

## Evidence Outline

### **General Approach to Evidence Analysis:**

1. Identify the evidence
2. Identify what it is offered to prove
3. Determine its relevance for that purpose (truth of the matter, character, liability, credibility...)
4. Apply rules governing admissibility for that purpose (hearsay, habit/conduct evidence, policy exclusions of evidence, impeachment, expert requirements, etc...)

### **I. Appellate Review of Evidentiary Issues**

#### **FR 103: Preserving a Claim of Error**

- Party need not renew an objection or offer of proof to preserve a claim of error
- Court must prevent jury from hearing inadmissible evidence
- Court may take notice of plain error if it affects a substantial right, even if the claim of error wasn't properly preserved

### **II. Sources of Evidence and the Nature of Proof**

#### **A. Human/Witness Testimony as Evidence**

##### Who Can be a Witness

**FR 601: General Competency** - every person is competent unless rules provide otherwise, or where it is a civil case in state fed court arising from diversity jdx and state law applies. Since everyone is able to testify, it really comes down to attacking witness credibility.

**FR 610: Religious Beliefs/Opinions** - not admissible to attack/support witness credibility

**CEC 700: General Competency** - same as FR 601

**CEC 701: Disqualification of Witness** - person is deemed not competent as witness if:

- (a) EXPRESSING: incapable of expressing self re: matter in way that can be understood
- (b) UNDERSTANDING: incapable of understanding duty of a witness to tell the truth

##### Judges and Jurors

**FR 605: Judge Competency** - may not testify as witness at trial

**FR 606: Juror Competency**

- (a) At Trial - may not testify before other jurors at trial
- (b) During Inquiry Into Validity of the Verdict
  - Juror MAY NOT testify about
    - STATEMENT: any statement or event during jury deliberations
    - EFFECT on VOTE: the effect that anything had on any juror's vote
    - MENTAL PROC: any juror's mental process in reaching the verdict
    - LYING: whether a juror lied during prelim juror questioning when the testimony about the lie is offered in support of a new trial
  - Juror MAY testify about
    - MISTAKE on FORM: literal clerical error made in entering verdict on verdict form
    - OUTSIDE INFLUENCE: but this doesn't include drunkenness
    - EXTRANEIOUS INFO: prejudicial info improperly brought to the jury's attention

**CEC 703: Judges as Witness, and CEC 704: Jurors as Witness**

1. INFORM PARTIES OF INFO: Before being called to testify, judge/juror must inform parties and jury of info he has regarding the matter about which he will testify.
2. CONSENT TO MISTRIAL: Calling a judge or juror to testify will be deemed a consent to mistrial if there is an objection to such calling.

3. MOTION FOR MISTRIAL: If a party objects, the judge/juror may not testify as a witness, a mistrial is declared, and the case is reassigned to different judge/juror.
4. NO OBJECTION, THEN CAN TESTIFY

#### Hypnotized Witnesses

**CEC 795: Hypnosis Testimony** - in a criminal proceeding, testimony by witness who underwent hypnosis to recall relevant events is ADMISSIBLE if:

1. LIMITED: testimony is limited to what witness recalled from the hypnosis
2. PRESERVED MEMORY: substance of pre-hypnosis memory was preserved in writing, recording, or video recording before hypnosis
3. PROCEDURE: hypnosis was conducted according to the following procedure
  - WRITTEN RECORD made prior to hypnosis documenting subject's description of the event, and this info was given to the hypnotist
  - CONSENT to hypnosis by subject
  - VIDEO RECORD of hypnosis session
  - LICENSED PROFESSIONAL with hypnosis experience conducted the hypnosis
  - NO LAW ENFORCEMENT, defense, or prosecution was present for the hypnosis
4. NOTE on CREDIBILITY: can still use hypnosis to attack party's credibility

#### Personal Knowledge Requirement

**FR 602: Need for Personal Knowledge** - witness may testify only if there is evidence sufficient to support a finding what witness has personal knowledge of the matter. Evidence may consist of the witness's own testimony.

