

CALIFORNIA EVIDENCE

Relevant Evidence

1. **Definitions.**

- A. Section 140: Definition of Evidence. Evidence means testimony, writings material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact (even inadmissible evidence is evidence).
- B. Section 210: Relevant Evidence. Relevant evidence is evidence having any tendency in reason to prove or disprove (probative value) any disputed fact that is of consequence to the determination of the action (materiality).

2. **Admissibility.**

- A. Sections 350 and 351: Only Relevant Evidence Admissible. The former says that no evidence is admissible except relevant evidence. The latter says that all relevant evidence is admissible, except as otherwise provided by statute. Note that the absence of certain evidence may be relevant.
- B. Observations of Party or Witness. Observations about a party or witness may be evidence regardless of whether or not the person testifies (e.g., age of the person, or compelled showing of physical characteristic). However, defendant's courtroom conduct is not evidence except (1) in a competency proceeding or (2) defendant's conduct can be reasonably construed as a threat against a particular witness, which is relevant as indicating a consciousness of guilt.
- C. Experimental Evidence. Experimental evidence must be relevant, must be conducted under substantially similar circumstances as existed when the incident occurred, and must not consume undue time, confuse the issues, or mislead the jury.
- D. Demonstrative Evidence. Physical objects can be used as evidence even if they weren't actually involved in the event, so long as they are substantially similar.
- E. Polygraphs. Section 351.1 disallows the use of polygraphs in criminal cases. The willingness to take a polygraph is also not admitted.

3. **Stipulations.** A stipulation is an offer to admit to a fact or set of facts. It has the effect of taking the fact out of dispute, meaning any evidence presented to prove that fact or set of facts will be irrelevant.

- A. Compulsion. A court can compel a stipulation if it will completely remove certain facts from dispute. However, a court cannot compel a stipulation if it would prevent the admission of evidence that is probative on other issues (e.g., qualification of an expert goes both to his capacity to be an expert witness and to the weight of his testimony).

4. **Section 356: Completeness Doctrine.** 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, and any other act, declaration, conversation, or writing may also be given in evidence. Statements may come in under this doctrine even if hearsay and even if a significant period of time (e.g., a week) had passed between the two statements, so long as it is necessary for context.

5. **Section 352: Discretion to Exclude.** 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 a substantial danger of undue prejudice, confusing the issues, or misleading the jury. The court should engage in a Section 352 weighing on the record to preserve the issue for appeal.

- A. Undue Prejudice. This refers to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. It refers to evidence that is unfair and tends to cause the trier of fact to decide the case on an improper basis.
- B. Factors. There are 3 important Section 352 factors: (1) the proponent's need for the evidence; (2) the availability of less harmful evidence; and (3) the effectiveness of a limiting instruction.
- C. Defense Evidence. Section 352 sometimes must bow to the due process rights of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense.

6. **Preliminary Determinations on Admissibility.**

- A. Preliminary Fact and Proffered Evidence. Section 400 defines a preliminary fact as a fact upon the existence of which depends the admissibility of evidence (includes qualification of a person to be a witness and the existence of a privilege). Section 401 defines proffered evidence as evidence the admissibility of which is dependent upon the

existence of a preliminary fact.

- B. Section 402: Preliminary Fact Determinations. This Section sets forth a procedure for determining foundational and other preliminary facts when the existence of a preliminary fact is disputed. It should be noted that, in California, judges can only consider admissible evidence in a Section 402 hearing. It should also be noted that the testimony of a single witness can be enough to determine the existence of any fact.
- C. Voluntary Confessions in a Criminal Case. Although the court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury, the court must do so to determine the admissibility of a confession or admission by the defendant.
- D. Section 403: Questions of Fact. This Section covers situations in which the judge is required to admit the proffered evidence upon the introduction of evidence sufficient to sustain a finding of the preliminary fact. The judge can admit the evidence if he finds evidence sufficient to sustain a finding; his role is merely to determine if there is evidence sufficient to permit the jury to decide the question.
- E. Section 405: Questions of Law. This Section deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion. The court indicates which party has the burden, and then determines the existence of the preliminary fact by a preponderance of the evidence. Such determinations are final.
- F. Example: Hearsay. A judge considers whether there is enough evidence to allow a jury to find (1) that the declarant actually made the statement (a Section 403 determination), and (2) that the statement is reliable or that there is an exception (a Section 405 determination).

Character Evidence

1. **Introduction.**

- A. Uses. Character evidence is relevant in three situations: (1) to establish witness credibility or lack thereof (Sections 780-790); (2) to show conduct in conformity with character (dealt with and severely limited by Sections 1101-1109); and (3) when character is an ultimate fact in disputes (e.g., libel and slander cases).
- B. Types. Three kinds of evidence may be used to prove a person's character: (1) opinion evidence; (2) reputation evidence; and (3) specific acts. Opinion is the witness's view of the person, meaning it must be based on the witness's personal knowledge or expertise. Reputation is the community's view of the person, meaning that it is not based on the witness's personal knowledge of the defendant (though, the witness must have some basis); note that under Section 1324 hearsay does not keep this evidence out.

