Northern California Chapter AAML

2012 TRIAL PRACTICUM

EVIDENCE

Presenter:
Ronald S. Granberg, AAML

Life is fair to doctors

Surgeon's audience:

Anesthesiologist

Operating nurse

Scrub nurse

(Assisting surgeon)

ALL ON "THE TEAM"

Best of all:

Patient is UNCONSCIOUS

Life is unfair to lawyers

Trial lawyer's audience:

Judge

Opposing counsel

Lawyers in waiting

Public

NONE ON "THE TEAM"

Worst of all:

Client is CONSCIOUS

If You Fail To Qualify Your Evidence, What Do You Do?

- **Try a different foundational litany?**
- **Roll your eyes helplessly at the judge, hoping for a tip?**
- **Ask opposing counsel for a stipulation?**
- **Continue, pretending that the EVIDENCE wasn't that important, anyhow?**
- **Continue, pretending that the CASE isn't that important, anyhow?**

Birth of the Evidence Code:

- **Enacted in 1965**
- **Effective on 1/1/67**
- **Derived largely from the Code of Civil Procedure**
- **The Evidence Code made dozens of substantial legal changes**
- **Law Revision Commission Comments help practitioners understand the changes.**

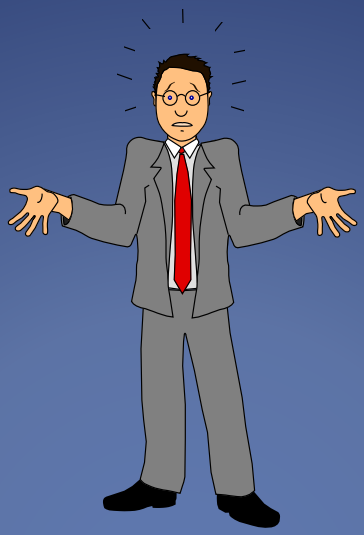
Law Revision Commission

- **Created in 1953 to replace the Code Commission**
- **8 gubernatorial appointees**
  1 State Senator
  1 State Assembly Member
- **Duty: "Recommend . . . changes in the law . . . ." (Gov. Code §8289(d))**
- **May hire a "specialist in the field" to perform a study**

"Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes . . . ."

Van Arsdale v. Hollinger **(1968) 68 Cal.2d 245, 249**

"This is particularly true . . . 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 in proposing the bill."
Catch v. Phillips **(1999) 73 Cal.App.4th 648, 654-655**



The Four Categories of Evidentiary Objections

May you object to:

1. **A WITNESS?**

   If so, on what grounds?

2. **AN ANSWER?**

   If so, on what grounds?

3. **THE FORM OF A QUESTION?**

   If so, on what grounds?

4. **ADMISSION OF EVIDENCE?**

   If so, on what grounds?

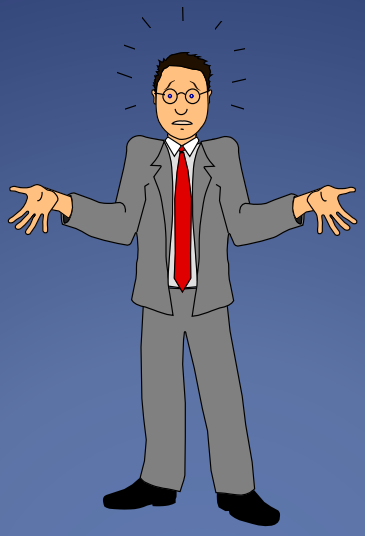
The Four Categories of Evidentiary Objections

4 objections to a WITNESS

1 objection to an ANSWER

10 objections to the FORM OF THE QUESTION

12 objections to the ADMISSION OF EVIDENCE (one of the dozen objections – hearsay – has 15 major exceptions)



The Four Objections to a Witness

Section 700:

“Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.”

A Witness Is Disqualified If:

#1 PERCIPIENT WITNESS lacks sufficient personal knowledge. (Section 702.)

#2 EXPERT WITNESS lacks sufficient special knowledge, skill, experience, training and/or education. (Section 720.)

A Witness Is Disqualified If:

#3 The witness is incapable of understanding the DUTY TO TELL THE TRUTH. (Section 701(a)(2).)

#4 The witness is incapable of EXPRESSING HIM/HERSELF concerning the matter so as to be understood. (Section 701(a)(1).)

Pre-Code law had these two **witness capacity** requirements:

Pre-Code law automatically disqualified these witnesses from testifying:

- **A child of tender years, and**
- **A mentally-impaired witness**

Why didn't Evidence Code section 701 adopt those requirements?

Because **Case Law Had Eroded** The Two Requirements

In *Bradburn v. Peacock* (1955) 135 Cal.App.2d 161, 164-166 the court had permitted a five-year-old boy to testify against a man who the boy said had run over his sister with a truck two years earlier, when the boy was three years old.

In *People v. McCaughan* (1957) 49 Cal.2d 409 the court had permitted a committed mental patient to testify.

What about capacities to PERCEIVE and RECOLLECT?

Section 701 FAILED TO ADOPT TWO other pre-Code WITNESS REQUIREMENTS:

A witness must have a demonstrated capacity to PERCEIVE the subject matter of her/his testimony

A witness must have a demonstrated capacity to RECOLLECT the subject matter of her/his testimony

Law Revision Commission Comment to Section 701:

"The missing qualifications – the capacity to PERCEIVE and to RECOLLECT – are determined in a different manner. Because a witness . . . must have personal knowledge of the facts to which he testifies (Section 702), he must, of course, have the capacity to perceive and recollect those facts."

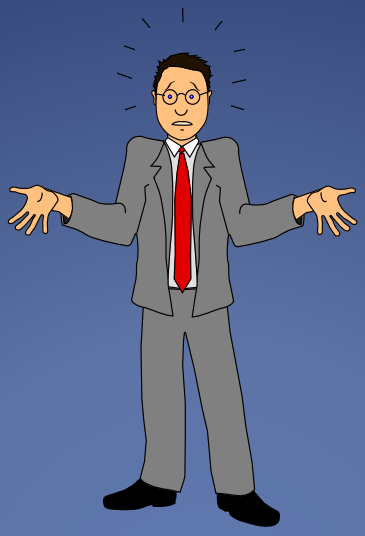
The Four Witness Qualifications:

#1 PERCIPIENT witness must have personal knowledge (Section 702)

#2 EXPERT witness must have expertise (Section 720)

#3 Understand the duty to tell the truth (Section 701(a)(2))

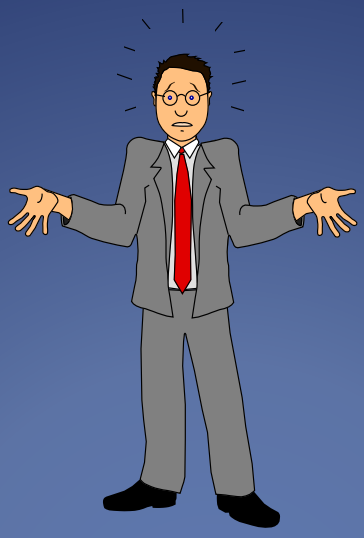
#4 Have ability to express herself/himself (Section 701(a)(1))



The Sole Ground for Objecting to an Answer

“Non-responsive”

“A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.” (Section 766.)



