

EVIDENCE

<<ESSAY>>

1. Form

Issue regarding Questions : (1)Answer Fact Not in Evidence

(2)Leading Question is one that suggests the answer, and it is not allowed on direct examination.

(3)Argumentative Question is “double negative.” (e.g. “You did not test it beforehand, didn’t you?”)

Issue regarding Answers : (1)Speculate answers, (2)Narrative Answer

(3)Non-responsive Answer is one that provides more information in the answer than what is asked for.

P’s answer beyond “yes” may be stricken from the record since the remainder of the answer was non-responsive answer.

2. Purpose

Logical relevance : Proposition 8 is part of the California Constitution. (事故死で、「夫は家族思いだった」は関連性あり)

Under Proposition 8, in criminal case, all relevant evidence is admissible unless the evidence falls within an exemption.

Legal relevance : Under CEC 352, a trial judge has discretion to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or waste of time.

Character evidence: In a murder prosecution, where the defendant claims self-defense, he may introduce evidence of the victim’s violent nature tending to show that the victim was the aggressor. California law does allow specific acts to prove the crime victim’s character as evidence of how the victim acted on the occasion in question.

Because the defense has placed both Victim’s and Defendant’s character in issue by raising a claim of self-defense, the prosecution may now offer evidence to rebut the defendant’s character. (Civil caseでは原則×)

3. Reliability

Competency :

Personal knowledge :

Impeachment :

Document reliability : Authentication(Written, Voice etc.), Best Evidence Rule

Opinion testimony : Lay opinion, Expert opinion (常に問題となる!!)

Judicial notice is proper where the fact is a notorious fact or easily verifiable from sources of undisputed accuracy.

Burden of proof, Presumptions

4. Hearsay

5. Privilege

RELEVANCE

Logical Relevance : whether the evidence tends to prove or disprove a material fact.

The California Evidence Code (CEC) requires the fact of consequence to be in dispute to be relevant.

Legal Relevance : whether the evidence results in unfair prejudice, misleading the jury, or undue delay.

Character Evidence in Civil Cases: generally inadmissible to prove propensity in civil cases.

EXCEPTION: (1) Negligent hiring, negligent entrustment.
(2) Defamation (i.e. libel or slander).

DEFENDANT’S OTHER CRIMES FOR NON-CHARACTER PURPOSE (別罪、余罪、前科の性格目的以外の使用)

The most common non-character purposes: <“MIMIC” RULE>

- a) **M** Motive
- b) **I** Intent
- c) **M** Mistake or accident (absence of) (故意か事故か)
- d) **I** Identity (i.e., connection between the crime and the defendant)
- e) **C** Common scheme of plan

*Other Requirements for MIMIC Evidence:

- f) Pragmatic considerations: MIMIC evidence is admissible, **ONLY** if the **judge** decides that the probative value of the MIMIC evidence **outweighs the unfair prejudice** to the defendant.
- g) Limiting Instructions: court must **instruct** jury about limited purpose of MIMIC evidence.
- h) Pre-trial notice: Upon defendant’s request, prosecution must give **pretrial notice** of intent to introduce MIMIC evidence.

Plaintiff's accident history. Generally, a plaintiff's **history of accidents** or **law suits** is **inadmissible**.

- EXCEPTION:** (1) **A fraudulent scheme or plan**; or
(2) That the plaintiff's **bodily injury** was caused by the **prior accident**.

Similar Accidents Caused by Same Event or Condition. generally not admissible, but ...

- EXCEPTION:** (1) **Existence of dangerous conditions** (Negligentを肯定する方向のみ!!)
(2) **Causation**
(3) **Prior notice to the defendant**

BEST EVIDENCE RULE requires that in proving the contents of a writing, the original must be produced or shown to be unavailable.

When will non-production of the original be excused?: if the original

- (a) Is **lost**, or cannot be found with **due diligence**; or,
- (b) Has been **destroyed without bad faith**; or,
- (c) Cannot be obtained with **legal process**.

"Escapes" from the Requirements of the Best Evidence Rule

- (d) **Voluminous records** can be presented through a **summary** or **chart**, provided the original records would be admissible and they are available for inspection.
- (e) **Certified copies of public records**.
- (f) **Collateral documents**, the document is **unimportant** to the issues in the case.