2. **Sections 1101-1109: Propensity Evidence.**

- A. Section 1101(a): Ban on Propensity Evidence. Except for the exceptions, evidence of a character trait is inadmissible when offered to prove conduct on a specified occasion.
- B. Section 1101(b): Non-Propensity Evidence. Evidence that a person committed a crime, civil wrong or other act can be admitted when relevant to prove some fact other than a disposition to commit an act. Some uses of evidence include: Knowledge, Intent, Preparation, Plan, Opportunity, Motive, Identity, and Absence of mistake. Such other acts need not be criminal or adjudicated.
 - i. *Similarity.* Similarity between the uncharged and charged acts are required to prove identification (high degree of similarity, e.g. modus operandi or criminal signature, must be unusual and distinctive), common plan or scheme (middle level of similarity, does not require an ongoing event, requires a concurrence of features so as to naturally be explained by common plan or scheme), and intent (low level of similarity, must be sufficiently similar to support inference that the defendant probably harbored the same intent).
- C. Section 1102: Mercy Rule. The defendant in a criminal case may introduce opinion or reputation evidence of his own character to prove conduct in conformity therewith when such evidence is relevant to a defense. If this is done, the prosecution may cross-examine about specific acts, so long as the prosecution can establish that it has a good faith belief that the acts occurred and that the questions will receive an affirmative response. No extrinsic evidence is allowed to prove the specific acts.
- D. Section 1103: Victim's Character Evidence. The defendant in a criminal case may introduce opinion, reputation, or specific acts evidence of the victim to establish a character trait and action in conformity with that trait.
 - i. *Non-Violent Character Traits.* If the defendant offers evidence of a non-violent character trait of the victim, the prosecution may offer evidence to rebut/rehabilitate the victim.

- ii. *Character for Violence.* If the defendant offers evidence that the victim had a violent character, the prosecution may offer evidence to rebut/rehabilitate, and to show that the defendant has a character for violence.
- iii. *Self Defense.* When defendant has a claim of self defense, evidence of prior violence by the victim that the defendant was aware of is admissible without any contention that they establish a relevant character trait when because, in such a case, it is the defendant's state of mind that matters. Prosecution cannot rebut in this case.
- E. Section 1104: Care or Skill. Except as provided in Section 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.
- F. Section 1105: Habit or Custom. Evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity therewith. Habit is a regular response to a repeated specific situation.
- G. Section 1106: Sexual Civil Actions. Defendant cannot introduce evidence of plaintiff's sexual conduct to show consent or absence of injury, except evidence as to plaintiff's sexual conduct with defendant is allowed. However, if the plaintiff introduces evidence of plaintiff's sexual conduct, the defendant may rebut. Subject to Section 783, plaintiff may still attack plaintiff's credibility.
- H. Section 1107: Intimate Partner Battering. In criminal actions, expert testimony is admissible by either side regarding intimate partner battering and its effects, including effects on victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.
- I. Section 1108: Criminal Sex Crimes. The prosecution may offer evidence of prior sexual offenses of the defendant to show propensity in sexual offense cases. The court must do a Section 352 balancing, and must evaluate: (1) the inflammatory nature of the evidence; (2) the probability of confusion; (3) the remoteness of prior instances; (4) consumption of court time; and (5) probative value. The jury may not rely on the prior act unless it finds that the act occurred by a preponderance of the evidence, but if it so decides it may rely on uncharged offenses occurring before or after the charged crime (if there was an acquittal, the judge must inform the jury).
- J. Section 1109: Domestic Violence, Elder Abuse, and Child Abuse. Same as Section 1108 above.

Policy Based Exclusions

1. **Section 1151: Subsequent Remedial Measures.** Evidence of subsequent remedial measures is inadmissible to prove negligence or culpable conduct, but it may be used to show ownership, control, feasibility, to impeach, and if a non-party made the repair. It may also be admitted in a strict liability products liability case.
2. **Section 1152: Offers to Compromise.** In civil actions, evidence of an offer to compromise, and statements made in negotiation thereof, are inadmissible to prove liability, but any admission is admissible.
3. **Section 1153: Guilty Pleas.** Evidence of a guilty plea later withdrawn, or an offer to plead guilty, is inadmissible. Statements made during plea negotiations are inadmissible unless used to impeach defendant.
4. **Section 1155: Insurance.** Evidence of liability insurance is inadmissible to prove liability or wrongdoing.
5. **Section 1160: Statements of Sympathy.** An expression of sympathy is inadmissible to show liability, but admissions of fault are admissible.