The Ten Objections to the Form of the Question

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1. **Leading (direct exam only)**
2. **Calls for a narrative response**
3. **Too general**
4. **Ambiguous**
5. **Compound**
6. **Calls for speculation**
7. **Argumentative**
8. **Asked and answered**
9. **Misquotes a witness**
10. **Assumes facts not in evidence**

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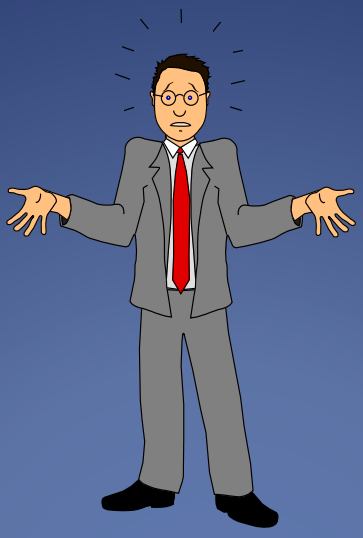

The Twelve Objections to the Admission of Evidence

The Twelve Objections to Evidence:

1. **Insufficient foundation**
2. **Hearsay**
3. **Privilege**
4. **Irrelevant**
5. **Improper impeachment**
6. **Improper rehabilitation**
7. **Inadmissible opinion**
8. **Inadmissible parol evidence**
9. **Unduly prejudicial (Sect. 352)**
10. **Beyond scope of preceding examination**
11. **Illegally-obtained evidence**
12. **Other objections (e.g., settlement offer, privacy right violation)**

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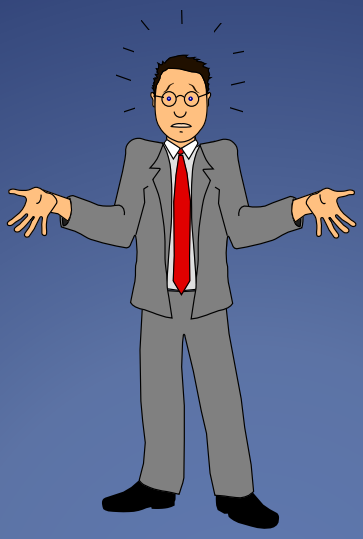


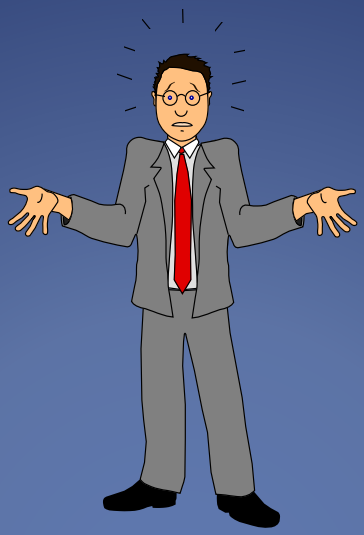
The Fifteen Major Exceptions to the Hearsay Rule

THE 15 MAJOR HEARSAY EXCEPTIONS

1220	statement made by a party ("party admission")	
1221	statement adopted by a party ("adopted admission")	
1222	statement authorized by a party ("authorized admission")	
1235, 770	**Prior Inconsistent Statement**	**(ADVERSARY CONTROLLER)**
771*	**Refreshed Recollection**	**(ALLY CONTROLLER)**
1237	**Past Recollection Recorded**	**(ALLY CONTROLLER)**
1240	Spontaneous statement	
1241	Contemporaneous statement	(*remember acronym*: "**SCARED**")
1242	**D**ying declaration	
1250, 2	then-existing mental or physical state	
1251, 2	previously-existing mental or physical state	(Unavailable)**
1230	declaration against interest	(Unavailable)**
1290, 1, 2	former testimony	(Unavailable)**
1271	business record	
1280	public record	

* Technically not a hearsay exception

** Declarant must be "unavailable" as defined by Evidence Code section 240



Introducing the Play

Our Characters:

Judge Stern

Wife's lawyer

Husband's lawyer

Rocky Robin

Lori Loon

Leonard Loon

Justice Sterner

Major play topics: the "Three Controllers"

- **Refreshed recollection (Section 771)**
- **Past recollection recorded (Section 1237)**
- **Impeaching with a prior inconsistent statement (Sections 1235 and 770)**

Two for the friendlies, one for the uglies

TWO FOR A FRIENDLY WITNESS ("Deer in the headlights")

- **Refreshed recollection**
- **Past recollection recorded**

ONE FOR A HOSTILE WITNESS ("Wolf on the prowl")

- **Impeachment with a prior inconsistent statement**

Other skit topics

Establishment of preliminary facts (Sections 400 and 405)

Technique for avoiding "blurted" hearsay testimony without making premature hearsay objections

Other skit topics

Witness credibility evidence (Sections 210 and 780)

Necessity of making an offer of proof after an adverse evidentiary ruling (Section 354; Cal. Const. Art VI, Sect. 13)

Other skit topics

Privilege not to be compelled to testify against spouse (Section 970)

- **Witness is sole holder**
- **Privilege exists only during marriage**

Privilege against disclosure of confidential marital communication (Section 980)

- **Spouses are joint holders**
- **Privilege continues after divorce or death**

Play Facts:

Eleven months ago, Harold filed a dissolution petition against Wilma.

Their trial is being heard today.

The sole issue: physical custody of their six-year-old son, Kenny.

The Three Witnesses:

Rocky Robin (for Harold):

- bird club member

Lori Loon (for Wilma):

- bird club member
- seeks to impeach Rocky

Leonard Loon (for Harold):

- Lori Loon's husband
- seeks to impeach Lori

Rocky Robin (Harold's witness):

Claims he saw Wilma be a BAD MOTHER to Kenny during a bird club outing.

Lori Loon (Wilma's witness):

Lori seeks to impeach Rocky's BAD MOTHER testimony with Rocky's prior inconsistent statement to her:

Lori claims that immediately after the bird club outing Rocky told her that he had seen Wilma be a GOOD MOTHER to Kenny.

Lori also claims that Harold admitted to her he wanted custody of Kenny only so he could receive child support.

Leonard Loon (Harold's witness):

Seeks to undermine Lori's anti-Harold testimony by offering evidence that Lori is biased against Harold.

Rocky Evidentiary Issues:

Rocky Robin's testimony is used to illustrate:

1. **Establishing preliminary facts, and**
2. **Past recollection recorded.**

Lori Evidentiary Issues:

Lori Loon's testimony is used to illustrate:

1. **Refreshing recollection,**
2. **Avoiding "blurted" hearsay testimony, and**
3. **Impeaching with a prior inconsistent statement.**

Leonard Evidentiary Issues:

Leonard Loon's testimony is used to illustrate:

1. **Relevance of witness bias,**
2. **Privilege not to testify against spouse, and**
3. **Privilege against disclosure of confidential marital communication.**

Appellate Evidentiary Issue:

The appellate argument is used to illustrate:

1. **The necessity of making an offer of proof when suffering an adverse evidentiary ruling.**

Good Judgment comes from Experience . . .

. . . and Experience comes from Bad Judgment

Judge Stern is TOUGH

Section 400:

"... 'preliminary fact' means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence."

Section 405:

"When the existence of a preliminary fact is disputed, the court shall . . determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises."

Section 1237(a):

"Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which [1] THE WITNESS HAS INSUFFICIENT PRESENT RECOLLECTION TO ENABLE HIM TO TESTIFY FULLY AND ACCURATELY . . .

Section 1237(a):

. . . and the statement is contained in a writing which: Was made at a time when [2] the fact recorded in the writing actually occurred or was FRESH IN THE WITNESS' MEMORY; [3] WAS MADE (i) BY THE WITNESS HIMSELF or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

Section 1237(a):

Is offered after the witness testifies that [4] the statement he made was A TRUE STATEMENT of such fact; and
Is offered after [5] the WRITING IS AUTHENTICATED as an accurate record of the statement."

Section 1237(b):

"The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party."

Section 771(a):

". . . if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing . . ."

Section 771(b):

"If the writing is produced at the hearing, THE ADVERSE PARTY may, if he chooses . . . introduce in evidence such portion of it as may be pertinent to the testimony of the witness."

Section 1235:

"Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

Section 770:

". . . a statement made by a witness that is inconsistent with any part of his testimony at the hearing SHALL BE EXCLUDED UNLESS:
(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
(b) The WITNESS HAS NOT BEEN EXCUSED from giving further testimony in the action."

Section 210:

“ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness . . . .”

Section 780:

". . . THE COURT . . . MAY CONSIDER IN DETERMINING THE CREDIBILITY OF A WITNESS any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including . . . [¶] (f) The EXISTENCE or nonexistence OF A BIAS, interest, or other motive."

Section 970:

". . . a married person has a privilege not to testify against his spouse in any proceeding."

Section 980:

". . . a spouse . . . 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."

California Constitution Article VI, Section 13:

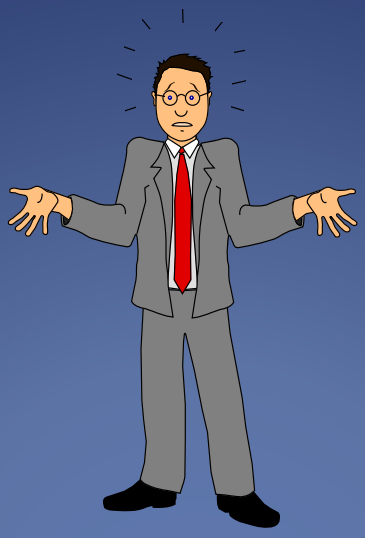
"NO JUDGMENT SHALL BE SET ASIDE . . . on the ground of . . . the improper admission or rejection of evidence . . . UNLESS, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted MISCARRIAGE OF JUSTICE."