REAL EVIDENCE

- a) **Personal knowledge**: must be **distinctive** (e.g., Witness testifies "I recognize this gun as the one found at the crime scene.")
- b) **Chain of custody**: must be **substantially unbroken**

If the condition of the item before trial is relevant, it must be shown at trial to be in **substantially the same condition**, otherwise could be tampered.

Testimony By Children A child may testify under oath, **SO LONG AS:** The child

- (i) had capacity to accurately perceive the event **at the time of the event**; AND
- (ii) **understands** the obligation to tell the truth, and **promises** to tell the truth, **at the time of the trial**.

WRITINGS IN AID OF ORAL TESTIMONY

1. Present Recollection Refreshed

- a) **Basic rule:** Witness must testify on basis of **current recollection**.
- b) **Refreshing Recollection:** But, if a witness **forgets** something he once knew, he may be shown a writing (or anything else) to **jog his memory**.
- c) the opposing party has a right to:
 - (1) **Inspect it.**
 - (2) **Use it in cross examination.**
 - (3) **Introduce it into evidence.**

2. Past Recollection Recorded (Hearsay Exception) (FRE 805(5))

A writing may be **read to the jury** as a "**Past Recollection Recorded**" if:

- (1) The witness **once** had **personal knowledge**,
- (2) The witness **now forgets**, and showing the writing to witness **fails** to jog the witness's memory,
- (3) The writing was either **made by the witness** or **adopted by the witness**
- (4) The writing was **made** when the event was **fresh in the witness's memory**.
- (5) And, the witness can **attest** that, when made, the writing was **accurate**.
 - i. The witness may **read** the document to the jury.
 - ii. But the witness may **NOT show** the document to the jury.
 - iii. **But the opposing party MAY** show the document to the jury

OPINION TESTIMONY

1. **Lay Witness Opinion:** Lay opinion testimony is **admissible**, if it is:
 - (1) **Rationally** based on the witness's **perception** (personal knowledge); and
 - (2) **Helpful** to the **jury**.
2. **Expert Witness:** may testify to an opinion as an expert ONLY IF:
 - (1) The witness is **qualified** (by education and/or experience)
 - (2) The testimony is about a **subject matter** where scientific, technical, or specialized knowledge will be **helpful** to the jury
 - (3) The opinion has a **proper basis**, and
 - (i) The opinion must be based upon a "**reasonable degree of probability or reasonable certainty**."
 - (ii) The opinion must be based on one of the following 3 data sources:
 - (a) The expert's **personal knowledge** (for example, **what** a treating physician **saw**)
 - (b) Evidence that is **already in the trial record** (made known to the expert through a hypothetical question)
 - (c) Facts **outside the record**, but ONLY IF those facts are of a type **reasonably relied on** by **experts in the particular field**. (**usually an inadmissible hearsay.**)
 - (4) The opinion is **reliable**.

Impeachment Methods

- (1) Prior Inconsistent Statements
 <hearsay exception> admitted as **substantive evidence**.
 - (a) **Orally under oath**, and
 - (b) **A part of a formal hearing, proceeding, trial or deposition.**
 - (2) Bias, Interest or Motive to Misrepresent
 - (3) Sensory Deficiencies
 - (4) Reputation or Opinion
 - (5) Criminal Convictions
 - (6) Bad Acts (without conviction)
 - (7) Contradiction
- } **Bad Character for Truthfulness**

Privilege

1. **Attorney-Client Privilege** (AttorneyのSecretaryに聞かれても、Privilegeを喪失しない。)
 - (a) between attorney and client
 - (b) communication
 - (c) confidential
 - (d) legal advice
2. **Doctor-Patient Privilege**
 - (a) between doctor and patient
 - (b) communication and information acquired by doctor
 - (c) confidential
 - (d) for the purpose of medical diagnosis or treatment
3. **Spousal Communication Privilege**
 - (a) between married spouses
 - (b) communication
 - (c) confidential
 - (d) waived only by both simultaneously
4. **Spousal Immunity (Spousal Testimony Privilege)**
 - (a) criminal
 - (b) testimony against a spouse
 - (c) currently married
 - (d) waived by the witness spouse alone

HEARSAY is an out of court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception to the hearsay rule applies. (*There are two levels of hearsay, i.e., multiple hearsay and both levels of the hearsay must fall within a hearsay exception in order to be admissible in court.)

