California Evidence

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A Wizard's Guide

Second Edition

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To the Memory of

Dr. Jean Uelmen
1947–2005

and

Donald Fiedler
1943–2008

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Introduction

In reading the Harry Potter novels, I was struck by the many parallels between Hogwarts School of Wizardry and the typical American law school. The "sorting hat" that assigns students to the various Hogwarts dormitories bears a strong resemblance to the L.S.A.T. The curriculum for the budding wizards often looks like our law school curriculum. As an Evidence teacher, I sometimes imagine myself as a Hogwarts professor teaching the course in "Magical Incantations." Many students enter the course in Evidence hoping it will teach them to be wizards in the courtroom, who can make evidence disappear by intoning the correct magical incantation. "Objection, this document is irrelevant and immaterial hearsay." "Sustained." It's just like waving a magic wand. The more profound message of Harry Potter, of course, is that there is "a lot more to magic…than waving your wand and saying a few funny words." [Rowling, *Harry Potter and the Sorcerer's Stone,* p.133]. Hogwarts' students get into the most trouble when they use their magical powers without sorting out all of their consequences. Likewise, a good lawyer doesn't make evidence appear or disappear without sorting out the ultimate impact upon the case to be proven or defeated. For the good lawyer, there are very few surprises in the courtroom. Nearly every evidentiary move has been anticipated and planned.

There is still another parallel between the neophyte wizards of Hogwarts and the student of Evidence. Often, the incantations pronounced by student wizards don't work, simply because they lack confidence that they *will* work. Confidence is a crucial ingredient for a successful trial lawyer, too. The confidence, however, comes from lots of patient practice.

In offering this text as a "Wizard's Guide," it comes with lots of opportunities for practice. The second half of the book is a series of fictional trial transcripts. They have been fully "tested," having been used as final examinations in a law school Evidence course. There are "answer guides" for each transcript in the Appendix, to take you to the objections that can be asserted. But one of the unique values of our "Wizard's Guide" is the references to the practice transcripts in the text itself. Follow the wand to the referenced transcript ex-

cerpts, and you will see an example of how the rule being discussed might be applied in a trial setting.

The Chapters in this Guide are broken up so that the applicable provisions of the California Evidence Code can be assigned at the same time that the corresponding rules of the Federal Rules of Evidence [FRE] are being covered in the typical law school casebook. It is assumed that you have a copy of the California Evidence Code [CEC]. Start each chapter by reading the language of the particular sections to be focused on. There are lots of differences between the Federal Rules and the California Evidence Code. This guide summarizes many of the differences in helpful charts. The transcripts all illustrate the application of the California Evidence Code. But always ask yourself whether the ruling would come out the same way in federal court.

What Is "Evidence"?

Focus on CEC 140, 190, 250, 353, 355, 400 and 401

1. California Evidence Code (CEC) 140 offers a useful definition of "evidence." It includes:
(a) "testimony," which comes in the form of answers to the questions posed to witnesses who appear in the courtroom;
(b) "writings," defined in CEC 250 to include any means of recording upon any tangible thing any form of communication or representation;
(c) "material objects," such as a weapon, a glove, a baggy of marijuana or a drop of blood; and
(d) "other things presented to the senses," such as the physical appearance of a person.
The definition, however, only includes those items which "are offered to prove the existence or non-existence of a fact." What if something the jurors can plainly observe is never formally "offered" as evidence? Assume, for example, the defendant is charged with a violation of California Penal Code §261.5, which provides:

> Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of [a crime].

The victim testifies that she was 15 when she engaged in an act of sexual intercourse with the defendant. In closing argument, the prosecutor points to the defendant sitting in the courtroom and argues, "You can see by looking at him that the defendant is over 21. He has grey hair, is balding, has wrinkles, and looks like he's at least forty years old." Is the defendant's physical appearance "evidence"? Was it formally "offered"? How would you go about "offering" it?

