ms. Witness, would you please read the statement aloud?

§38.7 2. Another Person Recorded Statement Under Witness's Supervision

[*Witness testifies to supervising a third person who recorded the witness's statement*]

Q: After the incident, did you ask Ms. Statement Writer to type a statement regarding the incident?

Q: How long after the incident was it that Ms. Statement Writer recorded your statement?

Q: Were the facts of the incident fresh in your memory at that time?

Q: Did Ms. Statement Writer record your statement?

PRACTICE TIP: The following questions may be asked but are not required unless you want the witness to authenticate the writing. When a witness's statement was recorded by another, the witness need not verify its accuracy. See Comment to Evid C §1237. The person who wrote it down can do so and authenticate the written statement. Even when not required, however, the following information will further bolster the witness's testimony.

Q: Did you read the statement after it was typed?

Q: Did the statement accurately reflect your observations?

Q: Was the statement true?

§38.8 3. Another Person Recorded Statement at Witness's Request

[*Third party testifies to preparing a document at the direction of the witness, who is unable to authenticate the writing*]

Q: Ms. Statement Writer, on May 24, 1998, did you type a statement at the request of Ms. Witness?

Q: Did you type exactly what Ms. Witness told you?

Q: Is Ms. Witness in the courtroom today?

Q: Where is she?

Proponent: Your Honor, may the record reflect that the witness has identified Ms. Witness.

Q: After you typed the statement for Ms. Witness, what did you do with it?

Q: I am showing you a one-page typed document marked People's Exhibit No. 1 for identification. Do you recognize this document?

Q: What is this document?

Q: How do you recognize this document?

Q: Is this the document you prepared on May 24, 1998, at Ms. Witness's direction?

Q: Ms. Statement Writer, would you please read the document aloud?

NOTE: When the witness/declarant is unable to authenticate the writing, the proponent must call the person who recorded the statement to authenticate it.

§38.9 4. Another Person Recorded Statement in Course of Duty

[*Third party testifies to having recorded the witness's statement as part of her job duties*]

Q: Ms. Police Officer, what is your occupation?

Q: Were you so employed on May 24, 1998?

Q: Were you on duty at 7 p.m. that evening?

Q: Were you assigned to investigate the robbery of the Acme Market?

Q: In the course of that investigation, did you interview Ms. Witness?

Q: Do you see Ms. Witness in the courtroom today?

Q: Where is she?

Proponent: Your Honor, may the record reflect that Ms. Police Officer has identified Ms. Witness?

Q: Where did you interview her?

Q: When did you interview her?

Q: Why did you interview her?

Q: Did you make a written report of her statement to you?

Q: Did that written report accurately reflect what Ms. Witness told you regarding what she observed at the Acme Liquor Store?

PRACTICE TIP: A witness who recorded a statement as part of her job, but does not accurately remember doing so, should be able to testify to a regular custom of taking statements accurately, under Evid C §1105.

Q: Why did you prepare a written report of Ms. Witness's statement?

Q: I am showing you People's Exhibit No. 1 for identification. Do you recognize this document?

Q: What is this document?

Q: How do you recognize it?

Q: Would you please read the statement aloud?

IV. COMMENT

§38.10 A. Witness Preparation

The proponent should carefully interview witnesses before calling them to the stand to ascertain whether and how well they remember the incident. Have them read the written statement to see whether it refreshes their recollection enough for them to testify from memory.

§38.11 B. Total Lack of Memory Not Required

The past recollection recorded exception to the hearsay rule applies whether the witness/declarant has totally forgotten the incident reflected in the writing, or remembers some of it but not enough "to testify fully and accurately." See Evid C §1237(a).

§38.12 C. Opponent's Excising of Objectionable Material

If the statement contains any objectionable matters, such as an improper opinion or third-party statements, opposing counsel may ask to have the admissibility of these matters ruled on at a preliminary fact hearing out of the jury's presence. See chap 4.

§38.13 D. Accident Reports

Vehicle Code §20013 prohibits the contents of accident reports from being used as evidence at a trial. A police officer's memory may be refreshed with a police report as long as the report itself is not introduced into evidence. *Robinson v Cable* (1961) 55 C2d 425, 11 CR 377. But see *Sherrell v Kelso* (1981) 116 CA3d Supp 22, 172 CR 667, in which the court upheld the trial court's ruling that a police officer could read his report into evidence, as past recollection recorded, after the report failed to refresh his recollection.

V. CHECKLISTS

§38.14 A. Checklist: Witnesses to Subpoena

- Witness/declarant to testify to when he or she wrote the statement and that it accurately reflected what happened
- Witness/declarant to testify that he or she supervised another in writing down what happened and that what witness/declarant said was accurate.

NOTE: The witness/declarant may be able to authenticate the writing containing the statement written under his or her supervision, if the witness/declarant can identify it. Otherwise, the person who wrote it down must authenticate it.

- Person who recorded the statement at the witness's direction, or who made the writing for the purpose of recording the witness's statement at the time it was made, to authenticate that writing by saying that he or she accurately recorded what the witness/declarant said.

§38.15 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1227; see chap 10.
- Declaration against interest. Evid C §1230; see chap 20.
- Deposition instead of unavailable witness. CCP §2025.620(c) (civil); Pen C §1335 (criminal). See chap 28.
- Deposition of adverse party. CCP §2025.620(b); see chap 28.
- Deposition used to impeach. CCP §2025.620(a); see chaps 19, 41.
- Former testimony. Evid C §§1290-1292; see chap 28.
- Prior consistent or inconsistent statement. Evid C §§791, 1202, 1235-1236; see chaps 40-41.
- Prior identification. Evid C §1238; see chap 42.
- Refresh recollection. If the witness's recollection is refreshed by reading the statement, and the witness's testimony is otherwise admissible, the witness can testify from memory to the events in the statement. Evid C §771; see chap 44.
- Spontaneous statement. Evid C §§1240-1241; see chap 49.

VI. SOURCES

§38.16 A. Evidence Code

Evid C §1237. (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

(3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(4) Is offered after the writing is authenticated as an accurate record of the statement.

(b) The writing may be read into evidence, but the writing itself may not be received into evidence unless offered by an adverse party.

§38.17 B. Other

For further discussion of past recollection recorded, see 3 Witkin, California Evidence, *Presentation at Trial* §§181-187 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 11 (4th ed CJA-CEB 2009); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *The Hearsay Rule and Its Exceptions* §9.F (3d ed 2000).

39

Physical Evidence

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§39.1 I. SCOPE OF CHAPTER

This chapter discusses physical evidence that may be used in trial, when relevant, to prove facts, impeach witnesses, illustrate testimony and arguments, refresh recollection, and rehabilitate witnesses. The requirements for the introduction of physical evidence depend on the type of evidence (*e.g.,* writings must satisfy the authentication requirements discussed in chap 11) and its use (*e.g.,* evidence used to refresh recollection must satisfy the requirements discussed in chap 44). See the detailed checklists in §§39.13-39.14 on procedures for introducing physical evidence at in limine motions and during trial.

II. REQUIREMENTS

A. To Admit

§39.2 1. Writing

To admit evidence in a writing, such as a letter or drawing, the proponent must show:

- Exception to hearsay rule (Evid C §1200);
- Authentication (Evid C §1401);
- Chain of custody, if relevant (see *People v Riser* (1956) 47 C2d 566, 580, 305 P2d 1, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201);
- Satisfaction of parol evidence rule, if relevant (see chap 37);
- If used to refresh recollection, satisfaction of applicable requirements (see chap 44);
- If used as past recollection recorded, satisfaction of applicable requirements (see chap 38); and
- If used to impeach or to rehabilitate a witness, satisfaction of applicable requirements (see particularly chaps 14-16, 19, 26-27, 34, 40-41).

PRACTICE TIP: You may want to mark some writings for identification only, without introducing them into evidence. This is often appropriate with writings used for impeachment purposes, and writings that serve demonstrative purposes only, such as charts and drawings.

Source: Evidence/Effective Introduction of Evidence in California/39 Physical Evidence/§39.3 2. Nonwriting

§39.3 2. Nonwriting

To admit nonwritten physical evidence, such as a weapon of the same type as that used in a crime, the proponent must show:

- Relevance (Evid C §350); and
- Substantial similarity, if evidence is created or acquired for trial to simulate or demonstrate an item or event, *e.g.,* that the same type of gun the victim claims to have seen during a robbery is substantially similar to the weapon in evidence (see *People v Roldan* (2005) 35 C4th 646, 707, 27 CR3d 360, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209).

PRACTICE TIP: Requiring that nonwritings be relevant achieves the same purpose as authentication of writings: The proponent must prove that the evidence is in fact what the proponent claims it to be. See *People v Player* (1958) 161 CA2d 360, 361, 327 P2d 83. As with writings, the proponent may want to mark some items for identification only, but not introduce them into evidence.

§39.4 B. To Object

The opponent may object to the admissibility of physical evidence on any of the following grounds:

- Hearsay (Evid C §1200);
- Improper opinion (Evid C §800);
- Inadmissible secondary evidence (Evid C §1521);
- Not (properly) authenticated (Evid C §1401);
- No showing of chain of custody (see *People v Riser* (1956) 47 C2d 566, 580, 305 P2d 1, disapproved on other grounds in *People v Morse* (1964) 60 C2d 631, 649, 36 CR 201);
- Irrelevant (Evid C §350);
- Privilege (Evid C §§900-1070);
- Too time consuming, prejudicial, confusing, or misleading (Evid C §352);
- Not produced in response to discovery request (see §39.11); or
- Not substantially similar (see *People v Bonin* (1989) 47 C3d 808, 847, 254 CR 298).

III. SAMPLE QUESTIONS

§39.5 A. Steps to Take

To introduce a surgical instrument into evidence in the segment in §39.6, the proponent takes the following steps:

- Has exhibit marked for identification;
- Writes exhibit number on exhibit log, and checks off that it is marked for identification;
- Shows exhibit to opposing counsel and judge;
- Asks witness to identify exhibit (no authentication needed because item is not a writing);
- Moves exhibit into evidence; and
- Marks exhibit as received in evidence.

§39.6 B. Questions to Ask

[*Counsel has premarked exhibits during recess, in keeping with the court's stated policy*]

Proponent: Ms. Clerk, would you please mark this surgical instrument as plaintiff's next in order for identification?

Clerk: Yes. That's Plaintiff's Exhibit No. 14.

[*Proponent returns to counsel table, writes the exhibit number on her exhibit list, and checks off that it is marked for identification. The questions that follow occur during direct examination of the witness, who testifies concerning the surgical instrument. Preliminary questions are omitted*]

Proponent: Your Honor, I would like to show this surgical instrument to opposing counsel and to Your Honor, then approach the witness to show it to him.

Court: Fine.

[*Proponent walks over and shows surgical instrument to opposing counsel, then gives it to bailiff, who brings it to judge, and then returns it to the proponent. The proponent then shows it to the witness*]

Proponent: Mr. Witness, do you recognize this surgical instrument I am showing you, which has been marked Plaintiff's Exhibit No. 14 for identification?

Witness: Yes. That is the instrument I removed from Mr. Plaintiff's abdomen on February 7, 1998.

Proponent: Your Honor, at this time I move to have Plaintiff's Exhibit No. 14 admitted into evidence.

Court: Any objection?

Opponent: No objection.

Court: Plaintiff's Exhibit No. 14 is admitted.

[*The proponent writes the exhibit number on the exhibit list and checks off that the instrument has been admitted in evidence before further questioning the witness*]

NOTE: After the witness testifies concerning the evidence, the proponent might ask the court's permission to have it passed among jurors, if he or she has not already done so.

IV. COMMENT

§39.7 A. Substantive and Demonstrative Evidence Distinguished

Physical evidence is sometimes divided into two categories: substantive (real) evidence, and demonstrative (constructed) evidence. Substantive evidence is evidence that is historical, such as a copy of the contract in dispute or the gun used in a murder. Demonstrative evidence is evidence that has been created for the trial, such as a three-dimensional model, a computer graphic, or an experiment performed before the jury. For more examples of demonstrative evidence, see §39.8.

B. Demonstrative Evidence

§39.8 1. Examples

As long as the attorney can establish substantial similarity (see §39.3), there is no particular limitation on the types of demonstrative evidence that may be helpful to a case. Typical examples are:

- Jury view (see CCP §651);
- Models (see California Personal Injury Proof, chap 18 (Cal CEB 1970));
- Motion pictures or videotapes (see P I Proof, chap 17); exhibiting part of the client's body (see P I Proof §8.36); photographs (see P I Proof, chap 15); X rays (see P I Proof, chap 16);
- Maps and diagrams, either prepared in advance, or drawn in court by the witness (see P I Proof, chap 19); and
- Computer-generated video graphics (see Canter, Pahre, & Immel, *Admissibility of Computer Generated Video Graphics in the Courtroom*, 13 CEB Civ Lit Rep 296 (Nov. 1991)).

See generally 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§1-40 (4th ed 2000); California Trial Practice: Civil Procedure During Trial §§13.85-13.138 (3d ed Cal CEB 1995); Cotchett, California Courtroom Evidence, chap 27 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *Logical Relevance; Personal Knowledge and Authentication* §§4.K-4.O (3d ed 2000).

PRACTICE TIP: Be sure all exhibits and demonstrations are large enough and in a location where the judge and all jurors can clearly see them.

§39.9 2. Demonstrative Evidence Is Persuasive

Using demonstrative evidence usually makes your case more persuasive because it allows jurors to perceive your evidence visually. You should be sure that you have all the materials you will need, that they work properly and smoothly, and that the courtroom has whatever is necessary, *e.g.,* an easel on which to lean a chart or easily located electrical outlets. Be sure jurors can see your evidence. Small photographs can be passed among jurors or enlarged. Written documents can be shown on an overhead projector or enlarged as poster-size blowups, or copies may made for each juror. If your witness writes on an item of demonstrative evidence and it is moved into evidence, do not let your opponent then make, or direct a witness to make, new marks on it.

PRACTICE TIP: If your demonstrative evidence is not something easily saved for the record, arrange to make it permanent. For example, instead of having a witness draw a map on a blackboard, either have the witness draw it on a large piece of paper or describe the demonstration for the record.

§39.10 3. In Limine Ruling Is Advisable

Demonstrative evidence is allowed at the court's discretion. See *Church v Headrick & Brown* (1950) 101 CA2d 396, 225 P2d 558. It is usually wise to notify the court at an in limine hearing of demonstrative evidence you plan to use so that the court is not surprised and does not rule the evidence inadmissible because of insufficient time to consider the issue. Local court rules may make it mandatory to raise the subject at an in limine hearing and obtain approval before trial to present demonstrative evidence. On procedures for introducing physical evidence at in limine motions and during trial, see checklists in §§39.13-39.14.

NOTE: Some demonstrations, however, are so simple that there is no need to discuss them ahead of time. For example, a witness may simply illustrate various parts of his or her testimony by pointing to a map or diagram already admitted in evidence, or a lawyer examining a witness may simply jot down key words of the testimony on a notepad, to use later in closing argument.

§39.11 C. Satisfy Pretrial Discovery Requirements

Be sure you have satisfied any pretrial discovery requirements. See, *e.g.,* CCP §§2023.010, 2025.480; *Dwyer v Crocker Nat'l Bank* (1987) 194 CA3d 1418, 240 CR 297 (civil); *Stanton v Superior Court* (1987) 193 CA3d 265, 239 CR 328 (criminal); *People v Mackey* (1985) 176 CA3d 177, 221 CR 405. For general discussion of discovery, see California Civil Discovery Practice (4th ed Cal CEB 2006); California Criminal Law Procedure and Practice, chap 11 (Cal CEB Annual). Note that under the Electronic Discovery Act effective August 11, 2009, counsel has new responsibilities regarding electronic discovery in civil cases. See Cal Rules of Ct 3.724(8).

V. CHECKLISTS

§39.12 A. Checklist: Witnesses to Subpoena

- Witness who can give testimony that demonstrates that the evidence is relevant.
- Authenticating witness if evidence is a writing.
- Witness to testify as to chain of custody, if needed.

NOTE: If a writing that must meet other requirements is involved, check the chapter on those issues, *e.g.,* past recollection recorded, refreshing recollection, or impeaching with a prior inconsistent statement.

§39.13 B. Checklist: Procedures for Introducing Physical Evidence at In Limine Motion

- Check local rules, which frequently designate the timing for obtaining the court's prior approval of trial exhibits to be presented to the jury.
- Make a pretrial in limine motion concerning your exhibits to ensure that problems of admissibility (*e.g.,* relevance, substantial similarity) are resolved, and to provide for a smoother presentation during trial. On in limine motions generally, see chap 3.
- Show the exhibit to opposing counsel and to the judge.
- When court and counsel discuss exhibit, ask the judge if the clerk can mark the exhibit for identification. From this point on, the exhibit is in the court's custody.
- Make an offer of proof in support of the exhibit. On offers of proof, see chap 3.
- Make sure that an opponent who is challenging your evidence has complied with any local rule requiring written notice of objection. If there is lack of compliance on your part, argue that the opponent has waived the right to object, and the evidence should be admitted.
- Obtain a ruling from the court on the record. The court may, however, rule conditionally, subject to a final ruling when the evidence is presented.
- If the evidence would be prejudicial if it was referred to and later ruled inadmissible, request that the judge order counsel not to refer to it until a final ruling is made.

WARNING: Once an exhibit is marked for identification and is in the clerk's custody, do not remove it from the courtroom, even if it is not admitted in evidence, unless the judge releases it to you.

Source: Evidence/Effective Introduction of Evidence in California/39 Physical Evidence/§39.14 C. Checklist: Procedures for Introducing Physical Evidence During Trial

§39.14 C. Checklist: Procedures for Introducing Physical Evidence During Trial

- Pretrial requirements:
- Check local rules. See, *e.g.,* Los Angeles Ct R 8.59-8.68, 8.73-8.75.
- Be sure you comply with all relevant pretrial requirements, such as disclosure to opponent, ruling on admissibility, and marking of exhibits. See checklist in §39.13.
- Storage of exhibits:
- Plan where exhibits will be kept in the courtroom before they are marked for identification. (After that, they remain in the clerk's possession.)
- Consult the court clerk if overnight storage is required or if equipment needs to be set up in during trial.
- If the exhibit is produced for the first time during trial:
- Show the exhibit to opposing counsel (if a document, provide a copy).
- Show the exhibit to the judge (if a document, provide a copy).
- Have the clerk mark the exhibit for identification, if not already marked before trial or during a recess.
- Write down the exhibit number on your exhibit log (see chap 2). At a recess, check with the clerk to make sure you have the right number and that the clerk has in fact marked the exhibit as in evidence.
- Identification of exhibit:
- During trial, identify the exhibit by its number, whether marked before or during trial.
- Describe the exhibit for the record if the judge allows this practice. This can be an opportunity to stress the relevance and importance of the exhibit. For this same reason, many trial judges allow only a brief descriptive phrase, *e.g.,* "a letter from Mr. A to Mr. B dated December 1, 1999."
- If testimony is needed to introduce the exhibit:
- Call the appropriate witness to the stand and ask the questions that lead up to introducing the physical evidence.
- Request the court's permission to approach the witness.
- Hand the exhibit to the witness. (If there will be any question as to admissibility, do not let the jury see the exhibit, because this would be unduly prejudicial; such evidentiary issues should usually be resolved at the pretrial stage, or at least outside the jury's presence.)
- Ask any further questions of the witness that are needed to lay a foundation for introducing the exhibit into evidence.

NOTE: Writings need not be shown to witnesses before they are questioned about the writing. Evid C §768(a). If you do plan to show a witness a writing, however, you must first show the writing to all parties. Evid C §768(b).

- If no testimony is needed, describe the exhibit for the jury and for the record.
- Deal with objections:
- Objections are usually handled in the judge's chambers (at an in limine hearing before or during trial) or at the bench outside the jury's hearing.
- If your opponent failed to make a pretrial in limine objection to your exhibit, if so required by local rules, ask the judge to overrule the objection based on waiver.

- If there is an objection, obtain a ruling on the record.
- If no objection is made, or any objection made is overruled, move the exhibit into evidence.

NOTE: Statements admitted as past recollections recorded, or to refresh recollection, may be received in evidence only if offered by the adverse party (Evid C §§771(b) (refreshing recollection), 1237(b) (past recollection recorded)); the proponent may, however, read a writing containing past recollection recorded, even though the proponent may not admit the writing into evidence. See chaps 38, 44.

- If the exhibit is a writing, have the witness read it aloud.
- If the exhibit has been moved into evidence, to allow jurors to read a writing more easily:
- Use a blowup or show it to them on an overhead projector, computer slide projector, or video.
- Be sure to check the equipment and electrical outlets ahead of time.
- As with any exhibit, obtain the court's permission beforehand to enlarge a document.
- Obtain the court's permission to show the physical evidence to the trier of fact (at a time the court has approved) in one or more of the following ways:
- Pass exhibit among jurors.
- Give each juror a copy. (In a case involving many documents, prepare jury binders containing all your exhibits. Resolve admissibility questions with opposing counsel and the court before trial.)
- Have witness show exhibit to jurors.
- Ask judge to send the exhibit to the jury room with jurors when they begin their deliberations.

NOTE: Jurors should not be given copies of transcripts from preliminary hearings (see *People v Stevenson* (1978) 79 CA3d 976, 990, 145 CR 301) or depositions (CCP §612; Pen C §1137). Evidence Code §§1290-1292 are silent on whether jurors may receive copies of the transcripts of former testimony other than that taken at a preliminary hearing, but the reasoning of *Stevenson* also seems applicable to other types of former testimony.

- If you are unsuccessful in obtaining the court's approval the first time you offer an exhibit into evidence, watch for a change in circumstances that will provide another opportunity to seek its admission.
- If appropriate, ask for a jury instruction concerning the exhibit.
- With the court's permission, you can sometimes use charts and other physical evidence that have not been admitted in evidence as illustrations during closing argument. On closing arguments, see California Trial Practice: Civil Procedure During Trial, chap 19 (3d ed Cal CEB 1995).

§39.15 VI. SOURCES

Most types of physical evidence are discussed in other chapters in this book, along with sample questions, *e.g.*, chaps 20 (declarations against interest), 28 (former testimony), 38 (past recollection recorded), 12 (maps), 23 (experiments and scientific tests), and 51 (stipulations). See the contents, chapter outlines, and index.

For further discussion of substantive and demonstrative evidence, see 2 Witkin, California Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§1-40 (4th ed 2000); California Trial Practice: Civil Procedure During Trial, chap 13 (3d ed Cal CEB 1995); California Personal Injury Proof (Cal CEB 1970).

40

Prior Consistent Statements

Holly J. Fujie

§40.1 I. SCOPE OF CHAPTER

This chapter covers prior consistent statements. Evidence of a witness's prior consistent statement may be introduced to rehabilitate the witness after the witness's truthfulness has been challenged, either expressly or impliedly. See Comment to Evid C §791. The prior consistent statement is admissible for the truth of the matter stated. See Comment to Evid C §1236. Prior consistent statements by *hearsay* declarants are allowed as an exception to the hearsay rule, but they are not admitted for the truth of the matter stated. They are admitted only to support the hearsay declarant's credibility. See Evid C §1202.

NOTE: For discussion of prior inconsistent statements, which are often the impetus for eliciting a prior *consistent* statement to rehabilitate a witness, see discussion in chap 41.

II. REQUIREMENTS

A. To Admit

§40.2 1. Rehabilitation of Testifying Witness

To admit evidence of a prior consistent statement of a testifying witness, the proponent must satisfy the following requirements:

After admission of prior inconsistent statement:

- The witness's prior inconsistent statement has been admitted in evidence (Evid C §§791(a), 1236; *People v Cook* (2007) 40 C4th 1334, 1357, 58 CR3d 340);
- The prior consistent statement was made before the alleged inconsistent statement was made (Evid C §791(b); *Cook,* 40 C4th at 1357); and
- If the prior consistent statement is a writing, it must be authenticated (Evid C §1401).

After charge of fabrication, bias, or improper motive:

- The witness's testimony at trial is claimed to be the result of a recent fabrication or to have been influenced by bias or improper motive (Evid C §§791(b), 1236));
- The prior consistent statement was made before these circumstances are alleged to have arisen (Evid C §791(b)); and
- If the prior consistent statement is a writing, it must be authenticated (Evid C §1401).

Source: Evidence/Effective Introduction of Evidence in California/40 Prior Consistent Statements/§40.3 2. Rehabilitation of Hearsay Declarant

§40.3 2. Rehabilitation of Hearsay Declarant

To admit evidence of a prior consistent statement to rehabilitate a hearsay declarant (whose credibility has been attacked without testimony in present hearing or trial), the proponent must:

- Offer evidence of a prior consistent statement in support of the credibility of the declarant (see Evid C §1202); and
- If the prior statement is in writing, authenticate it (Evid C §1401).

Source: Evidence/Effective Introduction of Evidence in California/40 Prior Consistent Statements/§40.4 B. To Object

§40.4 B. To Object

Grounds for objecting to the admissibility of a prior consistent statement include:

- Hearsay (Evid C §1200);
- No foundation (Evid C §§791, 1236), *e.g.:*
- Prior consistent statement was not made before prior inconsistent statement was made,
- Prior consistent statement was not made before any bias, motive for fabrication, or other improper motive arose; and
- If in writing:
- Not (properly) authenticated (Evid C §1401), and
- Inadmissible secondary evidence (Evid C §1521).

III. SAMPLE QUESTIONS

A. Prior Consistent Statement Introduced on Direct Examination of Witness to Prior Statement

§40.5 1. Information to Elicit

To introduce a prior consistent statement during the direct examination segment in §40.6, the proponent wants the witness to testify to the following matters:

- Identify herself and the witness being rehabilitated;
- Tell when the statement was made;
- Describe where the statement was made;
- Explain the nature of the conversation; and
- Report the prior consistent statement.

§40.6 2. Questions to Ask

Q: Are you acquainted with Mr. Witness?

Q: What is the nature of your relationship with Mr. Witness?

Q: I am showing you a document marked Exhibit A. Have you ever discussed the drafting of this document with Mr. Witness?

A: Yes.

Q: When was the first time you spoke with him on this subject?

A: On October 4, 1998.

Q: How did the topic come up in your conversation?

A: I asked him how negotiations on the Widget deal were coming.

Q: What did he say?

A: He said that he had signed a contract with Mr. Widget just the day before.

B. Prior Consistent Statement Introduced on Redirect Examination of Witness After Impeachment

§40.7 1. Information to Elicit

To introduce a prior consistent statement during the redirect examination of the witness who was impeached during cross-examination, the proponent wants the witness to testify to the following in §40.8:

- Identify the prior written consistent statement;
- Authenticate the written statement; and
- Read the statement to the jury.

§40.8 2. Questions to Ask

Q: Ms. Blue, I direct your attention to Plaintiff's Exhibit No. 4, which appears to be a letter dated May 5, 1997, from you to Mr. Prior Consistent Statement. Do you recognize this letter?

A: Yes. It is a letter I wrote to Mr. Prior Consistent Statement on May 5, 1999.

Q: Would you please read aloud the next-to-last sentence from that letter?

PRACTICE TIP: It is essential to have a categorized index of important testimony and statements in documents for reference during trial. See chap 2. If your witness is impeached by a prior inconsistent statement, you will be able to locate the prior inconsistent or consistent statement and prepare for the witness's rehabilitation.

Opponent: Objection, Your Honor, calls for hearsay.

Proponent: May I be heard at the bench, Your Honor?

Court: Yes.

[*At sidebar conference*]

Proponent: Under Evidence Code §§791 and 1236, a prior consistent statement may be used to support the credibility of a witness when there has been a charge of recent fabrication, as is the case here. Opposing counsel, in her cross-examination of Ms. Blue, asked her if she had told Mr. Green in July of 1994 that she and Mr. Purple couldn't agree on price, so she didn't sign the contract. This letter is dated May 4—well before July—and is consistent with Ms. Blue's testimony on direct.

Opponent: Your Honor, Ms. Blue denied making the statement, so there is no prior inconsistent statement.

Proponent: Your Honor, Evidence Code §791 says a prior consistent statement is admissible when, and I quote, "an express or implied charge has been made that his testimony at the hearing is recently fabricated." Opponent implied with her question that Ms. Blue was a liar. This prior consistent statement is perfectly appropriate to counter that innuendo.

Court: Objection overruled.

[*In open court*]

Proponent: Your Honor, could I have the last question read back to the witness?

Court: Yes. Reporter, would you please read aloud Proponent's last question?

Reporter: Yes. "Would you please read aloud the next-to-last sentence from that letter?"

A: "I am happy to report that Mr. Purple and I just signed a contract for the holiday widgets."

IV. COMMENT

§40.9 A. Prior Statements of Testifying Witnesses

A prior consistent statement may be used to support the testimony of a witness who has testified at the current hearing or trial after the witness has been impeached. Evid C §§791, 1236; *People v Cook* (2007) 40 C4th 1334, 1357, 58 CR3d 340 (officer's recollection of prior consistent statement admissible); *People v Williams* (2002) 102 CA4th 995, 1011, 125 CR2d 884 (videotaped interview admissible as prior consistent statement). In this circumstance, the prior consistent statement is admissible for the truth of the matter stated. See Comment to Evid C §1236.

The prior consistent statement need not have occurred before the existence of *all* biases or motives that may have influenced the witness's testimony. It is sufficient that the prior consistent statement occurred before any one or more of the alleged biases or motives to fabricate arose. *People v Hayes* (1990) 52 C3d 577, 609, 276 CR 874.

Prior consistent statements may be introduced either by asking the witness whose testimony is about his or her own prior consistent statement on redirect examination, or by introducing the testimony of a witness to the prior consistent statement. See *People v Crew* (2003) 31 C4th 822, 843, 3 CR3d 733.

The court makes determinations on the foundational requirements for this hearsay exception at an Evid C §405 hearing, discussed in chap 4. See 3 Witkin, California Evidence, *Presentation at Trial* §§364-365 (4th ed 2000) for examples of improper motive and recent fabrication.

PRACTICE TIP: It is usually more persuasive to the trier of fact to use a separate witness to testify to the prior consistent statement because the credibility of the witness whose testimony you are trying to rehabilitate has been put in issue.

§40.10 B. Prior Statements of Hearsay Declarants

Prior consistent statements may be introduced under Evid C §1202 for the purpose of supporting the credibility of a hearsay declarant if the statement would have been admissible had the declarant been a witness at the hearing. These statements may not be used, however, for the truth of the statement. Evid C §1202. Although Evid C §1202 specifically mentions "[a]ny other evidence offered to attack *or support* the credibility of the declarant" (emphasis added), none of the cases or the comments to this section discusses the use of prior consistent statements as opposed to prior inconsistent statements.