Hearsay

1. **General Rules.**
 - A. Section 1200: Hearsay Rule. 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; except as provided by law, hearsay statements are inadmissible.
 - B. Miscellaneous Rules. A "person" under the rule includes a natural person, firm, association, organization, partnership, business trust, corporation, LLC, or public entity; but it does not include animals or machines. A statement made at the hearing is not hearsay, but just because the declarant is the witness does not mean that the hearsay rule does not apply.
 - C. Conduct as a Statement. Section 225 defines a statement as (a) oral or written verbal expression or (b) nonverbal conduct by a person intended by him as a substitute for oral or written verbal expression. The distinction between conduct within and without this rule rests on the intent of the actor (was the conduct intended to express

something?). Generally, implied assertions are not hearsay, unless the implied assertion is intended by the declarant. Similarly, questions requests, and words of direction are generally not hearsay, unless the declarant has the apparent intent to convey an implied message to the listener.

- D. Section 1201: Multiple Hearsay. Evidence is not inadmissible on the ground that the evidence is hearsay if it consists of one or more statements each of which meets the requirements of a hearsay exception.
 - E. Section 1202: Impeachment of Declarant. Hearsay is not inadmissible for the purpose of attacking the credibility of the declarant even if he is not given an opportunity to explain or to deny such inconsistency.
 - F. Section 1203: Cross-Examination of Declarant. A declarant may be called and examined by an adverse party as if cross-examination concerning the statement, unless the declarant is a party or has already testified concerning the statement. This does not apply to confessions, admissions, prior statements, and judgment hearsay exceptions.
2. **Non-Hearsay Purposes.** To avoid hearsay problems, the proponent will often contend that the statement is offered for a reason other than its truth (if so, make sure the non-hearsay purpose is relevant). The following are examples of this.
- A. Indicia. For example, a document defendant's name on it would be admissible to show that defendant had control over the room.
 - B. Offer to Purchase Drugs or Place a Bet. For example, when a police officer participates in a telephone conversation and hears a third person offer to purchase drugs, testimony thereon is not hearsay and can be admitted as tending to show that the drug seized was possessed for the purpose of sale.
 - C. Proving Knowledge or Notice. For example, proof that a party made allegations of structural defects in a prior complaint is not hearsay if introduced solely to show that the party had knowledge that the defects existed.
 - D. Impeachment and False Statements. Any statement admitted for impeachment is not hearsay. For example, defendant's prior statement describing his confrontation with a murdered police officer was admitted to rebut his later claim of amnesia. Also, a criminal defendant's exonerating statements to the police may be introduced by the prosecution to show a consciousness of guilt and are not hearsay because they are not introduced for their truth.
 - E. Pay-Owe Ledgers. These are not offered to show that certain people owed money, but rather that the residence was the scene of a drug transaction.
 - F. Badge of Innocence. There is a narrow window of admissibility for badge of innocence testimony. For example, a rape suspect might be told that semen has been discovered and then asked what he thinks will occur when they compare his semen. If he *promptly* responds that he is prepared to give a sample because he knows it will clear him, a court might properly decide to admit the statement (or at least the first clause). This is highly fact intensive.
 - G. Verbal Acts. When the very thing in issue is whether certain words were said and not whether those words are true or false, the words are not hearsay (e.g., prostitute's offer of sex for money, or an offer of a bribe).
 - H. Effect on Listener.
3. **Hearsay Exceptions Requiring Unavailability.** Under Section 240, a declarant is unavailable if: (1) exercising privilege; (2) disqualified from testifying (e.g., incompetent); (3) deceased or unable to attend or testify because of ten-existing physical or mental illness (must be relatively impossible to testify); (4) absent and unable to be compelled to attend by court process; or (5) absent even though proponent exercised reasonable/due diligence. It should be noted that a declarant is not unavailable if any of the above are procured by wrongdoing or acquiescence.
- A. Section 1230: Declaration against Interest. Hearsay is not inadmissible when: (1) the declarant is unavailable; (2) the declarant has sufficient knowledge of the subject; and (3) the statement, when made, was contrary to the declarant's interest. This exception does not apply to any statement or part thereof that is not specifically disserving to the declarant (no part admitted in evidence if there is a net exculpatory effect).
 - i. *Contrary to Interest.* The statement must: (a) be contrary to declarant's pecuniary or proprietary interest; (b) subject him to risk of civil or criminal liability; (c) tend to invalidate a claim by him against another; or (d) create a risk of making him an object of hatred, ridicule, or social disgrace. Determining whether the statement is sufficiently adverse is a Section 405 determination.
 - B. Section 1290-1292: Former Testimony.
 - i. *Section 1290: Former Testimony.* Former testimony is any testimony given under oath in: (1) another action or a former part of the same action; (2) a proceeding by an agency with the power to determine the type of controversy determined; (3) a deposition taken in another action; or (4) an arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.
 - ii. *Section 1291: Former Testimony Offered against a Party to Former Proceeding.* Former testimony is not inadmissible hearsay if the declarant is unavailable and: (1) it is offered against the person who offered it into

evidence in the former proceeding (or the successor in interest of such person); or (2) it is offered against a party to the prior proceeding who had the right to cross the declarant and who had an interest and motive similar to that in the current proceeding. Confrontation clause does not apply because of the prior opportunity to cross.