- Personal Knowledge = facts a person perceived > the Facts Perceived must be the same Facts that person will Testify (FP=FT)
- Sensory Perception = ability to comprehend, REMEMBER, and communicate
- Limits on Perception = limits on person's perception don't make personal knowledge inadmissible, but maybe less credible

**CEC 702: Personal Knowledge** - same as FR but if a party objects to a witness, personal knowledge must be show BEFORE testifying in trial; cannot be determined while testifying

**CEC 403: Determination of Foundational and Other Prelim Facts** When Relevancy, Personal Knowledge, or Authenticity Disputed (CA version of FR 104(a)/104(b)):

1. Proponent of evidence (that requires establishment of a prelim fact) has burden of providing evidence that is sufficient to sustain a finding of the prelim fact's existence
2. Prelim fact is the personal knowledge of a witness on the matter of his testimony

#### Oath or Affirmation Requirement

**FR 603: Oath or Affirmation to Testify Truthfully** - must be given by a witness before testifying (because person can only be guilty of perjury if he lies after giving an oath)

**CEC 710: Oath Requirement** - same as FR except child under 10 yrs old, or person with cognitive impairment may only be required to say "I promise to tell the truth"

### **B. Physical Items/Documents as Evidence**

#### Authentication Requirement

\*This requirement is analogous to the personal knowledge requirement for witnesses

#### **FR 901: Authentication or Identification**

**(A) GENERAL** - to satisfy this, the evidentiary item's proponent may provide evidence sufficient to sustain a finding that the item is what the party claims it to be; this claim must be consistent with the evidentiary item's relevance

**(B) EXAMPLES** of how to satisfy the authentication requirement:

1. Testimony of witness with knowledge
2. Non-expert opinion about handwriting
3. Comparison by expert witness of trier of fact (ie comparing signatures to see if they're the same one)
4. Distinctive characteristics of an item (ie letterhead, postmarks, dates)
5. Opinion about a voice
6. Evidence of phone conversation
7. Evidence about public records, filed in public office or comes from office where public records are usually kept
8. Evidence of ancient documents, that are at least 20 yrs old when offered and in condition that creates no suspicion about its authenticity
9. Evidence about a process or system
10. Methods of authentication provided by a statute or other rule

**(C) Authentication of PHOTOS**

1. Determine what it is that the photo is claimed to be
2. Determine if witness has personal knowledge of photo to answer questions on it
3. REAL Evidence = photographer testifies about photo
4. DEMONSTRATIVE Evidence = person present at time of incident, but not the photographer, is asked "does this photo fairly & accurately depict the incident..."
5. If one-of-a-kind item was stolen, a witness can testify to the picture of the item

**(D) Authentication by CHAIN OF CUSTODY**

1. When item is UNIQUE in appearance/character, a single witness can authenticate that item base on seeing it just once before testifying; establishing subsequent history is not essential because of the uniqueness
2. When item is NOT UNIQUE, more than a single perception by one witness is needed to authenticate by chain of custody, by showing that item was
  - continuously in the safekeeping,
  - of one or more specific persons,
  - beginning with event that connects the evidence to case,
  - until the item was brought to court and marked for identification.

**CEC** - differences in authentication = Docs Affecting Property Interest

**CEC 1600: Record of Doc Affecting Property Interest** - a document purporting to establish or affect an interest in property is evidence of the original and authenticates its content if:

1. The record is a record of an office of a public entity; and
2. The statute authorized such a document to be recorded in that office.

**CEC 643: Authenticity of Ancient Documents** - DEED or WILL purporting to affect a PROPERTY INTEREST is presumed authentic if at least 30 years old, creates no suspicion of authenticity, and was kept in a place where such a writing would be kept.

Self-Authenticating Evidence

**FR 902: Evidence that doesn't need extrinsic evidence to be authenticated**

1. Public docs
  - sealed and signed
  - certified and signed (not sealed)
  - certified copies
  - foreign public docs
2. Acknowledged docs, i.e. have certified acknowledgment by notary public or other authorized officer that doc was lawfully executed

3. Publications, i.e. books, periodicals, newspapers
  4. Trade inscriptions, i.e. signs, tags, labels (nothing for this under CEC)
  5. Records/business records of a regularly conducted activity (not self-auth under CEC)
- \*Note: Wills are not self-authenticating

### Best Evidence Rule

\*Only applicable when the contents of a writing, recording, or photo in dispute.