Section 354:

"A . . . finding shall not be set aside, NOR SHALL THE JUDGMENT . . . BE REVERSED, BY REASON OF THE ERRONEOUS EXCLUSION OF EVIDENCE UNLESS the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a MISCARRIAGE OF JUSTICE . . . ."

Section 354:

“ . . .AND it appears of record that:
(a) The SUBSTANCE, purpose, and relevance OF THE EXCLUDED EVIDENCE WAS MADE KNOWN to the court BY . . . AN OFFER OF PROOF . . . ; [OR]
(b) The rulings of the court made compliance with subdivision (a) FUTILE . . . .”



Section 1235 Prior Inconsistent Statements

Two Impeachment Issues:

Q: May a party impeach her/his own witness?

A: YES.

Q: Is the prior inconsistent statement admitted: a) merely to discredit the witness, or b) both to discredit the witness and as evidence of the truth of the matter stated?

A: For BOTH purposes.

Pre-Code Impeachment:

A party was generally PROHIBITED FROM IMPEACHING HIS OWN WITNESS with a prior inconsistent statement – not even if the party had been surprised by the witness' trial testimony. (*People v. Brown* (1927) 81 Cal. App. 226.)

Section 1235 Impeachment:

A party MAY IMPEACH HIS OWN WITNESS with a prior inconsistent statement, whether or not the party was surprised by the witness' trial testimony. (Law Revision Commission Comment to Section 1235.)

Pre-Code Impeachment:

A prior inconsistent statement was admitted to discredit the witness' trial testimony, but was NOT admissible as evidence for the TRUTH OF THE MATTER STATED.
(*Albert v. McKay & Co.* (1917) 174 Cal. 451, 456.)

Section 1235 Impeachment:

A prior inconsistent statement is admissible to prove the TRUTH OF THE MATTER STATED, as well as to discredit the witness' trial testimony.
(Law Revision Commission Comment to Section 1235.)

Review our facts . . .

Rocky Robin was our IMPEACHEE / "LIAR" (because his testimony was sought to be impeached)

Lori Loon was our IMPEACHER (because she sought to impeach Rocky's testimony)

LIAR

Rocky testified that he saw:

Wilma slap Kenny hard across his face, saying,

“Don’t you dare grow up to be a crybaby like your wimpy father!”

IMPEACHER Lori testified that LIAR Rocky told her he had seen:

Wilma lovingly caress Kenny's cheek saying,

"You're growing up to be a brave man – just like your father!"

Section 1235:

"Evidence of a statement made by [Liar] is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing AND IS OFFERED IN COMPLIANCE WITH SECTION 770."

Section 770:

. . . a statement made by [Liar] that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) [Liar] was so examined while testifying as to give him AN OPPORTUNITY TO EXPLAIN OR TO DENY the statement; OR

(b) [Liar] HAS NOT BEEN EXCUSED from giving further testimony in the action.

because
Section 770(a)
compliance is
IMPRACTICAL . . .

. . . Section 770(b)
compliance is
CRUCIAL

In order for Liar to be ". . . so examined while testifying as to give him an OPPORTUNITY TO EXPLAIN OR TO DENY the statement . . ."

. . . Liar would have to testify AFTER Impeacher has testified.

BUT Impeacher's testimony about what Liar told her would NOT be admissible BEFORE Liar testified, because it WOULDN'T BE A PRIOR INCONSISTENT STATEMENT!

MORALS of the Story:

DON'T
plan to satisfy 770(a)

DO
plan to satisfy 770(b)

DON'T
permit Liar to be excused

Section 771 Refreshed Recollection (Bizarre Statute)

No express authority . . .

Section 771:

". . . if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing . . ."

Pre-Code Refreshment:

Under former Code of Civil Procedure section 2047, the ONLY ITEM that could be used to refresh a witness' recollection was a WRITING that would qualify as PAST RECOLLECTION RECORDED.

Section 771 Refreshment:

" . . . there is NO RESTRICTION in the Evidence Code ON THE MEANS THAT MAY BE USED TO REFRESH recollection. Thus, the limitations on the types of writings that may be used as recorded memory under Section 1237 DO NOT LIMIT the types of writings that may be used to refresh recollection under Section 771." (Law Revision Commission Comment to Evidence Code section 771.)

Pre-Code Refreshment:

Former Code of Civil Procedure section 2047 gave opposing counsel the right to inspect a writing that the witness had reviewed DURING TRIAL. (*Smith v. Smith* (1955) 135 Cal.App.2d 100.)

This rule presented no practical difficulties: the writing was present in court and available to be produced.

Pre-Code Refreshment:

But in a CRIMINAL CASE opposing counsel was given the right to inspect a writing the witness reviewed BEFORE TRIAL. (*People v. Estrada* (1960) 54 Cal.2d 713.)

This rule could present practical difficulties: the writing wasn't necessarily present in court, and might be difficult to produce.

Section 771 Refreshment:

In all cases:

- **CRIMINAL or**
- **CIVIL**

Opposing counsel has the right to inspect anything the witness reviewed:

- **DURING or**
- **BEFORE TRIAL**

Two Types of Refreshment:

Let's compare two ways in which Section 771 may be used at trial:

BF Refreshment

"BF" = "Bona Fide"

BS Refreshment

"BS" = "Bizarre Statute"

BF vs. BS Refreshment:

***BF Refreshment*:**

Review of the report brings back the witness' memory, and the witness TESTIFIES FROM HER/HIS MEMORY.

***BS Refreshment*:**

Review of the report doesn't bring back the witness' memory, and the witness TESTIFIES FROM HER/HIS REPORT.

Indicators of BF or BS:

BF Refreshment

Recalled item was simple

Recalled item was memorable

Refresher is evocative

BS Refreshment

Recalled item was detailed

Recalled item was routine

Refresher is humdrum

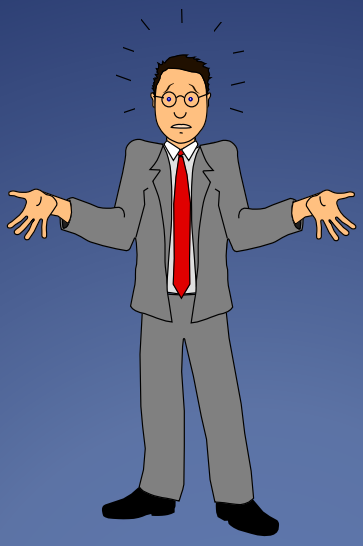
Examples of BF or BS :

***BF Refreshment*:**

"Did looking at your report refresh your recollection about who was present during the domestic violence?"

***BS Refreshment*:**

"Did looking at your report refresh your recollection regarding the vehicle identification number?"



When You Don't Know Whether Proffered Testimony is Based on Hearsay

Section 320:

“Except as otherwise provided by law, THE COURT IN ITS DISCRETION SHALL REGULATE THE ORDER OF PROOF.”

Section 403(a):

"The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact * * * when * * * (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony. * * *"

Section 403(b):

"Subject to Section 702, THE COURT MAY ADMIT CONDITIONALLY THE PROFFERED EVIDENCE under this section, SUBJECT TO EVIDENCE OF THE PRELIMINARY FACT BEING SUPPLIED LATER in the course of the trial."

In summary . . .

The court controls the order of proof.

The court may admit evidence on the condition that the proffering attorney lay its foundation later.

RESULT: if you object on "insufficient foundation" grounds, the court may tentatively overrule your objection, reserving its final ruling for later.

Issue:

With respect to the court's power to control the order of proof, does California law treat the . . .

PRELIMINARY FACT OF A PERCIPIENT WITNESS' PERSONAL KNOWLEDGE

. . . the same way it treats OTHER PRELIMINARY FACTS?

Opposing Counsel's question:

"Mr. Witness, did Harold discuss the airplane with Wilma before purchasing it?"

