A. General Strategies

1. If the call of the question is silent, use the FRE.

2. Always discuss Logical and Legal Relevance for each item of evidence.

3. Issue Spotting—Address every issue that is reasonably raised by the facts. You only get points for the issues you discuss!

4. For all California Evidence essays (civil or criminal), start with an introductory paragraph discussing Proposition 8 and California Evidence Code (CEC) 352:

   Under Proposition 8 of the California Constitution (hereafter Prop. 8), any evidence that is relevant may be admitted in a criminal case. However, Prop. 8 makes an exception for balancing under California Evidence Code (hereafter CEC) 352, which gives a court discretion in excluding relevant evidence if its probative value is substantially outweighed by a risk of unfair prejudice, confusion of issues, or misleading the jury.

5. If the case is civil, add the following sentence:

   This case is civil, so Prop. 8 will not be applied to the evidence.

6. For the remainder of the CA Evidence essay, you do not need to mention Prop. 8 or CEC 352.

7. Note: CEC 352 is the equivalent of FRE 403

B. Time Management Strategies

8. Outline before you write your answer

9. FINISH! You must address each item of evidence presented in the question. You may have to skip smaller issues in order to address later items of evidence.

10. Drop the rule statements in order to finish. Analysis is worth more than rules!
C. Summary of Issues Tested

Editor's Note 1: The Professor refers to specific page numbers throughout this lecture. The content does not always match these references due to formatting changes.

1. Form of question
   - Leading Question
   - Answer provides information not asked for
   - Assumes facts not in evidence
   - Calls for Narrative

2. Purpose
   - Logical relevance
   - Legal relevance
   - Character evidence
     - Civil
     - Criminal
       • D's character—specific rules for prosecution, D and when D “opens the door”
       • V's character—specific rules for prosecution and D
     - Prior bad acts
       • Not admissible to show D’s criminal propensity to prove he committed the crime in question unless MIMIC evidence (motive, intent, absence of mistake, identity or common plan)

3. Witnesses
   - Competence—personal knowledge
   - Impeachment
     - W’s character for truthfulness—opinion/reputation testimony admissible to attack W’s character for truthfulness (can only bolster credibility after it’s directly attacked and cross-examination rules
     - Criminal conviction—can be used to impeach witness’s character for truthfulness
     - Prior inconsistent statements
     - W bias or interest
     - Impeachment of hearsay declarant
     - Rehabilitation of W
   - Recollection refreshed
     - Present recollection refreshed
     - Past recollection recorded
4. **Tangible evidence**
   - Authentication
   - Best Evidence Rule

5. **Privileges**
   - Confidential communications
   - Spousal immunity & confidential marital communications
   - Attorney-client privilege
   - Physician/psychotherapist-patient privilege
   - Public policy exclusions
     - Subsequent remedial measures
     - Compromise offers and negotiations
     - Offers to pay medical expenses
     - Liability insurance

6. **Hearsay**
   a. **Assertive Conduct**
      - Laughing, crying, gestures
   b. **Non-Hearsay Use**
      - Effect on the listener/reader
      - Circumstantial evidence of state of mind
      - Legally significant verbal act
   c. **Double Hearsay—Hearsay within hearsay**
   d. **Non-hearsay**
      - Opposing party’s statement—judicial/adoptive admissions or vicarious statements
      - Prior statements—consistent/inconsistent or identifications
   e. **Hearsay Exceptions**
      1) Declarant unavailable
         - Dying declaration
         - Statement against interest
         - Unavailable declarant
         - Former testimony
      2) Declarant availability not at issue
         - Present sense impression
• Excited utterance
• Business and public records
• Statement of mental/emotional/physical condition
• Statement made for medical diagnosis/treatment
• Recorded recollection
• Judgments of previous convictions

3) Residual exception

D. California Evidence Distinctions

• Prop. 8, CEC 352
• Spousal Testimony Privilege
• Spontaneous Statement
• Contemporaneous Statement
• Statement for Medical Diagnosis/Treatment

E. Introductory Paragraph

• If prompted for California Evidence, write this introductory paragraph:

  Under Proposition 8 of the California Constitution (hereafter Prop. 8), any evidence that is relevant may be admitted in a criminal case. However, Prop. 8 makes an exception for balancing under California Evidence Code (hereafter CEC) 352, which gives a court discretion in excluding relevant evidence if its probative value is substantially outweighed by a risk of unfair prejudice, confusion of issues, or misleading the jury.