PRACTICE TIP: You may be able to persuade the trial judge to limit efforts to impeach your hearsay declarant so that you do not need to introduce a prior consistent statement. Argue that the issues are becoming too remote from relevant trial issues under Evid C §352.

V. CHECKLISTS

§40.11 A. Checklist: Witnesses to Subpoena

- Witness to the consistent statement, unless you ask witness being rehabilitated about it.

§40.12 B. Checklist: Alternative Methods of Admissibility

- Contemporaneous and spontaneous statements. Evid C §1241; see chap 49.
- Remainder offered to explain the part admitted. Evid C §356; see chap 46.
- Statements of state of mind or physical sensation. Evid C §1250; see chap 50.

VI. SOURCES

§40.13 A. Evidence Code

Evid C §791. Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

Evid C §1236. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.

Evidence Code §1202 is reproduced in chap 41.

§40.14 B. Other

For further discussion of prior consistent statements, see Jefferson's California Evidence Benchbook, chap 10 (4th ed CJA-CEB 2009); Cotchett, California Courtroom Evidence §§8.02, 16.27, 16.54, 21.25 (2008).

Source: Evidence/Effective Introduction of Evidence in California/41 Prior Inconsistent Statements/Chapter Outline

41

Prior Inconsistent Statements

Holly J. Fujie

B. Other §41.20

§41.1 I. SCOPE OF CHAPTER

This chapter discusses prior inconsistent statements. Evidence of prior inconsistent statements of testifying witnesses are admitted as an exception to the hearsay rule because they safeguard against changes in testimony. Evid C §1235. They are admissible for the truth of the matter stated because the witness declarant is available for confrontation and cross-examination (*California v Green* (1970) 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930), and because the previous statement may be closer to the truth in that it was made nearer in time to the recalled event (see Comment to Evid C §1235). Prior inconsistent statements by *hearsay* declarants are allowed as an exception to the hearsay rule, but they are not admitted for the truth of the matter stated. They are admitted only to reflect on the hearsay declarant's credibility. Evid C §1202.

II. REQUIREMENTS

A. To Admit

§41.2 1. Impeachment of Testifying Witness

To introduce evidence of a prior inconsistent statement of a testifying witness, the proponent must satisfy the following requirements:

- The impeaching statement is inconsistent with some part of either the express or implied testimony of the witness (Evid C §§770, 1235); and
- The witness, while testifying, was given an opportunity to explain or deny making the prior inconsistent statement (Evid C §770), or
- The witness has not been excused from giving further testimony in the action (Evid C §770); and
- If the impeaching statement is a writing, it must be authenticated (Evid C §1401).

Source: Evidence/Effective Introduction of Evidence in California/41 Prior Inconsistent Statements/§41.3 2. Impeachment of Hearsay Declarant

§41.3 2. Impeachment of Hearsay Declarant

To admit evidence of a prior inconsistent statement of a hearsay declarant (whose statement was admitted without testimony in the present hearing or trial), the proponent must satisfy the following requirements:

- The impeaching statement is inconsistent with any part of the statement by the hearsay declarant received in evidence (Evid C §1202); and
- If the impeaching statement is a writing, it must be authenticated (Evid C §1401).

PRACTICE TIP: Counsel can also introduce extrinsic evidence of prior inconsistent statements, *e.g.,* an investigator's testimony about a conversation with the witness. See Jefferson's California Evidence Benchbook, chap 10 (4th ed CJA-CEB 2009).

Source: Evidence/Effective Introduction of Evidence in California/41 Prior Inconsistent Statements/§41.4 B. To Object

§41.4 B. To Object

Grounds for objecting to the admissibility of a prior inconsistent statement include:

- Hearsay (Evid C §1200);
- Too time consuming, prejudicial, confusing, or misleading (Evid C §352);
- Improper impeachment, *e.g.:*
- Statement is not inconsistent with witness's testimony or declarant's statement (Evid C §§770, 1235, 1202),
- Witness's express testimony does not give rise to implication opponent is trying to combat (Evid C §§770, 1235),
- Witness has not been evasive or denied anything made in prior statement; witness merely cannot recall what happened (see *People v Sam* (1969) 71 C2d 194, 208, 77 CR 804),
- Denial of right to confront and cross-examine witness (typically made in criminal case when prosecutor puts witness on stand who refuses to testify; see, *e.g., People v Harris* (1969) 270 CA2d 863, 76 CR 130),
- Witness was not given an opportunity while testifying to explain or deny prior statement,
- Witness who was excused from further testimony had no opportunity to explain or deny prior statement (Evid C §770); and
- If prior statement is in a writing:
- Not (properly) authenticated (Evid C §1401), and
- Inadmissible secondary evidence (Evid C §1521).

III. SAMPLE QUESTIONS

A. Impeachment of Testifying Witness

§41.5 1. Steps to Take

When confronting a witness with a prior inconsistent statement during cross-examination in §41.6, the proponent wants to do the following:

- Tie the witness down on the present testimony that the proponent intends to impeach;
- Give the witness an opportunity to explain or deny the prior statement;
- Authenticate the prior statement if it is in writing;
- Move the prior statement into evidence; and
- Have the witness read the prior statement aloud to the jury.

§41.6 2. Questions to Ask

Q: Mr. Witness, who drafted the contract that is Exhibit A in this case?

A: I drafted it.

Q: Have you ever told anyone that someone else drafted the contract?

A: No.

Q: I ask that Exhibit B, a letter from Mr. Witness to Ms. Declarant, be placed before the witness at this time.

[*Witness shown prior inconsistent statement*]

PRACTICE TIP: The proponent does not first have to ask the witness declarant about the prior statement, as was done here, if the witness has not been excused (Evid C §§770, 1235) or if the judge makes an exception in the interests of justice (Evid C §770).

Q: Have you reviewed Exhibit B?

Q: Is that your handwriting on Exhibit B?

Q: Please read the highlighted handwriting aloud.

A: "Ms. Author drafted the contract."

PRACTICE TIP: The opponent might object that the witness's prior inconsistent statement was not made under oath, subject to cross-examination. The court should overrule this objection. Oral and written statements are admissible under Evid C §1235 even though not made under oath. See Evid C §1235; *People v Chavez* (1980) 26 C3d 334, 161 CR 762.

Q: After reviewing this letter, do you still maintain that you drafted the contract?

PRACTICE TIP: The proponent might wish to omit this last question, leaving opposing counsel to ask it. Either way, the situation can be exploited in closing argument.

B. Impeachment Through Another Witness's Testimony

§41.7 1. Steps to Take

To impeach a testifying witness through the direct examination of another witness who heard the prior inconsistent statement of the witness to be impeached, as illustrated in §41.8, counsel should take the following steps when the prior inconsistent statement is not in writing:

- Ask the witness to identify him- or herself and the witness being impeached;
- Show the witness's personal knowledge by eliciting information on the circumstances, date, and time of the prior inconsistent statement; and
- Have the witness report the statement made.

§41.8 2. Questions to Ask

Q: Have you ever spoken to Mr. Witness about this contract that is marked as Exhibit A?

[*Counsel shows Exhibit A to witness*]

Q: Did he tell you who drafted it?

A: He said that Mr. Y drafted it.

Q: When did he tell you that?

A: On the same date the contract was drafted—the date marked here.

C. Impeachment of Hearsay Declarant

§41.9 1. Steps to Take

Before the segment in §41.10 begins, the opposing party has presented admissible hearsay evidence that Mr. Y stated that he wrote the contract. To introduce a prior inconsistent statement from Mr. Y's deposition, the proponent should:

- Identify the deposition;
- Authenticate it;
- Move the deposition into evidence; and
- Read from the deposition.

§41.10 2. Questions to Ask

Proponent: Your Honor, I would like to read from the deposition of Mr. Y in the case of *Y versus Witness*, marked Defense Exhibit C, at Page 1, lines 1 through 5. The purpose of reading this former testimony is to show that Mr. Y testified under oath that Mr. Witness was in fact the one who wrote the contract.

Opponent: Objection, hearsay. Mr. Y is not present.

Proponent: Your Honor, under Evidence Code §1202, this is prior inconsistent testimony of a hearsay declarant. It is not submitted for the truth of the matter stated, but only for impeachment purposes.

Court: Objection overruled; you may proceed.

Proponent: Reading from the deposition of Mr. Y in the case of *Y versus Witness* at Page 1, lines 1 through 5: "Question: Who wrote the contract, Exhibit A? Answer: Mr. Witness."

PRACTICE TIP: The opponent might also have objected because the deposition transcript was not authenticated. For discussion of authenticating deposition testimony and sample questions, see chap 28.

IV. COMMENT

§41.11 A. Prior Inconsistent Statements of Testifying Witnesses (Evid C §1235)

Prior inconsistent statements of testifying witnesses are admissible for two purposes: to attack credibility and for the truth of the matter stated. See Comment to Evid C §1235. Because these statements are used to attack credibility, it is unnecessary to show their relevance; the statements may relate to a collateral issue that has no real substantive bearing on the merits of the case.

The rule that a prior inconsistent statement, even though unsworn, may be admitted for the truth of the matter stated, applies in both civil and criminal cases. *People v Chavez* (1980) 26 C3d 334, 161 CR 762.

A prior statement may be inconsistent not only with a witness's express testimony but also with his or her implied testimony. *People v Green* (1971) 3 C3d 981, 92 CR 494.

Generally, if a witness genuinely does not remember an event when testifying, his or her prior statement about that event is not truly "inconsistent." But courts do not apply this rule "mechanically"; the inconsistency must be "in effect" or conceptual, not just inconsistent with "express terms." *People v Hovarter* (2008) 44 C4th 983, 1008, 81 CR3d 299. See *People v Johnson* (1992) 3 C4th 1183, 1219, 14 CR2d 702. For example, a witness's prior out-of-court statement after actual brain damage, which he or she remembers making but cannot remember the basis for, may be introduced so long as the witness is available for an unrestricted cross-examination. *U.S. v Owen* (1988) 484 US 554, 98 L Ed 2d 951, 108 S Ct 838 (victim with brain damage from beating remembered details of attack only on one specific day, and remembered only perpetrator's identity).

If, however, a witness's "I don't remember" testimony is shown to be evasive or untruthful, then such lack-of-recollection testimony may constitute an inconsistent statement and pave the way for introduction of the earlier out-of-court statement. *Hovarter,* 44 C4th at 1008 (discussing delicate balance in determining if sexual assault victim evasive or reacting to trauma); *Johnson,* 3 C4th at 1219. See *People v Green, supra; People v Gunder* (2007) 151 CA4th 412, 418, 59 CR3d 817 (reasonable basis required to find feigned memory loss; witness was defendant's friend for decades and memory loss selective); *People v Perez* (2000) 82 CA4th 760, 764, 98 CR2d 522; *In re Deon D.* (1989) 208 CA3d 953, 256 CR 490 (discussion of when failure to recall becomes inconsistent with prior statement). See also discussion and analysis in Jefferson's California Evidence Benchbook, chap 10 (4th ed CJA-CEB 2009).

PRACTICE TIP: The proponent of the prior inconsistent statement must show that the witness's claim of lack of recollection is likely to be evasive or untruthful. That is a foundational fact to be established in a hearing under Evid C §402. Under Evid C §403, if the court finds that the proponent has produced such evidence, the court may instruct the jury to determine whether the witness's current testimony is evasive or untruthful, and to disregard the prior statement unless it so finds.

Relationship to confrontation rights. In a criminal case, if a testifying witness feigns memory loss about a testimonial prior inconsistent statement, then confrontation clause rights under *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 194, 124 S Ct 1354, *are not* triggered. A jury can judge the witness's demeanor and evaluate credibility. The confrontation clause is satisfied so long as the witness is available for cross-examination; there is no constitutional guarantee that the cross-examination be effectual. *People v Gunder* (2007) 151 CA4th 412, 419, 59 CR3d 817. For a discussion of *Crawford* and the confrontation clause, see §§20.20B, 49.4.

§41.12 1. Authentication Necessary If Statement in Writing

If the prior inconsistent statement is a written statement, the writing may be introduced into evidence if the requirements of Evid C §770 (limitations on use of extrinsic evidence) and Evid C §1401 (authentication) are met. See §41.13. *People v Price* (1991) 1 C4th 324, 411 n13, 3 CR2d 106, superseded on other grounds by statute, as stated in *People v Hinks* (1997) 58 CA4th 1157, 1161, 68 CR2d 440.

PRACTICE TIP: Be prepared to authenticate the impeaching statement. Evid C §1401. Consider asking for the opponent's stipulation to the writing's authenticity to avoid calling additional witnesses (which may be to the opponent's liking), save court time, and make impeachment proceed more smoothly.

As long as a witness is given an opportunity to explain a prior inconsistent statement, that statement is admissible as an exception to the hearsay rule. *In re Miranda* (2008) 43 C4th 541, 576, 76 CR3d 172, citing to Evid C §§770, 1235. In *Miranda,* a prosecution witness in the penalty phase of a capital case testified to the defendant's guilt to establish aggravating circumstances. Before he testified, however, he confessed to several prisoners that he had stabbed the victim, destroyed evidence, and created a false alibi, all of which one prisoner recorded in a handwritten letter. The supreme court found that the prisoner could have testified and the letter and its contents would have been admissible for the truth of the matter asserted under the hearsay exception for prior inconsistent statements. 43 C4th at 576.

§41.13 2. Procedures for Impeaching Witnesses With Prior Inconsistent Statements

Impeachment with prior inconsistent statements can be very difficult. You must be prepared to meet the legal requirements for impeaching a witness, including authentication if the prior statement is in writing. You must also prepare so that your questions make absolutely clear to the jury that the witness is being impeached, and highlight the former statement that is favorable to your case.

Decide whether you want to confront the witness being impeached with the prior statement or bring the prior statement in through your own witness. Take into account the likely response of the witness to be impeached if questioned directly, and how you will proceed if the witness fails to authenticate the prior statement, if written, or refuses to acknowledge having made the prior statement.

When confronting a witness with a prior inconsistent written statement, you must give the witness an opportunity to explain or deny it. Evid C §770. You may do so by giving the witness time to review the statement if it is lengthy or by refreshing the witness on the circumstances under which the statement was made. *People v Garcia* (1990) 224 CA3d 297, 303, 273 CR 666; *Bossi v State* (1981) 119 CA3d 313, 325, 174 CR 93.

Either the party calling a witness or the opposing party can introduce prior inconsistent statements under Evid C §1235. There is no requirement that the party calling a witness be surprised by the witness's testimony in order to be allowed to introduce a prior inconsistent statement. See Comment to Evid C §1235. This means that the holder of a hearsay writing may call the declarant to the stand without fear that the declarant will testify inconsistently without reprisal, even though the writing is otherwise inadmissible.

PRACTICE TIP: You can ask the court to give the jury instructions in CALCRIM 318 and 319 in criminal cases; civil practitioners may also want to draft an instruction based on CALCRIM 318 and 319. In at least three reported cases, CALCRIM 318 has been upheld against a challenge. *People v Hudson* (2009) 175 CA4th 1025, 1027, 96 CR3d 713; *People v Golde* (2008) 163 CA4th 101, 119, 77 CR3d 120; *People v Felix* (2008) 160 CA4th 849, 859, 72 CR3d 947.

For an example of impeaching a witness with prior deposition testimony, see chap 28.

§41.14 3. Meeting Opponent's Objections

Be prepared for objections, because opposing counsel is likely to interrupt impeaching questions with objections to try to keep jurors from understanding what is going on. You should be prepared to respond to objections both with legal arguments and with explanations that jurors will understand.

Your opponent may object if you try to impeach a witness for failure to mention a particular piece of information in a prior statement, if the witness was not asked about that information when the prior statement was made.

EXAMPLE: If a rape victim says at trial that the defendant had alcohol on his breath, but did not tell that to the police officer who took her statement right after the rape, can the defense impeach the victim with that prior silence? If the officer did not specifically ask her whether the defendant appeared to have been drinking, the prosecutor might object on the ground that the witness was not *asked* about that matter. The court's decision would probably turn on the officer's exact questions and the victim's responses.

The court rules on foundational questions concerning prior consistent statements as an exception to the hearsay rule at a preliminary fact hearing. Evid C §405. See chap 4.

§41.15 4. Statements Made During Judicial Arbitration Not Admissible at Trial

A witness's prior inconsistent statement made during a judicial arbitration proceeding is not admissible for impeachment at a subsequent trial because Cal Rules of Ct 3.826(c) prohibits any reference during trial to any aspect of arbitration proceedings or evidence adduced at the arbitration hearing. *Jimena v Alesso* (1995) 36 CA4th 1028, 43 CR2d 18.

§41.16 B. Prior Inconsistent Statements of Hearsay Declarants (Evid C §1202)

Evidence Code §1202 allows prior inconsistent statements to be used to impeach statements admitted in evidence that were made by declarants who did not testify at the current hearing or trial. They may be used, however, only for impeachment purposes. See Comment to Evid C §1202. They may not be admitted for the truth of the matter stated unless they fall within some recognized exception to the hearsay rule, *e.g.,* a declaration against interest. See Comment to Evid C §1202.

PRACTICE TIP: Counsel whose hearsay declarant is being impeached during trial is entitled to ask the court to give a limiting instruction that informs the jury that the prior inconsistent statement is not being admitted for the truth of the matter stated. See CACI 206.

The declarant does not have to be available for cross-examination at the present hearing or trial in order for a prior inconsistent statement to be admitted under Evid C §1202. See *People v Curl* (2009) 46 C4th 339, 361, 93 CR3d 537. If the declarant *is* available, the party who used the declarant's hearsay statement has the burden of calling him or her to explain or deny the prior inconsistent statement. See Comment to Evid C §1202. If the declarant is brought to trial to respond to the prior inconsistent statement, Evid C §1235 is then operative because the witness is available for cross-examination, and the statement can then be used for the truth of the matter stated. *Clifton v Ulis* (1976) 17 C3d 99, 130 CR 155.

Prior inconsistent statements admitted under Evid C §1202 are admissible to impeach the witness on collateral matters. See Comment to Evid C §1202.

NOTE: The Evidence Code distinguishes between impeachment of a witness testifying at the current hearing or trial and impeachment of a hearsay declarant whose statement is admitted *without* the witness's testimony at the current hearing or trial. An example of a hearsay declarant's statement might be introduction of someone's deposition testimony at trial without having the declarant testify at the trial.

The court rules on foundational questions concerning prior inconsistent statements of hearsay declarants at a preliminary fact hearing. Evid C §405. See chap 4.

V. CHECKLISTS

§41.17 A. Checklist: Witnesses to Subpoena

Testifying Witness (Evid C §1235)

- Person to testify to prior inconsistent statement, unless statement is a writing.
- If statement is a writing, a person to authenticate it, if testifying witness being impeached does not or cannot authenticate it.

Hearsay Declarant (Evid C §1202)

- Person to testify to conduct or statement if statement is not a writing.
- If statement is a writing, person to authenticate it.
- Declarant, if you want to introduce prior statement for truth of the matter stated.

§41.18 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §1220. See chap 10.
- Declaration against interest. Evid C §1230. See chap 20.
- Former testimony. Evid C §§1290-1292. See chap 28.
- Nonhearsay. Evid C §1200. See chap 35.
- Past recollection recorded. Evid C §1237. See chap 38.
- Prior identification. Evid C §1238. See chap 42.
- Refreshing recollection. Evid C §771. See chap 44.
- Spontaneous or contemporaneous declaration. Evid C §§1240-1241. See chap 49.

VI. SOURCES

§41.19 A. Evidence Code

Evid C §770. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statements; or

(b) The witness has not been excused from giving further testimony in the action.

Evid C §1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

Evid C §1235. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

§41.20 B. Other

For further discussion of the prior inconsistent statement of a witness exception to the hearsay rule, see 3 Witkin, California Evidence, *Presentation at Trial* §§315-366 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 10 (4th ed CJA-CEB 2009); Cotchett, California Courtroom Evidence, chap 16 and §§8.01, 21.02-21.03, 21.06, 21.09, 21.24-21.25, 21.49, 26.03 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *Limitations on Credibility Evidence* §5.L, *The Hearsay Rule and Its Exceptions* §9.B (3d ed 2000); California Personal Injury Proof §§2.7-2.19, 10.6-10.8, 13.42-13.47 (Cal CEB 1970).

Source: Evidence/Effective Introduction of Evidence in California/42 Prior Identifications/Chapter Outline

42

Prior Identifications

Nancy M. Naftel

§42.1 I. SCOPE OF CHAPTER

This chapter discusses prior identifications, which are admissible under Evid C §1238 when the person who made the identification testifies to having made it and vouches for its accuracy. Prior identifications are considered more reliable than identifications made in court months or years later because they occur closer to the time of the event, when memories are fresher. There is also less chance that other people or events will have modified the identifier's memories. See Comment to Evid C §1238.

II. REQUIREMENTS

§42.2 A. To Admit

To admit a prior identification into evidence, the proponent must meet the following requirements:

- The statement identifies a party or another as a participant in a crime or other occurrence relevant to the case (Evid C §1238(a));
- The crime or occurrence was fresh in the witness's memory when the statement was made (Evid C §1238(b); see *People v Sullivan* (2007) 151 CA4th 524, 560, 59 CR3d 876;
- The witness testifies that he or she made the identification and that it was a true reflection of his or her opinion at that time (Evid C §1238(c));
- The prior identification statement would have been admissible if made by the witness while testifying (Evid C §1238); and
- If in writing, the statement must be properly authenticated (see Evid C §1401).

Source: Evidence/Effective Introduction of Evidence in California/42 Prior Identifications/§42.3 B. To Object

§42.3 B. To Object

Grounds for objecting to the admissibility of a prior identification include:

- Hearsay (Evid C §1200);
- Irrelevant (Evid C §350);
- No foundation (Evid C §1238), *e.g.*:
- Statement does not constitute an "identification,"
- Occurrence not fresh in witness's memory when statement was made, or
- Witness who made identification has not testified at present proceeding;
- Admission of statement violates confrontation clause (criminal case) (see *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354; *Davis v Washington* (2006) 547 US 813, 165 L Ed 2d 224, 237, 126 S Ct 2266, discussed in §20.20B);
- Any other objection that could be made if witness was making an in-court identification, *e.g.,* lack of personal knowledge; and
- If in writing:
- Not (properly) authenticated (Evid C §1401), and
- Inadmissible secondary evidence (Evid C §1521).

III. SAMPLE QUESTIONS

A. Civil Case: Identity of Driver in Automobile Accident

1. Witness Testifies to Own Prior Identification

§42.4 a. Information to Elicit

In asking about the prior identification of the driver involved in an automobile accident, the proponent wants the witness to testify to the following in response to the direct examination questions in §42.5:

- Report the date, time, and place of the prior identification;
- Confirm that the statement was made when the incident was fresh in her memory;
- State that the identification was a true reflection of her opinion;
- Relate the prior identification itself; and
- Identify the driver in court, if possible.

§42.5 b. Questions to Ask

Q: Ms. Witness, where were you on January 3, 1998, at 1:30 p.m.?

Q: From your location in that restaurant, could you see the corner of First and Main Streets?

Q: Did anything unusual occur at that time?

Q: What did you see?

Q: At the time of the collision, how far away were you from the red car?

Q: Would you point to a place in the courtroom that is the same distance from you now as the red car was then?

Q: At the time of the collision, were you able to see the driver of the red car?

Q: Did you see the driver's face?

Q: Did you see the driver of the red car get out of his car?

Q: How long did you observe the driver?

Q: Was anything obstructing your view of the driver during this time?

Q: Did an officer of the California Highway Patrol interview you about the collision?

Q: When were you interviewed?

Q: Where were you interviewed?

Q: Did you identify the driver of the red car to the officer?

Q: Was the incident still fresh in your mind when you did that?

Q: Was the person you identified to the officer in fact the driver of the red car?

PRACTICE TIP: A witness who is still able to identify the driver, if present in the courtroom, should do so because it strengthens the prior identification.

2. Officer Testifies to Another's Prior Identification

§42.6 a. Information to Elicit

In asking a police officer who witnessed another person's prior identification of the driver involved in an automobile accident, the proponent wants the officer to testify to the following in response to the direct examination questions in §42.7:

- Identify self and person who made the prior identification;
- Report the date, time, and place where he witnessed the prior identification; and
- State whom that person identified.

§42.7 b. Questions to Ask

Q: Officer, would you please state your occupation and assignment?

Q: Were you so employed on January 3, 1998, at approximately 1:30 p.m.?

Q: At that time did you investigate a collision at the corner of First and Main Streets in the City of Anytown?

Q: In your investigation did you interview Ms. Witness?

Q: Do you see her in the courtroom?

Proponent: Your Honor, may the record reflect that Officer has identified Ms. Witness.

Q: Did you ask her if she could identify the driver of the red car?

Q: What did she say?

Q: Did she indicate to you the person who was driving the red car?

Q: Where did she do that?

Q: When did she do that?

Q: Is the person she pointed out as the driver of the red car in the courtroom today?

Q: Where is he?

Proponent: Your Honor, may the record reflect that Officer identified Mr. Driver.

B. Criminal Case: Identity of Robbery Suspect

1. Witness Testifies to Prior Identification at Crime Scene

§42.8 a. Information to Elicit

The prosecutor wants the witness to testify to the following matters in response to the direct examination questions in §42.9:

- Report the date, time, and place of the incident;
- Confirm her ability to see the suspect;
- Report the length of time she looked at suspect, and portion of suspect seen; and
- Describe the prior identification, *e.g.:*
- Where, when, who else was there to view,
- Details concerning who was identified, and
- That the prior identification was a true reflection of the witness's opinion at that time; and
- Identify the suspect in court.

NOTE: The prosecutor should make clear for the record the person whom the witness has just identified in court.

§42.9 b. Questions to Ask

Q: Ms. Witness, were you present in Department Store on July 6, 1998, at approximately 10:30 a.m.?

PRACTICE TIP: Although an objection could be made to this question as leading, judges usually allow such questions to establish preliminary matters. See California Trial Objections, chap 13 (Cal CEB Annual).

Q: Did something unusual occur at that time?

Q: What did you see?

Q: What was the lighting like where you were standing?

Q: Would you please indicate a point in the courtroom that is about as far away from you now as the person holding the gun was then?

Q: What was the man with the gun doing when you saw him?

Q: How long did you look at the man with the gun?

[*Questions omitted concerning crime itself*]

Q: Did you talk to a police officer on July 6, 1998, shortly after that incident?

Q. How long after the incident?

Q: Did the officer ask you whether you saw anyone who was involved?

Q: Did you make an identification at that time?

Q: Whom did you identify?

PRACTICE TIP: The opponent might object to the prior identification as cumulative. Prior identifications, however, may be admitted to corroborate an identification made at trial. *People v Slobodion* (1948) 31 C2d 555, 559, 191 P2d 1.

Q: How many minutes after the incident did you identify the defendant to the police?

Q: When you identified the defendant to the police, was your statement regarding the suspect's identity true?

Q: Do you see the man who held the gun in the courtroom today?

Q: Where is he?

Proponent: Your Honor, may the record reflect that the witness has identified the defendant?

2. Witness Testifies to Prior Identification Made From Photographic Lineup

§42.10 a. Information to Elicit

The proponent wants the witness to testify to the following matters in §42.11:

- Tell when and where the witness was shown photographs;
- Describe who showed them to the witness;
- Report the number of photographs she saw;
- Relate what the officer said before showing her the photographs; and
- If she picked out a photograph of a suspect, state that the identification was a true reflection of her opinion.

§42.11 b. Questions to Ask

Q: Ms. Witness, following the robbery were you shown any photographs?

Q: Who showed you those photographs?

Q: When were you shown the photographs?

Q: How many photographs were you shown?

Q: Did the officer tell you anything before she showed you the photographs?

NOTE: The officer may have given admonitions, *e.g.,* that the suspect may or may not be in the photographs the witness is about to review; that the exposure may make those depicted look darker or lighter; that facial hair or hair length may be different from those features when the photograph was taken.

Q: What did she say?

Q: Did you pick out any photograph as being that of the suspect?

Q: Was the robbery still fresh in your memory when you saw the photographs?

Q: Was the identification of the photograph a true reflection of your opinion at that time?

PRACTICE TIP: You may also need to call someone to testify that the person whose photograph the witness selected is defendant.

3. Witness Testifies to Prior Identification Made at Live Lineup

§42.12 a. Information to Elicit

The proponent wants the witness to testify to the following matters in §42.13:

- Describe when and where the witness attended the lineup;
- Report the number of persons in the lineup;
- State who was identified; and
- Confirm that the identification was a true reflection of her opinion.

§42.13 b. Questions to Ask

Q: Ms. Witness, following the incident did you attend a lineup at the police department?

Q: When did you do that?

Q. Did an officer inform you that you had no obligation to pick someone?

A: The officer told me that I would be asked to look at a person to see if he was or was not involved in the incident, and that it is just as important to clear an innocent person as to identify a guilty one.

Q: How many persons were in the lineup?

Q: Did you see the suspect in the lineup?

Q: Was the incident still fresh in your mind at the time you saw the lineup?

Q: When you identified the suspect in the lineup, was that a true reflection of your opinion at that time?

[*In-court identification omitted*]

4. Witness Testifies to Assisting in Creation of Drawing of Suspect

§42.14 a. Information to Elicit

The proponent wants the witness to testify to the following matters in §42.15:

- Tell where and when she described the suspect to the police artist;
- Confirm that incident was fresh in her mind when she gave the description;
- State that her description was accurate;
- Explain how she watched artist prepare drawing; and
- Identify and authenticate the drawing.

§42.15 b. Questions to Ask

Q: Ms. Witness, after the robbery did you give information to anyone to use in preparing a drawing of the suspect?

Q: To whom did you give that information?

Q: When did this occur?

Q: Was the incident fresh in your memory when you gave the police artist that information?

Q: Did you actually see the artist prepare the drawing?

Q: Your Honor, I have a drawing that I would like marked as People's Exhibit No. 1 for identification.

PRACTICE TIP: You should find out from the judge before trial begins how he or she wants exhibits marked and handled. See discussion in chap 39.

Q: Ms. Witness, I am showing you what has been marked as People's No. 1 for identification. Do you recognize this?

Q: What is it?

A: It's a drawing of the robber that the artist prepared with my help.

Q: At the time this drawing was made did you think it was an accurate representation of how the robber looked?

PRACTICE TIP: In this question sequence the witness authenticates the drawing. It is not necessary to have the person who prepared the drawing testify. See *People v Cooks* (1983) 141 CA3d 224, 308, 190 CR 211.