Objections: Hearsay and other objections are allowed at the current proceeding even if not made in the former proceeding, except objections to the form of question, or of competency or privilege that did not exist at the time of the former testimony, may not be made if they were not made at the time the former testimony was given.

- iii. *Section 1292: Former Testimony Offered against a Person not a Party to the Former Proceeding.* Evidence of former testimony is not inadmissible hearsay if the declarant is unavailable and: (1) the former testimony is offered in a civil action; (2) the party to the prior proceeding had a right and opportunity to cross, and had a similar interest and motive as the party in the current proceeding against whom the testimony is offered.

4. **Hearsay Exceptions, Unavailability Immaterial: Sections 1220-1223, Confessions and Admissions.**

- A. Section 1220: Admission of Party. Hearsay is not inadmissible when offered against the declarant in an action to which he is a party. At the time the statement was made, the admission may have been neutral or even self-serving; there is no requirement that the admission be incriminating, only that it be relevant.
 - i. *Co-Defendant Case.* Under *Aranda* and *Bruton*, in a joint trial an admission by one criminal defendant that implicates a co-defendant may not be introduced. The confession can be redacted to eliminate any reference to the non-talking co-defendant's existence. Other remedies include multiple juries and bifurcation.
- B. Section 1221: Adoptive Admission. Hearsay is not inadmissible when offered against a party 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. The accusatory statement does not come in for its truth, but only to supply meaning to the silence or conduct of the accused in the face of it.
 - i. *Silence.* Silence or an equivocal response may constitute an adoption if: (1) under the circumstances he had an opportunity to hear, understand, and to reply; (2) the circumstances do not lend themselves to an inference that he was relying on the right of silence; and (3) the circumstances were such that the statement would normally call for a response if the statement were untrue.
- C. Section 1222: Authorized Admission. Hearsay is not inadmissible if the statement was made by one authorized by that party to make statements for that party concerning the subject matter of the statement and there is sufficient evidence to support a finding that such authority existed (Section 403determination).
- D. Section 1223: Admission of Co-Conspirator. Hearsay is not inadmissible when offered against a party and: (1) the statement was made while *declarant* was participating in and in furtherance of a conspiracy; and (2) the statement was made prior to or during the time that the *party* was participating in that conspiracy. Evidence of facts required to establish a conspiracy must be shown by evidence independent of the declaration itself (Section 403 determination). The confrontation clause rarely applies because the statements are typically not testimonial.

5. **Hearsay Exceptions, Unavailability Immaterial: Sections 1235-1238, Prior Statements of Witnesses.**

- A. Sections 1235 and 770: Prior Inconsistent Statements. Hearsay is not inadmissible if it is a statement by a witness that is inconsistent with his testimony at the hearing and is offered in compliance with Section 770. Section 770 requires that the witness is given an opportunity to explain or deny the statement, or that the witness has not been excused from giving further testimony.
 - i. *Failure to Remember.* A witness's claim that he does not remember is not an inconsistent statement. However, an attorney can "Green" a witness by establishing that the witness remembers many details in proximity of what the witness claims not to remember; it establishes that the witness is lying about not remembering.
 - ii. *Silence.* Silence is not an inconsistent statement.
- B. Sections 1236 and 791: Prior Consistent Statements. Hearsay is not inadmissible if it is a statement by a witness that is consistent with his testimony at the hearing and is offered in compliance with Section 791. Section 791 requires that the prior consistent statement only be offered after: (a) an inconsistent statement made by him as been admitted for the purpose of attacking his credibility, and the consistent statement was made before the alleged inconsistent statement; or (b) an express or implied charge that his testimony is recently fabricated or is influenced by bias or other improper motive, and the consistent statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen. No confrontation clause issue – witness available for cross
- C. Section 1237: Past Recollection Recorded. Evidence of a statement previously made by the witness is not inadmissible hearsay if the following factors are established: (1) the statement would have been admissible if made by the witness while testifying; (2) the statement concerns a matter about which the witness has insufficient present

recollection to permit a full and accurate testimony; (3) and the statement was contained in a writing that: (a) was made at a time when the fact recorded actually occurred or was fresh in the witness's memory; (b) was made by the witness, under the witness's direction, or by some other person for the purpose of recording the witness's statement at the time it was made; (c) is offered after the witness testifies that the statement was a true statement of such fact; and (d) is authenticated as an accurate record of the statement. No confrontation clause issue – witness available for cross

i. *Refreshing Recollection.* Anything can be used to refresh the witness's recollection, and the other side can request that the refreshing document be produced at the hearing.