• If the case is civil, add this sentence:

  This case is civil, so Prop. 8 will not be applied to the evidence.

F. Form of Questions

1. Leading
   o Direct (leading not allowed) v. Cross-examination (leading allowed)

2. Improper
   o Assumes facts not in evidence
   o Calls for Narrative

G. Relevance

  **Exam Tip 1:** Always discuss Logical and Legal Relevance for each item of evidence.
1. **Logical Relevance**
   - Why this item of evidence helpful for determining the outcome the dispute

2. **Legal Relevance**
   - Balancing: relevant evidence can be excluded if the probative value is substantially outweighed by the danger of unfair prejudice

H. **Character Evidence**

   **Exam Tip 2:** Discuss if items of evidence attack the character of a defendant, plaintiff, victim, or witness through reputation, opinion, or specific acts.

   - Character evidence is generally not admissible

1. **Civil Case**
   - If character is at issue or an essential element of a claim, it can be admissible

2. **Criminal Case**
   - The prosecution is generally not permitted to introduce bad character evidence about a defendant
   - A defendant can introduce evidence of his own good character (reputation or opinion)
     - Once the defendant “opens the door,” the prosecution may:
       a) Call a witness to rebut the defendant’s claim of good character (reputation or opinion), or
       b) Cross-examine the defendant’s character witness (reputation, opinion, OR specific bad acts)
       - Note: The prosecution can ask about specific bad acts, but cannot introduce extrinsic evidence to prove it
   - A defendant can introduce evidence of reputation or opinion evidence of the victim’s character, when it is relevant to the defense
     - Once the defendant “opens the door,” the prosecution may:
       a) Introduce rebuttal evidence of the victim’s character (reputation or opinion), or
       b) Attack the defendant’s character for the same trait

3. **Specific Bad Acts**
   - Except for the limited cross-examination discussed above, the prosecution cannot introduce evidence of specific acts to prove character
   - Evidence of prior bad acts may be admissible for another purpose
     - MIMIC: motive, intent, absence of mistake, identity, or common plan
4. **Impeachment**
   - Evidence may be inadmissible for use as character evidence but admissible for impeachment.
   - Impeachment attacks the credibility of the witness for telling the truth.

   **Exam Tip 3:** Impeachment is discussed more thoroughly below. It is mentioned here to remind you to discuss impeachment when you have a character analysis.

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**CHAPTER 2: SUBSTANTIVE LAW (CONT’D)**

A. **Witnesses**

1. **Witness Competence**
   
   A witness must have personal knowledge of a matter in order to testify about it.

2. **Lay Opinion**

   **Example 1:** *A witness testifies about the speed of a vehicle*

   A law opinion is admissible if it is based on the perception of the witness and it is helpful to understand the testimony or determine a fact in issue.

3. **Expert Testimony**

   - Be sure to identify the expert testimony and address all four elements of the analysis.

   **Exam Tip 4:** If you are not sure whether the evidence should be given by an expert, give both the lay witness and expert witness standards.

4. **Present Recollection Refreshed**

   When a witness is unable to testify because she cannot remember, you may show the witness any document that might refresh her *memory*.

5. **Past Recollection Recorded**

   - If the witness still cannot remember after being “refreshed,” the witness may be able to read the prior statement out loud.
   - This raises a hearsay issue—there is an exception if the requirements are met.

6. **Impeachment**

   **Exam Tip 5:** Remember that impeachment should be discussed if character evidence is an issue.

   - Impeachment attacks the credibility of a testifying witness.

   a. **Opinion/reputation testimony**
      
      A witness may testify about the opinion or reputation for another witness’s truthfulness.
b. Specific instances of conduct
   - Generally, evidence of specific instances of conduct is not admissible
   - You can inquire into specific bad acts on cross-examination
     - This inquiry is limited to the cross-examination; extrinsic evidence is not admissible

   **Example 2:** Witness A testifies. On cross-examination, the attorney asks, “Isn’t it true that you lied on your taxes?” If the witness denies it, this ends the inquiry into that specific conduct.