#### **FR 1001: Definitions that Constitute an "Original":**

1. Writing or recording = the original OR its counterpart w same intended effect
2. Electronically stored info = printout that accurately reflects info
3. Photo = the negative or a print from it
4. Duplicate = any of these produced by mechanical, photographic, chemical, electronic, or any equivalent process that accurately reproduces the original

#### **FR 1002: Requirement of Original Writing, Recording, or Photo**

**EXCEPTIONS** to Original Requirement; Admissibility of other evidence of content

1. Duplicates (unless issue re the original's authenticity)
2. Secondary Evidence if original was lost or destroyed not in bad faith
3. Original cannot be obtained through any available judicial process
4. Summaries/Charts if evidence is too voluminous to bring to court
5. Writing, rec, photo not closely related to a controlling issue

**CEC 1521: Secondary Evidence Rule** - this is the equivalent to FR Best Ev. Rule; difference is that FR requires the original and then allows exceptions, but CEC doesn't require the original, so secondary evidence under CEC isn't an exception

### **III. Judicial Notice**

**FR 201: Notice of Adjudicative Facts** (facts about the event that gave rise to the lawsuit and that help explain who did what, when, where, how and/or motive).

1. TYPES OF FACTS court can notice = fact not subject to reasonable dispute because:
  - (a) it is generally known within the court, or
  - (b) it can be determined from accurate sources
2. TAKING NOTICE: at ANY stage in the proceeding, the court:
  - (a) MAY take notice on its own
  - (b) MUST take notice if party requests and give court necessary info
3. IF NOTICE IS TAKEN the court must
  - (a) in CIVIL case, instruct jury that it MUST accept noticed fact
  - (b) in CRIMINAL case, instruct jury that it MAY OR MAY NOT accept noticed fact

**CEC Judicial Notice is different:** Under CEC, court MUST take notice of a universal truth (i.e. the sun rises in the east), but if fact is merely undisputed (not a universal truth) court is not required to take notice, but may do so at its own discretion.

### **IV. Relevant Evidence**

**FR 401: Evidence is RELEVANT** if it makes a material fact more or less probable, regardless of degree of the evidence's probative value.

**FR:** Relevant evidence always admissible even if goes to UNDISPUTED fact.

**CEC:** Relevant evidence ONLY admissible if goes to a DISPUTED fact; but exception in criminal cases, because CAL CONST. says relevant evidence shall not be excluded in crim. case

### Balancing Value and Dangers of Evidence

**FR 403: EXCLUDING Relevant Evidence** - court may exclude relevant evidence if its probative value is outweighed by:

1. Unfair prejudice (inferential error = jury gives too much weight to the evidence, or a nullification error = jury bases verdict on who person IS not what person DID)
2. Confusing the issues
3. Misleading the jury
4. Undue delay/wasting time
5. Needlessly presenting lots of evidence

#### Conditional Relevancy and Prelim. Questions of Fact

Note: Judge decides admissibly of both, and may consider any evidence, even if inadmissible

**FR 104(a): Existence of Preliminary Fact** - where admissibly depends on the existence of preliminary fact, and such evidence is relevant regardless of if the prelim fact is true

\*Proponent must show by preponderance of evidence/that it is more likely than not that a certain prelim fact exists.

**CEC 405: Determination of the Existence of Prelim Fact** - same as FR

ASK: If the prelim fact is not proven, is evid. still relevant? If yes, 104(a), if no, 104(b).

**FR 104(b): Relevancy that Depends on a Fact** - aka conditional relevancy, where evidence is only relevant (and thus admissible) if a certain prelim fact exists.

\*Proponent must show by sufficient to support a finding that the evidence would allow a reasonable jury to find a certain way.

**CEC 403: Determination of Foundational and Other Prelim Facts** When Relevancy, Personal Knowledge, or Authenticity Disputed

- Also includes dispute over who is the person who made the statement that is being offered as evidence
- Standard is preponderance of the evidence - higher than FR 104(b)

## **V. HEARSAY**

See Separate Hearsay Approach....

## **VI. Character Evidence**

**FR 404(A) Character Evidence** NOT admissible to prove conduct

**Except in a criminal case** when character evidence is [first] offered by the accused. D can "open the door" to character evidence in two ways:

- (1) If D offers character evidence of D, prosecution may offer character evid of D to rebut
- (2) If D offers character evidence of V, protection may offer character evid of V to rebut AND may offer character evidence that D has same trait

**Note:** Special rule for homicide prosecutions in where prosecution can also offer evidence of V's character if defense offers evidence that victim attacked first (to establish self-defense).