THE FOUR PRINCIPAL CATEGORIES OF NON-HEARSAY PURPOSES

- ① **Impeachment: A prior inconsistent statement may be offered to show that the Witness is an**
- ② **Verbal Acts** (Legally operative words)
- ③ **To Show Effect on Person Who Heard or Read the Statement**
- ④ **Circumstantial Evidence of Speaker's State of Mind**

PRIOR STATEMENTS OF TRIAL WITNESS: A witness's own prior statement, if offered to prove the truth of the matter asserted in the statement, is **hearsay** and is **inadmissible** unless an exception or exclusion applies.

- EXCEPTIONS:**
- (a) Prior statement of **identification**
 - (b) Prior **inconsistent** statement, if:
 - ① made **under oath**,
 - ② during a **formal proceeding**.
 - (c) Prior **consistent** statement, if
 - (i) used to **rebut an accusation of a motive to lie**, and
 - (ii) made **before the motive to lie arose**.

THE TOP TEN HEARSAY EXCEPTIONS

1. Exception #1: Party Admissions (MBE: non-hearsay)

Any statement made by a party is admissible if it is offered against the party (himself).

***Admission by Silence: ONLY if**

- (i) The declarant **heard and understood** the statement;
- (ii) The declarant was **capable** of responding; AND
- (iii) A **reasonable person** would have **responded** under the circumstances.

Vicarious Admissions

- (i) By an **agent or employee** of a party,
- (ii) Is admissible against the **party**
- (iii) If it concerns a matter **within the scope of the agency or employment**
- (iv) And was made **during the agency or employment**= "**Speaking about the job**"

***In California**, "party admission" is one of the exceptions of hearsay.

Exception #2~5は、<Unavailability>が要件である。

Grounds of unavailability: "P A I L S"

- (a) **P: Privilege**
- (b) **A: Absence from the jurisdiction**
- (c) **I: Illness or death**
- (d) **L: Lack of memory**
- (e) **S: Stubborn refusal to testify**

2. Exception #2: Former Testimony: <Unavailability>

- (1) The declarant is **unavailable**
- (2) The prior statement was given in a **proceeding or deposition**
- (3) And is offered **against a party** who, in the prior occasion, had an **opportunity** and a **similar motive** to **cross-examine** or to otherwise **develop** the testimony.

	When made?	Declarant?	Prior Statement?
Former Testimony	In a proceeding	Must be unavailable	Opportunity and similar motive to cross-examine
Prior Inconsistent Statement	In a proceeding	Need not be unavailable	Must be inconsistent

3. Exception #3: Forfeiture by Wrongdoing: <Unavailability>

A declarant's out-of-court statement may be offered against any party who **intentionally** and **wrongfully** made the **declarant unavailable**

4. Exception #4: Statement Against Interest: <Unavailability>

- (1) Declarant is **unavailable**
- (2) Statement is **against** Declarant's **pecuniary, proprietary, or penal interest**.

5. **Exception #5: Dying Declaration**: <Unavailability>

- (1) Declarant is **unavailable** (California: "died")
- (2) Statement was made **under a belief of certain** and **impending** (切迫した) death.
- (3) Statement concerns the **cause or circumstances** of the declarant's death.

Exception #6以降は、<Unavailability>が要件でない。

6. **Exception #6: Excited Utterance**

- (1) The statement concerns a **startling event** (驚かせる出来事).
- (2) And was made **while** the declarant was **still under the stress** caused by the event.

7. **Exception #7: Present Sense Impression** (California: "Contemporaneous Statement")

- (1) The statement **describes** an event,
- (2) And is made **while** the event is **occurring**, or **immediately thereafter**.

8. **Exception #8: Statement of Then-Existing Mental, Emotional, or Physical Condition**

- (1) A **contemporaneous** statement
- (2) Concerning the declarant's **existing**:
 - (a) **Physical condition**, or
 - (b) **State of mind** (includes emotions, mental feelings, intent or future plans, sensations, and bodily health)

9. **Exception #9: Statement for purpose of medical treatment or diagnosis** (MBE only)

- (1) Made to **medical professional** (doctor, nurse, EMT)
- (2) Concerning:
 - (a) **Present symptoms**;
 - (b) **Past symptoms**; or
 - (c) **General cause of a medical condition**;
- (3) For the purpose of **treatment** or **diagnosis**.
- (4) **But NOT**:
 - (a) **Statements of fault** or
 - (b) **Identity of the wrongdoer**.