Proponent: Your Honor, may People's Exhibit No. 1 be admitted into evidence?

5. Police Officer Testifies to Having Heard Witness Describe Defendant

§42.16 a. Information to Elicit

The proponent wants the police officer to testify to the following matters in §42.17:

- Identify self and job;
- Explain that he was investigating crime;
- Describe when and where he interviewed the eyewitness;
- Report that the witness described the suspect; and
- State the witness's description.

§42.17 b. Questions to Ask

Q: Mr. Police Officer, during your investigation, did you interview Ms. Witness?

Q: Do you see Ms. Witness in the courtroom?

Proponent: Your Honor, may the record reflect that Mr. Officer has identified Ms. Witness.

Q: Where did you interview her?

Q: When did you interview her?

Q: Did she describe the suspect?

PRACTICE TIP: Evidence Code §1238 applies to descriptions. *People v Hatfield* (1969) 273 CA2d 745, 78 CR 805.

Q: How did she describe him?

Opponent: Objection, hearsay. Ms. Witness has not testified to the Evidence Code §1238 foundational requirements needed before this information can be admitted.

Proponent: Your Honor, Ms. Witness will be available to testify this afternoon. Can we take Mr. Officer's testimony now so he can get back to work, subject to a motion to strike?

Court: I will allow the testimony subject to a motion to strike.

Q: How did Ms. Witness describe the suspect to you?

6. Police Officer Testifies to Having Shown Photographs to Witness

§42.18 a. Information to Elicit

The proponent wants the police officer to testify to the following matters in §42.19:

- Identify self and job;
- State when and where he showed photographs to the witness;
- Describe how many photographs he showed the witness, and how they were arranged or presented;
- Report what he said to the witness before showing the photographs;
- Identify and authenticate photographic lineup;
- State that the witness identified the suspect; and
- Confirm which photograph the witness picked out.

§42.19 b. Questions to Ask

Q: Mr. Police Officer, did you show a group of photographs to Ms. Witness?

Q: Where did you do that?

Q: When did you do that?

Q: Before you showed the photographs to Ms. Witness, did you admonish her in any way?

Q: What did you tell her?

Q: After looking at the photographs, did she identify anyone as the robber?

Q: Officer, do you have the photographs with you today that you showed Ms. Witness?

Proponent: Your Honor, may this manila folder and the six photographs it contains be marked as People's Exhibit No. 2 for identification?

Q: Officer, showing you what has been marked People's Exhibit No. 2 for identification, are these the photographs you showed Ms. Witness?

Q: Are they in the same order and format as when you showed them to Ms. Witness at that time?

Q: Did Ms. Witness identify any of these photographs as being a photograph of the suspect?

A. Yes. She said, "That's the man who robbed the store."

Q: Which photograph did she identify?

Q: Did she indicate how certain she was of the identification?

NOTE: One factor a jury may consider in evaluating the credibility of a witness's identification is the certainty the witness places on that identification. *People v Sullivan* (2007) 151 CA4th 524, 561, 59 CR3d 876 (jury instruction about certainty in eyewitness identification proper, even when defense expert discredits certainty as factor at trial).

Q: Whose photograph is that?

PRACTICE TIP: Your opponent may object that the police officer has no personal knowledge that the photograph is actually of defendant because he was not there when it was taken. You can counter that the police officer knows who the defendant is and can testify that the photograph is a "faithful representation." See *People v Durrant* (1897) 116 C 179, 212, 48 P 75.

Source: Evidence/Effective Introduction of Evidence in California/42 Prior Identifications/ IV. COMMENT/§42.20 A. In Limine Hearings on Pretrial Identification Procedures

IV. COMMENT

§42.20 A. In Limine Hearings on Pretrial Identification Procedures

In a criminal case, the defense may seek to suppress a prior identification if the procedures used to obtain it were impermissibly suggestive. The following are some of the more common legal reasons for challenging pretrial identifications:

- Right to counsel at prior identification proceeding, which attaches on institution of formal adversary proceedings, was violated (*People v Cook* (2007) 40 C4th 1334, 1353, 58 CR3d 340);
- Prior identification proceeding was illegal because it was, *e.g.,* "impermissibly suggestive" (*Simmons v U.S.* (1968) 390 US 377, 384, 19 L Ed 2d 1247, 1253, 88 S Ct 967) or because the witness did not have sufficient opportunity to see clearly enough to make an identification;
- Prior identification was secured or enhanced through hypnosis (*People v Shirley* (1982) 31 C3d 18, 181 CR 243). But see Evid C §795 (establishing conditions that, if satisfied, permit use of testimony secured through hypnosis).

A court may find an unduly suggestive and unfair identification proceeding "reliable under the totality of the circumstances" by considering the following factors (see *People v Cook* (2007) 40 C4th 1334, 1353, 58 CR3d 340):

- The ability of the witness to see the defendant during the crime;
- The attentiveness of the witness;
- The accuracy of the witness's first description of the defendant;
- The confidence of the witness in the identification; and
- The amount of time between the crime and the formal identification.

Defense counsel has the right to a hearing in the trial court before trial begins and out of the jury's presence on his or her challenge to a prior identification procedure. See *People v Citrino* (1970) 11 CA3d 778, 782, 90 CR 80 (establishing rule). But see *People v George* (1972) 23 CA3d 767, 772, 100 CR 427 (criticizing rule). If the defense succeeds in suppressing evidence of a prior identification, the burden is on the prosecution to show by clear and convincing evidence that the witness's *in-court* identification will be based on the witness's observations at the scene or the crime and is not the result of any unfair pretrial identification procedure. See *People v Cooks* (1983) 141 CA3d 224, 305, 190 CR 211; *People v Vanbuskirk* (1976) 61 CA3d 395, 132 CR 30. If it is not based on illegal procedures, the identification is admissible without any additional showing. *People v Cooks*, *supra*. See generally California Criminal Law Procedure and Practice, chap 22 (Cal CEB Annual) for discussion of eyewitness identification in criminal cases.

NOTE: Although the California right to counsel at preindictment lineups was established in *People v Bustamante* (1981) 30 C3d 88, 102, 177 CR 576, the associated right to exclude relevant evidence from a preindictment lineup because of lack of counsel was abrogated by Proposition 8. *People v Cook* (2007) 40 C4th 1334, 1353, 58 CR3d 340.

§42.21 B. Other Procedural Vehicles for Challenging Prior Identifications

If the prior identification was obtained in an illegal detention, search, or seizure (see *Davis v Mississippi* (1969) 394 US 721, 22 L Ed 2d 676, 89 S Ct 1394), it may be challenged as part of a Pen C §1538.5 hearing before trial. In felony cases, challenges to identification procedures may take place at the preliminary hearing.

§42.22 C. Effect of Eyewitness Testimony at Trial

An in-court identification by an eyewitness at trial is evidence that will support a conviction. See *People v Collins* (1971) 20 CA3d 601, 97 CR 821. Whether a prior *out-of-court* identification is sufficient to support a criminal conviction should be determined by the "substantial evidence" standard of *People v Johnson* (1980) 26 C3d 557, 578, 162 CR 431. That is, the record as a whole should disclose evidence that is reasonable, credible, and of such value that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt). *People v Cuevas* (1995) 12 C4th 252, 260, 48 CR2d 135. See *People v Roa* (2009) 171 CA4th 1175, 1179, 90 CR3d 336 (repeated and consistent out-of-court identifications constituted substantial evidence of defendant's use of firearm in carjacking).

Certain prior in-court identifications, when admissible, will support a conviction, *e.g.,* preliminary hearing testimony (see *People v Ford* (1981) 30 C3d 209, 178 CR 196) and testimony from an earlier trial of the same case (see *People v Ashford* (1968) 265 CA2d 673, 71 CR 619). On admission of former testimony, see California Criminal Law Procedure and Practice §§31.20-31.21 (Cal CEB Annual). See also chap 28.

PRACTICE TIP: It is not required that someone testify to having seen the defendant commit the crime in question; other evidence, such as fingerprints or stolen items found in the suspect's possession, can support a conviction.

V. CHECKLISTS

§42.23 A. Checklist: Witnesses to Subpoena

- Person who made the prior identification (to testify that the statement was made when the incident was fresh in the witness's memory and that it was a true reflection of the witness's opinion at that time).
- Person who heard the witness make the identification and can testify about it. Although not usually required, this witness helps make the prior identification more persuasive.

Source: Evidence/Effective Introduction of Evidence in California/42 Prior Identifications/§42.24 B. Checklist: Alternative Methods of Admissibility

§42.24 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1227; see chap 10.
- Declaration against interest. Evid C §1230; see chap 20.
- Dying declaration. Evid C §1242; see chap 22.
- Former testimony. Evid C §§1290-1292; see chap 28.
- Past recollection recorded. Evid C §1237; see chap 38.
- Prior consistent statement. Evid C §§791, 1236; see chap 40.
- Prior inconsistent statement. Evid C §§770, 1235; see chap 41.
- Spontaneous statement. Evid C §1240; see chap 49.
- Statement of witness unavailable because of defendant's actions. Evid C §1350; *People v Zambrano* (2007) 41 C4th 1082, 1143, 63 CR3d 297, disapproved on other grounds in *People v Doolin* (2009) 45 C4th 390, 421 n22, 87 CR3d 209 (murder victim's prior testimonial statement to police about defendant's confession of assault admissible under §1350).

On confrontation rights and forfeiture by wrongdoing, see §§20.20, 22.3.

VI. SOURCES

§42.25 A. Evidence Code

Evid C §1238. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

§42.26 B. Other

For further discussion of prior identification, see 1 Witkin, California Evidence, *Hearsay* §§163-166 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 12 (4th ed CJA-CEB 2009). For discussion of lineup and identification procedures in criminal cases, see California Criminal Law Procedure and Practice, chap 22 (Cal CEB Annual).

43

Privileges and Confidential Communications

Holly J. Fujie

§43.1 I. SCOPE OF CHAPTER

The purpose of this chapter is to alert counsel to the possibility of a privilege being asserted for the first time at trial (see table in §43.15 for a full list of privileges). Successful assertion of a privilege either prevents the information it relates to from being elicited or supports a motion to strike that testimony. Evid C §§400, 405. Although most claims of privilege are determined at the discovery stage in civil cases, and either at a pretrial hearing or through an in limine motion at trial in criminal cases, occasionally privilege issues arise for the first time at trial, or a party may wish to waive a previously claimed privilege at trial. See §43.8.

In addition to the privileges created by Evid C §§900-1070, the legislature has established other categories of confidential information that generally may not be introduced as evidence. Examples include:

- Statements made during mediation (see Evid C §1119; see also *Wimsatt v Superior Court* (2007) 152 CA4th 137, 215, 61 CR3d 200 (mediation briefs and e-mails clarifying those briefs are confidential)); and
- Attorney work product (see CCP §§2018.010-2018.080).

See the table in §43.15 for a list of confidential information. Many of the rules relating to the assertion and waiver of privileges apply equally to confidential communications; thus, this chapter covers both categories of communications. For example, as with privileges, successfully asserting the confidentiality of a particular communication may prevent the statement from being introduced at trial.

NOTE: This chapter primarily uses the term "privilege" to refer to both privileged and confidential information. For discussion and analysis of the differences between privileges and other categories of confidential information, see Jefferson's California Evidence Benchbook, chaps 36 (evidence excluded by extrinsic policies), 37-46 (privileges) (4th ed CJA-CEB 2009).

It is essential to review a case before trial in light of whether privilege or right of confidentiality may be claimed concerning a witness or a piece of evidence, and prepare for this contingency. This chapter offers direction and resources in the event of a surprise assertion or waiver of privilege or right of confidentiality at trial. See the relevant statutory provisions and references to in-depth discussions of privilege in §§43.11-43.14, and the table listing various privileges in §43.15.

II. COMBATING ASSERTION OF PRIVILEGE

A. Privilege Must Have Been Claimed Before Trial If Privileged Information Was Requested

§43.2 1. Civil Cases

Because any privilege may be asserted during discovery (CCP §2017.010), failure to assert a privilege to protect requested information generally waives the privilege. CCP §2025.460(a); Evid C §912(a). See *Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1241, 65 CR3d 456 (discussing writ review of discovery as only adequate remedy against erroneous order to reveal privileged matters). See also *Snyder v Superior Court* (2007) 157 CA4th 1530, 69 CR3d 600 (plaintiffs properly refused to produce work product-protected material as provided under general order; court improperly dismissed complaint).

When no appropriate objection to the discovery of particular matter can be formulated, however, there may be grounds to claim that there has been no waiver of a privilege. In *Rico v Mitsubishi Motors Corp.* (2007) 42 C4th 807, 815 n8, 68 CR3d 758, for example, the supreme court held that counsel did not waive the absolute protection of the work product doctrine by failing to object to opposing counsel's clandestine use of a protected document in a deposition. The document (which counsel had not prepared, and which opposing counsel had inadvertently obtained) contained counsel's impressions about witnesses and trial strategy. Because counsel was unaware of the source of opposing counsel's deposition questions, he was unable to formulate an appropriate objection and there was no waiver.

PRACTICE TIP: Maintenance of a formal "privilege log" is practical, but not necessary, to preserve the privilege, so long as counsel asserts the privilege or privileges in response to a discovery request. See *Best Product, Inc. v Superior Court* (2004) 119 CA4th 1181, 1188, 15 CR3d 154.

The exception to this rule is the privilege against self-incrimination, which is waived only for the particular stage of the proceeding at which the holder of the privilege testifies without asserting the privilege. *People v Lopez* (1980) 110 CA3d 1010, 168 CR 378; *People v Lawrence* (1959) 168 CA2d 510, 517, 336 P2d 189. This privilege, however, cannot be used during trial to exclude testimony or documents that were voluntarily given before the trial. *People v Maxwell* (1979) 94 CA3d 562, 573, 156 CR 630.

Although a juvenile (wardship) commitment proceeding is a civil proceeding, under Welf & I C §1801.5, a juvenile may claim "all rights guaranteed under the federal and state constitutions in criminal proceedings." Those rights include the right against self-incrimination under the Fifth Amendment. *Joshua D. v Superior Court* (2007) 157 CA4th 549, 558, 68 CR3d 715.

For discussion of privileges during discovery in civil cases, see California Civil Discovery Practice, chap 3 (4th ed Cal CEB 2006).

§43.3 2. Criminal Cases

Although civil discovery provisions do not apply and there are no depositions and interrogatories in criminal law cases, there are other pretrial proceedings in criminal cases at which privileges must be asserted if information is requested that is claimed to be privileged. Examples include grand jury proceedings, preliminary hearings, hearings on motions, subpoenas duces tecum, and conditional examinations of witnesses who are sick or about to leave the state. See Evid C §912(a).

Nevertheless, a person may testify in a preliminary hearing and then successfully assert his or her Fifth Amendment right against self-incrimination to avoid testifying at trial. *People v Williams* (2008) 43 C4th 584, 615, 75 CR3d 691. In such an instance, the preliminary hearing testimony may be offered at trial, because the witness is unavailable and there was a full and complete opportunity to cross-examine the witness. 43 C4th at 618. A person may not, however, testify on direct and refuse to answer questions on cross-examination based on his or her Fifth Amendment rights. *People v Seminoff* (2008) 159 CA4th 518, 71 CR3d 582 (court struck testimony of codefendant after codefendant refused to answer questions during cross-examination). For further discussion of the Fifth Amendment privilege, see California Criminal Law Procedure and Practice §23.51 (Cal CEB Annual).

The defense must follow specific statutory procedures before trial to:

- Obtain peace officer personnel records (see Evid C §§1043, 1045; Pen C §832.5; *Chambers v Superior Court* (2007) 42 C4th 673, 68 CR3d 43 (approving use of derivative information obtained in another action); *Garcia v Superior Court* (2007) 42 C4th 63, 73, 63 CR3d 948; *Alford v Superior Court* (2003) 29 C4th 1033, 130 CR2d 672); and
- Discover the identity and location of informants (see Evid C §§405, 916, 1040-1041).

NOTE: A criminal defendant's Sixth Amendment confrontation rights under *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 194, 124 S Ct 1354, may survive a challenge that the testimonial material desired is subject to the attorney-client privilege. *Murdoch v Castro* (9th Cir 2007) 489 F3d 1063, 1068 n2, rehearing en banc granted (9th Cir 2008) 546 F3d 1051 (privileged, exculpatory letter of co-conspirator containing prior inconsistent statement was not necessary to aid defendant's effective cross-examination). On a criminal defendant's confrontation rights, see §§20.20B, 49.4. For discussion of privileges in criminal law cases, see California Criminal Law Procedure and Practice, chaps 9, 11-12, 17, 23, 51 (Cal CEB Annual).

Source: Evidence/Effective Introduction of Evidence in California/43 Privileges and Confidential Communications/§43.4 B. Procedures at Trial to Determine If Privilege Applies

§43.4 B. Procedures at Trial to Determine If Privilege Applies

After a privilege is asserted, it is up to the court to rule on it. Evid C §§905, 914(a). If the applicability of a privilege depends on the determination of preliminary questions of fact, they are decided under Evid C §§400-402, 405. See chap 4.

In most instances, a person asserting a privilege has the burden of proving that the requisites of the privilege exist in a preliminary fact hearing. See Evid C §§402, 405; Comment to Evid C §405. Exceptions to this rule are listed in Evid C §917(a), which establishes a presumption of confidentiality for communications between attorney and client, physician or psychotherapist and patient, clergy member and penitent, husband and wife, registered domestic partners, and sexual assault or domestic violence counselor and a victim of sexual assault or domestic violence. Evid C §917(a). See Fam C §297.5 (registered domestic partners). Thus, when a witness asserts that a communication with a person with whom the witness has one of the listed relationships was confidential, the proponent of the evidence has the burden of proving that the privilege does not apply. See Evid C §§402, 405; *Tritek Telecom, Inc. v Superior Court* (2009) 169 CA4th 1385, 1389, 87 CR3d 455.

In ruling on the assertion of the Fifth Amendment privilege against self-incrimination asserted in an instance when a statutory immunity may apply, the court must examine whether the immunity provided is fully co-extensive with the privilege against self-incrimination. *In re Mark A.* (2007) 156 CA4th 1124, 1134, 68 CR3d 106 (no sanctions in juvenile dependency proceeding against parent who refused to testify and claimed privilege against self-incrimination). See also *In re Brenda M.* (2008) 160 CA4th 772, 774, 72 CR3d 686 (sanctions were not harmless as in *Mark A.*).

If a claim of privilege cannot be decided without disclosure of the assertedly confidential information, the privilege will usually stand. The normal rule is that a judge may not require disclosure of the information for which a privilege is claimed to rule on the claim. Evid C §915(a). When, however, the claim of privilege exists only to the extent that "the interest in maintaining the secrecy of the information outweighs the interest in seeing that justice is done in the particular case" (Comment to Evid C §915), §915(b) permits the court to require disclosure in camera if necessary to rule on the claim. The privileges subject to in camera disclosure under §915(b) include:

- Official information (Evid C §1040);
- Identity of an informer (Evid C §1041);

NOTE: An in camera review is the proper procedure to review a defendant's motion to quash a search warrant obtained by the police using a confidential informant when the defendant believes the informant was his or her lawyer and the police solicited a breach of the lawyer-client privilege. See *People v Navarro* (2006) 138 CA4th 146, 41 CR3d 164.

- Trade secret (Evid C §1060); and
- Attorney work product (CCP §§2018.010-2018.080).

The court may also require in camera disclosure of assertedly privileged information when the claim is made at a Pen C §1524 hearing and relates to documents seized under a search warrant (Evid C §915(a)), or when the information in question is a communication made to a sexual assault or domestic violence counselor (Evid C §§1035.4, 1037.2), or contained in a police or custodial officer's personnel file (Evid C §§1040-1047).

NOTE: A defendant faces a low threshold to show good cause to compel an in camera hearing to discover complaints in a police officer's personnel file. *Uybungco v Superior Court* (2008) 163 CA4th 1043, 1048, 78 CR3d 30. At the hearing, the custodian of records must submit a full record of the file to the court, providing responsive documents for review and explaining what documents or categories of documents in the personnel file have been excluded and the basis for that exclusion. This hearing transcript is sealed and provides the basis for appellate review. *People v Wycoff* (2008) 164 CA4th 410, 414, 78 CR3d 907.

In camera disclosure is also an appropriate procedure for the court to use in deciding a claim that the newsperson's shield (Cal Const art I, §29; Evid C §1070) excuses a reporter or a publication from revealing a source or unpublished information. See, *e.g.*, *Miller v Superior Court* (1999) 21 C4th 883, 888, 89 CR2d 834. See §43.11 for text of Evid C §1070. Confidential information communicated in chambers does not lose its privilege. Evid C §915(b). For an illustration of the use of a privilege log and in camera review to determine whether documents are protected by privilege, see *TME Enters., Inc. v Norwest Corp.* (2004) 124 CA4th 1021, 22 CR3d 146.

NOTE: The newsperson's shield (Cal Const art I, §2; Evid C §1070) is not really a privilege, but an immunity from contempt.

New York Times Co. v Superior Court (1990) 51 C3d 453, 273 CR 98. A person or entity entitled to the shield law's protection may not immediately challenge a trial court's rejection of a claim that requested information is covered by the shield law, but may only challenge judgment of contempt based on his, her, or its refusal to comply with an order to disclose the information. 51 C3d at 458. The newsperson's shield against contempt, as enacted in Proposition 115 (Cal Const art I, §29), outweighs the People's right to due process in the prosecution of criminal cases. *Miller v Superior Court* (1999) 21 C4th 883, 901, 89 CR2d 834.

When the government claims the official information privilege (Evid C §1040) in a criminal proceeding, it must show that the information it wants to protect is covered by the privilege, unless that is self-evident. The showing must be in open court, unless such a showing would compromise the privilege. *Torres v Superior Court* (2000) 80 CA4th 867, 95 CR2d 686. The defendant has the burden of showing materiality in the in-chambers hearing. If the proposed testimony does not relate to a material issue, the court is not required to make a finding adverse to the government. *People v Lewis* (2009) 172 CA4th 1426, 1432, 92 CR3d 191; *People v Walker* (1991) 230 CA3d 230, 236, 282 CR 12. See *People v Garza* (1995) 32 CA4th 148, 153, 38 CR2d 11.

NOTE: In criminal actions, work product protection extends only to "core" work product established under CCP §2018.030(a), *i.e.,* just to an attorney's written strategy, legal research, thoughts, impressions, and conclusions. *People v Zamudio* (2008) 43 C4th 327, 354, 75 CR3d 289 (no error to allow prosecution expert to testify that she had released tested evidence and her findings to defense laboratory). See also *People v Bennett* (2009) 45 C4th 577, 595, 88 CR3d 131 (prosecutor's questions that merely sought to clarify that DNA samples were available for independent testing did not violate work product protection); Pen C §1054.6(a).

C. Defeating a Privilege

§43.5 1. Communication Not Privileged

In attempting to combat assertion of a privilege, the first question is always whether the privilege actually applies, *i.e.,* whether all requisite elements of the privilege exist. Not all communications between individuals who have a relationship that can give rise to an evidentiary privilege are confidential, and communications that were not confidential when made are not privileged. See, *e.g.,* Evid C §952 (defining confidential communication between lawyer and client). For example, fee arrangements between lawyer and client may not be privileged. See *In re Osterhoudt* (9th Cir 1983) 722 F2d 591, 593. Simply providing counsel with a copy of a communication does not create a privileged document and facts contained in the communication may not be shielded. *Zurich Am. Ins. Co. v Superior Court* (2007) 155 CA4th 1485, 1502, 66 CR3d 833 (communications revealing attorney strategy and legal advice, even if not directed from or to attorney, may be privileged under specific conditions).

Communications relevant to an issue of a breach of duty are similarly not privileged. Thus, the physician-patient privilege does not include a communication relevant to an issue of breach by either party arising out of the physician-patient relationship. See Evid C §1001; *California Consumer Health Care Council v Kaiser* (2006) 142 CA4th 21, 33, 47 CR3d 593. See also Evid C §§958 (attorney-client privilege), 1020 (psychotherapist-patient privilege).

Source: Evidence/Effective Introduction of Evidence in California/43 Privileges and Confidential Communications/§43.5A 2. Exception to Privilege Prevents Its Assertion

§43.5A 2. Exception to Privilege Prevents Its Assertion

Most privileges have exceptions. Some are statutory, for example, those excluding communications relevant to a breach of duty between an attorney and client, or between a physician or psychotherapist and patient. Evid C §§958, 1001, 1020. The California Supreme Court has noted, however, that the attorney-client privilege applied for purposes of retrial after otherwise privileged matters were disclosed pursuant to Evid C §958 in connection with habeas corpus proceedings. *In re Miranda* (2008) 43 C4th 541, 555, 76 CR3d 172; *People v Ledesma* (2006) 39 C4th 641, 695, 47 CR3d 326. Additional statutory exceptions include the:

- Crime or fraud exception to the lawyer-client privilege (Evid C §956);
- Exceptions to privileges for marital communications (Evid C §972);
- Exception to the work product doctrine for investigation or prosecution of attorney fraud (CCP §2018.050); and
- Exception to psychotherapist-patient privilege when a patient is a danger to himself or herself or others, and disclosure will thwart the danger (Evid C §1024), but this is not a basis for requiring a parolee to waive the psychotherapist-patient privilege for communications with a privately retained psychotherapist as a condition for parole (*In re Corona* (2008) 160 CA4th 315, 72 CR3d 736).

Other exceptions are found exclusively in case law, *e.g.:*

- Neither the federal nor the California constitutional privilege against self-incrimination prohibits a public employer from requiring a public employee, on threat of discipline, even dismissal, to answer questions regarding job performance, as long as the public employer does not require the employee, as a condition of remaining on the job, to surrender the right against criminal use of the statements obtained. *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 88 CR3d 590;
- The marital communications privilege does not apply in law enforcement administrative investigations and hearings. *Riverside County Sheriff's Dep't v Zigman* (2008) 169 CA4th 763, 87 CR3d 358;
- A police officer-spouse is not permitted to use the official information privilege to conceal benefits, investments, and insurance plan participation in family law proceedings (*City of Los Angeles v Superior Court* (2003) 111 CA4th 883, 896, 3 CR3d 915, disapproved on other grounds by *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v Superior Court* (2007) 42 C4th 319, 345, 64 CR3d 693);
- Basic information about police officers, such as their names, department, and hire and termination dates are not confidential or privileged, but some personal information may be withheld on the basis of a threat to an officer's safety or effectiveness (*Commission on Peace Officer Standards & Training v Superior Court* (2007) 42 C4th 278, 302, 64 CR3d 661);
- The names of public employees, including police officers, with salaries in excess of $100,000 per year may be produced on request (*International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v Superior Court, supra*);
- In prison settings, a state confidentiality agreement covering group psychotherapy sessions does not extend to a defendant's confession to a prison psychologist made outside the group communication session, because the agreement extended only limited confidentiality to statements made during group communication sessions (*Beaty v Schriro* (9th Cir 2007) 509 F3d 994, 999); and
- The newsperson privilege must yield to a criminal defendant's right to a fair trial when refusal to disclose requested information would unduly infringe that right (*Delaney v Superior Court* (1990) 50 C3d 785, 268 CR 753).

PRACTICE TIP: The principles underlying *Delaney* could be used to argue against giving effect to virtually any privilege that would interfere with the ability of the defendant in a criminal case to defend against the charges.

Careful study of the applicable statutes and case law may provide novel arguments for admission of the evidence in a given case. In *People v Sinohui* (2002) 28 C4th 205, 120 CR2d 783, for example, the California Supreme Court held that Evid C §972(e)(2) (which provides an exception to the marital privileges when defendant is charged with a crime against a third person "committed in the course of committing a crime against… the other spouse") "applies whenever the crime against the third person and the crime against the spouse (1) are part of a continuous course of criminal conduct, and (2) bear some logical relationship to each other." 28 C4th at 220. This broad construction of the exception's scope comports with the principle that privileges should be

"'accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" 28 C4th at 217, quoting from *Trammel v U.S.* (1980) 445 US 40, 50, 63 L Ed 2d 186, 194, 100 S Ct 906.

§43.6 3. There Is No Privilege Holder

If you conclude that a privilege may be asserted, ascertain whether a holder of the privilege still exists. If there is no longer anyone authorized to assert the privilege, it may no longer apply and testimony will be allowed. See, *e.g.,* Evid C §§957 (lawyer-client privilege), 1000 (psychotherapist-patient privilege). A privilege held by an individual may be exercised by that person's guardian or conservator until death (Prob C §§1600(a), 1860(a)) and, after the holder's death, by the personal representative of the estate. Evid C §953; Prob C §12252; *California Consumer Health Care Council, Inc. v Department of Managed Health Care* (2008) 161 CA4th 684, 694, 74 CR3d 215 (physician-patient privilege survives death and is held by personal representative). See Evid C §993(c).

The question of whether a privilege holder still exists can be exceedingly complex in situations involving, for example, dissolved or merged corporations and successor fiduciaries to a trust. For further discussion, see Jefferson's California Evidence Benchbook, chap 42 (4th ed CJA-CEB 2009).

§43.7 4. Privilege Was Waived

If a holder of the privilege still exists, ascertain whether that person or entity has waived the privilege. If the holder waives the privilege, the right of every other person to claim the privilege is also waived. See Evid C §912.

The most common method of waiver is by the allegedly confidential communication being made in the presence of third parties. Any noncoerced disclosure of a privileged communication by the privilege holder waives the privilege. Evid C §912(a). It is essential to learn who else was present at the time a privileged communication was made. If that person is present to accomplish the purpose of the relationship, *e.g.,* the attorney's secretary, there is no waiver in the case of a professional privilege. Evid C §912(d). See *California Oak Found. v County of Tehama* (2009) 174 CA4th 1217, 1222, 94 CR3d 902 (disclosure to real parties in interest not waiver under Evid C §912(d)). See also *Meza v H. Muehlstein & Co.* (2009) 176 CA4th 969, 973, 98 CR3d 422 (attorneys did not waive privilege by communicating with each other in interest of respective clients). Communications revealing attorney strategy and legal advice, even those not directed from or to an attorney, may be subject to the attorney-client privilege, so long as it is necessary for all persons involved to have the knowledge, and so long as the information is kept confidential. *Zurich Am. Ins. Co. v Superior Court* (2007) 155 CA4th 1485, 1502, 66 CR3d 833. Nor does the communication of privileged information by electronic means waive the privilege, even though individuals involved in the facilitation, delivery, and storage of electronic information have access to its contents. Evid C §917(b). The definition of "electronic," found in CC §1633.2, is broad and includes facsimile transmission, e-mail, and conversations on cellular telephones. Federal law protects confidential communications against unlawful interception. See §43.9.

