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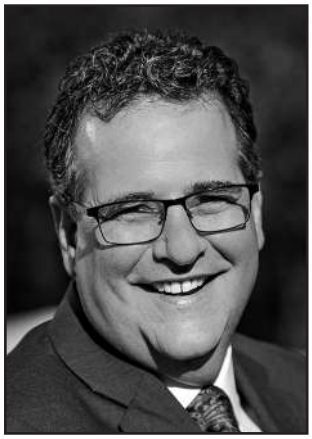
An Evidence Code Primer for Family Law Attorneys Part I: An Overview and General Approach

Hon. William J. Howatt, Jr. (Retired) and 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.

Stephen A. Kolodny, an extremely well-respected family law attorney, recommends that attorneys read the Evidence Code annually and before every trial. At first blush, that comment might appear to be tongue-in-cheek. It is not. It highlights the importance of knowing the Evidence Code as a trial skill. As Stephen has explained, repeated sustained objections often cause insecure lawyers to abandon even good testimony, and cases are sometimes won that way. We have all noticed with alarm how the recent case of *People v. Sanchez,* 63 Cal. 4th 665 (2016) has shaken family law litigation to its core.

Sometimes, it seems as if the Evidence Code does not exist in family court, mysteriously disappearing when we enter the courtroom. Whether because of the lack of family law-specific courses concerning the Evidence Code or the lack of a treatise specifically devoted to the Evidence Code in family law, both the bench and bar regularly encounter instances in which the Evidence Code is ignored or misapplied in family law matters. The "Table of Statutes" for the invaluable *California Practice Guide: Family Law* (The Rutter Group 2018) contains eighty pages of citations. Only 1½ of those pages pertain to the Evidence Code. For whatever reason, the Evidence Code is at times an afterthought in the practice of family law.

To start you on your path to understanding and mastering the California Evidence Code, we offer you this three-part series discussing Evidence Code issues and strategies for family court. Part I will address an overall approach and overview of the Evidence Code in family law. While it contains some legal citations, this Part I is intended to provide an overview and general approach to evaluating and presenting evidence. More substantive discussions will follow in Part II, which will address specific issues concerning testimony including hearsay, lay testimony and expert testimony. Part III will cover documentary evidence, exhibits and other non-testimonial evidentiary issues. On December 13, 2018, the Family Law Section will be hosting a webinar presented by the authors to address some of the evidentiary issues not covered by this series.

What is 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.[1]

The Law Revision Comments from 1965 when section 140 was enacted make clear that evidence was to be broadly defined and could include sights (such as a witness's appearance), sounds (such as an audio recording) and "any other thing that may be presented as a basis of proof."

Why is the Evidence Code Important?

Evidence is a basic tool of the legal profession as much as the hammer is to the carpenter. A good working knowledge of the Evidence Code as well as the nuances and interrelationship of its sections are hallmarks of a competent attorney. This knowledge is not just necessary for trial; it is critical to providing your client with a complete and accurate assessment of their case, as well as for developing tactical strategies.

Your worst nightmare as a family law litigator is an opponent who not only knows the Evidence Code but also knows how to use it. The ability to cite code sections is just one part of mastering evidence. A more nuanced issue is being familiar with your judicial officer and knowing when to make an objection. Just because you are technically correct, objecting to opposing counsel asking their client, "did you buy the Mustang in 2018?" as leading will not curry favor with most judicial officers and merely wastes time.

Evidence is by the Book [Until a Reviewing Court Says Otherwise]

Quite literally, evidence is supposed to be treated "by the book." California Evidence Code § 2 starts by stating that common law has no application to the Evidence Code. It provides that the Evidence Code "establishes the law of this state respecting the subject to which it relates, and its provisions are to be liberally construed with a view to effecting its objects and promoting justice." However, the California Supreme Court has rejected a literal application of section 2:

> [T]he purpose of all rules of evidence is to aid in arriving at the truth, [and] if it shall appear that any rule tends rather to hinder than to facilitate this result . . . it should be abrogated without hesitation.[2]

The Structure and Interpretation of the California Evidence Code

The first 54 sections of the Evidence Code, ending in section 356, are essentially the dictionary definitions to be applied throughout the code. When applying a code section, carefully consider the Law Revision Commission Comments to each section. These short descriptions often explain what was intended or continued from previous sections of other codes and can also assist you in understanding and applying a particular section.