Your objection:

"I object on the ground that the question calls for a **HEARSAY** response."

Judge's Ruling:

"Overruled."

Opposing Counsel's question:

"Mr. Witness, did Harold discuss the airplane with Wilma before purchasing it?"

Your objection:

"I object on the ground of insufficient foundation. The **PERSONAL KNOWLEDGE** of the witness regarding the subject matter of his testimony has not been proven."

JUDGE'S RULING:

"Your objection is taken under submission.

I admit the answer on the condition that Opposing Counsel prove personal knowledge at a later time.

The witness may answer."

ISSUE:

Does the judge have the authority to rule the way she did?

ANSWER:

NO! The Code gives personal knowledge special treatment.

Section 702(a):

". . . the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown BEFORE the witness may testify concerning the matter."

Section 320 (re-read):

"EXCEPT AS OTHERWISE PROVIDED BY LAW, the court in its discretion shall regulate the order of proof."

Section 403(b) (re-read):

"SUBJECT TO SECTION 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial."

Law Revision Commission Comment to Section 403:

"If a timely objection is made that a witness lacks personal knowledge, the court may NOT receive his testimony subject to the condition that evidence of personal knowledge be supplied later in the trial. SECTION 702 THUS LIMITS THE ORDINARY POWER OF THE COURT WITH RESPECT TO THE ORDER OF PROOF."

JUDGE'S RULING:

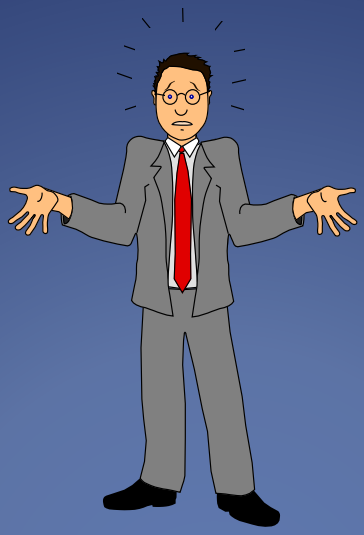
"Objection taken under submission.

I admit the answer on the condition that Opposing Counsel prove personal knowledge at a later time.

The witness may answer."

YOUR RESPONSE:

"I respectfully object. Evidence Code section 702(a) denies the court the power to hear the answer before Opposing Counsel has proven Mr. Witness' personal knowledge."



The Ten Objections to the Form of the Question

you veterans

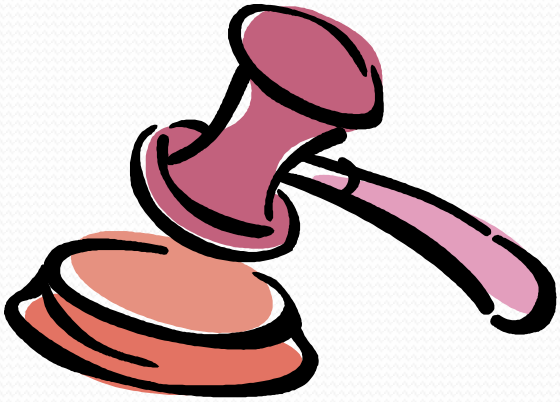
and

you

not-so-veterans

Section 765(a):

"The court shall exercise reasonable control over THE MODE OF INTERROGATION of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment."



“Leading”
(direct exam only)

“Leading Question” Defined:

“A ‘leading question’ is a question that suggests to the witness the answer that the examining party desires.” (Section 764.)

Section 767(a):

"Except under special circumstances where the interests of justice otherwise require:

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

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

Examples:

***Obvious*:**
"After you entered the room you saw Wilma slap Kenny, didn't you?"
"Objection: Leading."

***Less obvious*:**
"After you entered the room did you see Wilma slap Kenny?"
"Objection: Leading."

Why A Leading Question is Bad:

***Bad for the non-examining party*:**
The examining attorney testifies, "putting words in the witness' mouth."

***Bad for the examining party*:**
The witness' testimony is unpersuasive.

Cure:

Give the witness MORE ROOM:

"Did anything unusual happen after you entered the room?"

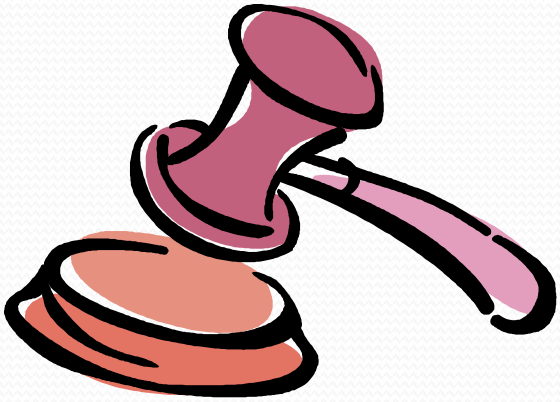
"What, if anything, did you observe after entering the room?"

"What happened next?"

“Less Leading” Questions:

A question is less likely to be leading if it gives the witness an EQUAL CHOICE between two alternatives. (*Estate of Melvin* (1927) 85 CA 691, 696.)

A question is less likely to be leading if the witness is asked to state "WHETHER OR NOT" a recited fact is true. (*People v Calloway* (1954) 127 CA2d 504, 508.)



“Calls for a Narrative Response”

***Obvious*:**

"Explain the events of March 15th."

"Objection: the question calls for a narrative response."

***Less Obvious*:**

"Tell the court how the board of directors handled the agenda."

"Objection: the question calls for a narrative response."

Why a Question Calling for a Narrative is Bad

***Bad for the court*:**
The witness can ramble, providing irrelevant and inadmissible testimony. The judge loses control over the testimony.

***Bad for the non-examining party*:**
It is impossible to prevent inadmissible testimony through objection, because everything is "responsive."

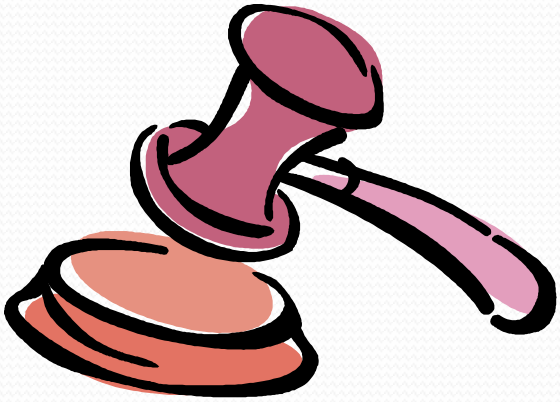
Cure:

Give the witness LESS ROOM:

"What happened after the board meeting was called to order?"

"Then what was the second item on the agenda?"

"What happened next?"



“Too General”

Too General Questions:

“Tell the court about Yosemite National Park.”

“Objection: the question is too general.”

The "too general" question resemble the "calls for a narrative response" question, except that it doesn't seek a chronology.

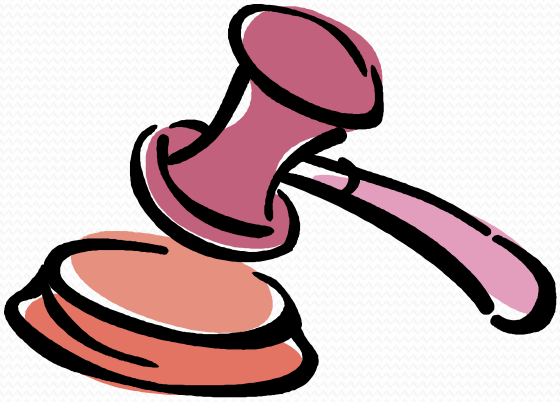
Because each question must limit the witness to a specific answer on a specific subject . . .

. . . a question is "too general" if it permits the witness to respond with irrelevant or otherwise inadmissible matter.

Cure:

Ask a MORE SPECIFIC question:

"Tell the court about the current eagle population at Yosemite National Park"



“Ambiguous”

AMBIGUOUS

(aka, “vague,” “unintelligible”)

If the question may be misunderstood by the witness, it is objectionable as ambiguous.

Why an Ambiguous Question is Bad:

***As to the court*:**
The witness might answer a question that wasn't asked, thereby confusing the trier of fact and/or giving inadmissible testimony.

***As to the non-examining party*:**
Since it is unclear what question is being asked, it is unclear whether an objection should be made.