**CEC 1101: Character Evidence** - same as FR

**CEC 1102:** Character evidence via specific instances not allowed even on cross-exam

**FR 405 Methods of Proving Character**

- (1) Direct Exam — D opens door with evidence of reputation or opinion
- (2) Cross-Exam — Inquiring into reputation, opinion, or specific instances is allowed
- (3) Re-direct Exam — D can ask about specific instances but only within scope of cross-exam

**Reputation** - testimony about reputation is hearsay, but FR 803(21) creates an exception for "reputation among person's associates or community" — witness must have

sufficient knowledge of the person's community reputation that amounts to more than a small circle of people

**Opinion - Lay Witness** - witness must know person well enough to assert a personal opinion about the person's character, and must be rationally based on perception (FR 701)

**Opinion - Expert Witness** - the opinion must be based on data that "experts in the particular field would reasonably rely on in forming an opinion on the subject", and that the opinion be grounded in "valid science" (FR 702, 703)

**Specific Instances** - always admissible when offered to prove character when it is an element of the claim/defense

#### Character Evidence in Sexual Assault Cases - Crim + Civil

##### **FR 413: Evidence in Criminal Sexual Assault Case**

Evidence of similar crimes for any relevant manner is admissible

**CEC 1108: same**

##### **FR 414: Evidence in Criminal Child Molestation Case**

Evidence of prior child molestation admissible for child molestation case, not prior rape

CEC has no equivalent

##### **FR 415: In CIVIL Case for Sexual Assault or Child Molestation**

Character evidence is admissible

CEC has no equivalent

##### **CEC 1109: Evidence of D's Acts of Domestic Abuse in Criminal Case**

Admissible

FR has no equivalent

##### **FR 412: Character Evidence of Rape Victims**

**Generally inadmissible:**

- (1) Evidence to prove V's other sexual behavior
- (2) Evidence to prove V's sexual character

**Except, in a criminal case**, the following is generally admissible:

- (1) V's sexual behavior to prove a person other than D did it
- (2) V's sexual behavior with D is admissible by D if offered to prove consent, or by P
- (3) Otherwise prohibited evidence is admissible if it would violate D's const rights

**Except, in a civil case**, the following is generally admissible:

- (1) V's sexual behavior if probative value outweighs danger/unfair prej. to V
- (2) V's reputation is only admissible if V placed her reputation in controversy

\*\*Victim includes an alleged victim

#### Crimes, Wrongs and Other Acts + Habit + Similar Acts

**FR 404(B) Crimes, Wrongs, and Other Acts** - AKA uncharged "misconduct" evidence

**(1) Not admissible to prove character**

**(2) Permitted to prove other facts, like:**

- Motive
- Intent
- Mistake or absence of mistake
- Identity
- Common plan/preparation

**(3) Notice:** On request by defendant in a criminal case, the prosecutor must:

- (A)** provide reasonable notice of any such evidence intended to be offered at trial, AND
- (B)** do so before trial—or during trial if the court excuses lack of notice for good cause.



- **Doctrine of Chances:** When similar rare instances occur multiple times, exceeding the ordinary incidence of such events, evidence of the uncharged acts is likely admissible to prove that each time could not have been an accident
- Highly probative of guilt bc the more similar the prior act, the more weight it carries
- Crime, wrong or act: deals with the **underlying conduct** that gave rise to the arrest or conviction other than the arrest or conviction itself
- Does not have to be an arrest or conviction — **an accusation is enough**, supported by evidence that makes it sufficient to support a finding under 104(b) that the accused did it
- Crime, wrong, or act can be **before or after** the act at issue in the case **but must be relevant**

**FR 406 Habit; Routine Practice** - evidence of a person's habit or organization's routine may be admitted to prove conduct.

**Evidence of Similar Events** - evidence can be about people/events other than those in the present case and still be relevant.

(1) Seeking to prove that an event occurred in particular way by using evidence that one or more similar events have occurred under similar circumstances

- Degree of similar must be high
- Frequency must be high

(2) Does not convey moral or ethical judgment

(3) Absence of similar accidents under similar conditions has a tendency to prove lack or unreasonable danger

## VII. EXCLUSION of Other Relevant Evidence for Policy Reasons

### Subsequent Remedial Measures

**FR 407 Subsequent Remedial Measures** - when AFTER accident causing injury/harm, measures are taken that would have made an earlier accident less likely to occur, evidence of the subsequent remedial measure is **NOT admissible to prove:**

(1) FAULT

- negligence,
- culpable conduct,

(2) PRODUCT DEFECT

- a defect in a product or its design, or
- a need for a warning or instruction.