Any privilege attached to a communication in writing (within the meaning of Evid C §250) is usually waived when a witness uses that privileged writing to refresh his or her memory, either before or while testifying, and then testifies regarding that document. *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 72 CR 74. On request, the writing must then be produced and may be introduced in evidence. Evid C §771. Only the parts of the refreshing memorandum that are relevant to the testimony of the witness are admissible under §771. *People v Silberstein* (1958) 159 CA2d Supp 848, 851, 323 P2d 591.

PRACTICE TIP: It is imperative that a privilege be asserted before giving any testimony facilitated by refreshing the witness's memory, because the privilege may be waived if testimony is given before assertion of the privilege. Evid C §771; *Mize v Atchison, Topeka & Santa Fe Ry.* (1975) 46 CA3d 436, 120 CR 787.

If a witness you are cross-examining claims to have used privileged material to refresh his or her recollection for testimony already given, but cannot or will not produce the document, your remedy is to ask that the witness's testimony on both direct and cross-examination be stricken, unless the unavailability of the materials was not the other party's fault. *People v Parham* (1963) 60 C2d 378, 33 CR 497, overruled on other grounds by *Soule v General Motors Corp.* (1994) 8 C4th 548, 577, 34 CR2d 607. See Evid C §771(c).

Waiver also occurs when the holder of the privilege subsequently either discloses the allegedly confidential communication to a third party not necessary to accomplish the purpose of the relationship, or otherwise consents to disclosure. If, however, the disclosure itself is privileged (*e.g.,* a physician-patient privileged communication is communicated to a spouse), that disclosure does not constitute a waiver. Evid C §912(c).

When there are joint holders of the privilege, waiver by one party does not imply waiver by the other(s). Evid C §912(b). Examples of joint holders include two people who consult a lawyer together, and both spouses or registered domestic partners in the spousal communication privilege context.

Waiver may be implied by the filing of a lawsuit that puts in issue matters that depend on privileged communication or that pertain to the relationship between the privileged communicants.

EXAMPLES: The filing of a malpractice claim implies a waiver of the attorney-client privilege, and a loss of consortium claim implies a waiver of the marital privilege. See *Fremont Indem. Co. v Superior Court* (1982) 137 CA3d 554, 559, 187 CR 137 (insured under fire insurance policy waives privilege against self-incrimination by submitting claim). Similarly, a party may waive the psychotherapist-patient privilege by putting his or her mental state at issue. See *People v Combs* (2004) 34 C4th 821, 863, 22 CR3d 61.

Individuals who are key witnesses and employees of a plaintiff may also be deemed to have "waived" a privilege if their corporate employer files a claim to which their privileged testimony is relevant. This is not truly a waiver; it means only that, if the privilege holder persists in asserting the privilege, the claim will be dismissed. See *Dalitz v Penthouse Int'l, Ltd.* (1985) 168 CA3d 468, 214 CR

254 (reporters claiming First Amendment privilege).

§43.8 D. Effect of Opposing Counsel's Waiver of Privilege at Trial

If opposing counsel waives a privilege at trial, the proponent cannot make adverse comments or inferences from the prior claiming of the privilege during discovery. Evid C §913. The proponent may, however, assert that the prior withholding of information was improper and move in limine to exclude it from the trial. Alternatively, a continuance may be sought to deal with the issues raised by the new information.

Evidence Code §913 precludes the trier of fact in a civil or criminal action from drawing any inferences as to the witness's credibility or as to any matter at issue from a witness's exercise of any privilege, including the privilege against self-incrimination. *People v Doolin* (2009) 45 C4th 390, 441, 87 CR3d 209. See also *People v Champion* (2005) 134 CA4th 1440, 37 CR3d 122 (instruction that allowed jury to consider evidence that defendant had been given opportunity to make statement during his police interrogation, for limited purpose of rebutting defendant's testimony that he had not been given opportunity to tell his side of story, satisfied requirement of Evid C §913(b)).

§43.9 E. No Waiver by Interception of Privileged Electronic Communications Such as Internet Communication

Under California law, the presumption of confidentiality for privileged communications extends to communications transmitted electronically (*e.g.,* by e-mail or cellular telephone). Evid C §917(b).

In addition, federal law prohibits virtually all electronic snooping such as wiretapping unless permission is obtained under federal law. See, *e.g.,* 18 USC §2511(2)-(3), (4)(b) (listing general exceptions to prohibition on intercepting wire, oral, or electronic communications). This law covers not only oral telephone communications, but any electronic communications and any computer storage incident to such communications. See generally 18 USC §§2510-2522. Any interception of an electronic communication—whether it violates, or is authorized by, the federal law—will not cause the privilege to be waived. 18 USC §2517(4). In general, therefore, if a privileged electronic communication is intercepted, whether by an authorized tap or by an unlawful hacker, it remains privileged.

§43.10 III. CHECKLIST: WITNESSES TO SUBPOENA

- Witness to establish that one or more required elements of privilege not present. (This may also be accomplished by argument alone.)

- Witness to waiver, *e.g.,* third parties not necessary to accomplish purpose of communication (assuming this is not elicited from any other party to the communication).

Source: Evidence/Effective Introduction of Evidence in California/43 Privileges and Confidential Communications/ IV. SOURCES/§43.11 A. Evidence Code

IV. SOURCES

§43.11 A. Evidence Code

General Provisions Relating to Privileges

Evid C §911. Except as otherwise provided by statute:

(a) No person has a privilege to refuse to be a witness.

(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.

(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

Evid C §912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psycho-therapist, sexual assault counselor, or domestic violence victim-counselor was consulted, is not a waiver of the privilege.

Evid C §916. (a) The presiding officer, on his own motion or on the motion of any party, shall exclude information that is subject to a claim of privilege under this division if:

(1) The person from whom the information is sought is not a person authorized to claim the privilege; and

(2) There is no party to the proceeding who is a person authorized to claim the privilege.

(b) The presiding officer may not exclude information under this section if:

(1) He is otherwise instructed by a person authorized to permit disclosure; or

(2) The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence.

See also the following Evidence Code sections: Evid C §§900-910 (definitions), 913 (no comment on exercise of privilege), 914 (how to determine claim of privilege and sanction), 917 (certain communications presumed confidential), 918 (who can claim error), 919 (erroneously disclosed privileged information inadmissible), 920 (no other privilege statute repealed by implication).

Attorney-Client Privilege

Evid C §954. Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

Evid C §956. There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud.

Evid C §956.5. There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

Evid C §957. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession, nonprobate transfer, or by inter vivos transaction.

Evid C §958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

Evid C §959. There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution of attestation of such a document.

Evid C §960. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

Evid C §961. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

Evid C §962. Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).

See also the following: Evid C §§950-953 (lawyer, client, confidential communication, and holder of privilege defined); Evid C §955 (when lawyer must claim privilege); Prob C §12252 (appointed personal representative after death in estate matters).

Clergy-Penitent Privilege

Evid C §1032. As used in this article, "penitential communication" means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret.

Evid C §1033. Subject to Section 912 [on waiver], a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege.

Evid C §1034. Subject to Section 912, a member of the clergy, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege.

See also Evid C §§1030-1031 (member of clergy and penitent defined).

Defendant: Right Not to Testify

Evid C §930. To the extent that such a privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.

Defendant: Right Against Self-Incrimination

Evid C §940. To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.

Domestic Violence Victim-Counselor Privilege

Evid C §1037.2. (a) As used in this article, "confidential communication" means any information, including, but not limited to, written or oral communication, transmitted between the victim and the counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the domestic violence counselor is consulted. The term includes all information regarding the facts and circumstances involving all incidences of domestic violence, as well as all information about the children of the victim or abuser and the relationship of the victim with the abuser.

(b) The court may compel disclosure of information received by a domestic violence counselor which constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim or another household member and which is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services. The court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator. The court may also compel disclosure in proceedings related to child abuse if the court determines that the probative value of the evidence outweighs the effect of the disclosure on the victim, the counseling relationship, and the counseling services.

(c) When a court rules on a claim of privilege under this article, it may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege consents to have present. If the judge determines that the information is privileged and shall not be disclosed, neither he nor she nor any other person may disclose, without the consent of a person authorized to permit disclosure, any information disclosed in the course of the proceedings in chambers.

(d) If the court determines that information shall be disclosed, the court shall so order and inform the defendant in the criminal action. If the court finds there is a reasonable likelihood that any information is subject to disclosure pursuant to the balancing test provided in this section, the procedure specified in subdivisions (1), (2), and (3) of Section 1035.4 shall be followed.

See also the following Evidence Code sections: Evid C §§1037 (definition of victim), 1037.1 (definition of domestic violence counselor), 1037.3 (no effect on child abuse reporting requirement), 1037.4 (definition of holder of privilege), 1037.5 (privilege to refuse disclosure), 1037.6 (when domestic violence counselor must claim privilege), 1037.7 (definition of domestic violence), 1037.8 (requirement that counselor inform victim of limitations on confidentiality).

Identity of Informer Privilege

Evid C §915. (a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under Subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the claim of privilege: provided, however, that in any hearing conducted pursuant to subdivision (c) of Section 1524 of the Penal Code in which a claim of privilege is made and the court determines that there is no other feasible means to rule on the validity of such claim other than to require disclosure, the court shall proceed in accordance with subdivision (b).

(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under Subdivision (b) of Section 2018.030 of the Code of Civil Procedure (attorney work product) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

Evid C §1041. (a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of Congress of the United States or a statute of this state; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished in confidence by the informer to:

(1) A law enforcement officer;

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

(c) There is no privilege under this section to prevent the informer from disclosing his identity.

Evid C §1043. (a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

(b) The motion shall include all of the following:

(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard;

(2) A description of the type of records or information sought; and

(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.

Evid C §1044. Nothing in this article shall be construed to affect the right of access to records of medical or psychological history where such access would otherwise be available under Section 996 or 1016.

Evid C §1045. (a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of such investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in Section 831.5 of the Penal Code, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his duties, provided that information is relevant to the subject matter involved in the pending litigation.

(b) In determining relevance the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure:

(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the

Penal Code.

(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.

See also the following Evidence Code sections: Evid C §§1042 (what happens when claim of privilege sustained in criminal case), 1046 (requirements when excessive force by police or custodial officer alleged), 1047 (rules concerning officers not present not present during arrest or other incident to which claim of officer misconduct relates).

Newsperson: Immunity From Citation for Contempt

Evid C §1070. (a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Official Information

Evid C §1040. (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(c) Notwithstanding any other provision of law, the Employment Development Department shall disclose to law enforcement agencies, in accordance with the provisions of subdivision (k) of Section 1095 and subdivision (b) of Section 2714 of the Unemployment Insurance Code, information in its possession relating to any person if an arrest warrant has been issued for the person for commission of a felony.

See also Evid C §915, set out under the Identity of Informer code sections above.

Physician-Patient Privilege

Evid C §992. As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship.

Evid C §996. There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the CCP for damages for the injury or death of the patient.

Evid C §997. There is no privilege under this article if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

Evid C §998. There is no privilege under this article in a criminal proceeding.

Evid C §999. There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure of the communication is shown.

Evid C §1000. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

Evid C §1001. There is no privilege under this article as to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship.

Evid C §1002. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

Evid C §1003. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

Evid C §1004. There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

Evid C §1005. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

Evid C §1006. There is no privilege under this article as to information that the physician or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection.

Evid C §1007. There is no privilege under this article in a proceeding brought by a public entity to determine whether a right, authority, license, or privilege (including the right or privilege to be employed by the public entity or to hold a public office) should be revoked, suspended, terminated, limited, or conditioned.

See also Evid C §§990-991 (physician and patient defined), 993 (holder of the privilege defined), 994-995 (who may and must claim privilege).

Political Vote Privilege

Evid C §1050. If he claims the privilege, a person has a privilege to refuse to disclose the tenor of his vote at a public election where the voting is by secret ballot unless he voted illegally or he previously made an unprivileged disclosure of the tenor of his vote.

Psychotherapist-Patient Privilege

Evid C §1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Evid C §1016. There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the CCP for damages for the injury or death of the patient.

Evid C §1017. There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his mental or emotional condition.

Evid C §1018. There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

Evid C §1019. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

Evid C §1020. There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

Evid C §1021. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

Evid C §1022. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

Evid C §1023. There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.

Evid C §1024. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

Evid C §1025. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

Evid C §1026. There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection.

Evid C §1027. There is no privilege under this article if all of the following circumstances exist:

(a) The patient is a child under the age of 16.

(b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.

See also Evid C §§1010-1011, 1013 (psychotherapist, educational psychologist, patient, and holder of privilege defined), 1014 (who may claim privilege), 1015 (when psychotherapist must claim privilege).

Sexual Assault Victim-Counselor Privilege

Evid C §1035.4. As used in this article, "confidential communication between the sexual assault counselor and the victim" means information transmitted between the victim and the sexual assault counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the sexual assault counselor is consulted. The term includes all information regarding the victim's prior or subsequent sexual conduct, and opinions regarding the victim's sexual conduct or reputation in sexual matters. The term does not include advice given by the sexual assault counselor on potential testimony in court.

Information received by the sexual assault counselor which constitutes relevant evidence of the facts and circumstances involving an alleged sexual assault about which the victim is complaining and which is the subject of a criminal proceeding is not a confidential communication.

In the event of a dispute regarding what is or is not a confidential communication, the following procedure shall be followed:

(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence containing prior inconsistent statements for the purposes of impeachment or evidence that any element of the offense charged is not present.

(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at such hearing allow the questioning of the sexual assault counselor regarding the offer of proof made by the defendant.

(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is admissible pursuant to Section 352, the court may make an order stating what evidence maybe introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

Evid C §1035.6. As used in this article, "holder of the privilege" means:

(a) The victim when such person has no guardian or conservator.

(b) A guardian or conservator of the victim when the victim has a guardian or conservator.

(c) The personal representative of the victim if the victim is dead.

Evid C §1035.8. A victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault counselor if the privilege is claimed by any of the following:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the sexual assault counselor at the time of the confidential communication, but that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

Evid C §1036. The sexual assault counselor who received or made a communication subject to the privilege under this article shall claim the privilege if he or she is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1035.8.

Evid C §1036.2. As used in this article, "sexual assault" includes:

(a) Rape, as defined in Section 261 of the Penal Code.

(b) Unlawful sexual intercourse, as defined in Section 261.5 of the Penal Code.

(c) Rape in concert with force and violence, as defined in Section 264.1 of the Penal Code.

(d) Rape of a spouse, as defined in Section 262 of the Penal Code.

(e) Sodomy, as defined in Section 286 of the Penal Code, except a violation of subdivision (e) of that section.

(f) A violation of Section 288 of the Penal Code.

(g) Oral copulation, as defined in Section 288a of the Penal Code, except a violation of subdivision (e) of that section.

(h) Sexual penetration, as defined in Section 289 of the Penal Code.

(i) Annoying or molesting a child under 18, as defined in Section 647a of the Penal Code.

(j) Any attempt to commit any of the above acts.

See also Evid C §§1035-1035.2 (victim and sexual assault counselor defined).

Spouse: Confidential Marital Communications Privilege

Evid C §980. Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

Evid C §981. There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

Evid C §982. There is no privilege under this article in a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

Evid C §983. There is no privilege under this article in a proceeding brought by or on behalf of either spouse to establish his competence.

Evid C §984. There is no privilege under this article in:

(a) A proceeding brought by or on behalf of one spouse against the other spouse.

(b) A proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction.

Evid C §985. There is no privilege under this article in a criminal proceeding in which one spouse is charged with:

(a) A crime committed at any time against the person or property of the other spouse or of a child of either.

(b) A crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse.

(c) Bigamy.

(d) A crime defined by Section 270 or 270a of the Penal Code.

Evid C §986. There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.

Evid C §987. There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.

See also Fam C §297.5 (registered domestic partners).

Spouse: Right Not to Testify Against Spouse

Evid C §970. Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.

Evid C §971. Except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

Evid C §972. A married person does not have a privilege under this article in:

(a) A proceeding brought by or on behalf of one spouse against the other spouse.

(b) A proceeding to commit or otherwise place his or her spouse or his or her spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition.

(c) A proceeding brought by or on behalf of a spouse to establish his or her competence.

(d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.

(e) A criminal proceeding in which one spouse is charged with:

(1) A crime against the person or property of the other spouse or of a child, parent, relative, or cohabitant of either, whether committed before or during marriage.

(2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage.

(3) Bigamy.

(4) A crime defined by Section 270 or 270a of the Penal Code.

(f) A proceeding resulting from a criminal act which occurred prior to legal marriage of the spouses to each other regarding knowledge acquired prior to such marriage if prior to the legal marriage the witness spouse was aware that his or her spouse had been arrested for or had been formally charged with the crime or crimes about which the spouse is called to testify.

(g) A proceeding brought against the spouse by a former spouse so long as the property and debts of the marriage have not been adjudicated, or in order to establish, modify, or enforce a child, family or spousal support obligation arising from the marriage to the former spouse; in a proceeding brought against a spouse by the other parent in order to establish, modify, or enforce a child support obligation for a child of a nonmarital relationship of the spouse; or in a proceeding brought against a spouse by the guardian of a child of that spouse in order to establish, modify, or enforce a child support obligation of the spouse. The married person does not have a privilege under this subdivision to refuse to provide information relating to the issues of income, expenses, assets, debts, and employment of either spouse, but may assert the privilege as otherwise provided in this article if other information is requested by the former spouse, guardian, or other parent of the child.

Any person demanding the otherwise privileged information made available by this subdivision, who also has an obligation to support the child for whom an order to establish, modify, or enforce child support is sought, waives his or her marital privilege to the same extent as the spouse as provided in this subdivision.

Evid C §973. (a) Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

See also Fam C §297.5 (registered domestic partners).

Trade Secret Privilege

Evid C §1060. If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

See also Evid C §§1061 (trade secret and article defined; procedure for assertion of privilege and obtaining protective order), 1062 (exclusion of public from portion of criminal proceeding in which trade secret may be disclosed), 1063 (requests to seal articles).

Confidentiality of Communications Made During Mediation

Evid C §1116. (a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

Evid C §1117. (a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 3.1380 of the California Rules of Court.

Evid C §1119. Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Evid C §1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

Evid C §1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

Evid C §1122. (a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

Evid C §1123. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Evid C §1124. An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with Section 1118.

(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Evid C §1126. Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

Evid C §1128. Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

See also Evid C §§1115 (definitions), 1118 (oral agreement defined), 1125 (end of mediation defined), 1127 (attorney fees for compelling mediator to testify or produce writing).

Confidentiality of Offer to Compromise

Evid C §1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.

(c) This section does not affect the admissibility of evidence of any of the following:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.

(2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

Other Types of Confidential Communications

See Evid C §§1156-1156.1 (confidentiality of hospital morbidity or mortality studies), 1157 (confidentiality for health care professional review committees), 1157.5 (confidentiality of records of nonprofit medical care foundation), 1158 (written authorization to disclose patient's medical records to plaintiff's attorney), 1159 (confidentiality of evidence of animal experimentation in product liability action involving motor vehicle).

§43.12 B. Code of Civil Procedure

Work-Product Doctrine

CCP §2018.010. For purposes of this chapter, "client" means a "client" as defined in Section 951 of the Evidence Code.

CCP §2018.020. It is the policy of the state to do both of the following:

(a) Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases.

(b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts.

CCP §2018.030. (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

(b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

CCP §2018.040. This chapter is intended to be a restatement of existing law relating to protection of work product. It is not intended to expand or reduce the extent to which work product is discoverable under existing law in any action.

CCP §2018.050. Notwithstanding Section 2018.040, when a lawyer is suspected of knowingly participating in a crime or fraud, there is no protection of work product under this chapter in any official investigation by a law enforcement agency or proceeding or action brought by a public prosecutor in the name of the people of the State of California if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud.

CCP §2018.060. Nothing in this chapter is intended to limit an attorney's ability to request an in camera hearing as provided for in *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703.

CCP §2018.070. (a) The State Bar may discover the work product of an attorney against whom disciplinary charges are pending when it is relevant to issues of breach of duty by the lawyer and requisite client approval has been granted.

(b) Where requested and for good cause, discovery under this section shall be subject to a protective order to ensure the confidentiality of the work product except for its use by the State Bar in disciplinary investigations and its consideration under seal in State Bar Court proceedings.

(c) For purposes of this chapter, whenever a client has initiated a complaint against an attorney, the requisite client approval shall be deemed to have been granted.

CCP §2018.080. In an action between an attorney and a client or a former client of the attorney, no work product privilege under this chapter exists if the work product is relevant to an issue of breach by the attorney of a duty to the client arising out of the attorney-client relationship.

§43.13 C. Penal Code

Pen C §1054.6. Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

§43.14 D. Other

For further discussion of the various privileges, see California Civil Discovery Practice, chap 3 (4th ed Cal CEB 2006); Jefferson's California Evidence Benchbook, chaps 37-46 (4th ed CJA-CEB 2009); California Trial Objections, chaps 33-51 (Cal CEB Annual); Cotchett, California Courtroom Evidence, chap 18 (2008); 2 Witkin, California Evidence, *Witnesses* §§59-502 (4th ed 2000).

For discussion of several specialized motions in criminal cases that relate to privileges, see generally California Criminal Law Procedure and Practice, chaps 11-12, 17, 23, 51 (Cal CEB Annual).

§43.15 V. TABLE: VARIOUS STATUTORY PRIVILEGES

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856.6	Immunity of public entities, employees, and volunteers administering influenza inoculation program
955.1	Immunity for earthquake predictions by public agencies
3303(f)-(g)	Confidentiality of investigations of public safety officers under Public Safety Officers Procedural Bill of Rights Act (Govt C §§3300-3313). See also *Berkeley Police Ass'n v City of Berkeley* (2008) 167 CA4th 385, 84 CR3d 130 (investigatory complaint commission must keep proceedings confidential).
3307	No testimony may be admitted in any proceeding regarding a public safety officer's refusal to submit to a polygraph examination
3544(b)	Proof of majority support in election to unionize employees is confidential
6205-6211	Nondisclosure of name and address of domestic violence, sexual assault, or stalking victims under confidentiality program. See also Cal Rules of Ct 2.575-2.833
6254	Specific exceptions to public inspection of records under Public Records Act (Govt C §§6250-6270)
6254.7(d)	Trade secrets are not "public records" subject to inspection
7460-7493	Right to Financial Privacy Act (especially Govt C §§7470 (confidentiality of financial records), 7474 (administrative subpoena of financial records)), subject to exceptions in Govt C §7480
8201.5	Confidentiality of applications for notary public appointments
8655-8660	Immunities and release of civil liability for governmental units, officials, volunteers, registered private businesses and nonprofit organizations, and medical personnel during state of emergency or emergency training programs
9054	Witness immunity in legislative bribery proceedings
9410	Witness immunity in senate or assembly hearings
10207	Attorney-client privilege between legislative counsel, and legislators, and governor
11183	Limited confidentiality of information gathered by state agencies about personal or business transactions of a confidential nature
11513(e)	Privilege rules apply in administrative adjudication
12932(b), 12933	Confidentiality of information received by Department of Fair Employment and Housing during conciliation assistance activities
15619	Confidentiality of Board of Equalization audits and investigations
18676-18677	Witness immunity in state civil service

	investigations or proceedings
20230	State retirement system records are confidential
31532	County retirement system records are confidential
83119	Witness immunity before the Fair Political Practices Commission
90005	Limited confidentiality of Franchise Tax Board audits of political campaign funds
Health and Safety Code	
1370	Immunity for participants in medical peer review committees; confidential nature of records of committees
1419	Confidential informants alleging violations in nursing homes
1439	Nondisclosure of names of persons included in state reports of nursing homes
11367	Peace officers and those working under their direction in narcotics investigations are immune from prosecution under narcotics laws
11845.5	Records of drug abuse programs are confidential
17956	Immunity of public entities enforcing state housing law
25170, 25173, 25175	Protection of trade secrets in hazardous wastes reports to Department of Public Health
34283	Leases and master lists of tenants in public housing authority are confidential
43206	Protection of trade secrets in motor vehicle pollution control reports
100330	Confidentiality of Department of Public Health morbidity and mortality studies
102135	State may demand vital statistics information from doctors, judges, funeral directors, and others
102455	Confidential character of optional medical history on birth certificates
102760(d)	Records of acknowledgment of paternity are available only by court order
103430(d)	Disclosure of sex change operations is not permitted in new birth certificates issued after surgical change
103585	Prohibited disclosure of certain vital statistics
103885(g)	Confidentiality of cancer reporting data
110165	Protection of trade secrets of food and drug producers who must file reports with Department of Public Health
120455	Nonliability for injuries from mandated immunization of children
120705	Confidentiality of prenatal syphilis test
123380	Confidentiality of pregnancy tests
124110	Confidentiality of records of child health and safety programs
124980(c)	Confidentiality of certain records of state programs on hereditary disorders
Insurance Code	
657	Immunity for contents of rejection notices to motor vehicle insurance applicants, and for evidence submitted to Insurance

	Commissioner regarding applicants
770.1	Confidentiality of information in fire or casualty insurance policies
784	Witness immunity in unfair insurance practices investigations
1215.7	Confidential state investigations of insurance corporations
10097	Confidentiality and immunity for FAIR Plan property insurance inspections
11754	Confidentiality of noncompliance notices to workers' compensation insurance rating organizations
11759	Immunity for workers' compensation rating inspectors
12919	Confidentiality of communications to Insurance Commissioner about licensees; immunity for informants
12924(b)	Witness immunity before the Insurance Commissioner
Labor Code	
65	Confidentiality of Department of Industrial Relations records of labor disputes
432.7-432.8	Nondisclosure to employers of arrest or detention records not resulting in conviction
1101-1105	Employers may not infringe employees' privileges of political belief and activities
1151.2	Witness immunity before the Agricultural Labor Relations Board
1197.5	Confidential informants of sex discrimination in wages
1309.5	Confidential records required of retailers who have reason to suspect suppliers of using minors in pornographic materials
6309	Confidential informants of unsafe labor conditions
6322	Protection of trade secrets in occupational safety investigations
Penal Code	
14	Use of witness's testimony against self allowed in prosecution for perjury
414a	Witness immunity in illegal boxing event
632	Criminal invasion of privacy, eavesdropping, or recording of confidential communications
832.7	Police officers' records confidential
851.7	Sealing minor's misdemeanor arrest record
924.3	Grand juror's privilege on matters legally pending before grand jury
930	Grand jurors' comments about unindicted persons not privileged
938.1	Petition for sealing grand jury transcript
1016(3)	Plea of nolo contendere to charges of crime punishable as misdemeanor may not be used as admission in civil suit (such a plea to a charge punishable as a felony admissible in civil suit)
1203.03	Diagnostic records of Department of Corrections are confidential
1203.45	Sealing of a minor's misdemeanor conviction record
1324	Witness immunity in felony proceeding
1324.1	Witness immunity in misdemeanor

	proceeding
3042(d)	Confidentiality of information in parole reports that could endanger security of persons or institutions
3063.5	Nondisclosure of confidential information in police reports provided to parolee in parole revocation or revocation extension proceeding
11075-11081, 11105	Dissemination of confidential criminal history records to authorized agencies only
11167	Identity of persons reporting child abuse may be disclosed only to certain agencies or persons
11172	Immunity for persons required to make reports or photographs of suspected victims of child abuse or molestation
13301-13305	Confidentiality of identity in criminal records released for statistical purposes
Public Resources Code	
2207(g), 2207.1	Confidentiality of producers and consumers whose data is included in public reports of the State Geologist on mineral production and use
3234	Limited confidentiality of well records
6826	Confidentiality of geological survey results furnished to state
21160	Protection of trade secrets in environmental impact reports and agency releases
25322	Confidentiality of information in gas and electric utilities' and producers' reports
Public Utilities Code	
583	Confidentiality of information furnished to Public Utilities Commission
5258	Witness immunity in moving company investigations
21693	Division of Aeronautics investigative reports may not be used in civil litigation other than by Department of Transportation
Revenue and Taxation Code	
451	Confidentiality of information submitted to property tax assessor
833	Confidentiality of State Board of Equalization records
1605.4	Protection of trade secrets at State Board of Equalization hearings
7056	Sales and use tax reports are confidential
11655	Confidentiality of information submitted for private railway car tax
19282	Criminal sanctions for disclosure of Franchise Tax Board records
19442(g)(3)	Confidentiality of settlement negotiations between taxpayer and the Franchise Tax Board in any later adjudicative proceedings
19554	Confidentiality of information used to locate owners of unclaimed land
30455	Confidentiality of cigarette tax records
32455	Limited confidentiality of winegrowers' reports to Alcoholic Beverage Control Board
38705	Confidentiality of timber tax records and information
Streets and Highways Code	

27177	Confidential nature of highway patrol accident reports
Unemployment Insurance Code	
1955	Witness immunity at unemployment insurance hearings
2714	Confidential medical records obtained for unemployment insurance purposes
Vehicle Code	
1808.2	Confidentiality of home address of district attorney inspector or investigator
1808.4	Confidentiality of home address of state officials, police officers, and other employees
5003	Confidentiality of registration of law enforcement vehicles (absent court order)
16005, 20012, 20014	Limited confidentiality of submitted accident reports
Water Code	
1106	Witness immunity before Water Resources Control Board
6028	Immunity of state and state employees for dam approval or operation
8576	Immunity of Reclamation Board for planning decisions
12519	Confidential nature of Colorado River Board executive sessions
Welfare and Institutions Code	
355.1(f)	Use immunity for testimony in a juvenile dependency hearing by parent, guardian, or other person who has care or custody of the minor
389	Petition to seal juvenile court records
630, 702.5	Privilege against self-incrimination extends to minor in juvenile court proceedings
781	Petition to seal records of proceeding to make minor a ward of the court
827	Confidentiality of juvenile court petitions and reports, except for deceased, abused, or neglected children on satisfaction of certain conditions (see Welf & I C §§826.7, 10850.4)
1767.6	Confidential security information may be excluded from police reports furnished to parolee in course of parole revocation proceedings
3152.5	Confidential security information may be excluded from police reports furnished to outpatient in outpatient revocation proceedings
4135	Confidentiality of records concerning mentally abnormal sex offenders
5328, 5328.6	Confidentiality of records of state mental patients
5330	Civil sanctions for improper release of confidential state mental patient records
9725	Confidentiality of ombudsman investigatory files and records supported by statute and privacy rights (*Ombudsman Servs. of N. Cal. v Superior Court* (2007) 154 CA4th 1233, 1243, 65 CR3d 456)
10810	Nondisclosure of confidential welfare records

	to volunteer social workers
10850	Confidentiality of welfare records
11478	Guidelines for disclosure of confidential information to state agencies for purpose of locating parents of abandoned or abducted children
17006	Confidentiality of county welfare records
18491	Confidentiality of county welfare investigations
18909	Confidentiality of food stamp program records
19016	Department of Rehabilitation empowered to restrict access to its records

44

Refreshing Recollection

William H. Armstrong

§44.1 I. SCOPE OF CHAPTER

This chapter discusses the procedures for refreshing a witness's recollection. See Evid C §771. Refreshing recollection primarily occurs in two ways: before a hearing or trial, witnesses may review their testimony to be sure they remember everything; during a hearing or trial, counsel may need to refresh the recollection of a witness who has forgotten something. When a writing is used to refresh a witness's memory, that writing must be produced at the opponent's request; otherwise, the witness's testimony about the refreshed items will be stricken, unless production of the writing is excused.