Ambiguous:

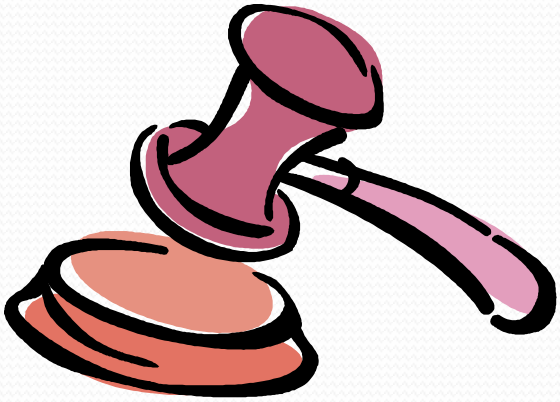
"What did she say?"

"Objection: ambiguous as to person. Who is 'she'?"

"Did Ms. Zepeda visit you?"

"Objection: ambiguous as to time. Did she visit on March 15th – or ever?

Cure: Ask a more specific question.



“Compound”

COMPOUND Question:

***Obvious*:**
"Did Alice Nelson review the contract, and did Bob Nelson leave the meeting?"

***Less obvious*:**
"Did the Nelsons leave the meeting?"

Cure: Ask two questions.

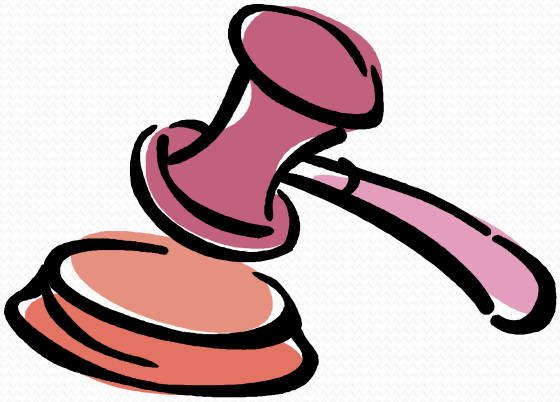
A Conjunction Can Signal A Compound Question:

Compound questions use conjunctions: "and," "or," "but," "because," "although."

But not every "OR" denotes a compound question.

"Was the light on OR off?" is one question, not two.

Reason: if the light wasn't on it was off – and if it wasn't off it was on.



“Calls for Speculation”

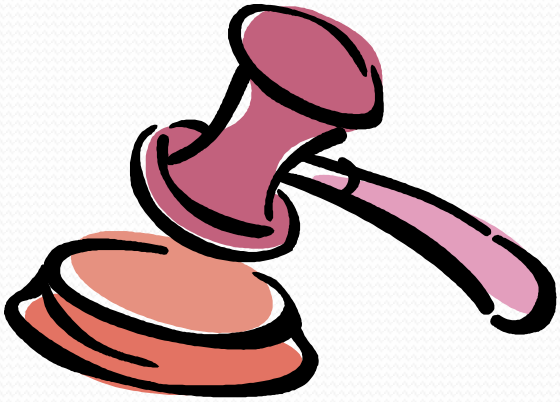
Calls For SPECULATION:

"Did Ms. Snyder intend to go out on a date on March 15th?"

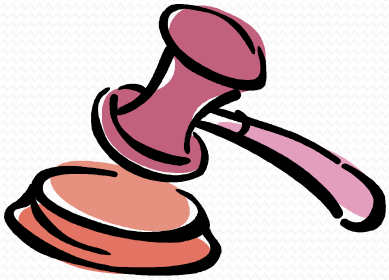
"Objection. The question calls for speculation. How can the witness know what Ms. Snyder did or didn't intend?"

Cure:

Did Ms. Snyder DO ANYTHING WHICH LEAD YOU TO BELIEVE that she intended to go out on a date that night?"



“Argumentative”



First category:

Badgering

"Argumentative"

Objection

Section 765(a) re Badgering:

THE COURT SHALL exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to PROTECT THE WITNESS FROM UNDUE HARASSMENT OR EMBARRASSMENT.

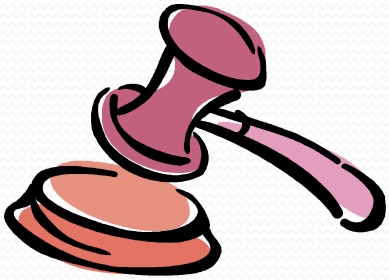
First Category Argumentative:

BADGERING A WITNESS

"You would gloat if you cheated my client out of a fair recovery, wouldn't you?"
"Objection: argumentative."

"Isn't it true that you're a lying pole cat?"
"Objection: argumentative."

Cure: Be nice.



Second category: **Making a Summation** "Argumentative" Objection

Second Category Argumentative:

MAKING A SUMMATION

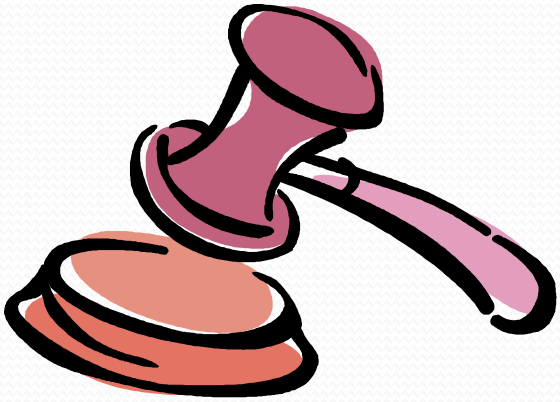
"So to review your testimony, Harold:
(1) you and Wilma bought Oak Street in joint title,
(2) you made separate property contributions toward the purchase price of the property, and
(3) you never signed a written waiver of reimbursement rights regarding those contributions – do I have that right?"
"Objection: argumentative."

Cure: Be patient. Bake your bricks by having your evidence admitted. Construct your building during summation.

Compare:

"Harold, are you entitled to reimbursement from Oak Street pursuant to Family Code section 2640?"

"Objection: the question calls for an impermissible LEGAL CONCLUSION."



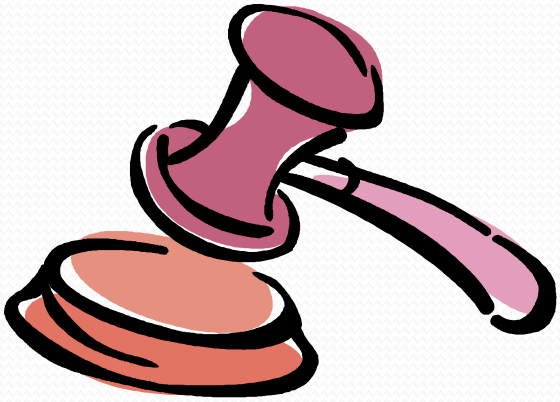
“Asked and Answered”

ASKED AND ANSWERED
(aka "Repetitive")

A question the witness already answered is re-asked (perhaps slightly rephrased).

"Objection: asked and answered."

Cure: Ask it just once.



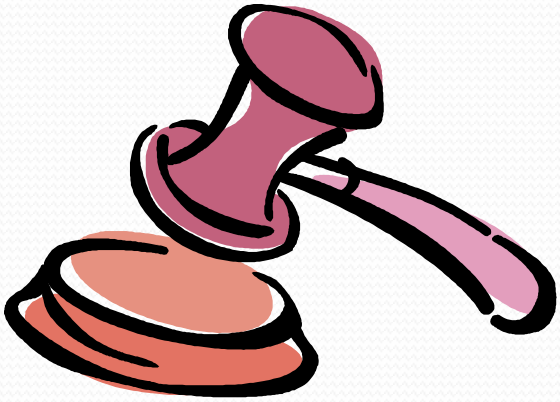
“Misquotes a Witness”

MISQUOTES A WITNESS:

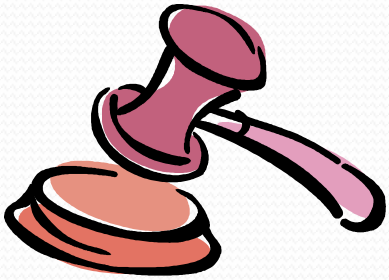
"Mr. Robin, where were you standing when you saw Ms. Wilma STROKE Kenny's face?

"Objection. The question misquotes the witness. Mr. Robin testified that he saw Ms. Wilma SLAP Kenny's face."

