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An Evidence Code Primer for Family Law Attorneys Part II: Testimonial Evidence

Hon. William J. Howatt, Jr. (Retired)
& Stephen D. Hamilton

Hon. William J. Howatt was appointed to the El Cajon Municipal Court in 1979 by Governor Edmund G. Brown, Jr. and to the San Diego Superior Court in 1987 by Governor George Deukmejian. In the Superior Court he served as Presiding Judge of the entire Court in 1996 and 1997, on the Appellate Division of the Superior Court, and culminated his career on the bench as Supervising Judge of the Family Law Division. His legal career included over ten years as a Deputy District Attorney for the County of San Diego, including felony trials, the Fraud Division and the Appellate Division. Judge Howatt frequently lectures on Evidence law and has designed a special three-evening Evidence program for family law attorneys. He retired from the Bench in December of 2006. Since retiring, he does arbitrations and mediations with JAMS in San Diego and acts as a privately compensated temporary judge.

Stephen D. Hamilton has been an attorney for 22 years, with a practice devoted almost exclusively to family law for 20 of those years. He has been a Certified Specialist in Family Law since 2004. He is currently a member of the California Family Law Executive Committee, for which he is the Legislation Chair. He is a member of ACFLS and serves on the ACFLS Outreach and Amicus Committees. He is also chairperson of the San Luis Obispo County Family Law Section.

When litigating family law matters, the primary way in which attorneys can present their case is through the testimony of witnesses. This article, the second of a three-part series, discusses the specific Evidence Code sections to be considered when introducing or objecting to testimonial evidence. However, a prefatory discussion of what constitutes testimonial evidence, as well as how the Rules of Court, the Family Code, and case law affect the introduction of testimonial evidence, is warranted.

What is Testimonial Evidence

Testimonial evidence is received through the statements made by a competent witness, under oath, during a judicial proceeding. A witness is a person who has personal knowledge of an act, incident, event, statement, or transaction and who is permitted to testify under oath as to their recollection of that act, incident, event, statement, or transaction. As set forth in the Code of Civil Procedure, "A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit."[1] We usually assume during trial that means live testimony because of the right to cross-examine a witness. However, in *Thorpe v. Thorpe,* 75 Cal.App.2d 605 (1946), the Court allowed the introduction of a party's deposition as their testimony when they failed to appear for trial.

The Right to Introduce Testimony

Elkins[2] made clear parties have the right to introduce live testimony in a family law trial. A local court's rule limiting testimony and requiring the use of affidavits was expressly overruled and triggered a tidal wave of reform within family courts governing evidence. One of the specific consequences of the *Elkins* decision and the subsequent reforms recommended by the Elkins Family Law Task Force was the enactment of Family Code section 217, which mandates that courts "receive any live, competent testimony that is relevant and within the scope of the hearing...."

California Rules of Court, rule 5.119 specifies the factors to be considered by the trial court in making a finding of good cause to refuse to receive live testimony. They include whether a substantive matter is at issue, whether material facts are in controversy, and whether live testimony is necessary for the court to assess the credibility of the parties or other witnesses.

Still undecided is the viability of the *Reifler*[3] decision, cited in support of the proposition that declarations are admissible testimonial evidence during hearings on requests for orders. In a decision published this year, *In Re Marriage of Swain*, the Court of Appeal stated:

> In this case, we also need not answer the general question whether section 217 makes written declarations submitted in connection with family law motions subject to the hearsay rule in every case. We conclude that, at a minimum, the hearsay exception in Code of Civil Procedure section 2009 does not apply to a motion to modify a family law judgment where, as here, the opposing party seeks to exclude the declaration on the ground that he or she is unable to cross-examine the declarant. In that situation, the opposing party's objection not only seeks to exclude hearsay evidence, but also amounts to an assertion of the party's right under section 217 to `live, competent testimony that is relevant and within the scope of the hearing.' (Id., subd. (a).) The opposing party's live testimony is necessary for cross- examination.[4]

As the cited passage makes clear, if declarations are still viable in family court, they can only be considered if the opposing party is given the opportunity to cross-examine the declarant.