**AND** relevance depends the remedial measure being the actor's implied recognition of fault.

**YES admissible to prove:**

- impeachment,
- ownership, control,
- or the **FEASIBILITY** of precautionary measures, where the defense amounts to a claim that it was not possible or reasonable to lessen the likelihood of the accident
  - not set definition of feasibility (class recording from March 30)
    - (1) Narrow reading = measures were impossible under the circumstances
    - (2) Broader reading = includes motives and explanations for not having adopted the measure earlier, considering cost/resources, design
  - if D alleges that the method used was the "best" or "only" way to do it, evidence to support or refute this is allowed

**Note on FEASIBILITY vs SAFETY** = often a judgment call as to comparative value or trade off between cost and benefit of the precautionary measure does not raise an issue of feasibility

- difference between saying something is not advisable bc of safety concerns vs. not feasible bc doctor saying something like “procedure was safe” is basically saying that doctor wasn't negligence, and evidence of remedial measures not admissible to prove negligence
- so if a doctor denies negligence and claims that what he did was reasonable, this does not go to feasibility (SEE PG 419 QUESTIONS)
- doctor/defendant must deny feasibility for plaintiff to offer evidence of remedial measures

**Policy for rule** = avoid discouraging repairs; prevent people from being punished for doing the right thing, like taking safety measures

**CEC 1151** Subsequent Remedial Conduct - same as FR except does not extend to product liability/strict liability cases

**JDX split on PROD/STRICT liability cases > CA in minority** and declines to extend the remedial measure rule in PL cases

Compromise + Payment of Medical Expenses

### **FR 408 Compromise, Offers, and Negotiations**

- (1) Settlement demands/offer/acceptance (includes both completed compromises AND efforts)
- (2) Statements made during settlement negotiation (includes statements of fact even if such statements would be admissible party admissions)

#### **NOT admissible:**

When there is an asserted or threatened claim (rule won't apply if person offers to pay damages before claim) AND

- Offered to prove the validity of a claim or the damages amount in a claim, OR
- Offered to impeach by a prior inconsistent statement

#### **YES admissible:**

- In criminal case when the negotiations related to a claim by a public office
- To prove an effort to obstruct a criminal investigation or prosecution
- To prove witness's bias or prejudice, negating contention of undue delay, or proving an

**Policy for rule** = humanitarian purposes, we want people to help > so if a party offers something only to ask for something in return, offer/statement will likely be admissible

### **CEC 1152: Offers to Compromise**

### **FR 409 Offers to Pay Medical and Similar Expenses**

Offers, promises, or actual payment of medical, hospital, or similar expenses not admissible to prove liability for the injury

- Rule doesn't require that person making offer/payment was actually involved
- Any offer/payment excluded if offered to prove liability
- Doesn't exclude statements made while offering to pay, i.e. statements of source of injury/ liability (as opposed to Rule 408)

### **CEC 1152: same as FR 408, 409**

### **CEC 1160: Admissibility of Expressions of Sympathy**

Statements expressing sympathy for pain of person in accident is inadmissible for proving liability BUT statement of fault which is part of that statement is admissible

Plea Evidence

### **FR 410 Pleas, Plea Discussions, and Related Statements**

**Inadmissible** for ANY purpose against D in criminal or civil case:

- Guilty plea that was later withdrawn



- Nolo contendere plea - "I will not contest it"
- Statement at plea hearing
- Statement during plea discussions (w prosec. attorney, so statements to police don't count)

**Exceptions:**

- When offered for completeness
- When offered in criminal proceeding for perjury or false statement made by D while under oath (which is not hearsay bc words have independent legal significance)

**CEC 1153: nothing said about excluding statements made during plea negotiations**

- CA Const says all relevant evidence admissible in criminal case, which applies to this rule...
- BUT no one wants to discourage Ds from plea bargaining, so unspoken rule to apply the FR exclusion

Evidence of Liability Insurance

**FR 411 Liability Insurance**

**NOT admissible** to prove negligence

**YES admissible** to prove things like ownership, control, bias or prejudice of witness

**Policy for rule** = don't want the jury to hear the defendant/insurance co has liability insurance bc the jury will be less inclined to consider all the fact and/or rule for the insurance co.