D. Section 1238: Prior Identification. Hearsay is not inadmissible if it is a prior identification made by the witness and: (1) the statement would have been admissible if made by the witness while testifying; (2) the statement is an identification of a party or another participant in the crime or other occurrence; (3) the statement was made at a time when the crime or other occurrence was fresh in the witness's memory; and (4) the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at the time. No confrontation clause issue – witness available for cross

6. **Hearsay Exceptions, Unavailability Immaterial: Sections 1240-1242, Spontaneous and Dying Declarations.**

A. Section 1240: Spontaneous Statements. Hearsay not inadmissible if: (1) it purports to narrate, describe or explain an act, condition, or event perceived by the declarant; and (2) it was made spontaneously while the declarant was under the stress of excitement caused by such perception. There must be a startling occurrence, the statement must be made before enough time has passed for the witness to contrive or misrepresent, and it must related to the circumstances. Focus on the mental state of the declarant. Other factors include: length of time between event and statement, whether the statements were made in response to questions, and whether those questions were suggestive. The declarant need not be competent.

B. Section 1241: Contemporaneous Statements. Hearsay is not inadmissible if it is made while the declarant was engaged in conduct and it was offered to explain, qualify, or make understandable that conduct.

C. Section 1242: Dying Declaration. Hearsay is not inadmissible if: (1) made by a dying person; (2) concerns the cause and circumstances of the person's death; (3) made on the individual's personal knowledge; and (4) made under a sense of immediately impending death.

7. **Hearsay Exceptions, Unavailability Immaterial: Sections 1250 and 1252, Mental or Physical State.**

A. Section 1250: Declarant's then Existing Mental or Physical State. Subject to Section 1252, hearsay is not inadmissible if it is a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement intent, plan, motive, design, mental feeling, pain, or bodily health) when: (1) offered to prove the declarant's state of mind, emotion or physical sensation; or (2) offered to prove or explain acts or conduct of the declarant. This does not include statements of memory or believe to prove the fact remembered or believed. The declarant's state of mind must be in issue.

i. *Permissible Inferences.* The trier of fact may infer the declarant's similar state of mind soon before and soon after the statement was made. Under *Griffin*, Section 1250 allows the trier of fact to draw inferences not only as to the actions of the declarant, but also the actions of others (girl said she was going to confront step-dad if he molested her again).

B. Section 1252: Restriction on Statements of Mental or Physical State. Such statements are inadmissible if made under circumstances that indicate its lack of trustworthiness.

8. **Hearsay Exceptions, Unavailability Immaterial: Business and Official Records.**

A. Section 250: Writings. The term "business" includes any kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

B. Section 1270: Business. The term "writing" includes handwriting, typewriting, printing, photographing, and every other means of recording upon any tangible thing, any form of communication or representation including letters, words, pictures, sounds or symbols.

C. Section 1271: Admissible Writings. A writing is not inadmissible if it is a record of an act, condition, or event and it is offered to prove that act, condition, or event, so long as: (1) made in the regular course of business; (2) at or near the time of the act, condition, or event; (3) qualified witness (custodian of records) testifies to its identity and mode of preparation; and (4) the sources of information and the circumstances of preparation indicate trustworthiness.

D. Section 1272: Absence of Records. The absence of an entry of an act, condition or event is not inadmissible when offered to prove the nonoccurrence of the act, condition or event if: (1) it was the regular course of business to record such act, condition, or event; and (2) the sources of information and the method and time of preparation of

the records indicate that the absence of a record is a trustworthy indication that the act or event did not occur.

- E. Sections 1280 and 1284: Official Records. Evidence of a writing made as a record of an act, condition, or event is not inadmissible hearsay when offered to prove the act, condition, or event if: (1) the writing was made by and within the scope of duty of a public employee; (2) the writing was made at or near the time of the act, condition or event; and (3) the sources of information and method and time of preparation indicate trustworthiness. Note that this is the same as the business records exception (including the absence of a record being admissible), except that there is no requirement that a custodian testify. Note also that police reports are not official records (or business records).
 - F. Section 425.5: Criminal Conviction Record. This Section creates a hearsay exception allowing admission of court records to prove not only that a conviction occurred, but also that the underlying offense occurred.
9. **Confrontation Clause.**
- A. Elements: Crawford. The elements of a 6th Amendment objection are: (1) testimonial statement; (2) unavailable declarant; (3) offered for its truth; and (4) no prior opportunity to cross. Such evidence will be excluded.
 - B. Crawford Inapplicable. The 6th Amendment does not apply in the following circumstances: (1) preliminary hearings; (2) civil commitment proceedings; and (3) juvenile dependency hearings. No court has ruled on whether it applies in juvenile delinquency hearings.
 - C. Testimonial Test. Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purposes of the interrogation is to enable police assistance to meet an *ongoing emergency*. They 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*.
 - i. Factors. Testimonial factors include: (1) primarily for the purpose ascribed to testimony (establish or prove some past fact for possible use in a criminal trial; (2) circumstances imparting the formality and solemnity of testimony; and (3) responses to questioning by law enforcement in a non-emergency situation.
 - D. Lab Reports, Melendez-Diaz. Certificates (affidavits) of state laboratory analysts stating that material seized by police was a drug are barred by the 6th Amendment unless there is an opportunity to cross an analyst. Though, courts are in disagreement about whether an expert testifying based on a review of the notes prepared by another is a violation of the 6th Amendment (notes constitute a contemporaneous recordation of observable events rather than the documentation of past events?).
 - E. Forfeiture by Wrongdoing. This doctrine applies when defendant had intent to prevent testimony by wrongdoing, but not when wrongdoing was caused by a different intent.