In *People v. Collie,* 110 Cal.App.3d 104, 167 Cal.Rptr. 720 (1980), the defendant wore dark glasses when he testified. In cross-examination of the defendant, the prosecutor asked why he was wearing dark glasses. The defendant responded that his eyes were sensitive to light and that he had always worn dark glasses for over twenty years, pursuant to a doctor's orders, except when he slept. The prosecutor then offered a photograph of the defendant in which he was not wearing dark glasses, and elicited testimony from one of the defendant's witnesses that he told her he wore dark glasses because "he liked them," and never mentioned any eye problems. In closing argument, the prosecutor argued to the jury as follows:

> When you talk to someone as I talk to you now, if I was wearing dark glasses would you wonder what my eyes were doing, would you wonder where I was looking, would you wonder what I was trying to hide? When I was cross-examining Mr. Collie I was thinking the same thing. Why? Because I couldn't see his eyes. So I was concerned about what kind of a reaction this jury is going to have to someone whose credibility they are asked to judge, when they can't even see what he looks like sitting on the stand answering questions, thinking about answers to questions.

The court concluded that the defendant's use of dark glasses was relevant evidence to assess his credibility, and the argument was not improper. Would the court's ruling be the same if the defendant had never been asked why he was wearing dark glasses? Is it improper for counsel to instruct a witness not to wear dark glasses? What if the lawyer suggests a witness get a shave or a haircut, or dress in a particular way to make a better impression on the jury?

2. If "evidence" can't be brought into the courtroom, the jury can be taken outside the courtroom to view it. A "jury view" is sometimes used to enable the jury to observe a crime scene, where the physical environment is an issue. In *People v. O.J. Simpson,* the jury was taken on a "jury view" to walk through the various rooms of Simpson's home. It was later claimed that defense attorney Johnny Cochran removed various photos of girlfriends from the walls, and replaced them with Norman Rockwell paintings, including the famous painting of a young black girl being escorted to a desegregated school by federal marshals. Is this any different than dressing up the defendant in a coat and tie when he's brought to court?

3. If "evidence" includes things "presented to the senses," should persons be included on juries who lack the senses to perceive the evidence? California Code of Civil Procedure §198, defining the competency of jurors, provides

that "no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which substantially impairs or interferes with the person's mobility."

4. What is the difference between "evidence" and "proof"? CEC 190 defines "proof" as "the establishment by evidence of a requisite degree of belief concerning a fact." The "elements" of a crime or a cause of action are facts which must be proved to the jury; the "evidence" is merely the *means* by which the facts are proved. But sometimes evidence cannot even be admitted until a factual prerequisite is established. For example, a confession is not admissible unless it is shown to be "voluntary." The factual prerequisite is called a "preliminary fact." CEC 400. If the admissibility of evidence depends upon a preliminary fact, the evidence is first "proffered." CEC 401. Only after the preliminary fact is "proven", in some cases to the judge, and in other cases to the jury, will the proffered evidence then be admissible.

5. An "objection" must be made to exclude inadmissible evidence. The California Evidence Code Sections relating to objections are summarized in Chapter 32, *infra.* If an appropriate objection is not made, it is ordinarily "waived," and the admission of the evidence cannot be challenged on appeal. FRE 103, CEC 353. An appropriate objection must be "timely made" and it must state specific legal grounds. A "motion to strike" will suffice if there was no opportunity to object in advance. CEC 353. A "motion in limine" can be used to raise an objection well in advance, outside the presence of the jury.

6. If an objection to a question is sustained, the witness will not be permitted to answer the question. However, counsel cannot argue on appeal that the erroneous sustaining of the objection was reversible error without showing it was prejudicial. The required showing of prejudice often requires an "offer of proof," in which the trial judge is informed of the substance, purpose and relevance of the anticipated answer. FRE 103(a)(2); CEC 354.

7. Frequently, evidence will be admitted to prove a particular fact, or against a particular party, but will *not* be admissible for a different purpose or against a different party. Under these circumstances, the jury must be instructed as to the restricted or limited use they are to make of the evidence. This is called a "limiting instruction." FRE 105, CEC 355.