**VII. Examining Witnesses: Attacking and Supporting Credibility**

Credibility Evidence Approach

1. What is the evidence?
2. Offered to support witness credibility?
3. Offered to impeach witness? If yes, what is the method of impeachment?
4. Is the evidence relevant and admissible under this method of impeachment?
  - Does this method require direct evidence (from the witness being cross-examined) of the impeaching facts
  - Does this method allow extrinsic evidence (from other sources) of the impeaching facts
5. Would admission of the evidence violate any other rules?

Mode of Witness Examination

**FR 611 Mode and Order of Examining Witnesses and Evidence**

**(a) COURT CONTROL:** court should exercise control over the mode and order of witness questioning and presentation of evidence... **Objectionable Questions:**

- Ambiguous - not clear
- Confusing - causes jury to misconstrue significance
- Misleading - tricks into assuming a fact to be true that hasn't been proven
- Argumentative - asked forcefully + suggests facts as true
- Compounded - poses multiple questions with multiple answers
- Assumes facts not in evidence
- Cumulative - goes to facts that are already established (waste of time)
- Repeating an already answered question
- Narrative - open ended and invites witness to give lengthy response

**(b) SCOPE of CROSS-EXAM:** always w/in scope of direct exam, but cross-exam is limited to subject matter of direct exam + credibility of witness, and re-direct exam is limited to cross-ex

**(c) LEADING Qs:** questions that suggest an answer are (1) prohibited on direct exam, except when witness is adverse/hostile to direct examiner, and (2) permissible on cross exam except when witness is not adverse, i.e. cross examining your own client

## Impeachment of Witness

### **CEC 780: Testimony; proof of truthfulness; considerations**

Court may consider any matter w tendency to prove truthfulness of witness testimony at the hearing, including:

- Demeanor + Manner while testifying\*\*
- Character of testimony
- Opportunity to perceive\*\*
- Capacity to
  - (1) perceive\*\*
  - (2) recollect\*\*
  - (3) narrate/communicate\*\*
- Honesty of witness
- Bias or other motive of witness
- Prior statement consistent w current testimony
- Prior statement inconsistent w current testimony
- Existence of fact testified to
- Attitude toward action or toward testifying
- Admission of untruthfulness
- Plausibility of witness testimony\*\*

*\*\* These factors are not defined or governed by other evidence rules, discussion of these factors on pages 460-64*

**FR 607 Who May Impeach** - any party, including the party who called the witness, may attack a witness's credibility

**Note:** impeachment can be used as a non-hearsay pretense > claiming that you want to admit evidence to impeach a witness (when you're not actually trying to impeach) in order to get around a hearsay rule is not allowed

## Witness Character

### **FR 608 (a) Reputation or Opinion Evidence Re Truthfulness**

Evidence (which is extrinsic evidence) of witness's truthful character **YES admissible ONLY IF:**

- (1) Witness's character for truthfulness has been attacked
- (2) On the basis of truthfulness (and NOT on other basis, i.e. forgetfulness, recklessness)

### **FR 608 (b) Specific Instances of Conduct Probative of Truthfulness**

**Extrinsic Evidence = NOT admissible;** cannot prove specific instances of conduct to attack witness's character for truthfulness via sources other than the witness

EXCEPTION: cross exam 2nd witness/character witness about spec instances of 1st witness/principal witness (i.e. did you know that 1st witness lied on this occasion?)

**Direct Evidence = YES admissible;** 1st witness may testify about own conduct of truthfulness

**CEC 787 = evidence (direct/extrinsic) of character conduct not admissible to impeach in civil**

**\*\*Notice if the character evidence is going to conduct in case (not admissible) or to credibility (yes admissible):**

COMMON HYPO: you get a party in the case (maybe D) who testifies as a witness who is now occupying two roles, and now his character is relevant for two purposes: (1) to prove he is not credible as a witness, and (2) to prove his conduct in the case, for which there are big limits under 404(a)... so when the evidence is offered to attack credibility to attack witness who is a party, and is admissible to attack credibility but not to show conduct in case, the THIS RAISES A 403 OBJECTION!!!