II. REQUIREMENTS

§44.2 A. To Admit

To refresh a witness's recollection, the proponent must:

- Use a writing (and possibly any nonwriting—see §44.9) to refresh the witness's recollection (see Comment to Evid C §771); and
- Produce at the hearing the writing used if the opponent requests it (Evid C §771(a)), unless the writing is:
- Privileged (*Sullivan v Superior Court* (1972) 29 CA3d 64, 105 CR 241), or
- Not in the witness's or proponent's possession or control and not reasonably procurable by them (Evid C §771(c)(1)-(2)).

§44.3 B. To Object

Opposing counsel may object to the admissibility of the witness's refreshed recollection on any of the following grounds:

- The writing was reasonably procurable, but not produced (Evid C §771);
- The writing was purposely destroyed to frustrate the purpose of Evid C §771;
- The witness should not be allowed to use nonwritings to refresh recollection (see §44.9);
- The privilege was waived or does not apply for some other reason, and the writing was not produced; or
- The writing should have been produced during discovery but was withheld (see CCP §2023.030).

III. SAMPLE QUESTIONS

A. Refreshing Recollection When Writing Produced in Court

§44.4 1. Steps to Take

To refresh a witness's recollection in the direct examination segment in §44.5, the proponent takes the following steps:

- Asks the witness for the desired information;
- If the witness cannot remember, identifies the writing to be used to refresh recollection (some courts require that the item be marked for identification before it is shown to the witness);
- Requests that the witness review the writing in order to refresh recollection;
- Confirms that after looking at the writing the witness's recollection is refreshed; and
- Has the witness testify to the information now recalled.

§44.5 2. Questions to Ask

Q: On what date did you meet with Mr. Jones?

A: I'm afraid I've forgotten.

Q: Would it refresh your recollection to take a look at your desk calendar?

A: Yes.

Proponent: Your Honor, may I approach the witness to give him his desk calendar?

Court: You may.

Opponent: Your Honor, I object to use of this calendar because it has not been shown that it was made by the witness at or near the time of the event.

Proponent: Your Honor, the witness is using it to refresh his recollection under Evidence Code §771. We are not using it as past recollection recorded.

Court: Objection overruled.

Q: Will you please look at your desk calendar to refresh your recollection about the date you met with Mr. Jones.

[*Witness reviews desk calendar*]

A: I've looked at it, and I remember now that I met Mr. Jones the day before I left on my trip for New York. That was Monday, March 20, 2006.

B. Refreshing Recollection When Writing Not Produced

§44.6 1. Steps to Take

It is usually during the witness's cross-examination that the proponent faces the situation in which the writing that refreshed recollection cannot be produced:

- Opposing counsel asks the witness how he or she is able to recall information; and
- The witness responds by saying that he or she reviewed a writing not now available.

After the opponent asks the court to strike the witness's testimony, as illustrated in §44.7, the proponent should be prepared to argue and prove that an exception exists under Evid C §771(c) that excuses production of the writing.

§44.7 2. Questions to Ask

Opponent: Your Honor, we object to the testimony of this witness on the amount of the purchases and move that his testimony be stricken under Evidence Code §771. The writing that was used to refresh his recollection has not been produced as we requested.

Proponent: Your Honor, we are unable to produce the document because it is not in the possession or control of the witness or my client or myself. As was stated in the testimony, the witness reviewed the document a month ago when he was in China. Our efforts to obtain the document or a copy of it have been fruitless.

Opponent: Your Honor, we have had no sworn testimony about any efforts made by anyone to try to produce this document. I therefore ask that the questions and answers concerning the document be stricken from the record, and that there be no further questioning concerning it, based on Evidence Code §771.

PRACTICE TIP: The judge may require the proponent to take one or more of the following steps:

- Have an investigator or other person give sworn testimony on the efforts made to obtain the document;
- Offer letters written and not answered, or responses from persons in China refusing to send the document;
- Make an offer of proof that summarizes the efforts made to obtain the document.

IV. COMMENT

§44.8 A. Prepare Witnesses About Material to Be Reviewed Before Testifying

The reason for using materials to refresh recollection is to allow witnesses to testify more fully from memory. When you have a choice of materials that a witness may use to refresh recollection, review them and instruct the witness what material to use and what not to use to prepare to testify, because opposing counsel is entitled under Evid C §771 to cross-examine witnesses on any writings they use to refresh their recollection. See chap 24 for discussion of special problems concerning expert witness preparation for trial.

PRACTICE TIP: The writing must actually have refreshed the witness's recollection in order to make it producible under Evid C §771.

§44.9 1. What May Be Used to Refresh Recollection

Witnesses are allowed to use writings to refresh recollection whether prepared by them or by another, and the materials need not have been prepared at or near the time of the event about which the witness is testifying. See Comment to Evid C §771 (witness may use any writing to refresh recollection).

A related concept is when a witness who had (or claims to have) a repressed memory that is (or is claimed to be) recalled after a long time. Expert testimony may be used to explain the concept of repressed memory or dissociative amnesia. See *Wilson v Phillips* (1999) 73 CA4th 250, 86 CR2d 204. A witness whose memory has been refreshed by hypnosis may testify if the conditions set forth in Evid C §795 are satisfied.

There are no Evidence Code restrictions on what may be used to refresh recollection. See Comment to Evid C §771. Nonwritings, such as looking at the physical evidence or going back to "the scene of the crime," can probably be used to refresh recollection. As the Comment to Evid C §771 points out, "there is no restriction in the Evidence Code on the means that may be used to refresh recollection." There is no procedure under Evid C §771 for viewing nonwritings.

PRACTICE TIP: Evidence Code §771 applies to refreshing writings used either before or during the trial. See Comment to Evid C §771.

§44.10 2. Effect of Failure to Produce Writing Used to Refresh Testimony

Explain to your witness that if a document used to refresh recollection is not produced at trial on the opponent's request, unless the writing is privileged or a failure to produce it can be excused, the witness's testimony will be stricken. See Evid C §771(a), (c).

PRACTICE TIP: Even when your witness refreshed his or her recollection with a writing you are excused from producing, consider carefully the extent to which your failure to produce it will affect the witness's credibility with the jury.

§44.11 B. When Writing Used to Refresh Recollection May Be Introduced Into Evidence

During trial, the proponent does not have the right to introduce a writing into evidence simply because a witness's recollection needs to be refreshed. In any event, the proponent should have the writing marked for identification to make it part of the record for any subsequent appeal. The opponent, however, *does* have the right to introduce into evidence portions relevant to the witness's testimony as long as the writing is not made inadmissible by statute. Evid C §771(b).

NOTE: Only those parts of the writing actually used to refresh recollection may be moved into evidence. See Comment to Evid C §771.

§44.12 C. Using Document to Refresh Recollection as Foundation for Impeachment

When you use a writing to refresh the recollection of an unfriendly witness who claims not to remember or who vacillates with regard to information favorable to your case, you may either read the document aloud to refresh the witness's memory or have the witness read it aloud. A weaker method is to identify the writing and ask the witness to read it silently. But see *People v Parks* (1971) 4 C3d 955, 961, 95 CR 193 (criticizing practice of reading to witness under guise of refreshing recollection then asking whether that reading has refreshed witness's recollection). Whatever method is used, you can then ask the witness whether reading (or hearing) the writing refreshed his or her recollection about the matter and what his or her testimony is now.

If the writing does not refresh the witness's recollection, you may be able to introduce the writing into evidence as past recollection recorded (Evid C §1237) or as extrinsic evidence of a consistent or inconsistent statement (Evid C §§1235-1236). See the checklist in §44.14 for more suggestions.

V. CHECKLISTS

§44.13 A. Checklist: Witnesses to Subpoena

- Witness if needed to prove that the writing used to refresh recollection could not reasonably be procured for trial; or
- Witness to testify on the same issue when the writing does not refresh the first witness's recollection.

NOTE: Because Evid C §771 applies only after a witness has testified, the proponent does not usually need to have additional witnesses testify, except when the witness's recollection has not been refreshed.

§44.14 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1228; see chap 10.
- Another witness with knowledge of relevant facts.
- Consistent or inconsistent statement. Evid C §§1235-1236; see chaps 40-41.
- Past recollection recorded. Evid C §1237; see chap 38.

VI. SOURCES

§44.15 A. Evidence Code

Evid C §771. (a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness.

(c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing:

(1) Is not in the possession or control of the witness or the party who produced his testimony concerning the matter; and

(2) Was not reasonably procurable by such party through the use of the court's process or other available means.

§44.16 B. Other

For further discussion of refreshing recollection, see Jefferson's California Evidence Benchbook, chap 28 (4th ed CJA-CEB 2009); 3 Witkin, California Evidence, *Presentation at Trial* §§177-180 (4th ed 2000); Cotchett, California Courtroom Evidence §§16.33, 16.37, 16.55, 21.26, 27.09 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *The Hearsay Rule and Its Exceptions* §9.F (3d ed 2000).

45

Relevance

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§45.1 I. SCOPE OF CHAPTER

This chapter discusses relevance. Only relevant evidence is admissible. Evid C §350. Relevant evidence is evidence tending to prove or disprove a disputed fact if that fact is of consequence to the action and if the evidence has a tendency in reason to prove or disprove that fact. Evid C §§210, 350.

II. REQUIREMENTS

§45.2 A. To Admit

To prove that the evidence to be introduced is relevant, the proponent must show that:

- The fact sought to be proved is disputed (Evid C §210);
- The fact is of consequence to a determination of the action (Evid C §210); and
- The evidence to be introduced has a tendency to prove or disprove the disputed fact (Evid C §210; see *People v McNeal* (2009) 46 C4th 1183, 1200, 96 CR3d 261 (evidence of partition ratio variability relevant to generic DUI cases)).

Source: Evidence/Effective Introduction of Evidence in California/45 Relevance/§45.3 B. To Object

§45.3 B. To Object

Opposing counsel may object to the proffered evidence on the following grounds:

- Irrelevant (Evid C §350) because:
- There is no dispute as to this fact (Evid C §210; *Schweitzer v Westminster Invs., Inc.* (2007) 157 CA4th 1195, 1214, 69 CR3d 472 (issues outside those covered in complaint and pleadings are irrelevant));
- Even if true, the fact has no bearing on the issues (Evid C §210; *People v Fritz* (2007) 153 CA4th 949, 956, 62 CR3d 885 (improper attempt by prosecutor to introduce inadmissible priors to impeach nontestifying defendant)); or
- The proffered evidence does not prove the fact (Evid C §210; *People v Buffington* (2007) 152 CA4th 446, 455, 62 CR3d 223 (prejudice or bias not proved by irrelevant fact that in three similar cases psychologist did not find mental disorder; unreliability of such testimony may only be disputed by another qualified expert));
- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352); or
- Barred by evidentiary rules, such as the hearsay rule (see Evid C §1200).

NOTE: In administrative proceedings, the rules of evidence are relaxed to allow "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Govt C §11513(c). Objecting on the grounds of hearsay is not valid in such proceedings. Govt C §11513(d). See also *Isaac v DMV* (2007) 155 CA4th 851, 862, 66 CR3d 372.

III. SAMPLE QUESTIONS

A. Cross-Examination of Defendant Doctor in Medical Malpractice Case

§45.4 1. Steps to Take

During the cross-examination of the defendant physician in §45.5, a case in which the defendant negligently diagnosed the plaintiff's cancerous condition, allegedly causing the cancer to spread, defense counsel challenges the relevance of a question about causation. In arguing the issue before the judge, plaintiff's counsel wants to take the following steps to show that her question is relevant:

- Detail relevant legal authority; and
- Relate the facts to that authority.

§45.5 2. Questions to Ask

Q: Doctor, in the course of your treatment of the plaintiff, did you keep records of that treatment?

Q: Is it your practice to enter notations into that record concurrently with the treatment or examination given?

Q: Is the purpose for which you enter these notations to make a record of what you have done and what your observations are?

Q: In reviewing the original records, Doctor, I saw that several appear to be missing; is that correct?

Opponent: Objection; Your Honor, may we approach the bench?

Court: Yes.

[*At the bench*]

Opponent: As has been repeatedly stated, the defendant has admitted that he was negligent. This line of inquiry is directed at the defendant's care and treatment of the plaintiff, which is not disputed and which the defendant has admitted was negligent.

Proponent: Your Honor, the plaintiff has alleged not only that the defendant negligently misdiagnosed her cancerous condition, but that this negligence caused her cancer to spread. The defendant has admitted only negligence, not causation. I'm informed that he has indeed either intentionally lost or destroyed these records. The destroyed evidence, which includes not only treatment information, but observation of the plaintiff's condition, is relevant on the causation issue. Evidence of his destruction of these records reflects on his credibility, and suggests that he thinks his case is weak. CACI 204, concerning willful suppression of evidence, highlights the importance of this type of evidence, as does *Thor v Boska* (1974) 38 CA3d 558, 113 CR 296, in which the appellate court held that the trial court committed reversible error in not admitting evidence of the willful suppression of evidence.

Court: Objection overruled. Counsel, you may proceed.

B. Direct Examination of Expert in Product Liability Action

§45.6 1. Steps to Take

In the direct examination of the defense expert in §45.7, the proponent wants to elicit testimony to counter the plaintiff's claims and show that a golf cart that rolled over the plaintiff was not designed defectively and rarely causes injuries compared with other recreational equipment. In arguing the issue before the judge, plaintiff's counsel wants to take the following steps to show that the expert's testimony on the issue is relevant:

- Detail relevant legal authority; and
- Relate the facts to that authority.

§45.7 2. Questions to Ask

[*Questions identifying and qualifying expert omitted*]

Q: Mr. Expert, tell us what you have done to analyze the safety of this vehicle.

A: I have prepared essentially a statistical study analyzing the risk of injury in operating a golf cart and have compared it with other recreational activities, such as skydiving, scuba diving, bicycling, and the like.

Q: What are your conclusions as a result of this study?

Opponent: Objection. The risk of injury from a golf cart compared with such other recreational activities is utterly irrelevant to any issue in this case. Such an analysis has nothing to do with the design of the golf cart that injured Mr. Plaintiff. He was not skydiving or scuba diving. He was golfing. Evidence concerning other sports and other recreational equipment is completely irrelevant.

Court: Objection sustained. This line of questioning is irrelevant.

PRACTICE TIP: Use the Judicial Council's approved jury instructions as a starting point for determining established parameters of relevancy. Be creative. What are your theories of liability or defense? Draft instructions supporting your theories. See sources of information in §45.16.

C. Direct Examination of Expert in Pedestrian-Vehicle Accident

§45.8 1. Steps to Take

In the direct examination in §45.9, the proponent wants the defense expert to testify about an experiment she performed to prove that the plaintiff was not in the crosswalk when the bus hit her. In arguing the issue before the judge, plaintiff's counsel wants to take the following steps to show that the expert's testimony on the issue is irrelevant:

- Cite relevant legal authority; and
- Point out how the facts relate to that authority.

§45.9 2. Questions to Ask

[*Questions identifying and qualifying expert omitted*]

Q: Would you please describe the experiment that you performed in this case?

A: I used the same bus involved in the subject accident and the same driver. The experiment was designed to find the maximum speed of the bus in negotiating a left-hand turn in an effort to use time and distance calculations to arrive at the exact point of impact. We pressed the accelerator to the floor as the bus made a left-hand turn and concluded that the maximum speed attainable by the bus during that turn was 15 miles per hour.

Opponent: Your Honor, I do not believe this experiment is relevant to the case. I would like to voir dire the witness.

Court: Go ahead.

Q: Are you aware, Doctor, that the bus driver testified that at the time of the experiment the bus was not capable of going as fast as it did on the day of the accident?

A: Yes.

Q: Do you know whether the bus was in substantially the same mechanical condition as on the day of the accident?

A: I have no knowledge of that.

Q: And was your conclusion as to the maximum speed attainable by the bus during the experiment based on reading the speedometer?

A: Yes.

Q: Do you know whether the speedometer was adequately calibrated at that time?

A: I have no knowledge of that.

Opponent: Your Honor, I object to the proposed testimony because this experiment was not conducted under conditions substantially similar to those on the day of the accident. As the court said in *Solis v Southern Cal. Rapid Transit Dist.* (1980) 105 CA3d 382, 164 CR 343, "if the conditions are not substantially similar, there is no adequate foundation for the expert's opinion testimony." It is irrelevant.

Court: Objection sustained—insufficient foundation.

PRACTICE TIP: When evidence is relevant only if certain foundational facts are true, be prepared to make an offer of proof to establish those foundational facts. Failure to do so may be fatal. See *Magic Kitchen LLC v Good Things Int'l* (2007) 153 CA4th 1144, 1164, 63 CR3d 713 (failure to make offer of proof on documents and testimony showing lack of prejudice in opposing laches defense forfeited issue on appeal); *Beyda v City of Los Angeles* (1998) 65 CA4th 511, 76 CR2d 547 (evidence of other acts of sexual harassment admissible if plaintiff knew of them; exclusion of that evidence upheld because no offer of proof made that plaintiff knew of them).

IV. COMMENT

§45.10 A. Test for Determining Relevance

The essential test for determining relevance is threefold:

- Is the fact disputed?
- Is the fact of consequence to a decision in the action?
- Does the evidence prove the fact?

The determination of relevancy is very much a question of logic and common sense. See *People v Harris* (2005) 37 C4th 310, 337, 33 CR3d 509 (test of relevance is whether evidence tends, "logically, naturally, and by reasonable inference," to establish material facts such as "identity, intent, or motive"). It is foreseeable that reasonable minds may differ on the relevancy of certain pieces of evidence. A finding of relevancy may be a difficult determination. See, *e.g.*, *People v McNeal* (2009) 46 C4th 1183, 1200, 96 CR3d 261 (evidence concerning partition ratio variability relevant to rebut presumption of intoxication in generic DUI cases charged under Veh C §23152(a) but irrelevant to per se DUI cases charged under Veh C §23152(b)).

PRACTICE TIP: Whether a fact is disputed is often raised by the pleadings. Credibility problems about a witness's testimony during trial may also have an effect on whether a fact is disputed. When you foresee that evidence tending to prove a particular fact may be objected to as irrelevant, try to find a case with facts similar to yours.

§45.11 B. Evidence Irrelevant If Issue Not in Dispute

If a stipulation, summary adjudication, collateral estoppel ruling, or similar order removes an issue from the case, evidence relating to that issue is irrelevant and should not be admitted (unless it is relevant to another issue). Evid C §§210, 350. One device for excluding evidence is to attempt to stipulate on the issue to which the evidence is relevant, although opposing counsel is not obliged to agree to the stipulation.

§45.12 C. When Relevant Evidence May Be Excluded (Evid C §352)

Evidence Code §352 gives the court discretion to exclude evidence (by definition meaning *relevant* evidence) if its probative value is substantially outweighed by the probability that admission would be unduly time-consuming, create substantial danger of undue prejudice, confuse the issues, or mislead the jury.

The probative value is determined by assessing the evidence's value in proving or disproving a disputed issue, including a witness's credibility. See *People v Scheid* (1997) 16 C4th 1, 65 CR2d 348. See also *People v Bautista* (2008) 163 CA4th 762, 781, 77 CR3d 824 (sex crime victim's sexual history inadmissible because defendant had ample opportunity to show bias or motive to lie). "Undue prejudice" means not merely damaging to one party's case; it refers to a tendency to evoke an emotional bias against one party without having a substantial effect on a disputed issue. See *People v Scheid, supra; Vorse v Sarasy* (1997) 53 CA4th 998, 62 CR2d 164. Even an admission of guilt by a third party may be excluded if the court finds that no direct evidence implicates that party and a "mini-trial" proving his or her whereabouts during the crime would confuse and mislead the jury. *People v Geier* (2007) 41 C4th 555, 581, 61 CR3d 580.

PRACTICE TIP: In a criminal trial, a defense objection based on Evid C §352 to the admission of evidence preserves for appeal only a very narrow due process argument that the erroneous admission of evidence had the additional legal consequence of violating due process; the defendant may not argue on appeal that due process required the court to exclude the evidence for a reason not included in the trial objection. See *People v Partida* (2005) 37 C4th 428, 35 CR3d 644.

V. CHECKLISTS

§45.13 A. Checklist: Witnesses to Subpoena

- The witnesses subpoenaed will depend on the facts of the case.

§45.14 B. Checklist: Alternative Methods of Admissibility

- Because all evidence must be relevant to be admissible, there are no alternatives.

VI. SOURCES

§45.15 A. Evidence Code

Evid C §210. "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Evid C §350. No evidence is admissible except relevant evidence.

Evid C §351. Except as otherwise provided by statute, all relevant evidence is admissible.

Evidence Code §352 is reproduced in §7.8.

§45.16 B. Other

Relevance as it relates to experiments and to physical evidence that are not writings are discussed in chaps 23, 39.

For further discussion of relevance, see Jefferson's California Evidence Benchbook, chaps 21-22 (4th ed CJA-CEB 2009); 1 Witkin, California Evidence, *Circumstantial Evidence* §§3-37 (4th ed 2000).

46

Remainder Offered to Explain Part Admitted

Jan Nielsen Little
E. Stewart Moritz

§46.1 I. SCOPE OF CHAPTER

This chapter discusses the "rule of completeness," as it is commonly called, which provides that, when part of an act, conversation, statement, or document comes into evidence, the opposing party may introduce other relevant parts of that act, conversation, statement, or document. Similarly, when an isolated act or document is introduced, other acts or writings "necessary to make it understood" may be introduced. Evid C §356.

II. REQUIREMENTS

§46.2 A. To Admit

When the opponent offers part of an act, declaration, conversation, or writing in evidence, the proponent may inquire into any of the remainder that is relevant to what was admitted. Evid C §356.

PRACTICE TIP: Although the rule places the burden of producing context evidence on the opponent of the party who introduced the partial evidence, some judges require the proponent of the partial evidence to introduce context evidence at the time the partial evidence is introduced in order to avoid misleading or confusing the jury. See Evid C §320 (court has inherent power to regulate order of proof).

§46.3 B. To Object

Grounds for objecting to the admissibility of the remainder of the evidence to explain the part admitted include:

- Irrelevant to portion already introduced (*People v Williams* (1975) 13 C3d 559, 119 CR 210; see Evid C §350);
- No foundation (*e.g.,* does not meet some statutory requirement of Evid C §356); and
- Time-consuming, prejudicial, confusing, or misleading (Evid C §352).

III. SAMPLE QUESTIONS

A. Direct Examination of Plaintiff in Wrongful Employment Termination Case

§46.4 1. Steps to Take

During the proponent's direct examination of the plaintiff in §46.5, defense counsel takes the following steps:

- Objects that the plaintiff has testified only to part of his conversation with the defendant;
- Asks the judge to order the witness to testify to the remainder of the conversation during cross-examination.

§46.5 2. Questions to Ask

Q: Mr. Fired, when you went to collect your paycheck that day, what did Mr. Boss say to you?

A: He said, "I don't care what your employment contract says, you're fired."

Opponent: Objection, Your Honor. My client said a lot more than that, and under the "rule of completeness" in Evidence Code §356 Mr. Fired should be required to testify to the rest of my client's statement.

Court: I'll leave that for you to cover in cross-examination.

B. Cross-Examination of Plaintiff in Wrongful Employment Termination Case

§46.6 1. Information to Elicit

The opponent cross-examines the plaintiff in §46.7 in the same wrongful employment termination case as illustrated in the direct examination in §46.5. The opponent's goal is to elicit complete information about the plaintiff's conversation with the defendant employer when the plaintiff was fired.

§46.7 2. Questions to Ask

Q: Mr. Fired, you testified to a statement made by Mr. Boss when he gave you your paycheck. Do you recall that testimony?

A: Yes I do.

Q: Is it true, sir, that Mr. Boss made some additional statements to you that day?

A: Yes.

Q: Tell the jury about those statements.

Proponent: Objection. Calls for self-serving hearsay.

Opponent: He opened the door to this, Your Honor. Under Evidence Code §356, I'm entitled to inquire further.

PRACTICE TIP: Application of the rule of completeness may require the admission of otherwise inadmissible evidence. See §46.9.

Court: Objection overruled. You may answer the question.

A: I don't remember exactly.

Q: Did Mr. Boss say to you: "I don't care what your employment contract says, you're fired. Anyone who leaves electrical wires hanging above the sink and stores poisonous chemicals in unmarked bottles in the refrigerator, is a hazard and has to go. You've been sloppy ever since your wife left you."

Proponent: Your Honor, I move to strike the witness's last sentence as irrelevant hearsay because it does not relate to the termination question.

PRACTICE TIP: Irrelevance is the main objection to Evid C §356 evidence. See *People v Perry* (1972) 7 C3d 756, 103 CR 161 (in allowing inquiry into whole of subject, court may exclude parts not relevant to items that were introduced).

Court: Motion granted. The last sentence will be stricken, and the jury will disregard it.

IV. COMMENT

§46.8 A. Application of Rule of Completeness

The rule of completeness applies to many types of evidence, including testimony of conversations or acts, documents, deposition transcripts, tape-recorded conversations, drawings, and letters and their replies. Be imaginative in your use of the rule. See Evid C §356.

PRACTICE TIP: The purpose of the "rule of completeness" is to provide a fair context and avoid misleading the trier of fact.

No exclusion on grounds of confrontation violation. In a criminal case, the defendant may not object to the admission of the remainder of a testimonial statement that he or she excerpted on the ground that its introduction violates the Sixth Amendment confrontation clause. *People v Parrish* (2007) 152 CA4th 263, 272, 60 CR3d 868. Under *Crawford,* the only reliable means to test testimonial hearsay is through the defendant's opportunity to cross-examine the hearsay declarant. See *Crawford v Washington* (2004) 541 US 36, 68, 158 L Ed 2d 177, 203, 124 S Ct 1354. But the *Crawford* court acknowledged an exception to confrontation clause rights when hearsay is admitted on equitable grounds, such as the rule of forfeiture for wrongdoing. 541 US at 62, 158 L Ed 2d at 199. By analogy, the *Parrish* court held that because the rule of completeness was equitably based and did not attempt to prove reliability of the hearsay statement (indeed, reliability under Evid C §356 is irrelevant to admissibility), the Sixth Amendment right to confront a witness was not implicated. *Parrish,* 152 CA4th at 272, 275 (after defendant presented accomplice's prior testimony to police as part of duress defense, court properly allowed prosecution to present accomplice's remaining statements that undercut defendant's coercion claim). For a discussion of *Crawford,* see §§20.20B, 22.3, 49.4.

§46.9 B. Rule May Apply to Otherwise Inadmissible Evidence

The rule of completeness may be invoked to introduce otherwise inadmissible evidence if your opponent "opens the door" by introducing part of the picture that you now need to complete. If you have favorable but inadmissible evidence (a common example being a client's prior self-serving statements), be alert for occasions to offer such evidence when your opponent introduces partial evidence out of context that unfairly misleads the jury about what actually happened.

§46.10 C. Strategic Considerations

If you are the proponent of evidence of part of a statement or writing, anticipate context objections and consider blunting them by introducing the entire statement or writing, or other appropriate statements and writings, including both favorable and unfavorable evidence. You will avoid appearing unfair, and you will mitigate your opponent's ability to highlight the unfavorable evidence.

V. CHECKLISTS

§46.11 A. Checklist: Witnesses to Subpoena

- Same witness who testified to part of the act, conversation, statement, or document.

§46.12 B. Checklist: Alternative Methods of Admissibility

- If the judge does not permit introduction of "context" evidence under Evid C §356, you will have to offer it as regular evidence subject to traditional requirements (*e.g.,* relevance) and restrictions (*e.g.,* foundation rules, hearsay rules).

VI. SOURCES

§46.13 A. Evidence Code

Evid C §356. Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

§46.14 B. Other

For further discussion, see Jefferson's California Evidence Benchbook, chap 20 (4th ed CJA-CEB 2009); California Trial Objections §26.7 (Cal CEB Annual); 1 Witkin, California Evidence, *Circumstantial Evidence* §§36-37 (4th ed 2000); 1 Witkin, California Evidence, *Hearsay* §96 (4th ed 2000); Cotchett, California Courtroom Evidence §9.02 (2008).

47

Secondary Evidence Rule: Copies and Other Evidence to Prove Content of Writing

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A. Evidence Code §47.18

B. Penal Code §47.19

C. Other §47.20

§47.1 I. SCOPE OF CHAPTER

This chapter discusses the evidentiary rules for proving the content of a writing. Either an otherwise admissible original (the "best evidence"), or otherwise admissible secondary evidence, may be used to prove the content of a writing. Evid C §§1520-1521. The term "writing" is defined broadly and is meant to encompass all records of expressive material. It includes photographs, audiotapes and videotapes, and any record of anything that can be considered a writing, no matter how recorded or stored. See Evid C §250. Thus, a computer graphics file is a writing. For discussion of circumstances in which a witness's oral testimony may be used to prove the content of a writing, see chap 48.

NOTE: Secondary evidence is only admissible if it complies with other rules of evidence, *e.g.,* authentication (Evid C §§1401(b), 1521(c); chap 11) and hearsay (Evid C §1200). See *Molenda v DMV* (2009) 172 CA4th 974, 994, 91 CR3d 792; *Pajaro Valley Water Mgmt. Agency v McGrath* (2005) 128 CA4th 1093, 27 CR3d 741.

II. REQUIREMENTS

§47.2 A. To Admit

A proponent may prove the content of a writing in any of the following ways:

- An admissible original (Evid C §1520) or a duplicate intended to be used as an original (Evid C §255);
- Admissible secondary evidence (Evid C §1521); or
- Oral testimony, if permitted by statute (Evid C §1523) (see chap 48).

PRACTICE TIP: Other alternatives for proving the content of a writing include judicial notice, stipulation of counsel, or authentication and proof of a writing under statutory provisions in Evid C §§1400-1454. See §47.17.