Procedural Requirements to Submit Testimony

Family Code section 271 imposes the requirement that all non-party witnesses be identified in a witness list which includes a brief description of the expected testimony. That witness list must be served before the hearing—if not, "the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing."[5] Witness lists required by Family Code section 217(c) must be served along with the order to show cause, notice of motion, or responsive papers in the manner required for the service of those documents. If no witness list has been served, the court may require an offer of proof before allowing any nonparty witness to testify. Judicial Council Form FL-321 is an optional "Witness List" form that may be used to satisfy the requirements of Family Code section 217(c).

Court's Duty to Control the Examination of Witnesses

Under Evidence Code section 765, the court is required to exercise "reasonable control" over the manner in which witnesses are questioned. That control is to be exercised to achieve two goals:

1. To make the questioning as rapid, and distinct, as necessary to effectively ascertain the truth; and,
2. To protect witnesses from "undue harassment or embarrassment.

A Court May Call its Own Witnesses

A trial court is authorized to "call witnesses and interrogate them the same as if they had been produced by a party to the action...."[6] This can occur on the court's own motion. Parties are still entitled to object to questions asked during this examination. While you are highly unlikely to have an objection to a question posed by the court sustained, the objection still needs to be made so it is not waived on appellate review.[7] Parties also have the right to cross-examine witnesses called by the court, although the court directs the order of cross examination.

Competency of a Witness to Testify

Preliminarily, counsel should address the competency and qualification of the witness to testify. Witness competency is addressed in Evidence Code sections 700 through 704. Age is not a factor in determining a witness's competency.[8] Instead, a witness must be able to express themselves in a manner that can be understood, either directly or through an interpreter.[9] The witness must also be capable of "understanding the duty of a witness to tell the truth."[10]

Except for expert witnesses, a witness must have "personal knowledge of the matter" about which they are testifying.[11] "Personal knowledge" means a present recollection of an impression derived from the exercise of the witness' own senses.[12] That personal knowledge must be shown before the witness can testify concerning that matter, although that requirement can "be shown by any otherwise admissible evidence, including their own testimony."[13] "'[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact' is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information.'"[14]

Special Considerations for Child Witnesses

When receiving or excluding testimony from children, "the court shall take special care to protect [the child witness] from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions."[15] Questions to children must be age appropriate and consider the child's cognitive level. If they are not, a court can "forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness."[16] For this reason, a trial court can permit the use of leading questions when examining a child.[17] The Evidence Code also specifically recognizes that, "under special circumstances where the interests of justice require," leading questions can be asked on direct or redirect.[18] Counsel in this case should argue that this exception is specifically applicable to children witnesses.

A *voir dire* examination must be conducted to determine a child's competency to testify, so the court can discern the child's degree of understanding and intelligence. That decision cannot be made merely because of a child's age. "It follows that the child's extreme youthfulness was not, per se, sufficient to exclude him from the witness stand. There is no arbitrary age limit under which the testimony of a child is automatically rejected."[19] In *Bradburn*, the child in question was 3 years and 3 months old at the time of the accident, which he observed, and 5 years old at the time of the trial.

When dealing with a child or dependent person with limited cognitive abilities counsel, whether on direct or cross-examination, should be very careful to avoid any improper questions. Stepping over the line can result in the court interposing its own Evidence Code section 765 objection. If the court has to intervene, the embarrassment will be yours and adverse to the interests of your client.

Witness Oath and Confrontation

All witnesses must take an oath, affirmation, or declaration "in the form provided by law" before testifying.[120] When the witness is a child or has a substantial cognitive impairment, the oath can consist of promising to tell the truth.