   **Exception: Criminal Convictions**
   - Evidence of a conviction for a crime of dishonesty is admissible to impeach
   - Evidence of a conviction for a felony is admissible to impeach
   - 10-year rule: If the conviction (or release) is more than 10 years old, the evidence is only admissible if the probative value outweighs the prejudicial effect

c. Prior inconsistent statements
   A witness’s prior statement that is inconsistent with the witness’s current testimony is admissible to impeach

   **Example 3:** A witness testifies that the weather was hot and the car was speeding. In an earlier deposition, the witness had said the weather was cold and the car was not speeding. The inconsistent statement about the car speeding is admissible to impeach.

d. Bias or interest
   **Example 4:** In a criminal trial, a witness accuses the defendant of committing the crime charged. The defense can introduce evidence of a plea bargain that the witness entered into in exchange for testifying for the prosecution.

e. Sensory competence
   **Example 5:** A grandmother is testifying that a murder occurred 100 yards away and she “clearly” saw the defendant. The defense may introduce extrinsic evidence of the witness’s ability to see.

f. Impeachment of a hearsay declarant
   **Example 6:** A wife testifies on the stand that her husband made a statement to her. The opposing side introduces a perjury conviction of the husband.

   Extrinsic evidence of a conviction for a crime of dishonesty is admissible to attack a hearsay declarant.
g. Rehabilitation of a witness

Once a witness has been impeached, the other side can introduce rebuttal evidence by re-examining the witness, introducing another witness for reputation or opinion evidence, or by introducing a prior consistent statement.

B. Tangible Evidence

1. Authentication—the item must be genuine

   Example 7: Someone presents a letter claiming it was written by the defendant. Someone who knows the defendant’s handwriting can authenticate the letter.

2. Best Evidence Rule—original document required

C. Privileges and Other Policy Exclusions

1. Privileges

   a. Spousal testimonial privilege

      If husband and wife are currently married and one spouse is called to testify, the testifying spouse can assert the privilege and refuse to testify against her spouse.

   b. Confidential marital communications

      ▪ If husband and wife had a confidential communication while married, those communications remain confidential, even after divorce

      ▪ Either spouse can prevent the other from testifying at trial

   c. Attorney-client privilege

2. Other Policy Exclusions

   a. Subsequent remedial measures

   b. Compromise offers and negotiations

   c. Offers to pay medical expenses

   d. Liability insurance
D. Hearsay

1. Approach

   1) Write the rule—hearsay is an out of court statement being used for the truth of the matter asserted and is generally inadmissible

   2) Explain why the item could be hearsay—this statement could be hearsay because...

   3) Look for non-assertive conduct—only assertive conduct is barred by the hearsay rule

   4) Look for non-hearsay uses—not for the truth of the matter asserted, but for another purpose

   5) Look for double hearsay—define the two levels and discuss both separately

   6) Discuss all relevant non-hearsay exemptions

   7) Discuss all relevant hearsay exceptions

2. Hearsay

   o An out-of-court statement that is offered to prove the truth of the matter asserted

   a. Assertive Conduct—substitute for a statement

     Example 8: Pointing, gesturing, nodding is assertive conduct

     Example 9: Laughing or crying is probably not assertive conduct

   b. Non-Hearsay Use—not used for the truth of the matter asserted

     Example 10: Effect on the listener: a mechanic tells the defendant that his car brakes are bad. This could be viewed as a hearsay statement if used to prove the car brakes are bad. But, it may be admissible to show the defendant had knowledge of the fact that his brakes were bad (effect on the listener).

       Exam Tip 6: Even if this argument is successful, do not stop the analysis.

   c. Double Hearsay—hearsay within hearsay

     Example 11: A written police report containing a statement made by a witness to a car crash would present two levels of hearsay. The written police report is hearsay. The written report also has a quote from the witness. The witness’s statement is also hearsay. Both levels must be admissible to admit the police report.
3. **Non-Hearsay Exceptions (“exemptions”)**
   a. **Prior statements**
      1) Prior inconsistent statement
      2) Prior consistent statement
      3) Prior statement of identification
   b. **Opposing party’s statements**
      1) Party opponent—anything the other party said is admissible for the truth of the matter asserted
      2) Adoptive admission—“adopts” a statement by failing to deny it
      3) Vicarious statements—someone else’s statement is imputed due to their relationship
         