Source: Evidence/Effective Introduction of Evidence in California/47 Secondary Evidence Rule: Copies and Other Evidence to Prove Content of Writing/§47.3 B. To Object

§47.3 B. To Object

Grounds for objecting to admission of secondary evidence to prove the content of a writing under Evid C §1521(a) are:

- A genuine dispute of the material terms of the writing exists and justice requires excluding the evidence; or
- Admitting the evidence would be unfair.

Other exclusionary rules of evidence may be used to object to admission of an original or of secondary evidence to prove the content of a writing, including:

- The writing contains inadmissible:
- Hearsay (Evid C §1200),
- Opinion (see Evid C §800), or
- Privileged matter (see Evid C §900);
- The writing is irrelevant (Evid C §350); and
- The writing is not (properly) authenticated (Evid C §§1401, 1521(c)).

III. SAMPLE QUESTIONS

A. Proponent Introduces Photocopy (Evid C §§1521, 1550)

§47.4 1. Information to Elicit

To introduce the copy of a letter, the original of which is unavailable, defense counsel wants to take the following steps in the direct examination segment in §47.5:

- Show the witness a copy of the letter;
- Have the witness authenticate the letter by identifying it;
- Overcome the opponent's objections; and
- Move the letter into evidence.

§47.5 2. Questions to Ask

Q: Did you report this $100,000 in income on your 1987 income tax return marked Defense Exhibit E in evidence?

[*Counsel shows witness her 1987 tax return*]

A: Looking at the tax return now I see it isn't reported, but I relied on my accountant to take care of that. I certainly reported the income to my accountant, in a letter dated April 3, 1998.

Q: I show you a copy of a letter marked Defense Exhibit F for identification. Is this the letter dated April 3, 1998, you sent your accountant?

A: Yes it is.

Q: I offer the letter as Defense Exhibit next in order.

Opponent: Objection Your Honor. This copy is not admissible secondary evidence of the letter under Evidence Code §1521. There is a substantial question as to its authenticity. The accountant does not have the original letter that was supposedly mailed to him and thus may not have received it. For all we know, Ms. Witness may have written and photocopied this letter last week. The original must be produced and this copy excluded.

Proponent: We don't have the original letter. The original was sent to the accountant, who recalls receiving the information in the letter and who will testify to that fact this afternoon. The witness has just identified and authenticated the letter. There is no genuine dispute as to the material terms in the letter and its admission would not be unfair.

Court: I will admit the letter under Evidence Code §1521.

B. Proponent Introduces Computer Records (Evid C §§1521, 1552)

§47.6 1. Information to Elicit

To introduce computer records in the direct examination segment in §47.7, plaintiff's counsel wants to cover the following points:

- Ask the witness to describe the records;
- Establish the business record exception for records through the witness's testimony;
- Have the witness describe computer instructions that create a printout;
- Request the witness to authenticate the printout by identifying it;
- Move the records into evidence;
- Ask the witness to read the records aloud to the jury; and
- Request the court's permission to pass the records among the jurors.

PRACTICE TIP: Alternatively, the proponent could display relevant parts of the records, enlarging them to poster-size or projecting them on a screen. See discussion of trial exhibits in chap 39.

§47.7 2. Questions to Ask

Q: Mr. Security, how is access to this secure area of the building monitored?

A: Every time employees enter or exit the building they must insert their employee card into the security machine, which unlocks the door.

Q: Does the machine record such entries and exits?

A: Yes. The machine records the badge number and time of entry or exit. The data is automatically transmitted at the end of each day to our master security computer.

Q: Is the use of this security system part of the standard business procedures of Corporation?

Q: Is the data from the security machines collected and retained in the normal course of Corporation's business?

Q: Is it possible to retrieve exit and entry data from the computer for a particular date?

A: Yes. By entering the date and function code, the computer will retrieve the data pertaining to that date and print it out.

Q: Have you checked the computer at my instruction for exit and entry records for October 1, 1999?

A: Yes, and I have a printout right here.

Q: At this time I offer Plaintiff's next Exhibit in order into evidence.

Opponent: Objection. There is no proof that this printout is accurate. Also, it is not relevant.

Proponent: The relevance of this record is to demonstrate that Mr. Lazy was not in Corporation's building on October 1, 1999, a day on which he claims to have been at his office. As to the reliability objection, under Evidence Code §1552 this printout is presumed accurate unless Mr. Opponent can offer evidence of its unreliability.

Opponent: I have reason to believe that some employees were able to enter the building, thereby bypassing the security machine without using their badges.

Proponent: That claim is purely speculative. In any event, such a claim would go only to the weight of this evidence, not to its admissibility. This printout accurately reflects the data in the computer.

Court: I will admit the printout as evidence. Mr. Opponent, you are of course free to introduce evidence that the data itself is incomplete because the machines were not always turned on or because people could enter or exit the building without using the machines.

Q: Have you examined the records for October 1, 1999?

Q: Is there any record of Mr. Lazy entering or leaving?

PRACTICE TIP: The proponent is asking for an oral summary of a writing. The opponent might object because the writing is not numerous or voluminous. See Evid C §1523(d) discussed in chap 48.

IV. COMMENT

§47.8 A. Proving Content of Writing

Either an otherwise admissible original (the "best evidence"—Evid C §1520) or otherwise admissible secondary evidence (Evid C §1521) may be used to prove the content of a writing. The secondary evidence rule, effective January 1, 1999, replaced the best evidence rule, under which only the original was admissible unless a statutory exception provided otherwise (former Evid C §§1500-1511). See *People v Hovarter* (2008) 44 C4th 983, 1012, 81 CR3d 299.

Photocopies, computer-stored records, and other technological conveniences are normally as reliable as originals to prove the content of writings, as reflected by the statutes governing secondary evidence of writings. See Evid C §§1550-1553. In the present scheme, the admissible original of a writing is no longer preferred over admissible secondary evidence. Unlike the federal rules (see §47.15), however, one form of secondary evidence—oral testimony—is limited to a few permissible statutory exceptions under Evid C §1523, "based on an assumption that oral testimony as to the content of a writing is typically less reliable than other proof of the content of a writing." See Comment to Evid C §1523. Introducing oral testimony to prove the content of a writing is discussed in chap 48.

Writings are frequently subject to admissibility requirements in addition to the secondary evidence rule. The most common requirements other than the secondary evidence rule that must be met before a writing may be admitted in evidence are that the writing come within an exception to the hearsay rule, that it be authenticated, and that it be relevant.

Authentication is required before a writing or secondary evidence of its content may be received into evidence. Evid C §§1401, 1521(c); see chap 11. However, many statutes eliminate the need for a witness to be called to authenticate a writing. See, *e.g.,* Evid C §1530 (recorded copy of an official writing in the custody of the government or a public entity is prima facie evidence of the existence and content of such writing).

PRACTICE TIP: The secondary evidence rule does not apply to writings proffered for reasons other than to prove the content of the writing.

§47.9 B. Relevant Definitions

"Writing" means "handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Evid C §250.

- "Original" means the writing itself or any counterpart intended to have the same effect by a person executing or issuing it; an original of a photograph includes the negative or any print made from it; if data are stored in a computer or similar device, the original includes any printout, or other output readable by sight, shown to reflect the data accurately. Evid C §255.

- "Duplicate" means a counterpart produced by the same impression as the original or from the same matrix; by means of photography, including enlargements and miniatures; by mechanical or electronic recording; by chemical reproduction; or by equivalent techniques that accurately reproduce the original. Evid C §260.

NOTE: Arguably, the content of inscription on an inscribed chattel is a "writing" under Evid C §250, and a photograph of that inscription would be secondary evidence. The all-inclusive definition of a writing includes every "means of recording upon any tangible thing any form of communication or representation, including letters, and any record thereby created, regardless of the manner in which the record has been stored." Evid C §250. See discussion in Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009). But see *People v Martin* (1981) 115 CA3d 978, 171 CR 780 (admission of picture of guns inscribed with owner's initials; ruling under former best evidence rule).

§47.10 C. Criminal Proceedings

Additional requirements and limitations on the use of secondary evidence apply in criminal proceedings. Secondary evidence of the content of a writing must be excluded if (Evid C §1522(a)):

- The original is in the proponent's possession, custody, or control; and
- The proponent has not made the original reasonably available for inspection at or before trial.

This provision does not apply to:

- A "duplicate" as defined in Evid C §260 (Evid C §1522(a)(1));
- A writing not closely related to the controlling issues in the action (Evid C §1522(a)(2));
- A copy of a writing in a public entity's custody (Evid C §1522(a)(3)); or
- A copy of a writing recorded in the public records if the record or a certified copy is made evidence of the writing by statute (Evid C §1522(a)(4)).

The rule of admissibility is much broader at a preliminary hearing, and the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence (Pen C §872.5), even if it would be excluded at trial under Evid C §1522.

A photographic record of exhibits certified by the court clerk under the Pen C §1417.7 procedure is not subject to Evid C §§1521-1522. Pen C §1417.7.

NOTE: The request to exclude secondary evidence of the content of a writing must be made out of the jury's presence. Evid C §1522(b).

D. Printed Representations

§47.10A 1. Photographic Reproductions

Photocopies are undoubtedly the most common category of writing made admissible by the secondary evidence rule. Under Evid C §1550, any photostatic or photographic copy (including an enlargement) of a writing is admissible in evidence as if it were the original if it was made and preserved as a business record.

Likewise, reproductions of files, records, writings, photographs, fingerprints, or other instruments in the official custody of a criminal justice agency that were microphotographed or otherwise reproduced in a manner that conforms with Penal Code requirements (see Pen C §§11106.1-11106.3) are admissible to the same extent and under the same circumstances as the original file, record, writing, or other instrument would be admissible. Evid C §1550.1.

§47.11 2. Computer Information and Computer Programs

Secondary evidence of writings includes a printed representation of computer information or computer programs:

- A computer representation is presumed to be an accurate representation of the computer information or program it purports to represent. Evid C §1552(a).
- If a party proffers evidence that the representation is inaccurate or unreliable, the proponent of the printed representation then has the burden of proving by a preponderance of the evidence that the printed representation accurately represents the existence and content of the information or program. Evid C §1552(a).

PRACTICE TIP: Computer-generated official records under Evid C §452.5 or §1530 are not subject to Evid C §1552(a)'s presumption of accuracy and corresponding burdens of proof. Evid C §1552(b).

For discussion of admission of computer records under the business records exception to the hearsay rule, see chap 13. For discussion of oral testimony summarizing voluminous records or accountings, see discussion of Evid C §1523(d) in chap 48.

§47.12 3. Images Stored on Video or Digital Media

Secondary evidence of writings includes a printed representation of images stored on video or digital media, which may be offered to prove the images that it purports to represent:

- A printed representation is presumed to be an accurate representation of the images it purports to represent. Evid C §1553.
- If a party proffers evidence that the representation is inaccurate or unreliable, the proponent of the printed representation has the burden of proving by a preponderance of the evidence that the printed representation accurately represents the existence and content of the images. Evid C §1553.

For discussion of admission of video and digital images under the business records exception to the hearsay rule, see chap 13.

E. Copies of Official Writings

§47.13 1. Governmental Entity Has Custody of Original

When the original writing is in the official custody of a governmental or public entity:

- A copy of the writing in official custody is prima facie evidence of its content under Evid C §1530(a) if:
- The copy purports to be published by authority of the nation, state, or public entity in which the original writing is kept; and
- The office where the original is kept is within the United States, the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and a public employee or deputy having legal custody of the writing attests or certifies the copy as a correct copy of the original writing or entry; or
- The office where the original is kept is elsewhere, and the attestation of the copy is made by a person with the authority to attest and is accompanied by a final statement certifying the genuineness of the signature and official position of the person attesting the copy.
- The attestation or certification must state in substance that the copy is a correct copy of the original or a specific part of the original. Evid C §1531. Although attestation and certification of authenticity is inadmissible hearsay under Evid C §1200, Evid C §1530(a) creates an exception to the hearsay rule.
- The presumption of the copy's admissibility affects the burden of producing evidence of the existence and content of the original writing or entry. Evid C §1530(b). See *Ambriz v Kelegian* (2007) 146 CA4th 1519, 1530, 53 CR3d 700 (plaintiff included certification by city clerk attesting to authenticity of copied documents introduced into evidence, thus raising presumption documents "were what they purported to be"). If the opponent of the purported copy proffers evidence sufficient to sustain a finding that the original does not exist or that the copy is incorrect, the presumption does not apply and the trier of fact must determine the existence and content issues regardless of the presumption. Evid C §604.

For further discussion of official records and writings, see chap 36.

§47.14 2. Governmental Entity Has Custody of Copy

When a writing in the official custody of a governmental or public entity is itself a copy and not the original (original returned to its owner or possessor by the public entity):

- A copy of the writing in official custody is prima facie evidence of the existence and content of the recorded writing, if the record is in fact a record of an office of a public entity and a statute authorized the recording in that office. Evid C §1532(a).

- The presumption as to the copy's admissibility affects the burden of producing evidence of the existence and content of the recorded writing or entry. Evid C §1532(b). If an opponent of the purported copy proffers evidence sufficient to sustain a finding that the recorded writing is not authentic, the presumption does not apply and the trier of fact must determine the authenticity without regard to the presumption. Evid C §604.

- Proof of the existence of the original recorded writing alone is not proof of authenticity. If the recorded writing was a deed or trust deed or other writing with a certificate of acknowledgment or proof of due execution of the recorded writing, the original recorded writing is presumed authentic under Evid C §§1450-1451 and 1453. If the certificate of acknowledgment or proof of due execution is lacking, additional evidence must be proffered to authenticate the original writing.

For further discussion of official records and writings, see chap 36.

§47.15 F. Federal Law on Proving Content of Writings (Fed R Evid 1001-1008)

Definitions of relevant terminology for "writings," "recordings," "photographs," "original," and "duplicate" are in Fed R Evid 1001, and correspond to the definitions in Evid C §§250, 255, 260.

The federal rules for proving the content of a writing are highlighted as follows:

- The original is required to prove content unless the rules provide otherwise. Fed R Evid 1002.
- A duplicate is admissible to the same extent as the original unless authenticity is disputed and it would be unfair to admit a duplicate. Fed R Evid 1003.
- The original is not required and other evidence is admissible if all originals are lost or destroyed (unless the proponent is responsible for the loss or destruction), if the original is not obtainable, if the opponent has possession of the original, or if the writing pertains to collateral matters. Fed R Evid 1004.
- The use of a copy in preference to oral testimony is not required. However, Fed R Evid 1005, which is analogous to Evid C §§1530 and 1532, permits proving the content of an original official record or the original of a recorded document by means of a copy.
- Contents of voluminous writings, recordings, or photographs can be presented by chart, summary, or calculation if they cannot conveniently be examined in court, as long as they are made available for examination, copying, or both by the parties at a reasonable time and place. Fed R Evid 1006.
- Testimony or written admission of a party against whom the writing is offered may prove its contents, without accounting for nonproduction of the original. Fed R Evid 1007.

PRACTICE TIP: It is the court's function to rule on most preliminary issues of whether to prefer the original as evidence of contents, and it is the jury's function as the trier of fact to decide whether the asserted writing ever existed; whether another writing, recording, or photograph produced at trial is the original; or whether the contents are accurately reflected by the other evidence. Fed R Evid 1008.

NOTE: At the time of this writing, proposed amendments to the Federal Rules of Evidence were being circulated for comment (with the comment period scheduled to end on February 16, 2010). The proposed amendments are not intended to change the substantive meaning of the rules, but only to restyle them for clarification and uniformity. For more information see http://www.uscourts.gov/rules.

V. CHECKLISTS

§47.16 A. Checklist: Witnesses to Subpoena

- Witness to authenticate writing unless documentation is self-authenticating. See chap 11.
- Witness to prove that writing comes within an exception to the hearsay rule, if required. See, *e.g.,* chaps 40-41.
- Witness to prove relevance of document, if required. See chap 45.

§47.17 B. Checklist: Alternative Methods of Admissibility

- Judicial notice. Evid C §450; see chap 31.
- Use witness to testify to what occurred instead of introducing a writing, if statutory requirements can be met. See chap 48.
- Stipulation of counsel. See chap 51.
- Authentication and proof of writings under statutory provisions. See chap 11.

VI. SOURCES

§47.18 A. Evidence Code

Evid C §255. "Original" means the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. 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."

Evid C §260. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

Evid C §1520. The content of a writing may be proved by an otherwise admissible original.

Evid C §1521. (a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of the writing if the court determines either of the following:

(1) A genuine dispute exists concerning material terms of the writing and justice required the exclusion.

(2) Admission of the secondary evidence would be unfair.

(b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).

(c) Nothing in this section excuses compliance with Section 1401 (authentication).

(d) This section shall be known as the "Secondary Evidence Rule."

Evid C §1522. (a) In addition to the grounds for exclusion authorized by Section 1521, in a criminal action the court shall exclude secondary evidence of the content of a writing if the court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial. This section does not apply to any of the following:

(1) A duplicate as defined in Section 260.

(2) A writing that is not closely related to the controlling issues in the action.

(3) A copy of a writing in the custody of a public entity.

(4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

(b) In a criminal action, a request to exclude secondary evidence of the content of a writing, under this section or any other law, shall not be made in the presence of the jury.

Evid C §1523. (a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

Evid C §1552. (a) A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. The presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

(b) Subdivision (a) shall not apply to computer-generated official records certified in accordance with Section 452.5 or 1530.

Evid C §1553. A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. The presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of the evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

See Evid C §250, defining a "writing," which is reproduced in §11.19. See also Evid C §§1530-1532, reproduced in chap 36.

§47.19 B. Penal Code

Pen C §872.5. Notwithstanding Article 1 (commencing with Section 1520) of Chapter 2 of Division 11 of the Evidence Code, in a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

§47.20 C. Other

For further discussion of the scope and application of the secondary evidence rule, see Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009).

48

Secondary Evidence Rule: Oral Testimony to Prove Content of Writing

Richard P. Caputo
Robert A. Franklin

§48.1 I. SCOPE OF CHAPTER

Evidence Code §1523(a) prohibits using oral testimony to prove the content of a writing unless otherwise permitted by statute. This chapter discusses the exceptions set out in Evid C §1523(b)-(d). The general rule is based on the assumption that oral testimony is typically less reliable than other proof of the content of a writing. See Comment to Evid C §1523. For discussion of using copies and evidence other than oral testimony to prove the content of a writing, see chap 47.

II. REQUIREMENTS

A. To Admit

§48.2 1. Writing Lost or Destroyed (Evid C §1523(b))

To introduce oral testimony to prove the content of a writing that has been lost or destroyed, counsel seeking to admit the evidence must show that (Evid C §1523(b)):

- The proponent does not have possession or control of a copy of the writing; and
- The original was lost or destroyed without proponent's fraudulent intent.

PRACTICE TIP: Like other provisions for introducing oral testimony on an unavailable writing, this provision assumes that the witness has personal knowledge of the original. See §48.8.

§48.3 2. Writing Not Reasonably Procurable (Evid C §1523(c))

To introduce oral testimony to prove the content of a writing that is not reasonably procurable or not expedient to produce, counsel seeking to admit the evidence must show that (Evid C §1523(c)):

- The proponent does not have possession or control of the original or a copy of the writing, and either:
- The proponent cannot reasonably procure through court process or other available means the original writing or its copy, or
- The writing is not closely related to the case's controlling issues, and requiring its production would be inexpedient.

PRACTICE TIP: This provision is useful for writings in the opponent's possession or in the custody of a governmental or public entity.

§48.4 3. Writing Summarizing Voluminous Records (Evid C §1523(d))

To introduce oral testimony to prove the content of a writing that summarizes voluminous records, counsel seeking to admit the evidence must show that (Evid C §1523(d)):

- The writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time; and
- The evidence sought from them is only the general result of the whole.

NOTE: Unlike former Evid C §1509, Evid C §1523 does not address whether the court has discretion to order that the documents be produced for the opponent's inspection. In contrast, Fed R Evid 1006 (see §47.11) requires the proponent to make the documents available to the opponent for examination, copying, or both. See Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009).

Source: Evidence/Effective Introduction of Evidence in California/48 Secondary Evidence Rule: Oral Testimony to Prove Content of Writing/§48.5 B. To Object

§48.5 B. To Object

Opposing counsel may object to the admission of oral testimony to prove the content of a writing on any of the following grounds:

- Irrelevant (Evid C §350);
- Unduly time-consuming, prejudicial, confusing, or misleading (Evid C §352); or
- Lack of foundation, *e.g.:*
- Witness has no personal knowledge of original (Evid C §702; see *Elias Real Estate, LLC v Tseng* (2007) 156 CA4th 425, 430, 67 CR3d 360 (in absence of any facts showing that written agreement was made, trial court could not properly infer its existence));
- Proponent has possession or control of a copy of the writing (Evid C §1523(b));
- Proponent lost or destroyed the original with fraudulent intent, or the original in fact was not lost or destroyed (Evid C §1523(b));
- Proponent could reasonably have procured the writing or a copy through court process or other available means (Evid C §1523(c));
- The writing is closely related to the case's controlling issues, and it would be reasonable to require its production (Evid C §1523(c));
- The writing consists of only a few accounts or other writings that could be examined in court without great loss of time (Evid C §1523(d)); or
- The evidence opponent seeks from the writing or writings is not only the general result of the whole, but specific information that bears on the issue in dispute (Evid C §1523(d)).

III. SAMPLE QUESTIONS

§48.6 A. Information to Elicit

Defendant businessman takes the stand to offer proof that he cannot find the original or a copy of an agreement between himself and the plaintiff. See *Hausen v Goldman* (1954) 124 CA2d 25, 267 P2d 852, on which this example is based. In response to the direct examination questions in §48.7, counsel wants the client to testify to the following matters:

- Describe the lost document;
- Establish basis for admissibility of oral testimony;
- Show personal knowledge of the writing; and
- Report the content of the writing.

§48.7 B. Questions to Ask

Q: Mr. Defendant, do you recall signing an agreement between yourself and Ms. Plaintiff?

Q: Did you retain the original of that document?

Q: Did you make any copies of that document?

Q: Did you place the documents somewhere for safekeeping?

Q: Where is that document now?

Q: Have you made a search for that document?

Q: Describe your search.

Q: Were you able to locate the document?

IV. COMMENT

§48.8 A. Witness's Personal Knowledge of Original

Before introducing evidence about an unavailable writing, the proponent must show that the witness has personal knowledge of the original. Evid C §702. See *Stenseth v Wells Fargo Bank* (1995) 41 CA4th 457, 48 CR2d 192 (decided under former Evidence Code provisions but applicable to the admissibility of oral evidence under Evid C §1523(b)-(d)). In *Stenseth*, the court held that the introduction of secondary evidence based on the testimony of a witness who had no personal knowledge of the originals was prejudicial error. For further discussion, see Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009). See also 2 Witkin, California Evidence, *Documentary Evidence* §§30, 36 (4th ed 2000).

§48.9 B. Relevance; Evid C §405

In addition to demonstrating that oral evidence of a writing is admissible, the proponent must show that the writing has a bearing on relevant issues in the case. See Evid C §350. Relevance issues are determined under Evid C §405; see Comment to Evid C §405. Section 405 hearings are discussed in chap 4.

§48.10 C. Proof of Loss or Destruction

A witness who will testify to the content of the writing, but who does not have possession or control of a copy (when the original was lost or destroyed without fraudulent intent), should be prepared to prove how the original and any copies were destroyed, unless opposing counsel stipulates to that fact. Evid C §1523(b); *People v Wright* (1990) 52 C3d 367, 393, 276 CR 731. See *Daddario v Snow Valley, Inc.* (1995) 36 CA4th 1325, 43 CR2d 726 (fact that agreement was destroyed in fire proved by affidavit).

To prove the content of private documents destroyed by disaster, trial counsel may notice a hearing on a verified petition filed under CCP §§1953.10-1953.13 for a court order asserting the prior existence and authenticity of such evidentiary documents. See *Daddario v Snow Valley, Inc., supra;* Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009). Similarly, a hearing may be noticed on a verified petition to prove the content of court records destroyed by disaster under CCP §§1953-1953.06.

PRACTICE TIP: Proof of the content of lost official records affecting real property may be accomplished by following the procedures in Evid C §1601.

§48.11 D. Federal Law on Oral Testimony

Under Fed R Evid 1004, the original is not required and other evidence will be admissible if all originals are lost or destroyed (unless the proponent is responsible for the loss or destruction), the original is not obtainable, the opponent has possession of the original, or the writing pertains to collateral matters. "Other evidence" includes oral testimony of an original writing's content as well as a copy of the original writing. With regard to an official document, the use of a copy instead of oral testimony is not required. Fed R Evid 1005. For further discussion of federal law on proving content of writings, see §47.15.

§48.12 V. CHECKLIST: WITNESSES TO SUBPOENA

- Witness whose oral testimony will prove content of writing as admissible secondary evidence under Evid C §1523(b)-(d).
- Witness to satisfy parol evidence rule, if required. See chap 37.
- Witness to prove that writing is relevant, if required. See chap 45.

VI. SOURCES

§48.13 A. Evidence Code

Evid C §1523. (a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

§48.14 B. Other

For further discussion of the oral testimony aspect of the secondary evidence rule, see Jefferson's California Evidence Benchbook, chap 32 (4th ed CJA-CEB 2009).

49

Spontaneous and Contemporaneous Statements; Statements by Abuse Victims

Holly J. Fujie

§49.1 I. SCOPE OF CHAPTER

This chapter discusses spontaneous and contemporaneous statements. Spontaneous statements that describe or explain an act, and statements that explain conduct in which the declarant was engaged (contemporaneous statements), are considered reliable enough to be exceptions to the hearsay rule. See Comments to Evid C §§1240-1241.

II. REQUIREMENTS

A. To Admit

§49.2 1. Spontaneous Statements

To admit a spontaneous statement into evidence as an exception to the hearsay rule, the proponent must show that the statement:

- Was made spontaneously while the declarant was under the stress of excitement caused by something he or she perceived (Evid C §1240);
- Describes or explains those perceptions (Evid C §1240); and
- If in writing, is authenticated (Evid C §1401).

NOTE: Some evidence must show that the declarant witnessed the event; the proponent has the burden of showing that foundational fact. *People v Phillips* (2000) 22 C4th 226, 92 CR2d 58. In *People v Gutierrez* (2000) 78 CA4th 170, 92 CR2d 626, the court admitted, as a spontaneous statement, a writing showing a license plate number. The court found evidence from which it could be inferred that the declarant had witnessed a robbery and wrote the number within minutes of that event.

The amount of time that has elapsed between an event and a spontaneous statement about it is important as an indicator of the declarant's state of mind, but is not determinative of admissibility. *People v Ramirez* (2006) 143 CA4th 1512, 1523, 50 CR3d 110. See §49.10. Spontaneous statements are also called "excited utterances," "spontaneous declarations," and "spontaneous utterances."

§49.3 2. Contemporaneous Statements

To admit a contemporaneous statement into evidence as an exception to the hearsay rule, the proponent must show that the statement (Evid C §1241):

- Is offered to explain, qualify, or make understandable the declarant's conduct; and
- Was made while the declarant was engaged in the conduct.

If the statement is in writing, it must be authenticated. Evid C §1401.

These statements are sometimes referred to as "verbal acts." There is disagreement among commentators about whether such statements are actually hearsay. See *People v Marchialette* (1975) 45 CA3d 974, 119 CR 816; Comment to Evid C §1241; Jefferson's California Evidence Benchbook, chap 13 (4th ed CJA-CEB 2009).

3. Statements by Victims of Abuse or Violence

§49.3A a. Child Dependency Exception to Hearsay Rule

Under the judicially created child dependency hearsay exception, admission of out-of-court statements by alleged victims of child abuse may be admitted, under certain conditions, during a hearing to determine whether a child will become a dependent of the juvenile court. See *In re Carmen O.* (1994) 28 CA4th 908, 33 CR2d 848. See also Evid C §1360. The California Supreme Court has held that this exception is well-founded, but it has adopted three requirements for its application (*In re Cindy L.* (1997) 17 C4th 15, 29, 69 CR2d 803):

- The court must find that the time, content, and circumstances of the statement provide sufficient indicia of reliability;
- Either the child must be available for cross-examination or there must be evidence of child sexual abuse that corroborates the child's statement; and
- Other interested parties must have adequate notice of the public agency's intention to introduce the hearsay statement in order to put it in context.

For further discussion, see California Juvenile Dependency Practice, chap 4 (Cal CEB Annual).

In addition, Evid C §1293 provides for the admissibility in a dependency proceeding of the child's former testimony from a preliminary hearing if its conditions are met. See Evid C §1293(a)(2). There is no requirement that the child be unavailable as a witness. Compare Evid C §1293 with Evid C §1291.

§49.3B b. Other Hearsay Exceptions for Statements Made by Victims of Abuse or Violence

During the 1990s, the legislature enacted several other hearsay exceptions intended to permit the introduction of out-of-court statements by victims of abuse or violence. These include:

- Evid C §1253. A statement made by the victim of child abuse or neglect may be introduced if the statement was elicited for the purpose of diagnosis or treatment. See §§50.3A, 50.16.

- Evid C §1350. A statement made by a declarant who is unavailable as a witness may be introduced in a criminal proceeding charging a serious felony if the defendant procured the witness's unavailability by kidnapping or killing the declarant. The specific conditions that must be met to make such a statement admissible are set out in Evid C §1350(a)(1)-(6).

- Evid C §1360. A statement by a victim of child abuse or neglect, describing any act of abuse or neglect, may be introduced in a criminal action when:

- The child was under the age of 12 at the time of the statement;

- The statement is not otherwise admissible;

- The court finds "sufficient indicia of reliability"; and either
  —The child testifies at the hearing, or
  —The child is unavailable as a witness and there is other evidence corroborating the statement.

NOTE: Under the construction of the confrontation clause adopted by the United States Supreme Court in *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, Evid C §1360 cannot authorize the introduction of a child's out-of-court statement made to the police or in circumstances that would lead an objective observer to reasonably expect that the statement would be used in a criminal prosecution. *People v Sisavath* (2004) 118 CA4th 1396, 13 CR3d 753. See *Davis v Washington* (2006) 547 US 813, 822, 165 L Ed 2d 224, 237, 126 S Ct 2266 (statements are testimonial when made in course of police interrogation under circumstances that objectively indicate that primary purpose of interrogation "is to establish or prove past events potentially relevant to later criminal prosecution"). For further discussion of *Crawford* and *Davis,* see §§20.20B, 49.4.