## Conviction of Crime to Impeach

### FR 609 - Impeachment by Evidence of a Criminal Conviction

CRIME	Impeaching D/ACCUSED	Impeaching OTHER WITNESS
<b>Dishonesty or false statement</b> is an element of the crime (literal lying, not talking about theft, etc)	Admissible. No discretion to exclude for unfair prejudice.	Admissible. No discretion to exclude for unfair prejudice.
<b>Felonies</b> (crimes punishable by 1yr prison or death) (different standard depending on who witness is)	Admissible ONLY IF prosecution shows prob. value outweighs unfair prejudice (Diff from 403; skewed <i>against</i> admiss).	Admissible UNLESS opposing party shows that unfair prejudice outweighs prob. value (403 standard).
<b>Misdemeanors</b> (crimes not punishable by 1 yr prison/death)	Not admissible.	Not admissible.
<b>10 or more years</b> since conviction or confinement (remember, even if admissible, the older the conviction, the less probative value it has)	Admissible ONLY IF prosecution shows prob. value outweighs unfair prejudice + gives adverse party written notice so there's a fair chance to contest its use.	Admissible ONLY IF prosecution shows prob. value outweighs unfair prejudice + gives adverse party written notice so there's a fair chance to contest its use.

#### Notes:

- evidence of prior conviction only admissible if D testifies
- > court can't do the balancing test of value vs. prejudice of evidence of conviction if D doesn't testify about crime and thus the evidence is never offered
- SO to raise and preserve for review the claim of improper impeachment w/prior conviction, D basically must risk impeachment and testify (*Luce* case)
- Conviction that satisfies this rule is admissible even if appeal pending (presumption of judicial accuracy...)
- **Evidence NOT admissible:**
  - Convictions subject of pardon, annulment, or certificate of rehab
  - Juvenile convictions (unless offered in criminal case and witness is not D)

#### CEC 788 Conviction of FELONY or crime of moral turp is relevant to impeach in crim cases

- misdemeanors not admissible to impeach BUT CA const says all relevant evidence
- so any conviction, including misdemeanor, for crime involving moral turpitude (crime involving lying, violence, theft, extreme recklessness, or sexual misconduct... which does not include crimes of negligence) is admissible to impeach

**ASK:** (1) Crime of moral turp? If yes, (2) balance unfair prejudice to determine admiss

## Religious Beliefs or Opinions

**FR 610 Evidence of Religious Beliefs or Opinions** inadmissible to attack witness credibility.

## Bias, Motive, and Interest

**There is no specific Fed Rule** regulating impeachment based on bias...

### PROVING BIAS

- can only be proved circumstantially, extrinsic evidence
- by evidence that a witness has been favorably or unfavorably disposed to a party
- exists when witness has personal interest in the case

## ADMISSIBILITY

- D says “the accomplice told me that the accomplice would falsely accuse me” showing that accomplice has motive to shade evidence to be against D; then accomplice says that they are ALL members of a society that encourages lying
- evidence of joining society that encourages lying relevant to show
  - (1) bias/motive to lie - which is admissible bc no rule regulating extrinsic evidence of bias/motive (*US v. Abel* case)
  - (2) of specific instances of conduct to show untruthful character - which is inadmissible bc extrinsic evidence
  - (3) character of D to commit crime/robbery - which is inadmissible bc character evidence cannot be used to show conduct in case
- **If evidence of bias is a prior statement**, party offering the evidence must give opposing party a chance to explain inconsistent statement re: bias
- if witness denies bias, then extrinsic evidence of bias is admissible

### Impeachment by Contradiction

**There is no specific Fed Rule** regulating impeachment based on contradiction... but impeachment by contradiction is common.

**General rule** = extrinsic evidence is not admissible to contradict witness on a collateral matter.

### PROVING CONTRADICTION

- witness has testified to three facts, A B and C, and you try to admit evidence to show that one of the facts testified to isn't true... i.e. “not B”
- attacks witness's credibility bc if witness testified to fact that isn't true/is lying or mistaken about one thing, witness may be lying or mistaken about another thing

### ADMISSIBILITY

- rule limiting admissibility of contradiction evidence to impeach **ONLY** limits the admissibility of evidence that contradicts witness on a **COLLATERAL** matter
  - collateral matter = a fact not material to the issues in the case, and it says nothing about the witness's credibility other than just to contradict
  - so if evidence is **NOT** about a collateral matter (issue material to case or issue of witness credibility beyond contradiction) then **YES** admissible
- and rule limiting admissibility **ONLY** applies to extrinsic evidence... thus, witness can only be impeached when witness contradicts herself on cross-examination
- **so this rule applies/makes evidence NOT admissible IF:**
  1. evidence is about impeachment of witness by contradiction
  2. evidence contradicts witness on a collateral matter
    - does NOT contradict witness on a material issue in case
    - does NOT attack witness credibility on any basis beyond contradiction
  3. the impeachment evidence is extrinsic evidence, not from witness's mouth