         **Example 12:** An employee’s statement might be attributed to the employer.

4. **Hearsay Exceptions**
   a. **Declarant Unavailable as a witness**
      - Unavailability—dead, missing, refuses to testify, or (in a criminal trial) invokes the 5th Amendment
        1) Former testimony
        2) Dying declaration—declarant believes death is imminent and the statement concerns the circumstances of her death
        3) Statement against interest—any declarant who is unavailable and the statement is against the declarant’s interest
        4) Statement of personal/family history
        5) Statement against party that caused declarant’s unavailability
   b. **Declarant availability immaterial**
      1) Present sense impression
      2) Excited utterance
         
         **Exam Tip 7:** Present sense impression and excited utterance are often tested together. You should discuss both when the facts are relevant.
      3) Statement of mental, emotional or physical condition
      4) Statement made for medical diagnosis/treatment
      5) Recorded recollection
      6) Business records
Exam Tip 8: Be on the lookout for double hearsay.

7) Public records
8) Learned treatises
9) Judgment of previous conviction

CHAPTER 3: EXAM QUESTIONS

A. Question 1: Transcript Style Question

QUESTION 3, JULY 2003

Dan was charged with aggravated assault on Paul, an off-duty police officer, in a tavern. The prosecutor called Paul as the first witness at the criminal trial. Paul testified that he and Dan were at the tavern and that the incident arose when Dan became irate over their discussion about Dan’s ex-girlfriend. Then the following questions were asked and answers given:

<table>
<thead>
<tr>
<th>Q.</th>
<th>A.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q.</td>
<td>What happened then?</td>
</tr>
<tr>
<td>[1] A.</td>
<td>I went over to Dan and said to him, “Your ex-girlfriend Gina is living with me now.”</td>
</tr>
<tr>
<td>Q.</td>
<td>Did Dan say anything?</td>
</tr>
<tr>
<td>[2] A.</td>
<td>He said, “Yeah, and my buddies tell me you’re treating her like dirt.”</td>
</tr>
<tr>
<td>Q.</td>
<td>Is that when he pulled the club out of his pocket?</td>
</tr>
<tr>
<td>[3] A.</td>
<td>He sure did. Then he just sat there tapping it against the bar.</td>
</tr>
<tr>
<td>Q.</td>
<td>Tell the jury everything that happened after that.</td>
</tr>
<tr>
<td>[4] A.</td>
<td>I said that he was a fine one to be talking. I told him I’d read several police reports where Gina had called the police after he’d beaten her.</td>
</tr>
<tr>
<td>Q.</td>
<td>Do you believe the substance of those reports?</td>
</tr>
<tr>
<td>Q.</td>
<td>How did Dan react to this statement about the police reports?</td>
</tr>
<tr>
<td>[6] A.</td>
<td>He hit me on the head with the club.</td>
</tr>
<tr>
<td>Q.</td>
<td>What happened next?</td>
</tr>
<tr>
<td>[7] A.</td>
<td>I heard somebody yell, “Watch out— he’s gonna hit you again!” I ducked, but the club hit me on the top of my head. The last thing I remember, I saw a foot kicking at my face.</td>
</tr>
<tr>
<td>Q.</td>
<td>What happened then?</td>
</tr>
<tr>
<td>[8] A.</td>
<td>Dan must have kicked and hit me more after I passed out, because when I came to in the hospital, I had bruises all over my body.</td>
</tr>
</tbody>
</table>

At each of the eight points indicated by numbers, on what grounds could an objection or a motion to strike have properly been made, and how should the trial judge have ruled on each? Discuss.
B. Question 1: Issues

1. Item #1
   a. Relevance
      1) Logical Relevance
      2) Legal Relevance
   b. Hearsay
      1) Why is this statement Hearsay? Out-of-court statement to prove truth of matter asserted
      2) Non-hearsay use? Effect on the listener

2. Item #2
   a. Relevance
      1) Logical Relevance
      2) Legal Relevance
   b. Hearsay
      1) Why is this statement Hearsay? Out-of-court statement to prove truth of matter asserted
      2) Non-hearsay use? State of mind
      3) Exemption to hearsay? Opposing party’s statement

3. Item #3 . . .
C. Question 2

QUESTION 3, JULY 2009

While driving their cars, Paula and Dan collided and each suffered personal injuries and property damage. Paula sued Dan for negligence in a California state court and Dan filed a cross-complaint for negligence against Paula. At the ensuing jury trial, Paula testified that she was driving to meet her husband, Hank, and that Dan drove his car into hers. Paula also testified that, as she and Dan were waiting for an ambulance immediately following the accident, Dan said, “I have plenty of insurance to cover your injuries.” Paula further testified that, three hours after the accident, when a physician at the hospital to which she was taken asked her how she was feeling, she said, “My right leg hurts the most, all because that idiot Dan failed to yield the right-of-way.”