> "Reports of commission which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes. . . . This is particularly true where the statute proposed by the commission is adopted by the Legislature without any change whatsoever and where the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the legislators' votes were based in large measure upon the explanation of the commission proposing the bill."[3]

The Truth, the Whole Truth and Nothing But the Truth

The primary purpose of admitting evidence is to arrive at the truth as to any issue in controversy in a case. An attorney's duty to arrive at the truth is codified in California Business and Professions Code § 6068(d), which prohibits an attorney from misleading a judicial officer by a false statement of fact or law. As Mark Twain said: "Always do the right thing. It will gratify some people and astonish others."[4]

Direct vs. Circumstantial Evidence

California Evidence Code § 410 explains that direct evidence "proves a fact without an inference or presumption." Based on that characteristic, direct evidence conclusively proves that fact is true. Unless a statutory exception exists, "the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."[5]

Curiously, the Evidence Code does not define or explain what constitutes "circumstantial" evidence. *People v. Riveras,* 109 Cal. App. 4th 1241 (2003), stated at 1244 that "[c]ircumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred." California Evidence Code § 600 distinguishes an inference (admissible) from a presumption (inadmissible). "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."[6] However, "(a) presumption is not evidence."[7]

A Step-By-Step Approach to Evaluating Evidence

Understanding and evaluating evidence can be undertaken in a seven-step process:

1. Characterization;
2. Determining relevance;
3. Authentication;
4. Addressing constitutional or statutory exclusions;
5. Addressing preliminary or foundational facts;
6. The burden of proof and burden of producing evidence;
7. Objecting and moving to strike proffered evidence.

This article will address Steps 1 through 6. Step 7 will be addressed in the December webinar.

Step 1: Characterize the Evidence

Evidence can be characterized in three ways:

1. *Testimonial*, provided through witnesses based on their present recollection of a past event or circumstance.
2. *Documentary*, usually a writing as defined by California Evidence Code section 250. The definition of "document" is quite broad, and includes writings, photographs and videos, "regardless of the manner in which the record has been stored," e.g. electronically stored information [ESI].
3. *Real or tangible*, i.e a physical object. While not often used in family law proceedings, tangible evidence can be introduced. For example, in a custody case in which one of the parents habitually tormented the parties' young children with a Halloween mask (á la Freddy Kruger or Jigsaw), you may want to introduce the actual mask to give your judicial officer a perspective on what the children experienced.

Step 2: Relevance

Court time is a precious commodity and should not be wasted. Explain to a client why a certain fact will not be relevant to a judicial officer before a trial or hearing. Otherwise, you will be treated to "But you didn't tell the judge ..." in the event of an undesired outcome.

The doctrine of relevancy is the primary and the first consideration in the presentation and admission of any evidence in any hearing. Only relevant evidence is admissible.[8] Absent a statutory prohibition, all relevant evidence is admissible.[9] "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."[10] This requires counsel to answer for themselves (and their client):

1. Is the proffered evidence being offered by a credible witness or source?
2. Is the evidence material, i.e. does it prove or disprove a disputed fact? This factor is frequently framed as whether the evidence has "probative value"—does it have a tendency in reason to prove or disprove a disputed fact?
3. Is the evidence of consequence? To be of consequence is not the same as saying the evidence speaks to an ultimate fact—the evidence could instead address intermediate or evidentiary issue, so long as it is of consequence in the determination of the action.

Even if evidence satisfies the initial inquiries required under California Evidence Code § 210, you are not guaranteed its admission. California Evidence Code § 352 is frequently invoked in family court to prevent the admission of evidence when its "probative value is substantially outweighed by the probability its admission...," it will unduly waste time, "create substantial danger of undue prejudice," or confuse the issues.[11] Thus, while your client might be really upset about a particularly salacious detail that led to the demise of the marriage, section 352 will be frequently invoked to prevent admission of that detail.

Another point frequently overlooked by counsel is that if a fact is undisputed, *it is irrelevant*. This may seem intuitively inaccurate, but California Evidence Code § 210 specifically states that to be relevant, evidence must prove or disprove a "disputed" fact. What do you call an undisputed agreement that Husband's 401k account is his separate property? A stipulation, and one that should be read into the record at the commencement of trial. That said, while a technically correct objection, most trial jurists may not appreciate counsel objecting to a proposed evidentiary or property stipulation during the middle of trial. This relevancy objection under Cal. Evid. Code, §210 should therefore be used sparingly, if at all. Instead, it is mentioned as a practice pointer to encourage the recitation of stipulations before trial.

Step 3: Authentication

Is the evidence genuine? Whether it is written or physical, evidence must be authenticated. However, the proponent need only make a *prima facie* showing that the evidence is what it purports to be. This is clearly a low threshold. "Indeed, the inability to get evidence admitted because of a failure to authenticate it almost always is a self-inflicted injury which can be avoided by thoughtful advance preparation."[12] Authentication is the most often overlooked aspect of the introduction of evidence and the most overlooked objection to be interposed to the admission of evidence at a trial or hearing.

"Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law."[13] California Evidence Code § 1401 requires that any writing be authenticated before it can be received into evidence or before any secondary evidence regarding its content is received. Personal knowledge is the key to satisfying the *prima facie* showing required to authenticate a document. Typically, this will require the testimony of the person who created the document or maintained it in the ordinary course of business.

Personal knowledge is a present recollection of a past perception. California Evidence Code § 702 requires (subject to section 801) that a witness have personal knowledge of the matter on which he or she is testifying. "Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." That objection can be addressed either by the proponent making an offer of proof as to the witness's personal knowledge or the opponent can conduct a voir dire[14] of the witness. The witness's personal knowledge "may be shown by any otherwise admissible evidence, including his own testimony."[15]

Step 4: Address Any Constitutional or Statutory Exclusions

Statutory exclusions include the exclusion of hearsay[16] evidence[17] or other exclusions designed to prohibit the introduction of illegally-obtained evidence. While most of those statutory exceptions are limited to criminal proceedings, California Family Code § 2022 is specifically applicable to family law proceedings. That statute provides that evidence obtained by eavesdropping in violation of the Penal Code is inadmissible, and in fact can cause the family court to make a criminal referral. The two primary constitutional issues that arise in the context of family law matters are the Fifth Amendment right against self-incrimination[18] and the right of privacy[19].

Step 5: Preliminary or Foundational Fact

A preliminary fact, also referred to as a foundational fact, is "a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence."[20] The "admissibility or inadmissibility of evidence" can refer to a witness's qualifications to testify or to a privilege.[21]

Counsel may wish to introduce, or "proffer," evidence, that is reliant upon the existence of a preliminary fact to be introduced.[22] In those circumstances, the proffered evidence is inadmissible unless the "court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact..."[23] The preliminary fact may explain the relevance of the proffered evidence, the personal knowledge of a witness concerning the subject matter of his testimony, the authenticity of a writing or whether a person made the statement or so conducted him- or herself as asserted by the proffered evidence.[24]

Proof of the preliminary fact and the proffered evidence may come from different witnesses. In those circumstances, the Court may conditionally admit the proffered evidence "subject to evidence of the preliminary fact being supplied later in the course of the trial."[25] if a preliminary fact is not addressed by section 403, the court is required to indicate which party has the burden of producing evidence and the burden of proof on the issue.[26]

Step 6: The Burden of Proof and the Burden of Producing Evidence

Under California Evidence Code § 110, the "burden of producing evidence" refers to a party's obligation to introduce evidence sufficient to avoid a ruling against him on the issue. This is distinct from the burden of *proof*, which is "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact..."[27] In family court, we almost always utilize the preponderance of the evidence standard, which is the default standard.[28]

Conclusion

To fulfill your professional duty to your client, you must know and understand the complexity of the Evidence Code and be prepared to apply its provisions in advising your client on the facts presented by the client, plan and execute discovery of relevant facts and information to present your client's case and know and apply the

appropriate Evidence Code provisions to be successful. In the next installment of this series, we will address that duty as it pertains to testimony.

Endnotes

1 Cal. Evid. Code § 140.

2 *People v. Spriggs*, 60 Cal. 2d 868, 874 (1964).

3 *Jevne vs. Super. Court,* 35 Cal. 4th 935, 947 (2005); *Sargon Enterprises, Inc.*, 55 Cal. 4th 747, 770 (2012).

4 Mark Twain, Note to the Young People's Society, Greenpoint Presbyterian Church (1901).

5 Cal. Evid. Code § 411.

6 Cal. Evid. Code § 600(b).

7 Cal. Evid. Code § 600(a).

8 Cal. Evid. Code § 350.

9 Cal. Evid. Code § 351.

10 Cal. Evid. Code § 210.

11 Another factor, misleading the jury, is not applicable in family law matters.

12 *Lorraine v. Markel American Insurance Company*, 241 F.R.D. 534, 542 (2007).

13 Cal. Evid. Code § 1400.

14 From the French "to speak the truth".

15 Cal. Evid. Code § 702(b).

16 Cal. Evid. Code § 1200.

17 Hearsay will be discussed at length in Part II of this series.

18 Adopted by Cal. Const. art. I, §15.

19 Cal. Const. art. I, §1.

20 Cal. Evid. Code § 400.

21 *See* Cal. Evid. Code § 701 "Disqualification of Witnesses".

22 Cal. Evid. Code § § 401.

23 Cal. Evid. Code § 403(a).

24 Cal. Evid. Code § 403(a)(1)-(4).

25 Cal. Evid. Code § 403(b).

26 Cal. Evid. Code § §405.

27 Cal. Evid. Code § 115.

28 Cal. Evid. Code § 115.