Witnesses must testify in the presence of all of the parties to the action who chose to attend the proceeding.[21] Attending parties who chose to do so have the right to then examine a testifying witness. However, that right is not absolute. In the case of children or parties with special needs, the court has specific[22] or general[23] authority to control the manner of examination of such witnesses.

Method and Scope of Examination of Witnesses

The examination of witnesses can be broken down by the types of examination being conducted as defined in the evidence code: direct examination,[24] cross-examination,[25] re-direct examination,[26] and recross-examination.[27] Examination of witnesses proceeds in that order and continues thereafter by redirect and recross.[28] Each phase must be completed before the next starts, "[u]nless for good cause the court otherwise directs...."[29] The court also has discretion to allow a party to interrupt cross, re-direct and recross "in order to examine the witness upon a matter not within the scope of a previous examination of the witness."[30] This allows counsel, for example, to go beyond the scope of direct for a witness called by the other party so as to not require you to recall the witness during your case in chief.

This follows also from the fact that direct examination may not be the first time a witness testifies in a proceeding. Direct examination is the first examination of a witness on a matter not within the scope of any prior examination.[31]

In the context of family law litigation, during direct examination your client will have the desire to tell the "whole story." However, family law counsel has an ethical responsibility to not mislead the court, whether it be by your client offering false testimony directly or by implication. If you find yourself at odds with your client over this responsibility, provide them with a copy of the Rules of Professional Conduct and highlight your obligation to not "seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."[32]

As to cross-examination, the basic principle from the perspective of the Evidence Code is that the cross-examination of a witness is limited to the scope of the direct examination of the witness.[33] "Scope of direct examination" generally refers to matter that was covered by or is the subject of the direct examination of the witness. It may include any direct statements of fact made by the witness as observed by the witness or inferences that may be drawn from the testimony of the witness. "Scope" is not inclusive of attacks upon the credibility or bias of the witness as that is separate from the limitations of "scope."

The Court in *In Re Anthony P.,* 167 Cal.App.3d 502, 507 (1985) makes the point as follows:

> Cross-examination cannot serve its critical function unless trial lawyers are given wide latitude in the scope, subject matter and technique of their questioning. This is especially true when the cross-examiner is testing the credibility of a witness. True, California law restricts most other forms of cross-examination to the scope of the preceding direct examination. [Citations omitted]. But not so cross-examination directed at the witness' credibility. 'The rule restricting cross-examination to the scope of the direct ... cannot reasonably be applied to cross-examination designed to impeach the witness.' There the trial judge is expected to allow a wide-ranging inquiry as to any factor which could reasonably lead the witness to present less than reliable testimony. [Citations omitted].

Sections 765 through 778 of the Evidence Code set forth the rules regarding the examination of witnesses. Several of those sections are discussed elsewhere in this article. Summarizing the rules from the remaining sections:

- You may examine a witness concerning a writing without showing, reading, or disclosing the writing to the witness.[34] However, if you show the witness the writing, "all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness."[35]
- You may examine a witness about a prior inconsistent statement or conduct without disclosing the statement or conduct.[36]
- Extrinsic evidence of a prior inconsistent statement shall be excluded unless the witness was examined about the statement (and thus given an opportunity to explain or deny the statement) or the witness has not yet been excused from further testimony.[37]
- The cross-examination of a non-adverse witness is governed by the rules concerning direct testimony.[38]
- Don not ask the witness a question already asked and answered; however, you can reexamine the witness "as to any new matter upon which he has been examined by another party to the action."[39]
- Witnesses **may be** excluded from the courtroom to prevent them from hearing the testimony of other witnesses; however, while an exclusion order is usually granted, it is not mandatory.[40] Further, exclusion orders do not apply to parties.[41]
- After being excused, a witness cannot be recalled without leave of court (which is discretionary).[42]

Leading Questions

The most difficult aspect of direct examination for most attorneys is the inability to ask "leading" questions. Leading questions are not permitted on direct or redirect examination "except under special circumstances where the interests of justice otherwise require."[43] A leading question is "a question that suggests to the witness the answer that the examining party desires."[44]

A leading question can be determined, generally, by whether or not the question to a reasonable person would understand that the examiner wants a specific answer contained within the framework of the question. In other words, the examiner is instructing the witness to respond to the question in a specific way.[45]

The danger in a leading question is that it directs the witness to answer a question in a certain way and eliminates the statement of personal knowledge of the witness. This rule does not apply to expert witnesses.[46] However, use caution–when examining an expert witness using leading questions, it may give the impression that it is the attorney testifying and not the expert witness.