- Evid C §1370. A statement describing the threat or infliction of physical injury on the declarant may be introduced when the declarant is unavailable as a witness and the conditions set out in §1370(a)(1)-(5) are met.

- Evid C §1380. An out-of-court statement made by the alleged victim may be introduced in a criminal proceeding that charges the abuse of an elder or dependent adult, if the conditions set out in §1380(a)(1)-(6) are met.

NOTE: *People v Pirwani* (2004) 119 CA4th 770, 14 CR3d 673, held that under the construction of the confrontation clause adopted by the United States Supreme Court in *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, Evid C §1380 is unconstitutional on its face. But see *People v Cooper* (2007) 148 CA4th 731, 742, 56 CR3d 6 (even assuming correctness of *Pirwani,* that case did not consider whether videotaped statements of elder abuse victim might be admissible for reasons apart from Evid C §1380). For further discussion of *Cooper,* see §50.11. On nonhearsay, see chap 35.

Source: Evidence/Effective Introduction of Evidence in California/49 Spontaneous and Contemporaneous Statements; Statements by Abuse Victims/§49.4 B. To Object

§49.4 B. To Object

Grounds for objecting to the admission of spontaneous or contemporaneous statements include:

- Hearsay (Evid C §1200);
- Improper opinion (see *People v Miron* (1989) 210 CA3d 580, 258 CR 494);
- Irrelevant (Evid C §350);
- No personal knowledge (Evid C §702);
- Too time consuming, prejudicial, confusing, or misleading (Evid C §352);
- Statement does not meet a statutory requirement of Evid C §1240 (if spontaneous) or §1241 (if contemporaneous);
- Too unreliable (see *People v Provencio* (1989) 210 CA3d 290, 299, 258 CR 330); and
- If a writing, it is:
- Not (properly) authenticated (Evid C §1401), or
- Inadmissible secondary evidence (Evid C §1521).

"Testimonial" statements. In a criminal case, the defendant may be able to object to the admission of a spontaneous or contemporaneous statement on the ground that its introduction violates the Sixth Amendment confrontation clause, if the statement is "testimonial" in nature. See *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354. The *Crawford* court held that when the declarant does not testify, testimonial hearsay is inadmissible against the defendant in a criminal prosecution unless the declarant is unavailable as a witness *and* the defendant has had an opportunity to cross-examine. 541 US at 52, 158 L Ed 2d at 194. The suggestion in *White v Illinois* (1992) 502 US 346, 116 L Ed 2d 848, 112 S Ct 736, that the confrontation clause does not preclude the admission of spontaneous statements if they are reliable, may have been superseded by *Crawford* for spontaneous statements that are testimonial. See 541 US at 58 n8, 158 L Ed 2d at 197 n8.

On construction of the word "testimonial," see:

- *Crawford,* 541 US at 51, 158 L Ed 2d at 193;
- *Davis v Washington* (2006) 547 US 813, 822, 165 L Ed 2d 224, 237, 126 S Ct 2266 (circumstances under which statements made in course of police interrogation are testimonial);
- *Melkonians v Los Angeles County Civil Serv. Comm'n* (2009) 174 CA4th 1159, 1171, 95 CR3d 415 (even if *Crawford* applied to civil service proceedings, victim's call to business line of sheriff's station was spontaneous and equivalent of 911 call);
- *People v Saracoglu* (2007) 152 CA4th 1584, 1596, 62 CR3d 418 (despite state's concession that abuse victim's statements in police station 30 minutes after abuse were testimonial, court disagreed, finding victim's initial statements were "functional equivalent" of "911" call and made during ongoing emergency because her safety at the station was "temporary");
- *People v Brenn* (2007) 152 CA4th 166, 173, 60 CR3d 830 (victim's 911 call was spontaneous and nontestimonial, even though much of call was in response to questions from dispatcher);
- *People v Johnson* (2007) 150 CA4th 1467, 1479, 59 CR3d 405 (court found ongoing emergency and spontaneous, nontestimonial statement in response to officer's question of "What happened?" when officer heard woman scream and saw bloody defendant and bloody, injured victim);
- *People v Smith* (2005) 135 CA4th 914, 924, 38 CR3d 1 (codefendant's statements to his girlfriend in their motel room were spontaneous and nontestimonial);
- *People v Rincon* (2005) 129 CA4th 738, 754, 28 CR3d 844 (spontaneous statements made to civilian unconnected to law enforcement, under circumstances in which person who made statements could not reasonably anticipate they would be

used in court, were not testimonial).

III. SAMPLE QUESTIONS

A. Spontaneous Statement

§49.5 1. Information to Elicit

In the example in §49.6, the proponent wants the witness to testify to the following matters:

- Describe the declarant's stress or excitement and tell why it existed; and
- Quote the spontaneous statement relating what the declarant perceived.

§49.6 2. Questions to Ask

Q: Did you see anything when you walked into the room?

Q: What did you see?

A: Mr. Declarant was lying on the floor, unconscious.

Q: Did he regain consciousness when you were present?

Q: Did he say anything after he regained consciousness?

Q: How long after he regained consciousness did he make this statement?

Q: What did he say?

A: He said, "Mr. Defendant hit me on the head with a stick."

Q: At the time he made this statement, what did his condition appear to be to you?

PRACTICE TIP: Your opponent might object to this last question as impermissible lay opinion. It should be overruled. See *Capelouto v Kaiser Found. Hosps.* (1972) 7 C3d 889, 896, 103 CR 856.

A: He appeared stunned and excited.

B. Contemporaneous Statement

§49.7 1. Information to Elicit

In the example in §49.8, the proponent wants the witness to testify to the following matters:

- Identify conduct in which the declarant engaged that will be explained; and
- Quote contemporaneous statement that the declarant made to explain the conduct.

§49.8 2. Questions to Ask

Q: Did Ms. Declarant say anything to you when she handed you the deed to be recorded?

Q: What did she say?

A: She said, "I'm having this recorded as a gift for my son because he promised to take care of my husband as long as he lives."

Opponent: Objection. Your Honor, there is no foundation, as required by Evidence Code §1241, that this alleged statement was required to explain, qualify, or make understandable the act of recording the deed to the house. By handing the recording clerk the deed in the County Recorder's office, it was obvious she wanted to record it. I move to strike the last question and answer.

Proponent: Your Honor, Ms. Witness's statement is coming in as a hearsay exception under Evidence Code §1241, contemporaneous declaration. It satisfies all requirements: The statement was made while the declarant was handing over a deed. Her statement explained why she was giving the deed to Ms. Witness. The county recorder answers a lot of questions about deeds and has duties other than just recording deeds. Ms. Declarant's statement was necessary to explain what she wanted done.

Court: The objection is overruled.

IV. COMMENT

§49.9 A. Objections to Spontaneous Statements

When the opponent of evidence proffered as a spontaneous statement intends to dispute the spontaneity of the out-of-court statements, it is a good idea to request a preliminary fact hearing under Evid C §402 outside the presence of the jury. See chap 4.

In a criminal trial, determining whether the introduction of such a statement would violate the confrontation clause is also a foundational matter that should be decided outside the presence of the jury. On factors relevant to determining whether the admission of hearsay violates the confrontation clause, see *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, and *Davis v Washington* (2006) 547 US 813, 821, 165 L Ed 2d 224, 236, 126 S Ct 2266, discussed in §§20.20B, 49.4.

The following objections to the admission of evidence have been held *not* to apply to spontaneous statements:

- Competence to testify (*People v Butler* (1967) 249 CA2d 799, 806, 57 CR 798) and
- Self-serving (*People v Haskell* (1960) 185 CA2d 267, 273, 8 CR 228).

NOTE: Before enactment of the 1967 Evidence Code, "res gestae" was used to refer to several sorts of admissible hearsay and nonhearsay statements, including both contemporaneous and spontaneous statements. Although res gestae should no longer be used, you may hear it occasionally. See 1 Witkin, California Evidence, *Hearsay* §173 (4th ed 2000).

§49.10 1. Lapse of Time May Make Statement Inadmissible

When determining whether too much time has elapsed between the actual occurrence and the making of the statement for the statement to be considered "spontaneous," the court will consider the physical and psychological state of the declarant at the time the statement was made. *People v Jones* (1984) 155 CA3d 653, 202 CR 289. A crucial element in determining whether a statement is sufficiently reliable is whether the declarant's reflective powers remained in abeyance under the stress of the excitement. *People v Brown* (2003) 31 C4th 518, 540, 3 CR3d 145 (statement made 2½ hours after event held spontaneous). See *People v Raley* (1992) 2 C4th 870, 892, 8 CR2d 678 (statement made 18 hours after event held spontaneous); *People v Smith* (2005) 135 CA4th 914, 923, 38 CR3d 1 (codefendant was speaking "under… stress of excitement and while reflective powers were still in abeyance" though 3 to 6 hours passed after commission of crime); *People v Pearch* (1991) 229 CA3d 1282, 1290, 280 CR 584 (defendant's conviction reversed for admission as "spontaneous" victim's statement made 13 hours after crime).

§49.11 2. Statements Made in Response to Questions

Whether courts will admit statements under Evid C §1240 that were made in response to questioning depends on whether the responses were made "without deliberation or reflection." *People v Morrison* (2004) 34 C4th 698, 718, 21 CR3d 682; *People v Farmer* (1989) 47 C3d 888, 903, 254 CR 508, overruled on another ground in *People v Waidla* (2000) 22 C4th 690, 724 n6, 94 CR2d 396; *People v Stanphill* (2009) 170 CA4th 61, 75, 87 CR3d 643. The extent of the questioning is also a factor in making this determination. A person may spontaneously answer a simple inquiry. *Morrison,* 34 C4th at 718.

NOTE: When the assertedly spontaneous statement is made in response to questioning by police, it may be inadmissible in a criminal case unless the declarant is unavailable as a witness and the defendant has had an opportunity to cross-examine the declarant about the substance of the statement. *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354; *Davis v Washington* (2006) 547 US 813, 821, 165 L Ed 2d 224, 236, 126 S Ct 2266. The mere fact that a declarant responds to questioning, however, does not render the resulting statement inadmissible. See *People v Pedroza* (2007) 147 CA4th 784, 791, 54 CR3d 636 (despite 5 minutes of police questioning, statements were spontaneous, because burn victim was in pain and having difficulty providing more than one-word answers). For discussion, see §§20.20B, 49.4.

§49.12 B. Affidavits Setting Forth Contemporaneous Statements [Deleted]

This section has been deleted.

V. CHECKLISTS

§49.13 A. Checklist: Witnesses to Subpoena

- Person who heard statement and can describe what was perceived and that declarant was excited (spontaneous statement)
- Person who heard statement and can describe conduct in which declarant engaged when statement was made (contemporaneous statement)

§49.14 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1227; see chap 10.
- Dying declaration. Evid C §1242; see chap 22.
- Statement of state of mind, emotion, or physical sensation. Evid C §1250; see chap 50.
- Declaration against interest. Evid C §1230; see chap 20.
- Prior inconsistent or consistent statements. Evid C §§1235-1236; see chaps 40-41.
- Remainder of act to explain part admitted. See chap 46.

VI. SOURCES

§49.15 A. Evidence Code

Evid C §1240. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

Evid C §1241. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Is offered to explain, qualify or make understandable conduct of a declarant; and

(b) Was made while the declarant was engaged in such conduct.

§49.16 B. Other

For further discussion of spontaneous and contemporaneous statements, see 1 Witkin, California Evidence, *Hearsay* §§173-185 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 13 (4th ed CJA-CEB 2009); Cotchett, California Courtroom Evidence §§21.01, 21.28-21.29 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *The Hearsay Rule and Its Exceptions* §9.I (3d ed 2000).

Source: Evidence/Effective Introduction of Evidence in California/50 Statements of State of Mind, Emotion, or Physical Sensation/Chapter Outline

50

Statements of State of Mind, Emotion, or Physical Sensation

Nancy M. Naftel

VI. SOURCES

A. Evidence Code §50.16

B. Other §50.17

§50.1 I. SCOPE OF CHAPTER

This chapter discusses out-of-court statements, which are not inadmissible hearsay when they are trustworthy (Evid C §1252) and concern the declarant's state of mind, emotion, or physical sensation either at the time the statement was made (Evid C §1250) or before the statement was made (Evid C §1251) and which meet the requirements of Evid C §1252 and either §1250 or §1251. Statements admitted under Evid C §§1250-1252 are admitted for the truth of the matter stated. See Comment to Evid C §1250. Statements on state of mind, emotion, or physical sensation may be admissible as *nonhearsay* if they are not admitted for the truth of the matter stated. See Comments to Evid C §§1200, 1250. For discussion of nonhearsay, see chap 35.

II. REQUIREMENTS

A. To Admit

§50.2 1. Present State of Mind, Emotion, or Physical Sensation

To admit an out-of-court statement about the declarant's present state of mind, emotion, or physical sensation, the proponent must show that the statement:

- Asserts the declarant's then-existing state of mind, emotion, or physical sensation (Evid C §1250), and either:
- Is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or another time when such state of mind, emotion, or physical sensation is itself in issue (Evid C §1250(a)(1)), or
- Is offered to prove or explain the declarant's acts or conduct in conformity with such state of mind, emotion, or physical sensation (Evid C §1250(a)(2); *People v Sakarias* (2000) 22 C4th 596, 94 CR2d 17; *People v Romero* (2007) 149 CA4th 29, 37, 56 CR3d 678 (victim's statement to third party that his lover would kill him if he found him with another man was admissible under §1250));
- Was made under circumstances indicating its trustworthiness (Evid C §1252); and
- If in writing, is authenticated (Evid C §1401).

§50.3 2. Prior State of Mind, Emotion, or Physical Sensation

To admit an out-of-court statement about the declarant's previous state of mind, emotion, or physical sensation, the proponent must show that:

- The statement asserts the declarant's *previously existing* state of mind, emotion, or physical sensation (Evid C §1251);
- The statement was made under circumstances that indicate it is trustworthy (Evid C §1252);
- The declarant is unavailable as a witness (Evid C §1251(a));
- The evidence is offered solely to prove such prior state of mind, emotion, or physical sensation when one of those is at issue (Evid C §1251(b)); and
- If in writing, the statement is authenticated (Evid C §§1400-1401).

§50.3A 3. Statements by Minors for Purposes of Medical Treatment Involving Child Abuse

To admit an out-of-court statement by a minor made for purposes of medical treatment involving child abuse or neglect, the proponent must show that (Evid C §1253):

- The statement was made by one who is a minor at the time of the hearing, and who was under the age of 12 at the time the statement was made;
- The statement was made for purposes of medical diagnosis or treatment; and
- The statement describes the medical history, past or present symptoms, pains or sensations, or the general character of the cause or source insofar as pertinent to diagnosis or treatment.

A child's statement identifying the perpetrator is relevant to the treatment and consequently admissible under §1253 when there is a familial connection between the child and the perpetrator that would affect the question of whether to return the victim to the same situation that facilitated the abuse. *In re Daniel W.* (2003) 106 CA4th 159, 165, 130 CR2d 412.

In a criminal action, the opponent may be able to exclude the statement as a violation of the confrontation clause if it can be shown that it was made under circumstances that make it "testimonial evidence" within the meaning of *Crawford v Washington* (2004) 541 US 36, 52, 158 L Ed 2d 177, 193, 124 S Ct 1354. See §§20.20B, 49.4. The opponent may also be able to exclude the statement by showing it was made under circumstances indicating a lack of trustworthiness. Evid C §1252.

Source: Evidence/Effective Introduction of Evidence in California/50 Statements of State of Mind, Emotion, or Physical Sensation/§50.4 B. To Object

§50.4 B. To Object

The opponent may object to a statement of present or previous state of mind, emotion, or physical sensation on any of the following grounds:

- Hearsay (Evid C §1200);
- Made in circumstances indicating that statement is untrustworthy because [*explain why*] (Evid C §1252);
- No foundation under Evid C §1250:
- Statement not being offered to prove declarant's state of mind, emotion, physical sensation, or conduct, but rather to prove [*explain what*],
- Declarant's state of mind, emotion, physical sensation, or conduct not in issue [*explain why*], or
- Statement being offered to prove state of mind, emotion, physical sensation, or conduct of someone other than declarant;
- No foundation under Evid C §1251:
- Statement not offered to prove declarant's previously existing state of mind, emotion, or physical sensation, or
- No foundation that declarant is unavailable as a witness;
- Irrelevant to any issue in the case (Evid C §§350-351, 1250-1251);
- Too time-consuming, prejudicial, confusing, or misleading (Evid C §352);
- Admission of statement violates confrontation clause (*Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 194, 124 S Ct 1354; *Davis v Washington* (2006) 547 US 813, 165 L Ed 2d 224, 236, 126 S Ct 2266, discussed in §§20.20B, 49.4); or
- If in writing:
- Not (properly) authenticated (Evid C §1400), or
- Inadmissible secondary evidence (Evid C §1521).

NOTE: A defendant may not assert a Sixth Amendment confrontation objection under *Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354, if the defendant bribed, intimidated, or killed the declarant with the specific design of preventing the declarant's testimony and the declarant is unavailable to testify because of the defendant's actions. *Giles v California* (2008) ___ US ___, 171 L Ed 2d 488, 496, 128 S Ct 2678.

III. SAMPLE QUESTIONS

A. Present State of Mind, Emotion, or Physical Sensation

1. Criminal Case: Victim's State of Mind

§50.5 a. Information to Elicit

During the direct examination segment in §50.6, the proponent wants the witness to cover the following matters when she testifies about hearing the murder victim express her fear of the defendant:

- State that she knew the declarant;
- Identify the declarant;
- Describe the nature and duration of the relationship with the declarant (to indicate trustworthiness of declarant's statement);
- Tell who was present when the statement was made;
- Explain why the statement was made; and
- Quote the declarant's statement.

§50.6 b. Questions to Ask

[*A preliminary fact hearing has already been held out of the jury's presence on this issue at the opponent's request, at which the judge ruled the statement admissible under Evid C §1250(a)(1)*]

Q: Mr. Witness, were you acquainted with Ms. Victim?

Q: I am showing you a photograph, marked People's Exhibit No. 14 in evidence. Do you recognize this person?

Q: When did you first meet her?

Q: Can you describe the circumstances of that meeting?

Q: Did you ever hear her discuss her feelings toward Mr. Defendant?

Q: When did that occur?

Q: Where were you and Ms. Victim when she discussed this?

Q: How did the subject come up?

Q: Was anyone else present?

Q: What did Ms. Victim say about her feelings toward Mr. Defendant?

2. Criminal Case: Defendant's State of Mind

§50.7 a. Information to Elicit

During the direct examination segment in §50.8, the proponent wants the witness to cover the following matters when she testifies to defendant's statement concerning his intention to do an act:

- State that she knows the declarant;
- Identify the declarant;
- Describe the nature and duration of her relationship with the declarant (to indicate trustworthiness of declarant's statement);
- Tell who was present when the statement was made;
- Explain why the statement was made; and
- Quote the declarant's statement.

§50.8 b. Questions to Ask

[*A preliminary fact hearing has already been held out of the jury's presence on this issue at the opponent's request, and the trial judge ruled the statement admissible under Evid C §1250(a)(2)*]

Q: Ms. Witness, are you acquainted with Mr. Defendant?

Q: Would you please describe Mr. Defendant?

Q: Do you see him in the courtroom today?

Q: What is he wearing?

Proponent: Your Honor, I request that the record reflect that the witness has identified the defendant.

Q: How long have you known Mr. Defendant?

Q: Were you a friend of his?

Q: Did you speak with him on the last day of February 1999?

Q: Why were you talking to him then?

Q: Where did you speak with him that day?

Q: What time was it?

Q: What was he doing at that time?

A: Cleaning his gun.

Q: Was anyone else present?

Q: Did he say anything to you as he was cleaning his gun?

Q: What did he say?

A: He said he was very upset with the way his boss was treating him at work.

Q: Did he say anything else?

A: He said he was going to talk to his boss and if his boss did not apologize, he would shoot him.

PRACTICE TIP: The defendant's out-of-court statement relates his intent to do a future act, namely to shoot his boss if the boss does not apologize. Under Evid C §1250(a)(2), the statement can be admitted against the defendant to prove his future conduct.

B. Previous State of Mind, Emotion, or Physical Sensation

§50.9 1. Information to Elicit

During the direct examination segment in §50.10, the proponent wants the witness to cover the following matters when, in a wrongful death action concerning the surviving spouse's loss of love and companionship, he testifies to the decedent's statements about his emotional fulfillment with his spouse:

- State that he knows the declarant;
- Identify the declarant;
- Describe the nature and duration of his relationship with the declarant (to indicate trustworthiness of declarant's statement);
- Tell who was present when the statement was made;
- Explain why the statement was made; and
- Quote the declarant's statement.

§50.10 2. Questions to Ask

[*A preliminary fact hearing has already been held out of the jury's presence on this issue at the opponent's request, at which the judge ruled statements admissible under Evid C §1251*]

Q: Mr. Witness, did you know Mr. Decedent?

Proponent: Will counsel stipulate that the Mr. Decedent referred to is the same Mr. Decedent whose death is the basis for this wrongful death action?

Opponent: Yes.

Q: How long did you know him?

Q: How often did you get together with him?

Q: Did Mr. Decedent ever discuss the quality of his marriage with you?

Q: On what occasions did he do that?

Q: Where were the two of you when you had that discussion?

Q: Was anyone else present?

Q: What did he say about his marriage?

PRACTICE TIP: Damages may be awarded in a wrongful death action for loss of love and companionship. *Krouse v Graham* (1977) 19 C3d 59, 137 CR 863. The decedent's statements are relevant to this issue because they relate to his feelings toward his wife. Because the decedent is obviously unavailable, the requirements of Evid C §1251 are met.

C. Abused Child's Statements Made for Purpose of Medical Treatment

§50.10A 1. Information to Elicit

When seeking to introduce a statement made by a child during the course of medical treatment to prove that the child sustained injuries as a result of child abuse (see §50.3A), the proponent wants the witness to cover the following matters:

- That the witness was the treating health care professional;
- That the child was under the age of 12 at the time of treatment;
- That the witness heard the statement;
- That the statement was made during the course of treatment;
- That the statement was helpful in diagnosis or treatment; and
- What the child said.

§50.10B 2. Sample Questions

[*If the treating doctor, or other health care professional who heard the statement, is available as a witness, he or she would normally be the best witness; otherwise it may be necessary to use someone (e.g., a retained expert physician) who has reviewed the medical record or other record of the minor's statement.*]

Q: Doctor, did you treat Abused Minor in December 2002?

Q: At that time, how old was Abused Minor?

Q: Did Abused Minor make any statements to you at that time?

Q: Were those statements useful to you in diagnosing or treating Abused Minor's condition?

Q: Did Abused Minor's statements to you describe any symptoms, pains, or sensations she was having or had recently experienced?

Q: Did Abused Minor's statements to you describe aspects of her medical history?

Q: Please tell the jury what Abused Minor stated to you about her symptoms and medical history.

IV. COMMENT

§50.11 A. Difference Between Statements Admitted as Nonhearsay and Under Evid C §§1250-1252

Statements under Evid C §§1250-1252 are admitted as exceptions to the hearsay rule for the truth of the matter asserted. See Comments to Evid C §§1250-1251. Statements admitted as nonhearsay are not admitted for the truth of the matter asserted. See Comment to Evid C §1250. In practical terms, however, counsel trying a case to a jury who is unable to introduce an out-of-court statement under an exception to the hearsay rule may try to admit it as relevant nonhearsay, with the appropriate limiting instructions from the judge. For discussion of nonhearsay, see chap 35.

In a criminal case, when statements are offered to show a victim's state of mind, physical and emotional condition, and need for future care and assistance, they are nonhearsay, are not offered for the truth of the matter asserted, and do not implicate confrontation clause concerns under *Crawford v Washington* (2004) 541 US 36, 59 n9, 158 L Ed 2d 177, 197 n9, 124 S Ct 1354. See *People v Cooper* (2007) 148 CA4th 731, 743, 56 CR3d 6 (involving elder abuse interview, which evolved into testimonial statement; that part of interview was inadmissible because of defendant's inability to confront witness). For a discussion of *Crawford* and the confrontation clause, see §§20.20B, 22.3, 49.4; on nonhearsay, see chap 35.

§50.12 B. Strategic Considerations

Although out-of-court statements can be a tricky area, they may be crucial to your case. It is a good idea to prepare a memorandum of points and authorities that makes clear why the statement is relevant, and how statutes and case law support your use of the statement. Be sure to show the statement's trustworthiness. See Evid C §1252. Decide whether you want to raise the admissibility of the statement before you begin questioning the witness, or leave it to your opponent to object. If you feel that the judge is likely to keep the statement out but think that the law is clearly on your side, it is to your advantage to raise the issue beforehand. In this situation, you are more likely to be successful if you present a well-prepared brief to the judge early in the case. See chaps 3 (motions in limine), 4 (preliminary fact hearings).

PRACTICE TIP: Relevance is frequently an important issue in the admissibility of statements of state of mind, emotion, or physical sensation. In a criminal case, as in the example in §50.6, if the statement concerns the victim's fear of the defendant, and the defendant claims self-defense, the statement will likely be allowed. See *People v Atchley* (1959) 53 C2d 160, 172, 346 P2d 764. The statement would probably also be relevant if it concerned the victim's hatred of the defendant, and the defendant claims lack of premeditation owing to a highly charged relationship with the victim that involved frequent fights. See *People v Brust* (1957) 47 C2d 776, 306 P2d 480. A murder victim's fear of the alleged killer may be in issue when the victim's state of mind is directly relevant to an element of the offense. That fear may also be in issue when, according to the defendant, the victim has behaved in a manner inconsistent with that fear. *People v Hernandez* (2003) 30 C4th 835, 872, 134 CR2d 602. Statements showing the victim's state of mind regarding the defendant's past conduct may also be admitted. See *People v Ortiz* (1995) 38 CA4th 377, 44 CR2d 914.

§50.13 C. Difference Between Evid C §§1250 and 1251

Out-of-court statements admissible under Evid C §1250 concern the declarant's state of mind, emotion, or physical sensation at the time the statement was made. Evid C §1250(a). That statement may be used to prove the declarant's state of mind, emotion, or physical sensation at that or any other time. It may also be used to prove or explain the declarant's acts or conduct.

Evidence Code §1251 concerns out-of-court statements about the declarant's state of mind, emotion, or physical sensation *before* the statement was made. That statement may be used only to prove *that prior* state of mind, emotion, or physical sensation. The statement may not be used to prove conduct or the declarant's state of mind, emotion, or physical sensation at another time.

V. CHECKLISTS

§50.14 A. Checklist: Witnesses to Subpoena

- Witness who heard the declarant make the statement, if it will be introduced through oral testimony.
- Witness who can authenticate statement, if it will be introduced as a writing.
- Witness to establish that the declarant is unavailable, if the statement is to be introduced under Evid C §1251.
- Witness to establish the relevance of the declarant's statements, if necessary.
- Witness to establish trustworthiness of statement.

§50.15 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1227; see chap 10.
- Declarant unavailable in criminal case. Evid C §1350.
- Declaration against interest. Evid C §1230; see chap 20.
- Dying declaration. Evid C §1242; see chap 22.
- Nonhearsay. Evid C §1200; see chap 35.
- Prior consistent statement. Evid C §1236; see chap 40.
- Prior inconsistent statement. Evid C §1235; see chap 41.
- Spontaneous or contemporaneous statement. Evid C §§1240-1241; see chap 49.

VI. SOURCES

§50.16 A. Evidence Code

Evid C §1250. (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

Evid C §1251. Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:

(a) The declarant is unavailable as a witness; and

(b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

Evid C §1252. Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Evid C §1253. Subject to Section 1252. evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. This section applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect. "Child abuse" and "child neglect," for purposes of this section, have the meanings provided in subdivision (c) of Section 1360. In addition, "child abuse" means any act proscribed by Chapter 5 (commencing with Section 281) of Title 9 of Part 1 of the Penal Code committed against a minor.

§50.17 B. Other

For further discussion of statements of state of mind, emotion, or physical sensation, see 1 Witkin, California Evidence, *Hearsay* §§194-219 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 14 (4th ed CJA-CEB 2009); Cotchett, California Courtroom Evidence §§6.01, 6.03, 7.01, 11.01, 19.02, 21.01, 21.23, 21.30-21.32, 21.34 (2008); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *The Hearsay Rule and Its Exceptions* §§9.B, 9.K, 9.R (3d ed 2000).

51

Stipulations; Undisputed Facts

Jan Nielsen Little
E. Stewart Moritz

§51.1 I. SCOPE OF CHAPTER

This chapter discusses stipulations among counsel. Attorneys may stipulate to facts as undisputed. They may also stipulate to a witness's testimony so that that witness will not have to testify. In this event, the substance of the testimony will not be in dispute, but the meaning of the testimony (whether it is credible, or whether it proves or disproves contested issues) will remain open to dispute. Sometimes one attorney can stipulate to a disputed element, thereby making it undisputed and rendering any evidence from opposing counsel inadmissible.

§51.2 II. REQUIREMENTS

The procedures for attorneys who wish to enter into a stipulation are generally as follows:

- Attorneys inform the judge that they have agreed to stipulate to certain facts or to a particular witness's testimony;
- One attorney recites the oral stipulation for the record or gives the judge a copy of the written stipulation (CCP §283(1));
- The judge may question parties to obtain their consent to the stipulation on the record, particularly criminal defendants; and
- The judge has the court reporter read back an oral stipulation to jurors, or asks counsel or the judge's clerk to read a written stipulation to jurors.

III. SAMPLE QUESTIONS

A. Stipulation

§51.3 1. Steps to Take

In the illustration in §51.4, both attorneys offer to stipulate to testimony so that the witness need not appear, with the proponent taking the following steps:

- Notifies judge of stipulation;
- Describes content of stipulation;
- Ensures that opposing counsel acknowledges agreement to stipulation (especially important in criminal cases); and
- Asks judge to have stipulation read to jury.

§51.4 2. Questions to Ask

Proponent: Your Honor, Opposing Counsel and I are prepared to stipulate to the testimony of Intoxilyzer 5000 Employee that the machine prints out only "Deficient Sample" when any sample read after the first one differs by more than 0.02% from the first reading. We do not intend by this stipulation to preclude argument or other testimony on any issue concerning this machine.

Court: Opposing Counsel, are you prepared to enter into this stipulation?

Opponent: Yes, Your Honor.

Court: Defendant, do you understand that your lawyer wishes to agree to this testimony so the employee does not have to appear and that this stipulation has the same effect as if the employee had testified?

Defendant: Yes.

Court: Is that all right with you?

Defendant: Yes.

Court: Mr. Clerk, please read back the stipulation to the jury.