***In California**, statement of a declarant's **past bodily condition** is admissible only if the declarant is **unavailable**, and his past bodily condition is in issue. CEC has no counterpart concerning statement made to medical personnel to obtain diagnosis or treatment.

10. **Exception #10: Business and Public Records**

Business Records:

- (1) **Records** of a **business** (any type, including public agencies)
- (2) Made in the **regular course** of business (i.e., germane to the business)
- (3) The business **regularly keeps** such records
- (4) Made **contemporaneously** (at or about the time of the event recorded), and
- (5) The **contents** consist of: either
 - (a) Information **observed** by **employees** of the business, or
 - (b) A statement that falls within some **other hearsay exception**. (e.g. double hearsay)

Public Records:

- (1) The record is made by a **public employee**;
- (2) The record is made **within the scope of duty** of the public employee;
- (3) The record is **made contemporaneously**; AND
- (4) The record is **trustworthy**

11. **Catch-All Equivalency Exception**

The Federal Rules "catch-all" exception may also apply, provided that T's statement is deemed trustworthy and is more probative of his identification than any other evidence. For this exception to apply, the prosecutor must give advance notice to Defendant as to nature of the statement and the name and address of the declarant. There is no California Evidence Code (CEC) counterpart, but judges can create new hearsay exceptions by decisional law.

- B. Document reliability
1. Authentication
 2. Best Evidence Rule (2d Evidence Rule)

C. Opinion Testimony

1. Lay opinion
 2. Expert opinion
- Judicial Notice
- Burdens of proof
- F. Presumptions

IV. HEARSAY

Any out of court statements introduced?

- A. Definition
1. Out of court
 2. Statement
 3. To prove truth of matter asserted
- B. Exceptions

1. Admissions
 - a. Party
 - b. Vicarious
 - c. Adoptive (Tacit)
 - d. Co-conspirator statements
2. Unavailability exceptions
 - a. Declarations against interest
 - b. Dying declarations
 - c. Former testimony
3. Reliability exceptions
 - a. Excited utterances
 - b. Present sense impressions
 - c. Bodily condition
 - d. Present state of mind
4. Documentary exceptions
 - a. Past recollection recorded
 - b. Business records
 - c. Official records
5. Others
 - a. Ancient documents
 - b. Learned treatises
 - c. Federal catch all

V. PRIVILEGES

Any privileged relationship involved?

- A. Approach
1. Privileged Relationship
 - a. Professional
 - b. Marital
 - 1) Spousal testimonial privilege
 - 2) Confidential marital communications
 2. Confidential communication?
 3. Holder of Privilege? Waived?
 4. Exceptions?

EVIDENCE

*(Leading Question - direct examination only)
(Non-responsive answer (5th Civ. R. 303) not, unless to make ok)*

I. FORM

- In what way is the evidence being introduced?** Qn 48 AN 48
- A. Sequence of witness examination - direct, cross, etc.
 - B. Objections to questions and answers / Leading Question. *Non-responsive Answer*

II. PURPOSE

What is the purpose for introducing the evidence?

- A. Logical relevance
 1. Tendency in reason to prove...
 2. Special relevancy problems: Similar happenings, experiments, prior suits or K's, negative evidence

B. Legal relevance

1. Extrinsic policy exclusions
 - a. Liability insurance
 - b. Subsequent remedial conduct
 - c. Settlement Offers
 - d. Payment or offer to pay medical expenses
 - e. Guilty pleas
2. Prejudicial impact ** prejudice, misleading, confusion*

C. Character

1. Civil cases
 - a. Character in issue by virtue of case
 - b. Habit
2. Criminal Cases
 - a. Open Door Rule
 - b. "MIMIC"

III. PRESENTATION

How is the evidence being presented?

- A. Witness
 1. Competency - age and mental
 2. Personal knowledge
 3. Impeachment
 - a. Character
 - 1) Truth or veracity
 - 2) Look to form of character evidence
 - a) Opinion and reputation
 - b) Specific Acts
 - b. Bias, Motive
 - c. Defects in memory, perception, knowledge
 - d. Inconsistent statements