So, what are some of the other special circumstances under which leading questions are allowed on direct or redirect examination?

- When there is little danger of improper suggestions of the answer to the witness or it is necessary to obtain relevant testimony from the witness, such as in establishing preliminary matters;
- To refresh the recollection of the witness;
- To aid a witness who needs assistance due to age, cognitive abilities, subject matter or language;[47] or,
- To identify exhibits.[48]

Interestingly, under the provision of section 767, the court may also preclude the use of leading questions during cross or recross-examination. Where the witness is biased in favor of the examiner or would be unduly susceptible to the influence of the suggestion of a desired

answer in the question, objections to leading questions can be sustained.[49]

Examination of Adverse Party/Witness

Leading questions are permitted when examining an adverse party or person identified with an adverse party under Evidence Code section 776, even during direct or re-direct examination. The section also identifies what type of relationships between the witness and a party create the necessary link to invoke the section.[50] In the context of a family law proceeding, this usually means the new spouse or family members of the opposing party, the employer, employee or co-workers of the opposing party, or a friend of the opposing party.

Witness Credibility

The Evidence Code can be a very powerful tool when you want to convey to a judge that the other party or their witness is not credible. Evidence Code section 780 identifies eleven different factors the court can consider when determining the credibility of a witness: demeanor; the character of the witness's testimony; the witness's "capacity to perceive, to recollect, or to communicate any matter about which" they testify; the extent of the witness's opportunity to perceive any matter about which they testify; their "character for honesty or veracity or their opposites;" whether a witness has (or does not have) a bias, interest or motive; prior consistent statements; prior inconsistent statements; the "existence or nonexistence of any fact testified to by" the witness; a witness's attitude towards the action or toward testifying; and a witness's admission of being untruthful. All of these statutory factors should be considered when examining witnesses during a proceeding and then addressed in your closing arguments.

The Unresponsive Witness

"A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party."[51] However, just because you can legitimately make an objection to a non-responsive answer does not mean you should. This objection should be used sparingly and only for good reason as it simply gives the opposing party the opportunity to rephrase the question or bring out the answer on re-direct or recross. Further, with the impacted nature of most family court calendars, objecting to a non-responsive answer that is otherwise relevant and would come out on a corrected question could ultimately frustrate the judicial officer (which is never a good tactic).

The 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.[52] The rule against the admission of hearsay is one of the most difficult issues a trial lawyer will face. If testimony is excluded under this rule, it means counsel did not have the right witness or evidence available at trial to introduce the fact or testimony they thought was important when asking another witness to make a hearsay statement.

When dealing with the "Hearsay Rule," it is critical to determine whether the proffer of evidence is hearsay: Is the evidence an out of court statement offered to prove the truth of the matter contained within the statement? For example, if the statement is offered only to show that the statement was made or communicated and not for the truth of the content of the statement, then there is no hearsay by definition. This is often referred to as the "Operative Facts Doctrine."

When assessing whether proposed testimony is hearsay, there are five key questions to ask yourself:

1. Does the evidence constitute a "statement"?[53]
2. Was the statement made by a declarant ("person")?[54]
3. Is the statement offered to prove the truth of the content of the statement?[55]
4. Is the statement excluded by the definition of hearsay?[56]
5. Is the statement within an exception to the hearsay rule?