B. Undisputed Facts

§51.5 1. Steps to Take

In the direct examination segment in §51.6, defense counsel objects in an attempt to exclude the police officer's testimony on the plaintiff's appearance at the scene of the automobile accident because it is an undisputed fact that the defendant has admitted liability. The proponent counters with argument that the testimony is relevant to the issue of damages, the amount of which is disputed.

§51.6 2. Questions to Ask

Proponent: Mr. Officer, when you arrived at the scene of the head-on collision, on which side of the double line did you find Mr. Reckless's car?

Opponent: Objection, Your Honor. This is irrelevant. Mr. Reckless has admitted liability in this case. The only issue is damages.

Court: Sustained.

Proponent: Mr. Officer, how did Mrs. Victim's body look when you arrived at the scene?

Opponent: Same objection, Your Honor. We have stipulated to liability, yet Plaintiff's counsel continues to try to inflame this jury by reliving the accident.

Proponent: Not so, Your Honor. Mr. Reckless has not stipulated to my client's damages, and indeed has disputed her claim for needing drastic and expensive medical care. The nature and extent of her injuries are clearly relevant.

Court: I'll allow it.

Officer: She was covered with blood, and appeared to be in a great deal of pain.

IV. COMMENT

§51.7 A. Circumstances Giving Rise to Stipulations

In civil cases, a party may admit to particular facts during depositions, through responses to requests for admission or to interrogatories, in the answer, and in other pleadings. See, *e.g.,* CCP §§2025.620 (depositions), 2030.410 (interrogatories), 2033.410 (requests for admission); *Welch v Alcott* (1921) 185 C 731, 754, 198 P 626 (answer); *Smith v Walter E. Heller & Co.* (1978) 82 CA3d 259, 268, 147 CR 1 (complaint). See 1 Witkin, California Evidence, *Hearsay* §97 (4th ed 2000).

In both civil and criminal cases, counsel may unilaterally stipulate to particular facts. Counsel may also wish to stipulate to particular testimony so that a witness does not have to testify. In the second circumstance, the only thing agreed on is what the witness would say were he or she in court; the witness's credibility and the import of his or her testimony remain in dispute.

PRACTICE TIP: Be sure to clarify with opposing counsel and the judge what stipulated information is undisputed and what otherwise, if anything, remains in dispute. An offer to stipulate to anything in front of the jury is inappropriate and is likely to be viewed as an affront to the court. It is important for the judge to inform the jury of the effect of the stipulation. See §51.10.

Stipulations are usually arranged between attorneys before trial, then cleared with the trial judge. Local rules may regulate procedures. See, *e.g.,* Los Angeles Ct R 8.43 (offers of stipulation to be made outside of jurors' hearing). If counsel's request for a stipulation before trial is rejected, there is still time to subpoena witnesses to testify.

§51.8 B. Effect of Stipulations

Undisputed facts are irrelevant to an issue in dispute and therefore inadmissible. Evid C §§210, 352. A litigant may stipulate or admit to certain facts to remove them from dispute, thus making any evidence concerning them inadmissible because they are irrelevant. See *People v Bonin* (1989) 47 C3d 808, 848, 254 CR 298 (error in rejecting stipulation, but error harmless). Carefully tailored admissions or offers to stipulate can be powerful offensive tools. Selected admissions to damaging facts will shorten the trial and may shield the jury from evidence prejudicial to your client.

An offer to stipulate to certain damaging facts may surprise and please an eager opposing counsel who does not realize that by accepting the offer he or she may be left with the sensational parts of the case gone and only dry issues left to try. Conversely, be cautious in making your own requests for admission—a number of admissions may leave you with little evidence of interest to try before the jury.

§51.9 C. Strategic Considerations

Reasons to stipulate include:

- To save time and make for a smoother presentation;
- To spare routine and relatively unimportant witnesses (*e.g.,* records custodians) from having to testify;
- To minimize the impact of damaging testimony or facts (*e.g.,* when liability is obvious, a stipulation will limit the damaging testimony about it); and
- To foreclose testimony on an issue by making it "undisputed."

Reasons *not* to stipulate include:

- To force your opponent to prove his or her case in its entirety; and
- To preserve the dramatic impact in presenting your own proof.

§51.10 D. Ask Judge to Inform Jury of Significance of Stipulation

Be sure the judge informs the jury of the effect of the stipulation both at the time the stipulation is read to them during trial and during closing jury instructions. See CACI 106, 5002.

V. CHECKLISTS

§51.11 A. Checklist: Witnesses to Subpoena

- No witnesses are needed for stipulations.

§51.12 B. Checklist: Alternative Methods of Admissibility

"Undisputed" (*i.e.,* admitted) facts come in many forms. The following checklist shows examples of admissions that may form the basis for, or serve as a substitute for, a stipulation.

- Admission or confession. Evid C §§1220-1228; see chap 10.
- Adoptive admission. Evid C §1221; see *Nungaray v Pleasant Valley Lima Bean Growers & Warehouse Ass'n* (1956) 142 CA2d 653, 666, 300 P2d 285. See also chap 10.
- Co-conspirator statement. Evid C §1223; see chap 10.
- Former testimony. Evid C §1290; see chap 28.
- Judicial notice. Evid C §§450-460; see chap 31.
- Failed plea bargain or withdrawn guilty plea. Compare Evid C §§1153-1153.5 and Pen C §1192.4 (not admissible) with Cal Const art I, §28(f)(2) (may make it admissible). See discussion in California Criminal Law Procedure and Practice §26.40 (Cal CEB Annual).
- Past recollection recorded. Evid C §1237; see chap 38.
- Plea of guilty or no contest. Pen C §1016(3); see Crim Law §26.7.
- Prior inconsistent statement. Evid C §§1202, 1235; see chap 41.
- Vicarious admission. Evid C §1222; see chap 10.

VI. SOURCES

§51.13 A. Code of Civil Procedure; Evidence Code

CCP §283. An attorney and counselor shall have authority:

1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise;….

See Evid C §§210 (reproduced in §45.15) and 352 (reproduced in §7.8).

§51.14 B. Other

For further discussion of stipulations, see entries under "Stipulations" in the index of California Criminal Law Procedure and Practice (Cal CEB Annual); Jefferson's California Evidence Benchbook, chap 21 (4th ed CJA-CEB 2009); Imwinkelried, Wydick, & Hogan, California Evidentiary Foundations, *Substitutes for Evidence* §12.B (3d ed 2000).

52

Subsequent Repairs or Other Remedial Conduct

Richard P. Caputo
Robert A. Franklin

§52.1 I. SCOPE OF CHAPTER

This chapter discusses the rules that apply to subsequent repairs or other remedial conduct. Evidence of such conduct is not admissible to prove negligent or culpable conduct at the time of the incident giving rise to the litigation. Evid C §1151. Such evidence may be admissible, however, to attack a witness's credibility, to prove control or management of property, to show a defect in a strict liability action, or to establish that a subsequent change was made by a nonparty.

II. REQUIREMENTS

§52.2 A. To Admit

To admit evidence of subsequent repairs or other remedial conduct, the proponent must show that the evidence is offered for one of the following purposes:

- To impeach a witness (see *Sanchez v Bagues & Sons Mortuaries* (1969) 271 CA2d 188, 190, 76 CR 372);
- To show control of premises (see *Morehouse v Taubman Co.* (1970) 5 CA3d 548, 85 CR 308);
- To prove a nonnegligent and nonculpable purpose in a strict liability case (see *Ault v International Harvester Co.* (1974) 13 C3d 113, 117, 117 CR 812); or
- To establish that subsequent changes were made by nonparty (see *Magnante v Pettibone Wood Mfg. Co.* (1986) 183 CA3d 764, 228 CR 420; see also *Santilli v Otis Elevator Co.* (1989) 215 CA3d 210, 263 CR 496 (limits use against nonparties when jury asked to decide whether nonparty was negligent, and strict liability not asserted)).

§52.3 B. To Object

Grounds for objecting to evidence of subsequent repairs or other remedial conduct include:

- Evidence offered for an improper purpose (Evid C §1151);
- Irrelevant (Evid C §350); and
- Unduly time-consuming, prejudicial, confusing, or misleading (Evid C §352).

III. SAMPLE QUESTIONS

A. Impeaching Witness

§52.4 1. Steps to Take

Alleging that the stairway of defendant's premises was in a dangerous condition, the plaintiff wants to show that the defendant made repairs after the accident. In §52.5, defense counsel interrupts the plaintiff's cross-examination to:

- Object to questions about remedial conduct; and
- Argue reasons for inadmissibility.

§52.5 2. Questions to Ask

[*Witness testified on direct examination that tape on stairs was in good condition*]

Q: At some point before the accident did you inspect the stairs in question?

A. Yes.

Q: Did you find that the tape was worn and slippery?

A: No.

Q: Is it true that the tape was replaced immediately after the accident?

A: I never replaced the tape, nor did I tell anyone to.

Opponent: Objection. May we approach the bench?

Court: Yes.

[*In conference at bench*]

Opponent: Evidence Code §1151 prohibits introducing evidence of any subsequent repairs or remedial conduct. I move for a mistrial.

Proponent: Your Honor, although this information may not be admissible to prove negligent or culpable conduct, it is admissible to impeach this witness's testimony. She testified on direct examination that the tape was in good condition. Under *Sanchez v Bagues & Sons Mortuaries* (1969) 271 CA2d 188, 76 CR 372, I can attempt to impeach that testimony.

Opponent: Your Honor, there is no showing that this witness replaced the tape or instructed anyone to replace the tape. Anything concerning replacement of the tape is therefore irrelevant to impeach this witness.

Court: Do you have an offer of proof?

Proponent: No.

Court: Objection sustained. There is no evidence that the witness replaced the tape and thus that fact cannot impeach this witness's testimony regarding his inspection of the tape. The jury must disregard counsel's implication that the tape was replaced. Counsel's questions are not evidence. With this corrective instruction, the motion for mistrial is denied.

B. Establishing Control of Premises

§52.6 1. Steps to Take

Alleging a dangerous condition on the defendant's premises, namely, that a gate in disrepair allowed the plaintiff's child to enter the defendant's property and sustain injury, the plaintiff wants to show that the defendant had control of the property. In the cross-examination segment in §52.7, plaintiff's counsel wants to take the following steps:

- Ask about the defendant's subsequent repair; and
- Argue reasons for admissibility.

§52.7 2. Questions to Ask

Q: Sir, do you own the property in question?

A: No, I am simply a lessee.

Q: Regardless, did you have control over the premises and maintain the premises?

A: No, I was only a tenant.

Q: Well, is it true that, after this accident, you replaced the old gate with a new protective gate to guard against unauthorized entry?

Opponent: Objection. May we approach the bench?

Court: Yes.

[*In conference at bench*]

Opponent: This evidence is inadmissible under Evidence Code §1151.

Proponent: Your Honor, this witness has testified that he had no control over the premises. The fact that he installed a gate on the property contradicts his assertion. Evidence that he made subsequent repairs is relevant to show that he did indeed have control over the premises. As authority, I cite Witkin, volume one of California Evidence, third edition, §444, page 413.

Court: Objection overruled. The evidence is admissible to prove control of the property.

C. Strict Liability Case

§52.8 1. Steps to Take

Alleging a defect in the gearbox of an automobile, the plaintiff contends that it was made of inadequate material. In the cross-examination segment in §52.9, plaintiff's counsel, who wants to show that the defendant changed the material after the accident from aluminum to iron, wants to take the following steps:

- Ask about the remedial conduct; and
- Argue reasons for its admissibility.

§52.9 2. Questions to Ask

Q: Is it true that at the time of this accident the gearbox was made out of a material called Aluminum 380?

A: Yes.

Q: After the accident, did you conduct tests on the suitability of this material for its intended use in this car?

A: Yes.

Q: After the accident, did you change the material from Aluminum 380 to malleable iron?

Opponent: Objection. May we approach the bench?

Court: Yes.

[*In conference at bench*]

Opponent: This evidence is excludable under Evidence Code §1151.

Proponent: Although §1151 prohibits introduction of evidence to prove negligence or culpable conduct, this evidence is not being offered for either of those purposes. Actions in products liability focus on the product rather than on the manufacturer's conduct, and the manufacturer can be liable "without fault." It is unreasonable to believe that the statutory object of §1151 would be advanced by not allowing this information to be admitted. Ruling this type of information admissible should not discourage manufacturers from improving their products; as the court stated in *Ault v International Harvester Co.* (1974) 13 C3d 113, 117, 117 CR 812, "if they refused to make a needed change they would only expose themselves to additional suits based on the same claimed defect."

PRACTICE TIP: For the same reasons, evidence of subsequent warnings placed on a product is also admissible to prove a design defect consisting of a failure to warn or of inadequate warnings. See *Schelbauer v Butler Mfg. Co.* (1984) 35 C3d 442, 452, 198 CR 155.

Court: Objection overruled. You may answer the question.

§52.10 IV. COMMENT

Although unquestionably relevant to prove negligence or culpable conduct, the courts articulated a public policy to make evidence of subsequent repairs inadmissible. This policy, which was codified in Evid C §1151, encourages persons to make repairs without fear of incurring liability for injuries caused by negligent conduct. Thus, when the evidence is offered to prove negligence or culpable conduct, it is inadmissible. If offered for other, relevant purposes, however, such evidence is admissible.

V. CHECKLISTS

§52.11 A. Checklist: Witnesses to Subpoena

- Independent witness available to testify in the event the opposing witness or party denies the remedial conduct. Introduce photographic proof when possible.

PRACTICE TIP: Evidence of subsequent repairs is usually brought out on cross-examination of an opposing witness or party. When impeaching a witness with previous deposition testimony, be sure either to ask the witness about it or to ask the court not to excuse the witness, in compliance with Evid C §770. On prior inconsistent statements, see chap 41.

§52.12 B. Checklist: Alternative Methods of Admissibility

- Stipulation. See chap 51.

VI. SOURCES

§52.13 A. Evidence Code

Evid C §1151. When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

§52.14 B. Other

For further discussion of subsequent repairs and other remedial conduct, see Jefferson's California Evidence Benchbook, chap 36 (4th ed CJA-CEB 2009); Cotchett, California Courtroom Evidence §§9.01, 20.16, 29.06 (2008).

53

Wills and Claims Against Estates: Admissible Relevant Statements

Nancy M. Naftel

§53.1 I. SCOPE OF CHAPTER

This chapter discusses statements made by unavailable declarants about their wills (Evid C §1260) and by decedents concerning claims against their estates (Evid C §1261). Such statements are admissible as exceptions to the hearsay rule when they meet specific statutory requirements. Evid C §§1260-1261.

II. REQUIREMENTS

A. Statement by Unavailable Declarant

§53.2 1. To Admit

To admit a statement made by an unavailable declarant concerning a will, the proponent must prove that the statement:

- Was made by a declarant who is unavailable as a witness (Evid C §1260(a));
- Is that the declarant did or did not make a will, did or did not revoke a will, or identifies his or her will (Evid C §1260(a));
- Was not made in circumstances that indicate a lack of trustworthiness (Evid C §1260(b)); and
- If in writing, is authenticated (Evid C §1401).

Source: Evidence/Effective Introduction of Evidence in California/53 Wills and Claims Against Estates: Admissible Relevant Statements/§53.3 2. To Object

§53.3 2. To Object

Grounds for objecting to a statement made by an unavailable declarant concerning a will include:

- Hearsay (Evid C §1200);
- No showing that declarant is unavailable (Evid C §1260(a));
- Statement is untrustworthy (Evid C §1260(b));
- Statement does not relate to making, revoking, or identifying will (Evid C §1260(a));
- Prob C §§8223-8224 not complied with if will lost or destroyed [*describe why*]; and
- If a writing:
- Not (properly) authenticated (Evid C §1401), or
- Inadmissible secondary evidence (Evid C §1521).

B. Statement by Decedent

§53.4 1. To Admit

To admit a statement made by a decedent concerning a claim against the estate, the proponent must prove that the statement:

- Is offered in an action on a claim or demand against the estate of the decedent-declarant (Evid C §1261(a));
- Was based on the declarant's personal knowledge (Evid C §1261(a));
- Is about matter that had been recently perceived by the declarant (Evid C §1261(a));
- Was made while the declarant's recollection was clear (Evid C §1261(a));
- Was not made in circumstances indicating a lack of trustworthiness (Evid C §1261(b)); and
- If in writing, is authenticated (Evid C §1401).

§53.5 2. To Object

Grounds for objecting to a statement made by a decedent concerning a claim against that decedent's estate, include:

- Declarant lacked personal knowledge of facts (Evid C §1261(a));
- Declarant did not recently perceive matter (Evid C §1261(a));
- Declarant's recollection was not clear (Evid C §1261(a));
- Statement is untrustworthy (Evid C §1261(b)); and
- If statement in writing:
- Not (properly) authenticated (Evid C §1401), or
- Inadmissible secondary evidence (Evid C §1521).

III. SAMPLE QUESTIONS

A. Statement by Unavailable Declarant

§53.6 1. Information to Elicit (Evid C §1260)

The proponent wants the witness to cover the following points in response to the direct examination questions in §53.7 about the statement the decedent had made regarding his will:

- Show that the witness was acquainted with the declarant (unavailable because, in this example, declarant is dead);
- Describe the nature and length of his relationship with declarant;
- Give relevant background information to put statement in context for jury;
- Explain where, when, and why declarant made statement;
- List anyone else who was present when statement was made;
- Tell how declarant was competent when he made statement;
- Quote statement declarant made about his will; and
- Introduce revoked will in evidence after identifying it.

Source: Evidence/Effective Introduction of Evidence in California/53 Wills and Claims Against Estates: Admissible Relevant Statements/§53.7 2. Questions to Ask

§53.7 2. Questions to Ask

Q: Mr. Witness, were you acquainted with Mr. Decedent?

Q: How long had you known him?

Q: What was the nature of your relationship with him?

Q: Were you acquainted with other members of his family?

Q: Did Mr. Decedent discuss his family with you?

Q: Do you know the names of Mr. Decedent's children?

PRACTICE TIP: These types of questions may be important if the witness will testify about the terms of the will. For instance, if the witness is unaware that the declarant had two sons, and the declarant said he wanted "his son" to inherit the ranch, the witness's testimony may be ambiguous.

Q: How often did you see Mr. Decedent in the year before his death?

Q: Did he discuss with you whether he had prepared a will?

Q: When did he discuss this with you?

Q: Where were you when you had this discussion?

Q: Was anyone else present?

Q: Did he appear to understand you during this conversation?

Q: Did he have any difficulty in speaking at that time?

Q: Did he express himself so you could understand him?

Q: Did you notice anything unusual about him during this conversation?

PRACTICE TIP: These questions may be important to prove the statement's trustworthiness. For example, if the declarant was in the hospital or under the influence of medication when he made the statements, they might be excluded as untrustworthy.

Q: What did he say about his will?

Q: Did he tell you the terms of the will?

Q: What did he tell you about the terms of the will?

Q: Did he ever say he had revoked a will?

Q: Did he ever show you a will?

Q: When did he do that?

Q: Where were you when he showed you the will?

Q: Was anyone else present?

Q: I am showing you what has been marked as Plaintiff's Exhibit No. 1 for identification. Do you recognize this document?

Q: How do you recognize this document?

Q: Is it the same document that Mr. Decedent showed you?

Q: Is this the same document that Mr. Decedent told you was the will he had revoked?

Proponent: Your Honor, may Plaintiff's Exhibit No. 1 be admitted into evidence?

B. Statement by Decedent

§53.8 1. Information to Elicit (Evid C §1261)

In an action in which the decedent's statement is offered against her estate, the proponent wants the witness to testify to the following matters in response to the direct examination questions in §53.9:

- Show that he was acquainted with the decedent;
- Describe the nature and length of their relationship;
- Explain where, when, and why the statement was made;
- List anyone else who was present when the decedent made the statement; and
- Quote the statement the decedent made.

§53.9 2. Questions to Ask

Q: Mr. Witness, did you know Ms. Decedent?

Q: How long did you know her?

Q: Did you ever discuss with her the automobile accident that occurred on July 10, 1996?

Q: Where did you discuss this?

Q: When did that discussion take place?

Q: Was anyone else present?

Q: How did the topic come up?

PRACTICE TIP: Background information such as why the decedent made a particular statement may make the statement more credible to jurors.

Q: What did she say about the cause of the accident?

IV. COMMENT

§53.10 A. Differences Between Evid C §§1260 and 1261

Evidence Code §§1260 and 1261 have different requirements and uses. Section 1260 concerns wills, and the declarant does not have to be dead, simply unavailable. Section 1261 concerns claims or demands against a declarant-decedent's estate, and the statement does not have to relate directly to a will.

§53.11 B. Lost or Destroyed Wills

Evidence Code §1260 is subject to Prob C §§8223-8224, which set forth the procedures for proving the testamentary words or substance of wills that are lost or destroyed. See Comment to Evid C §1260 (referring to former Prob C §§350-351, repealed effective January 1, 1985, which had applied to establishment of lost or destroyed wills).

§53.12 C. In Limine Hearings

Questions about hearsay exceptions are decided by the trial judge at a preliminary fact hearing under Evid C §405. For discussion, see chap 4.

V. CHECKLISTS

§53.13 A. Checklist: Witnesses to Subpoena

- Witness to establish that the declarant is unavailable. Evid C §1260.
- Witness who heard the declarant make the statement regarding his or her will. Evid C §1260.
- Witness to prove that Prob C §§8223-8224 complied with if will lost or destroyed.
- Witness who heard the decedent make the statement that is now sought to be introduced in the action on a claim or demand against the estate of the decedent. Evid C §1261.
- Witness to prove trustworthiness. Evid C §§1260-1261.
- Witness to authenticate written will or statement. Evid C §1401.

§53.14 B. Checklist: Alternative Methods of Admissibility

- Admission. Evid C §§1220-1227. See chap 10.
- Declaration against interest. Evid C §1230. See chap 20.
- Former testimony. Evid C §§1290-1292. See chap 28.
- Nonhearsay. Evid C §1200. See chap 35.
- Spontaneous or contemporaneous statement. Evid C §§1240-1241. See chap 49.
- Statement of declarant used in civil action by party whose liability is based on that of declarant. Evid C §1224, set out in chap 10.

VI. SOURCES

§53.15 A. Evidence Code

Evid C §1260. (a) Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Evid C §1261. (a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

§53.16 B. Other

For further discussion of statements relating to wills and to claims against estates, see 1 Witkin, California Evidence, *Hearsay* §§221-225 (4th ed 2000); Jefferson's California Evidence Benchbook, chap 15 (4th ed CJA-CEB 2009).

Appendix

Trial Objections

Nature of Objection	***Authority***
(1) *Objections to Form of Question*	
Ambiguous or unintelligible	Evid C §765
Compound	Evid C §765
Too general	Evid C §765
Calls for narrative answer	Evid C §765
Has been asked and answered	Evid C §765
Misquotes a witness	Evid C §765
Leading	Evid C §§765, 767
Argumentative	Evid C §765
Assumes fact in dispute or not in evidence	Evid C §765
Calls for speculation	Evid C §§702, 801 (matter not in witness's personal knowledge), 800-801 (question calls for improper conclusion)
(2) *Incompetent to Testify*	
Cannot be understood	Evid C §701(a)(1)
Does not understand duty to tell the truth	Evid C §701(a)(2)
No personal knowledge	Evid C §702(a)
Juror cannot give subjective evidence impeaching verdict	Evid C §1150
Juror at this trial	Evid C §704(b)
Judge at this trial	Evid C §703(b)
(3) *Objections to Offered Evidence*	
Irrelevant	Evid C §§210, 350-351
Hearsay	Evid C §1200
Inadmissible opinion	
Of lay witness:	
Question calls for inadmissible lay opinion	Evid C §§800, 802-803
Of expert witness:	
Insufficient foundation to qualify witness as expert	Evid C §§720(a), 801
Improper subject matter for expert testimony	Evid C §801(a)
Witness is basing opinion on improper material	Evid C §801(b)
Insufficient foundation	Evid C §403 or §405
Improper impeachment	Evid C §§352, 780, 785, 1101-1103
Improper rehabilitation	Evid C §§780, 785
Inadmissible secondary evidence	Evid C §§1520-1523, 1552-1553; Pen C §872.5
Inadmissible parol evidence	CCP §1856
Cross-examination exceeds scope of direct	Evid C §§761, 773(a)
Corpus delicti not proved	*People v Cobb* (1955) 45 C2d 158, 161, 287 P2d 752; see *People v Reeves* (1974) 39 CA3d 944, 114 CR 574
Illegally obtained	US Const amends IV, XIV; Cal Const art I, §13 (see California Criminal Law Procedure and Practice, chap 16 (Cal CEB Annual)) (objection normally must be made before trial)
Misconduct	
Of counsel:	
Assign specific acts as misconduct	Bus & P C §§6000-6206; Cal Rules of Prof Cond 5-200; see California Trial Objections, chap 29 (Cal
Request that jury be admonished (describe admonition), and that counsel be ordered to stop	

misconduct	CEB Annual)
Move for mistrial on ground that effect of misconduct is so prejudicial that fair trial is now impossible	
Of judge:	
Object to judge's misconduct, describe it, and assign it as error	Code of Judicial Ethics, Canon 3; ABA Model Code of Judicial Cond, Canon 2; see Trial Objections, chap 29
Move for mistrial on ground that effect of misconduct is so prejudicial that a fair trial is now impossible	
Of juror (before verdict rendered):	
Assign specific acts as misconduct	See *People v Johnson* (1993) 6 C4th 1, 21, 23 CR2d 593, overruled on other grounds by *People v Rogers* (2006) 39 C4th 826, 879, 48 CR3d 1; Trial Objections, chap 29
Move for replacement of juror for being "unable to perform his or her duty"	See Pen C §1089; *People v Johnson* (1993) 6 C4th 1, 21, 23 CR2d 593
Move for mistrial on ground that misconduct is so prejudicial that a fair trial is now impossible	*People v Daniels* (1991) 52 C3d 815, 864, 277 CR 122
Request that jury be admonished	*People v Harper* (1986) 186 CA3d 1420, 1429, 231 CR 414
Cumulative	Evid C §352
Unduly inflammatory	Evid C §352
(4) *Objection on Ground of Privilege or Other Right of Confidentiality*	
Lawyer-client privilege	Evid C §§950-955 (of client or unrepresented witness), 916 (when no witness or party can claim privilege); Prob C §12252 (appointed personal representative after death in estate matters)
Physician-patient privilege	Evid C §§990-995 (of client or unrepresented witness), 916 (when no witness or party can claim privilege)
Psychotherapist-patient privilege	Evid C §§1010-1015 (of client or unrepresented witness), 916 (when no witness or party can claim privilege)
Sexual assault counselor-victim privilege	Evid C §§1035-1036.2 (of client or unrepresented witness), 916 (when no witness or party can claim privilege)
Clergy-penitent privilege	Evid C §§1030-1034 (of client or unrepresented witness), 916 (when no witness or party can claim privilege)
Domestic violence counselor-victim privilege	Evid C §§1037-1037.8 (of client or unrepresented witness), 916 (when no witness or party can claim privilege)
Human trafficking caseworker-victim privilege	Evid C §§1038-1038.2 (of client or unrepresented

	witness), 916 (when no witness or party can claim privilege)
Confidential marital communications or communications between registered domestic partners	Evid C §§980 (of client or unrepresented witness), 916 (when no witness or party can claim privilege); see Fam C §297.5 (registered domestic partners)
Not to testify against spouse or registered domestic partner	Evid C §§970-973; see Fam C §297.5 (registered domestic partners)
Not to be called as witness against spouse or registered domestic partner	Evid C §§970-973; see Fam C §297.5 (registered domestic partners)
Official information	Evid C §§1040, 1042-1047
Identity of informer	Evid C §§1041-1042 (see Crim Law, chap 17; this information usually requested by pretrial motion)
Against self-incrimination	US Const amends V, XIV; Cal Const art I, §15; Evid C §§404, 940
Defendant in criminal case not to be called and not to testify	US Const amends V, XIV; Cal Const art I, §15; Evid C §930
News reporter's immunity from contempt	Evid C §1070
Voter	Evid C §1050
Trade secret	Evid C §§1060-1063
Communication made in the course of mediation or mediation consultation	Evid C §§1115-1128
Offer to compromise	Evid C §1152
Attorney work product	CCP §§2018.010-2018.080

(5) *Motion to Strike*

Answer is nonresponsive to question	Evid C §766
Insufficient opportunity to object to question before witness answered and question is objectionable on ground that (state objection)	*Wysock v Borchers Bros.* (1951) 104 CA2d 571, 581, 232 P2d 531
Answer contains inadmissible portions (specify what they are)	*Johnston v Beadle* (1907) 6 CA 251, 254, 91 P 1011
No foundation has been proved	Evid C §403 or §405
Evidence has been shown to be inadmissible	*People ex rel Dep't of Pub. Works v Dunn* (1956) 46 C2d 639, 297 P2d 964

Source: Evidence/Effective Introduction of Evidence in California/Table of Statutes and Rules

Table of Statutes and Rules

CALIFORNIA

Constitution

Statutes

BUSINESS AND PROFESSIONS CODE

7067.5: §43.15

7539(a): §43.15

16606: §43.15

16607: §43.15

16758: §43.15

17087: §43.15

17530.5: §43.15

22350-22360: §11.18

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43.7: §43.15

43.95: §43.15

43.96: §43.15

47: §43.15

1180-1207: §§11.18, 25.16

1624: §§37.10, 37.16

1624(a)(1): §37.10

1625: §37.1

1633.2: §43.7

1698: §§37.1, 37.16

1698(c): §37.10

1714.2: §43.15

1785.15-1785.15.2: §43.15

1798-1798.78: §36.3

1798.3: §43.15

1798.24: §43.15

1803.1-1803.8: §37.11

1812.52: §37.11

CODE OF CIVIL PROCEDURE

13: §31.7

128: §3.2

129: §43.15

170.1: §32.20

170.3: §32.3

1856(c): §§37.2-37.3, 37.14

1856(e): §§37.2-37.3

1856(f): §§37.2-37.3

1856(g): §§37.2-37.3

1856(h): §37.1

1860: §37.15

1870(11) (former): §18.11

1953-1953.06: §48.10

1953-1953.13: §21.13

1953.10-1953.13: §48.10

1985: §2.8

1985.1: §2.15

1985.3: §§2.5, 6.5, 13.7

1987: §§2.5, 13.7

1987(b)-(c): §6.5

1989: §20.16

2015.5: §§13.3, 13.16, 13.28

2016.010-2036.050: §28.11

2017.010: §§43.2, 43.15

2018.010: §43.12

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