Cure: Quote the witness accurately.



“Assumes Facts Not In Evidence”



First Category: **Technical** "Assumes Facts Not In Evidence" Objection

Assumes Facts Not in Evidence

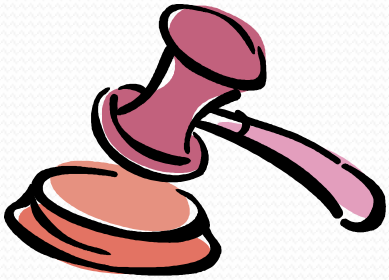
"What did Ms. Ng tell you?"

"Objection. The question assumes a fact not in evidence – namely, that Ms. Ng told the witness anything."

Cure:

Simply add “IF ANYTHING” to your question:

“What, IF ANYTHING, did Ms. Ng tell you?”



Second category:

Substantive

"Assumes Facts Not In Evidence" Objection

ASSUMES FACTS NOT IN EVIDENCE:

"Have you stopped beating your wife?"

"Objection. The question assumes a fact not in evidence – namely, that the witness has ever beaten his wife."

First Alternative:

Drop the line of questioning with this witness.

Call another witness to establish the fact.

Re-call the first witness and re-ask the question.

<u>Second Alternative:</u>
Request permission to elicit the testimony now, **conditioned** upon the subsequent proof.

Later – **PROVE THE FACT.** (If you **fail** to do so, you're in **deep do-do**.)

DANGER AHEAD!

Misquoting A Witness

- OR -

Assuming Facts Not In Evidence

Hypothetical situation:

- W and H are divorcing.
- W contends that H breached his fiduciary duty to preserve community property . . .

  . . . when H invested $100,000 of community funds in Shady Grove Investments, a business in which W's mother Mabel held a partnership interest.

Hypothetical facts:

- W's mother, Mabel, was a general partner in Shady Grove Investments.
- H knew that Shady Grove needed funds immediately.
- H and Mabel discussed whether Shady Grove would be a good investment opportunity.
- H was unable to contact W, who was traveling.

- H wrote Shady Grove a $100,000 check drawn on community property funds.
- The $100,000 was lost when Shady Grove went bankrupt.
- In the divorce, W contended that H breached his fiduciary duties regarding preservation of community property funds.

Undisputed Fact:

H wrote Shady Grove a $100,000 check drawn on community property funds.

“Paging Doctor Spin . . .”

- The divorce lawyers can characterize what occurred in many different ways.
- (10 x 10 x 10 =) 1,000
- Permutations follow

W's Lawyer asks Mabel:

"Was it on March 14th or 15th that you:

gave in to H's

demand that he

lend the $100,000?

ANSWER: "It was on the 14th"

Evidence:

Mabel was **passive**

H was **active**

The $100,000 was a **loan**

H's Lawyer asks Mabel:

"Was it on March 14th or 15th that you:

won H's

capitulation to

lend the $100,000?

ANSWER: "It was on the 14th"

Evidence:

Mabel was **active**

H was **passive**

The $100,000 was a **loan**

H's action:

DEMAND

Insistence

Offer

Approval

Consent

Ratification

Compliance

Obedience

Submission

CAPITULATION

↑

H

More

Active

H

Less

Active

↓

Mabel's action:

GAVE IN TO
Submitted to
Acquiesced in
Accepted
Received
Gained
Procured
Took
Achieved
WON

↑
Mabel
Less
Active

Mabel
More
Active
↓

What did H do?

LEND THE $100,000

Advance the $100,000 ↑

Part with the $100,000 Loan

Assist the partnership

Contribute the $100,000

Become involved

Participate in endeavor Pship

Enter the investment ↓

Invest the $100,000

BECOME A PARTNER

Your tricky Opposing Counsel . . .

. . . couldn't care less whether the check was written on March 14th or 15th.

(The date is a smokescreen.)

What OPC wants is an **ANSWER** that will provide

EVIDENCE

THAT OPC's CHARACTERIZATION IS CORRECT!

We lawyers are
WORDSMITHS
who deal with
shades of meaning.

If a witness **has testified** regarding a matter, OPC may **MISTATE** the witness's prior testimony.

If a witness **hasn't testified** regarding a matter, OPC may **FORCE FEED** the witness.

Guard against OPC's **Misstatement** of a witness's prior testimony with a "**Misquotes the Witness**" objection.

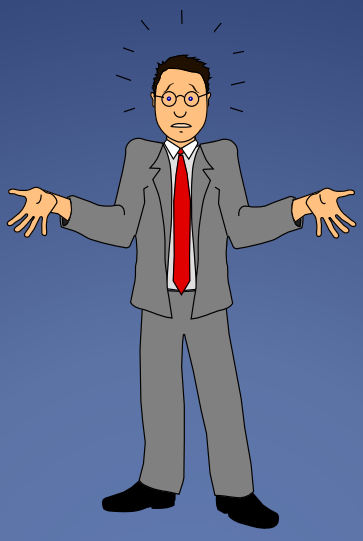
Guard against OPC's **Force Feeding** a witness with an "**Assumes Facts Not in Evidence**" objection.

If OPC Misquotes and/or Force Feeds

HIS OWN WITNESS

(which s/he probably won't),

Also guard against both sins with a "**Leading**" objection.



Quizzical?

FIRST QUIZ:

QUESTION:
"What is the best evidence rule?"

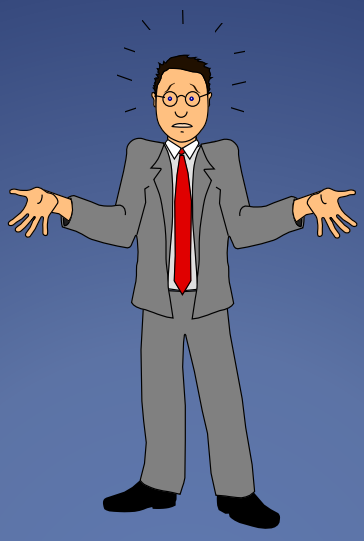
ANSWER:
"IT'S GONE"
As of 1/1/99, with full retroactivity due to Section 1521

SECOND QUIZ:

QUESTION:
"What is un-objected-to INADMISSIBLE testimony or an un-objected-to INADMISSIBLE document called?"

ANSWER: "EVIDENCE."

"A verdict or finding shall not be set aside . . . by reason of the erroneous admission of evidence unless: (a) there appears of record an objection to . . . the evidence that was timely made . . . ."
(Evid. Code §353)



Evidence Authentication

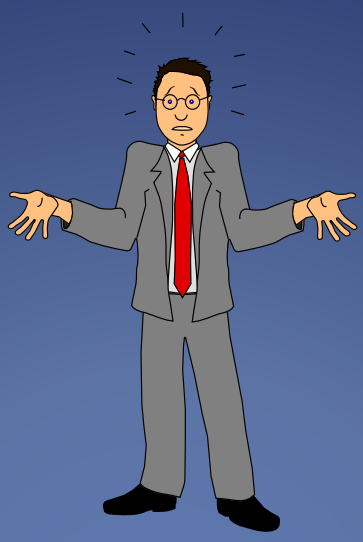
Authentication of Real Evidence

The RELEVANCE of an item of REAL EVIDENCE is a preliminary fact the proponent must establish.
(Evid. Code §§403(a)(1))

Authentication of a Writing

AUTHENTICITY of a WRITING is a preliminary fact the proponent must establish.
(Evid. Code §§403(a)(3), 1401.)

AUTHENTICITY of a WRITING requires proof that the writing "is the writing that the proponent . . . claims it is." (Evid. Code §1400(a))



Evidentiary Objections and Professionalism

Professionalism and Civility Rule!

ISSUE: When you are making evidentiary decisions,

Are you an ADVOCATE . . .

. . . or an ASS?

Should you "go along to get along"?

"Tech not lest ye be teched"?

"What goes around comes around"?

Your dilemma

Should you:

- **Cooperate with your Opposing Counsel, or**
- **Hang tough for your client?**

Cooperation can:

- **Result in admission of adverse evidence that would have been excluded upon proper objection, and**
- **Provide a client (who later CONTENDS THAT S/HE DEMANDED AGGRESSIVE EVIDENTIARY TACTICS) a colorable ground for a malpractice claim.**

Hanging tough can:

- **Delay case/anger judge,**
- **Create unnecessary animosity and mistrust between counsel,**
- **Lose a fee request,**
- **Provide your client (who later DENIES THAT S/HE REQUESTED AGGRESSIVE EVIDENTIARY TACTICS) a colorable defense against the high fees.**

Your reasonable fears:

"If I hang tough, I'll be disrespected as a JERK."