Writings

1. **Authentication of a Writing.**

- A. Section 1400: Authentication. Authentication of a writing means that there is sufficient evidence to support a finding that it is what it is claimed to be. Circumstantial evidence can be used to authenticate. Handwriting can be authenticated by an expert, the jury, or someone with personal knowledge of the person's handwriting. For audio recordings, someone must testify that the tape is complete and accurate and that the transcript that is given to the jury is accurate.
- B. Section 1401: Authentication Required. Authentication of a writing is required before it may be received into evidence, and before secondary evidence of its content may be received into evidence. A writing is authenticated if the opposing party has admitted its authenticity or has acted upon it as authentic. A writing need not be authenticated by the testimony of a subscribing witness, but may be authenticated by anyone who saw the writing being made, or by circumstantial evidence.
- C. Section 1402: Authentication of Altered Writings. The proponent must account for the alteration of a writing in order to introduce the writing into evidence, and must show that the alteration was: (1) made by another without the proponent's concurrence; (2) made with consent of the parties affected by it; (3) otherwise properly or innocently made; or (4) that the alteration did not change the meaning or language of the instrument.

2. **Secondary Evidence Rule.**

- A. Section 1520: Proving the Content of a Writing. The content of a writing may be proved by an otherwise admissible original.
- B. Section 1521: Secondary Evidence Rule. The content of a writing may be proved by otherwise admissible

secondary evidence, unless the court concludes: (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion; or (2) admission of the secondary evidence would be unfair.

C. Section 1522: Additional Grounds for Excluding Secondary Evidence. 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. However, this section does not apply to: duplicates, writings not closely related to controlling issues, copies of writings in possession of a public entity, and copies of writings in public records.

D. Section 1523: Oral Testimony of the Content of a Writing. Oral testimony is not admissible to prove the content of a writing, except as follows.

First, oral testimony of the content of a writing is allowed 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.

Second, oral testimony of the content of a writing is allowed if the proponent does not have possession or control of the original or a copy of the writing and either of the following: (1) neither the writing nor a copy 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.

Third, oral testimony of the content of a writing is allowed if the writing is voluminous and cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

Witnesses

1. **Sections 701-702: Competency.**

A. Section 701: Disqualification. A person is disqualified to be a witness if he is: (1) incapable of expressing himself so as to be understood; or (2) incapable of understanding the duty to tell the truth.

B. Section 702: Personal Knowledge. The testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. After an objection, such personal knowledge must be shown before the witness may testify concerning the matter, but such knowledge may be shown by any otherwise admissible evidence, including his own testimony.

2. **Credibility of Witnesses.**

A. Section 780: Allowable Considerations. The trier of fact may consider anything that has a tendency in reason to prove or disprove the truthfulness of a witness's testimony, including: (a) demeanor; (b) character of testimony; (c) capacity to perceive, recollect, or communicate any matter; (d) extent of his opportunity to perceive any matter; (e) character for honesty or veracity; (f) existence of bias, interest, or other motive; (g) previous consistent and inconsistent statements he made; (h) existence of any fact testified to; (i) attitude; and (j) admission of untruthfulness. Note that extrinsic evidence of consistent or inconsistent statements can only come in if Section 1235/770 or Section 1236/791 is complied with (both for truth and for impeachment).

B. Section 785: Attacking or Supporting Credibility. The credibility of a witness may be attacked or supported by any party, including the party calling him.

3. **Impeachment by Prior Bad Acts.**

A. Section 786: Character Evidence Generally. 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. Prop. 8 eliminates this rule in criminal cases. Thus, evidence of traits of character other than honesty or veracity is admissible to attack or support the credibility of a witness in a criminal case.

B. Section 787: Specific Instances of Conduct. 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. Prop. 8 eliminates this rule in criminal cases. Thus, evidence of specific instances of conduct only relevant to prove a trait of character is admissible to attack or support the credibility of a witness in a criminal case.