Officer, who was the investigating police officer who responded to the accident, was unavailable at the trial. The court granted a motion by Paula to admit Officer’s accident report into evidence. Officer’s accident report states: “When I arrived at the scene three minutes after the accident occurred, an unnamed bystander immediately came up to me and stated that Dan pulled right out into the path of Paula’s car. Based on this information, my interviews with Paula and Dan, and the skidmarks, I conclude that Dan caused the accident.” Officer prepared his accident report shortly after the accident.

In his case-in-chief, Dan called a paramedic who had treated Paula at the scene of the accident. Dan showed the paramedic a greeting card, and the paramedic testified that he had found the card in Paula’s pocket as he was treating her. The court granted a motion by Dan to admit the card into evidence. The card states: “Dearest Paula, Hurry home from work as fast as you can today. We need to get an early start on our weekend trip to the mountains! Love, Hank.”

Dan testified that, as he and Paula were waiting for the ambulance immediately following the accident, Wilma handed him a note. Wilma had been identified as a witness during discovery, but had died before she could be deposed. The court granted a motion by Dan to admit the note into evidence. The note says: “I saw the whole thing. Paula was speeding. She was definitely negligent.”

Assuming all appropriate objections were timely made, should the court have admitted:

1. Dan’s statement to Paula about insurance? Discuss.
2. Paula’s statement to the physician? Discuss.
3. Officer’s accident report relating to:
   a. The unnamed bystander’s statement? Discuss.
   b. Officer’s conclusion and its basis? Discuss.
5. Wilma’s note? Discuss.

Answer according to California law.
D. Question 2: Sample Answer (Excerpt)

Paula also testified that, as she and Dan were waiting for an ambulance immediately following the accident, Dan said, “I have plenty of insurance to cover your injuries.”

Preliminary Matters

Proposition 8 is an amendment to the California Constitution that states, in part, that all relevant evidence is admissible in a criminal trial. However, the present action is a civil action for negligence and thus Proposition 8 does not apply. Under CEC 352, a judge has discretion to exclude evidence where its probative value is substantially outweighed by risk of unfair prejudice, waste of time, or confusion of the issues.

1. Dan’s statement to Paula about the insurance

Logical Relevance

In California, factual relevance is evidence that would tend to make a matter in dispute more or less probable. Here, it is in dispute whether Dan was liable. Therefore, Dan’s statement that “he has plenty of insurance to cover the injuries” will be logically relevant to making the matter of Dan’s negligence more probable.

Legal Relevance

Legal relevance means that the probative value of the evidence outweighs any prejudicial impact that the evidence may have. While Dan’s comment may be slightly prejudicial in implicating him in the matter, it is highly probative because it establishes that he could have been liable. Therefore, the comment will be found to be legally relevant.

Evidence of Insurance

In California, evidence of liability insurance is inadmissible in a civil trial to prove that the defendant was at fault or that the defendant has the ability to pay, because public policy concerns dictate that we should encourage persons to have insurance. Therefore, Paula’s testimony that Dan said he had plenty of insurance to cover the injuries should not have been admitted.

Offers to pay for injuries

In California, offers to pay another person’s medical costs are inadmissible in court to show that the defendant was at fault, or that the defendant had the ability to pay. Paula is likely introducing the evidence to show that Dan was at fault, and this is why he offered to pay her costs. Therefore, Dan’s statement that he can pay for Paula’s injuries should not be admitted.
Hearsay

Hearsay is any out-of-court statement offered to prove the truth of the matter stated therein. Hearsay is generally inadmissible in court. In this case, Dan’s statement was made out of court, and is being offered to show that Dan was liable; therefore, it will be inadmissible hearsay unless an exception applies.

Admission

In California, an admission by a party opponent is an exception to the hearsay rule. An admission includes any statement made by the opposing party that is a prior acknowledgement of any fact in the case. Here, Dan made a prior statement that he could pay for Paula’s injuries. Therefore, the statement is an admission by a party opponent, and would fall under the hearsay exception.

However, as stated above, the evidence will be inadmissible, because of the public policy rule governing the exclusion of statements made in connection with proof of insurance and statements offering to pay for the plaintiff’s injuries.

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