"If I cooperate, I'll be disrespected as a WIMP."

Issue:

When to HANG TOUGH, and when to COOPERATE?

What's a good lawyer like you to do?

Advocacy and Civility

The answer is found in martial arts.

(No surprise here – consider how similar litigation and martial arts are.)

The symbol of the judoka is the cherry blossom

white (soft) on the outside

red (hard) on the inside

Deposition Evidentiary Issues

#1: Protect that Privilege

"The protection of information from discovery on the ground that it is PRIVILEGED or that it is a protected WORK PRODUCT . . . is waived unless a specific objection to its disclosure is timely made during the deposition."
(CCP §2025.460(a).

#2: Object to the Form of the Question

"Errors and irregularities of any kind occurring at the oral examination that might be cured if promptly presented are waived unless a specific objection to them is timely made during the deposition. These errors and irregularities include . . . the FORM OF ANY QUESTION . . . ."
(CCP §2025.460(b).)

#3: Chill re the Rest!

OBJECTIONS TO the competency of the deponent, or to the relevancy, materiality, or ADMISSIBILITY at trial of the testimony or of the materials produced ARE UNNECESSARY AND ARE NOT WAIVED by failure to make them before or during the deposition. (CCP §2025.460(b).)

Obstruct at your peril

Justifications for instructing a client not to answer a deposition question:

- **Preserve a privilege**
- **Prevent serious harassment (then seek protective order)**

Stewart v. Colonial Western Agency, Inc. **(2001) 87 Cal.App.4th 1006, 1015**

The twin goals of depo defense:

#1 Prevent volunteered testimony, and

#2 Preserve for trial the 11 objections:

- **Privilege**
- **The 10 objections to the form of the question**

Defender be smooth; Deposer be cautious.

Defending attorney should OBJECT UNOBTRUSIVELY: "Objection: compound. You may answer."

Deposing attorney should REPHRASE the question if there is any chance that the objection may be valid.

Depo Defender's *Sullivan* Safety Net

". . . if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing" (Evid. Code §771(a).)

Your deponent need not produce privileged material s/he reviewed. (*Sullivan v Superior Court* (1972) 29 Cal.App.3d 64, 68.)

Witness Preparation

Preparing Ida Independent

1. **My only request: tell the whole truth**
2. **My promise: no attempt to put words in your mouth**
3. **Story of Cora Confident**
4. **Story of Timothy Timid**
5. **You'll feel more at ease and better able to tell the truth**
6. **If OPC asks . . . .**

Preliminary Facts, Anyone?

27 PAGES OF FOUNDATIONAL LITANIES COVERING:

The 15 major hearsay exceptions;

Writings;

Real Evidence; and

Demonstrative Evidence

FOUNDATIONAL LITANIES
FOR HEARSAY EXCEPTIONS

EXCEPTION 1
"ADMISSION OF PARTY OPPONENT"
Evidence Code Section 1220

STATUTE

Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual of representative capacity.

LITANY

I offer into evidence *[as a party statement]* a statement the opposing party made.

[Implied: The fact that the statement is being offered against the opposing party is demonstrated by the fact that I am offering it.]

EXCEPTION 2
"ADOPTIVE ADMISSION OF STATEMENT BY PARTY"
Evidence Code Section 1221

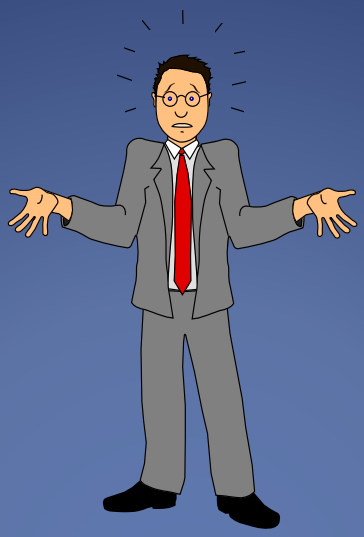
STATUTE

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

LITANY

I offer into evidence *[as a statement adopted by a party] [e.g., a statement the opposing party's brother made in the presence of the opposing party.]*

The fact that the opposing party by words or other conduct manifested his adoption of the statement (or manifested his belief in its truth) is demonstrated by the fact that *[e.g., the opposing party was present when his brother instructed my client to buy her airline ticket with the opposing party's credit card. The fact that opposing party did not contradict his brother's statement demonstrates that the opposing party adopted his brother's statement as his own]*.



Non-Hearsay

NON-HEARSAY

STATEMENT SHOWING STATE OF MIND OF SPEAKER OR WRITER
(the statement is not offered to prove the truth of the matter asserted)

H tells W, "I am the Pope" on the day they settle their divorce case. One of the issues in H's subsequent set aside motion is whether on the settlement date H was sane (as W contends) or insane (as H contends). H seeks to admit into evidence his statement to W. H's statement is admissible as non-hearsay. The statement is not offered to prove the truth of the matter asserted (that H was the Pope), but is instead offered to prove that he was insane on the settlement date.

OPERATIVE FACT

(the statement provides an element of proof regarding an issue in the case)

On March 15th H tells W, "I can just taste how good I'm going to feel as soon as I divorce you." One of the issues in the dissolution case is whether the date of separation is March 15th (as H contends) or April 15th (as W contends). H seeks to admit into evidence his statement to W. The statement is admissible as an operative fact regarding date of separation.

STATEMENT SHOWING NOTICE TO HEARER OR READER
(the statement is not offered to prove the truth of the matter asserted)

H tells W that he will die if he doesn't invest $50,000 of community funds into a certain risky venture. W doesn't object to the investment. H invests the funds and they are lost when the venture tanks. One of the issues in the dissolution case is whether W knew of H's intention to invest community funds in the venture (as H contends) or not (as W contends). H's statement to W is admissible as non-hearsay. H's statement is not offered to prove the truth of the matter asserted (that he would die if he didn't make the investment) but is instead offered to prove that W was on notice regarding the investment.

NON-HEARSAY (continued)

STATEMENT SHOWING STATE OF MIND OF SPEAKER OR WRITER

H and W are under a court order not to take daughter Katie out of California without first notifying to the other parent of the intention to do so. On March 14th W tells H, "Chicago isn't a safe place for a child – everybody living there is a kidnapper." One of the issues in the subsequent custody trial is whether H notified W before he took Katie to Chicago on March 15th. W's statement to H is admissible as non-hearsay. The statement is not offered to prove the truth of the matter asserted (that everybody living in Chicago is a kidnapper) but is instead offered to prove that W knew of H's intention to take Katie to Chicago.

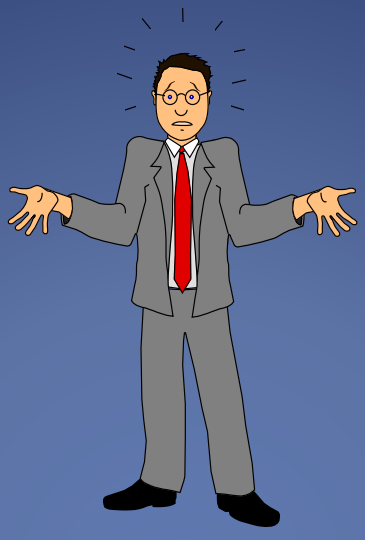
On February 15th W tells the Lottery Commission, "I'm too upset to begin receiving my lottery winnings yet – wait until after March 15th before you begin sending them." On March 15th W settles her divorce case with H. One of the issues in H's subsequent *Rossi* motion is whether W intentionally concealed her lottery winnings from him (as H contends) or not (as W contends). W's statement to the Lottery Commission is admissible as non-hearsay. The statement is not offered to prove the truth of the matter asserted (that W was too upset to begin receiving lottery winnings) but is instead offered to prove that W intentionally concealed her lottery winnings from H.