*...because we don't really care if witness is wrong about immaterial issue if there's no other reason to find witness not credible*

### Prior Statements of Witnesses

**FR 801(d)(1)(A) Prior Inconsistent Statements** admissible to impeach if:

- (1) Declarant testifies at current trial
- (2) Declarant is subject to cross-examination about statement (even if declarant doesn't remember everything about prior statement) (same under CEC)
- (3) Inconsistent statement was made **under oath** subject to penalty for perjury (not the same under CEC - no requirement that it was given under oath)

\*\*Extrinsic evidence of prior inconsistent statement ONLY admissible if witness is given an opportunity to explain or deny the statement (same under CEC)

### **FR 801(d)(1)(B) Prior Consistent Statements**

**Note:** no jury is ever going to be able to manage, in their minds, using a prior consistent statement just to support credibility and not using it to support the truth of the matter asserted, so to be admissible, prior consistent statement MUST PROVE BOTH

**Five elements... admissible to support witness credibility if:**

1. Declarant testifies at current trial
2. Subject to cross examination about statement
3. Prior statement must be consistent with current testimony
4. **Credibility is attacked** - a party accuses declarant/witness of recently fabricating, or acting from an improper influence or motive in testifying
5. Statement is offered to rebut this accusation to support/rehabilitate witness credibility

**\*\*TIMING IS KEY** > prior consistent statement must have been made BEFORE the alleged improper influence or motive arose... if statement was made after, it's not admissible

**CEC is the same**

## **VIII. Lay and Expert Opinion Testimony**

### **FR 701 Lay Witness**

May testify in the form of an opinion if:

- (a) Based on the witness's personal perception
- (b) Rationally based on that perception
  - some connection between subject of opinion and the matter perceived
  - quality and quantity of perception must be sufficient to logically permit the witness to base an opinion on it
- (c) Helpful to either (1) clearly understanding the witness's testimony or (2) to determining a fact at issue

### **FR 702 Expert Witness = qualified by knowledge, skill, experience, training, or education**

May testify in the form of an opinion or if:

- (a) the expert's scientific, technical, or other specialized knowledge will **help the trier of fact** understand evidence or determine a fact in issue,
  - Factors**
    1. RELEVANCY of testimony; REASONING is logical
    2. JURY'S NEED for the expert testimony to determine the facts at issue (i.e. when the facts/issues challenge the comprehension of lay people; when evidence is confusing but can be explained by an expert)
    3. INCOMPLETE or INACCURACY of jury's understanding without the expert testimony
- (b) the testimony is based on sufficient facts or data,
- (c) the testimony is the product of reliable principles and methods, AND
- (d) the expert has reliably applied the principles and methods to the facts of the case.

### **RELIABILITY of Expert Testimony:**

1. TESTING - produced by some method, technique, or theory that has been tested
2. PEER REVIEW, or publication of this science
3. LOW ERROR RATE - known error rate with this scientific evidence being offered, or is there some other standard for judging its accuracy?
4. ACCEPTED - reasonable level of acceptance within the scientific community?

### **BASIS for Expert Testimony**

1. Personal knowledge
2. Facts/knowledge about which the expert was made aware (here's what the other witnesses testified to, what's your opinion on this)
3. Inadmissible evidence

### **FR 704 Opinion on Ultimate Issue:** intent, cause of death, etc.

Testimony as to the ultimate issue of the case is admissible EXCEPT:

- Criminal case, cannot give opinion as to whether the defendant had the requisite mental condition or not (but can say he "could have" had it)
- **Note:** to avoid violating 704, witness could testify that "typically this is how crime is done"... Expert could describe in a general way what certain conduct could tell us about intent, as long as they don't draw the last inference in the logic.

### **FR 706 Court Power to Appoint Experts**

- Rare but it can be done when court feels it needs a neutral expert to advise

### **FR 604 Interpreters**

- An interpreter must be qualified and must give an oath or affirmation to make a true translation
- Translator/interpreter must be considered an expert in order to assist the trier of fact