C. Section 788: Prior Felony Convictions. For 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 he has been pardoned based on innocence or there is a certificate of rehabilitation. Only the fact of conviction comes in, unless the witness opens the door by stating facts that can be disproven by the conviction.

i. *Moral Turpitude and Misdemeanors.* Only felonies involving moral turpitude (a readiness to do evil) can come

- in. Because of Prop. 8, misdemeanor convictions of moral turpitude come in as well.
- ii. *Section 352 Balancing Required.* When deciding whether to allow impeachment with prior convictions, the court should balance the following factors: (1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the remoteness of the crime; (3) the nature of the crime; (4) the age of the defendant at the time of the crime; (5) the defendant's conduct since the crime; and (6) in the case of a Defendant witness, whether it will discourage him from testifying.

Opinion Testimony

1. **Expert Testimony.**

- A. Section 720: Qualification. A person is qualified 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.
- B. Section 801: Expert Witnesses Opinion Testimony. An expert's opinion testimony is limited to that which is related to a subject that is sufficiently beyond common experience that the opinion would assist the trier of fact, and based on matter 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 experts in the field (but does not need to be based on personal observation).
- C. Section 802: Statement of Basis of Opinion. An expert may state the reasons for his opinion and the matter upon which it is based.
- D. Section 803: Opinion Based on Improper Matter. The court may exclude testimony based on matter that is not a proper basis for such an opinion. It is unclear if relying on hearsay is proper because of *Crawford*.
- E. Section 804: Opinion Based on Opinion or Statement of Another. If an expert basis his opinion on the opinion or statement of another, such other person may be called and examined by an adverse party as if under cross-examination concerning the opinion or statement, unless such person is a party, or is a witness who has testified in the concerning the subject matter of the opinion or statement.
- F. Section 805: Opinion on Ultimate Issue. 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.
- G. Improper Opinion Evidence. Experts cannot testify to the veracity of a witness, the likelihood of future violent acts, legal conclusions, and the credibility of a particular identification, but they can testify as to factors affecting reliability of identification.
- H. Hypothetical Questions. One may set forth a series of facts that the witness is asked to assume true and then render an opinion upon, so long as it is based on and supported by evidence in the record.
- I. Section 721(a): Cross Examining Experts. 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) qualifications, (2) the subject to which his testimony relates, (3) any matter upon which his opinion is based and the reasons for his opinion, (4) compensation (under 722), (5) the fact that he is appointed by the court (722), and (6) the frequency with which he testifies on one side of an issue.
- J. Section 721(b): Cross and Texts. An expert may not be cross-examined about a text unless (1) the witness referred to, considered, or relied upon the text in arriving at or forming his opinion; (2) the text has been admitted in evidence; or (3) the text has been established as a reliable authority by the testimony of the expert or by other expert testimony or by judicial notice.

2. **Lay Witnesses Opinion Testimony.** Section 800 limits the opinion evidence of a witness not testifying as an expert to that is rationally based on the perception of the witness (personal knowledge) and helpful to a clear understanding of his testimony. Some examples of appropriate topics for lay witness opinion include: quantity, value, weight, measurements, time, distance, velocity, emotions, whether a person appeared to be sick, well, intoxicated, nervous, or irrational.

Privileges

1. **General Rules.**

- A. Section 913: Comments and Inferences from Privilege. If a privilege is or was exercised, neither the presiding officer nor counsel may comment thereon, no presumption arises, and the trier of fact may not draw any inference

therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

- B. Section 917: Presumed Privileges. Whenever a privilege is claimed, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.
2. **Spousal Privilege**. This privilege applies to anything, not just communications during the marriage. Its purpose is to protect the marriage. It is held by the witness spouse only.
 - A. Section 970: Spousal Privilege. A married person has a privilege *not to testify against* his spouse (not to answer bad questions). This privilege may be claimed only if there is a valid marriage in effect at the time the witness testifies.
 - B. Section 971: Spousal Privilege. A married person *whose spouse is a party* has a privilege *not to be called* as a witness by an adverse party to that proceeding without the prior express consent of the witness spouse unless the party calling the spouse does so in good faith without knowledge of the marital relationship.
 - C. Section 972: Exceptions to Spousal Privilege. This privilege is not available in: divorce proceedings, commitment proceedings, one spouse charged with a crime and the victim is the other spouse, one spouse is charged with bigamy, domestic violence proceedings, and child support proceedings.
 - D. Waiver and Disclosure. This privilege is waived when the witness spouse testifies for his spouse. However, disclosure outside of the action is immaterial, and there is no requirement that the communication was confidential.
3. **Confidential Marital Communication Privilege**. Both spouses hold the privilege.
 - A. Section 980: Confidential Marital Communication Privilege. A spouse, 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.
 - B. Exceptions. There is no privilege in: commitment proceedings, divorce proceedings, proceedings brought by one spouse against the other, criminal proceedings in which one spouse is charged and the other is the victim, in bigamy proceedings where one spouse is a party, in a criminal proceeding in which the communication is offered by a defendant spouse.
 - C. Section 912: Waiver. This privilege is waived if any holder of the privilege has disclosed a significant part of the communication or has consented to 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. A waiver by one spouse does not waive the privilege for the other spouse.
4. **Police Officer Privilege**.
 - A. Section 1040: Definition of Official Information. Official information means information acquired in confidence by a public employee in the course of his duty and not open to the public at the time the privilege is made. One example of official information is the surveillance location from which officers observe criminal activity.
 - B. Section 1040: Privilege for Official Information. A public entity has a privilege to refuse to disclose, and to prevent another from disclosing, official information if the privilege is claimed by a person authorized to do so if disclosure 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.
 - C. Section 1041: Privilege for Identity of Informer. A public entity has a privilege to refuse to disclose, and to prevent another from disclosing, the identity of a person who has furnished certain information if 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.
 - i. Type of Information Furnished by Informant. This section applies if the information is furnished in confidence by the informer to a law enforcement officer, a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated, or any person for the purpose of transmittal to either of those persons. The information must purport to disclose a violation of law.
 - ii. Privilege Unavailable. This privilege is unavailable if the witness is material, percipient, and in possession of exculpatory evidence.
 - D. Ruling in a Civil Case. If the court determines that information was acquired in confidence, the court should engage in a weighing process. This requires the party seeking disclosure to show its need for the information. The government then presents evidence on its need for confidentiality, which can be done in camera. The court must make a separate assessment of each factor, balance them, and order disclosure unless the need for confidentiality outweighs the need for disclosure.

- E. **Ruling in a Criminal Case.** If the defense establishes a reasonable possibility that the disclosure of the information might result in the defendant's exoneration, the court must have an in camera hearing outside the presence of the defense in which the information sought may be disclosed to assist the court in deciding if the privilege should be upheld. Prior to the in camera hearing, the court should permit the defense to submit questions to be asked at the hearing.
- i. ***Informant.*** If an informant's identity is sought, the informant need not testify at the in camera hearing, unless the information is an eyewitness to the transaction, in which case his testimony is necessary. In such a case, the court should order disclosure only if there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial by denying the defendant evidence that could be exculpatory
 - ii. ***Confidential Information.*** If official information is sought, the privilege should be upheld if the court concludes that the need for confidentiality outweighs the need for disclosure.

Judicial Notice

1. **Section 451: Mandatory Judicial Notice.** Judicial notice shall be taken of the following: (a) the decisional, constitutional, and public statutory law of CA and the US; (b) rules of professional conduct and rules of practice and procedure; (c) rules of pleading, practice, and procedure; (d) the true meaning of all English words and phrases and of all legal expressions; (e) facts and propositions of generalized knowledge that are so universally known that they cannot be the subject of dispute.
2. **Section 452: Permissive Judicial Notice.** Judicial notice may be taken of the following: (a) decisional, constitutional, and statutory law of the US and resolutions of private acts of Congress of CA and US; (b) regulations and legislative enactments issued by US or any public entity in the US; (c) official acts of the legislative, executive, and judicial departments of the US or of any state; (d) records of any courts; (e) rules of any court; (f) the law of foreign nations; (g) facts and propositions that are of such common knowledge within the territorial jx 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.
3. **Section 453: Compulsory Notice upon Request.** The trial court shall take judicial notice of any matter if a party requests it and: (a) gives each adverse party sufficient notice of the request to enable such adverse party to prepare to meet that request; and (b) furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Presumptions

1. **Burden of Proof in General.** The burden of proof involves two issues: (1) which party must prove a fact (allocation) and (2) the degree to which that fact must be proved (standard).
2. **Allocation.** Section 500 provides that the burden of proof on a particular issue is normally assigned to the party to whom the fact is essential. When a court considers shifting the normal allocation of the proof burden, it must consider the following factors: the knowledge of each party concerning the particular fact, the availability of the evidence to each party, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. Courts rarely shift the normal burden of proof.
 - A. **Civil Cases.** In civil cases, the burden is usually allocated to the party that loses if the claim or defense fails and requires proof by a preponderance of the evidence.
 - B. **Criminal Cases.** In criminal cases, the burden is virtually always with the prosecution, which must establish guilt beyond a reasonable doubt.
 - C. **Presumption Distinguished.** A presumption is an assumption of fact that the law requires to be made from another fact established in the action.
3. **Standards.** Burden of proof means the obligation of a party to establish, by evidence, a requisite degree of belief concerning a fact in the mind of the trier of fact. CA has four levels of proof: a party can be required to raise a reasonable doubt concerning the existence or nonexistence of a fact; or a party can establish the existence or nonexistence of a fact by a preponderance of evidence, clear and convincing proof, or by proof beyond a reasonable doubt.