The exceptions to hearsay are numerous and beyond the scope of this article. However, they include admissions and confessions,[57] declarations against interest,[58] dying declarations,[59] spontaneous or contemporaneous statements,[60] "state of mind" testimony,[61] or statements regarding family history.[62] For an exhaustive and thorough discussion of hearsay exceptions, *Jefferson's California Evidence Benchbook* is considered to be one of the (if not the) definitive sources.

Expert Witnesses and Opinion Testimony

"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."[63] A witness's expertise can be established through any otherwise admissible evidence, including their own testimony.

The subject matter of an expert witness's testimony has garnered a lot of attention in the past few years following the decision in *Sanchez*.[64] It is not the purposes of this article to review or comment on the *Sanchez* decision as it applies to an expert witness's reliance on hearsay statements in the formation of their opinions. However, the Evidence Code does provide the underpinnings for the decision reached in *Sanchez*.

Generally, a witness is not allowed to offer opinion testimony unless they are qualified as an expert witness concerning the subject matter of the testimony or unless the opinion is rationally based on the witness's perception or assists in understanding the witness's testimony.[65] Statutory exceptions to this rule exist, such as an owner's right to testify about the value of real property in an action.[66]

When an expert opinion is required, the opinion and testimony must pertain to a "subject that is sufficiently beyond common experience," such that the expert opinion will assist the trier of fact.[67] Further, the opinion must be based on matters "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."[68] The language of Evidence Code section 801 allows an expert witness to consider information such as scientific treaties or a photographic database to identify drugs.[69] In the case of the latter, experts are allowed to rely on tabulations, lists, directories, registers, or other published compilations.[70]

The number of expert witnesses that can be called in a proceeding can be limited by the court, either before or during trial of the action.[71] When combined with Evidence Code sections 352 and 765, section 723 can be a very effective tool in limiting opposing counsel's presentation. This is especially true in these times of limited trial court availability and where a lengthy presentation is being suggested.

The court also has the authority to appoint its own expert witnesses.[72] In family law actions, this most frequently occurs when a mental health professional is appointed to prepare a custody or psychological evaluation in the matter. However, Evidence Code section 730 can be read much more broadly than being limited to custody disputes. A court can appoint an expert to offer opinions regarding the value of real property, a business, or any other issue which would assist the court in deciding the issues before it.

Conclusion

Understanding and using the Evidence Code will help you, not only in your examination of witnesses, but in developing the theme of your case. Understanding which Evidence Code sections are mandatory (must) or permissive (shall)[73] will help you determine what testimonial evidence you should be able to get in versus what evidence you may be able to introduce. In making that evaluation, it is always helpful to consider the legislative comments and history, so you can effectively argue the intent of a particular Evidence Code section.

Part three of this series will be published in Issue 4 and will address application of the Evidence Code to documentary evidence and a discussion of privileges. That will be followed up with a December 13, 2018, webinar hosted by the Family Law Section and featuring the authors, which will cover cross-examination tips and tactics, *voir dire* of expert witnesses, objecting to evidence (how, when and why), offers of proof, and motions to strike evidence.

Endnotes

1 Cal. Civ. Proc. Code § 1878.

2 Elkins v. Superior Court, 41 Cal.4th 1337 (2007).

3 Reifler v. Superior Court, 39 Cal.App.3d 479 (1974).

4 *In Re* Marriage of Swain, 21 Cal.App.5th 830 (2018).

5 Cal. Ct. R. 5.119.

6 Cal. Evid. Code § 775.

7 Cal. Evid. Code § 353(a).

8 Cal. Evid. Code § 700.

9 Cal. Evid. Code § 701(a)(1).

10 Cal. Evid. Code § 701(a)(2).

11 Cal. Evid. Code § 702(a).

12 Cal. Evid. Code § 702, The Law Revision Commission Comments.

13 Cal. Evid. Code § 702(b).

14 Fed. R. Evid. 602, Advisory Committee's Notes.

15 Cal. Evid. Code § 765(b). *See also,* Cal. Fam. Code § 3042(b), which states that "[i]n addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interests of the child."