OPERATIVE FACT

W's mother writes H and W a letter stating, "I hope you both enjoy your around-the-world vacation. Find enclosed $50,000 in cash." One of the issues in H's and W's dissolution case is whether the $50,000 was a gift to W alone (as W contends) or a gift to both spouses (as H contends). H seeks to admit the letter into evidence. The letter is admissible as an operative fact of donor intent.

STATEMENT SHOWING NOTICE TO HEARER OR READER

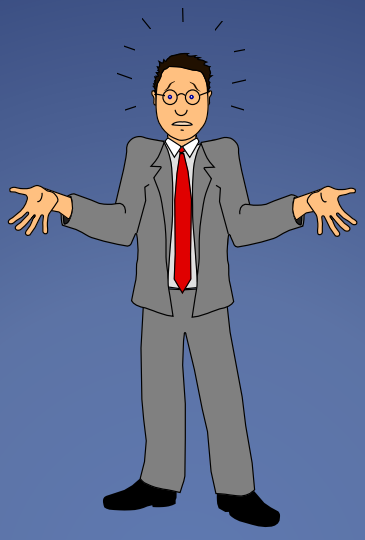
H tells W2 that he divorced W1. W2 marries H. It turns out that H never divorced W1. One of the issues in the nullity case between H and W2 is whether W2 is a putative spouse. One of the issues in the case is whether W2 is a putative spouse (as W contends) or not (as H contends). H's statement to W2 is admissible as non-hearsay to prove W2's putative status. The statement is not offered to prove the truth of the matter asserted (that H divorced W1) but is instead offered to prove that W2 had grounds for a reasonable belief that H wasn't married to W1.



Character Evidence

CHARACTER EVIDENCE IN CIVIL CASES

	CHARACTER IN ISSUE (1100)	CONDUCT IN CONFORMITY (1101, 1104, 1105)	CREDIBILITY AS A WITNESS (780(e), 786, 787, 788, 790)
OPINION EVIDENCE	All three types of evidence of X's character (opinion evidence, reputation evidence, and evidence of specific instances of conduct) are **ADMISSIBLE** when such character itself is in issue (1100). Character itself is in issue in an child custody case (*Feist v. Feist* (1965) 236 Cal.App.2d 433, 435).	Opinion evidence is **INADMISSIBLE** to prove X's conduct in conformity with the act sought to be proven (1101(a)).	Opinion evidence regarding X's dishonesty/honesty is **ADMISSIBLE** to attack/rehabilitate X's credibility as a witness (780(e)), but opinion evidence regarding X's other character traits is not (786). [*NOTE:* Opinion evidence of X's good character may be offered only after introduction of evidence of X's bad character (790).]
REPUTATION EVIDENCE		Reputation evidence is **INADMISSIBLE** to prove X's conduct in conformity with the act sought to be proven (1101(a)).	Reputation evidence regarding X's dishonesty/honesty is **ADMISSIBLE** to attack/rehabilitate X's credibility as a witness (780(e)), but reputation evidence regarding X's other character traits is not (786). [*NOTE:* Reputation evidence of X's good character may be offered only after introduction of evidence of X's bad character (790).]
EVIDENCE OF SPECIFIC INSTANCES OF CONDUCT		The **ONLY SPECIFIC INSTANCES OF CONDUCT** which are admissible to prove X's conduct in conformity with therewith are instances offered to prove **MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY, OR ABSENCE OF MISTAKE OR ACCIDENT**. Specific acts of conduct offered to prove X's disposition to commit such an act are inadmissible (1101(b)). **EXCEPT FOR HABIT/CUSTOM EVIDENCE** (1105), evidence of a person's general character for care is **INADMISSIBLE TO PROVE CARE IN CONFORMITY** with that character on a specific occasion (1104).	The **ONLY SPECIFIC INSTANCE OF CONDUCT** which is admissible to attack X's credibility as a witness is a **FELONY CONVICTION** (787, 788). [NOTE: Despite the limitation contained in Evidence Code section 787, a specific instance of X's conduct may be admitted to attack X's credibility as a witness if it demonstrates the existence or nonexistence of a X's bias or some other motive for X to testify falsely (780(e)).]



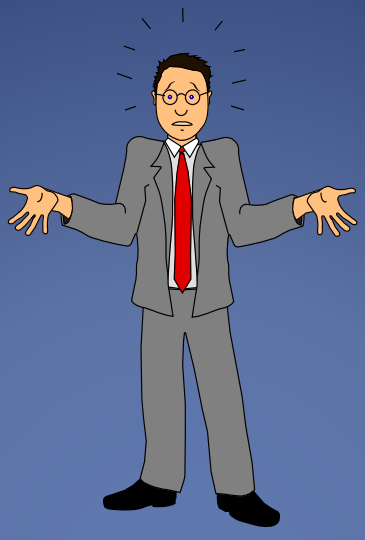
Granberg, the Exaggerator

I exaggerate, of course – evidence isn't the ONLY courtroom stressor:

- I miss the point
- Judge misses the point
- Witness goes sideways
- Client goes sideways

But I hope this program has been useful.

Now, in brief review . . .



Points to Remember

Evidentiary Objections Sheet

4 objections to a WITNESS

1 objection to an ANSWER

10 objections to the FORM OF THE QUESTION

12 objections to the ADMISSION OF EVIDENCE

EVIDENTIARY OBJECTIONS

THE FOUR OBJECTION TO A WITNESS

1. Percipient witness lacks sufficient personal knowledge (§702)
2. Expert witness lacks sufficient expertise (§720)
3. Witness incapable of understanding the duty to tell the truth (§701(a)(2))
4. Witness incapable of expressing him/herself so as to be understood (§701(a)(1))

THE SOLE OBJECTION TO A WITNESS' ANSWER

1. The answer is non-responsive (§766)

THE TEN OBJECTIONS TO THE FORM OF THE QUESTION (§765(a))

1. * Leading (objectionable during direct or redirect examination only)
2. * Calls for a narrative response
3. * Too general
4. * Ambiguous
5. * Compound
6. * Calls for speculation
7. * Asked and answered
8. * Argumentative
9. * Misquotes a witness
10. * Assumes facts not in evidence

*** DEPOSITION TIP**: if you don't make one of these 11 objections during deposition, you have **WAIVED** it

THE TWELVE OBJECTIONS TO EVIDENCE

1. Insufficient foundation
2. Hearsay
3. * Privilege/work product
4. Irrelevant
5. Improper impeachment
6. Improper rehabilitation
7. Inadmissible opinion
8. Inadmissible parol evidence
9. Evidence Code section 352
10. Beyond scope of preceding examination
11. Illegally-obtained evidence
12. Other objections (e.g., settlement offer, privacy right)

THE 15 MAJOR HEARSAY EXCEPTIONS

1220	statement made by a party ("party admission")	
1221	statement adopted by a party ("adopted admission")	
1222	statement authorized by a party ("authorized admission")	
1235, 770	**Prior Inconsistent Statement**	**(ADVERSARY CONTROLLER)**
771*	**Refreshed Recollection**	**(ALLY CONTROLLER)**
1237	**Past Recollection Recorded**	**(ALLY CONTROLLER)**
1240	Spontaneous statement	
1241	Contemporaneous statement	(*remember acronym*: "**SCARED**")
1242	**D**ying declaration	
1250, 2	then-existing mental or physical state	
1251, 2	previously-existing mental or physical state	(Unavailable)**
1230	declaration against interest	(Unavailable)**
1290, 1, 2	former testimony	(Unavailable)**
1271	business record	
1280	public record	

* Technically not a hearsay exception

** Declarant must be "unavailable" as defined by Evidence Code section 240

- **THREE COURTROOM CONTROLLERS:**
  - **Section 771 refreshment**
  - **Section 1237 past recollection recorded**
  - **Section 1235 impeachment**
    (*Satisfy Section 770 – DON'T EXCUSE IMPEACHEE from giving further testimony*)

- **When defending a deposition, make unobtrusive objections to the form of the question**
- **When taking a deposition, rephrase if an objection to the form of the question could be valid**
- **Remember to make "Misquotes the Witness" and "Assumes Facts Not in Evidence" objections**

- **If you don't understand the basis of a witness's testimony, object: "lack of foundation regarding personal knowledge" (Evid. Code §702)**
- **Avoid the "blurt"**
- **Make an offer of proof regarding any excluded evidence (Evid. Code §354)**
- **Preliminary facts (Evid. Code §§400, 405) in litanies**

The End