16 Cal. Evid. Code § 765(b).

17 Cal. Evid Code § 765; *see also,* Cal. Ct. R. 5.250(3)(C) and 5.250(4).

18 Cal. Evid. Code § 767(a).

19 Bradburn v. Peacock, 135 Cal.App.2d 161, 163-164 (1955) (*Bradburn*).

20 Cal. Evid. Code § 710.

21 Cal. Evid. Code § 711.

22 Cal. Fam. Code § 3042, which is applicable when the child is testifying as to their custodial preferences.

23 Cal. Evid. Code § 765.

24 Cal. Evid. Code § 760.

25 Cal. Evid. Code § 761.

26 Cal. Evid. Code § 762.

27 Cal. Evid. Code § 763.

28 Cal. Evid. Code § 772(a).

29 Cal. Evid. Code § 772(b).

30 Cal. Evid. Code § 772(c).

31 Cal. Evid. Code § 760.

32 Cal. R. Prof. Conduct 5-200(B). Effective November 1, 2018, this rule will be replaced by Rule 3.3, which will preclude a lawyer from offering "evidence which the lawyer knows to be false" and requires counsel to take "remedial measures," to the extent permitted under Bus. & Prof. Code § 6068, if the lawyer knows a witness has or intends to engage in criminal conduct (e.g. perjury).

33 People v. Foss, 155 Cal.App.4th 113 (2007).

34 Cal. Evid. Code § 768(a).

35 Cal. Evid. Code § 769(b).

36 Cal. Evid. Code § 769.

37 Cal. Evid. Code § 770.

38 Cal. Evid. Code § 773(b).

39 Cal. Evid. Code § 774.

40 Cal. Evid. Code § 777(a).

41 Cal. Evid. Code § 777(b).

42 Cal. Evid. Code § 778.

43 Cal. Evid. Code § 767(a)(1).

44 Cal. Evid. Code § 764.

45 People v. Williams, 16 Cal.4th 635, 672 (1997).

46 People v. Campbell, 233 CA2d 38, 44 (1965).

47 *See, e.g.*, People v. Augustin, 112 CA4th 444, 449 (2003) [assault victim had cerebral palsy and speech disability]; People v. Jackson, 124 CA2d 787, 789 (1954) [leading questions to statutory rape victim allowed regarding particulars of the alleged sexual acts].

48 People v. Campbell, 233 CA2d 38, 44 (1965).

49 People v. Spain, 154 Cal.App.3d 845, 852-854 (1984); People v. Grey, 23 Cal.App.3d 456, 464 (1972).

50 Cal. Evid. Code § 776(d).

51 Cal. Evid. Code § 776.

52 Cal. Evid. Code § 1200.

53 Cal. Evid. Code § 225.

54 Cal. Evid. Code § 135.

55 Cal. Evid. Code § 1200(a).

56 Cal. Evid. Code § 1200(b).

57 Cal. Evid. Code §§ 1220-1228.

58 Cal. Evid. Code § 1230.

59 Cal. Evid. Code § 1242.

60 Cal. Evid. Code §§ 1240 and 1241.

61 Cal. Evid. Code § 1250.

62 Cal. Evid. Code § 1310.

63 Cal. Evid. Code § 720.

64 People v. Sanchez, 63 Cal. 4th 665 (2016).

65 Cal. Evid. Code § 800.

66 Cal. Evid. Code § 813(a)(2).

67 Cal. Evid. Code § 801(a).

68 Cal. Evid. Code § 801(b).

69 People v. Mooring, 15 Cal. App. 5th 928 (2017); People v. Espinoza, 23 Cal. App. 5th 317 (2018); *cf.* People v. Stamps, 3 Cal. App. 5th 988 (2016).

70 Cal. Evid. Code § 1340.

71 Cal. Evid. Code § 723.

72 Cal. Evid. Code § 730.

73 Cal. Evid. Code § 11.