

# Evidentiary Issues from a judicial perspective

A view from the bench

Judge Curtis M. Fiorini  
1/29/21

# Topics we will cover

(or at least try)

- Approach to Relevance
- Balancing Probative Value v. Prejudice
- Approach to Hearsay
- Refreshing Memory

# Topics we will cover

(or at least try)

- Approach to Hearsay Exceptions
  - Admission of Party Opponent
  - Prior Inconsistent Statements
  - Past Recollection Recorded
  - Spontaneous Statements
  - Business Records

# Topics we will cover

(or at least try)

- Experts - Sanchez
- Confrontation - Crawford

Approach to relevance

# Approach

- Always Ask:
  - What is the PURPOSE of the evidence?

# Relevance: California Evidence Code

210

- Evidence
- Having any tendency
- To prove / disprove
- A disputed fact of consequence

Certainty -----

Clear & Convincing --

Beyond Reas. Doubt

Preponderance -----

Probable Cause -----

Reasonable Doubt ---

Relevance -----

## The Relevance Scale



0%

25%

50%

75%

100%



# Admissibility of Letter

**Man writes a love letter**

**Loves the woman he writes to**

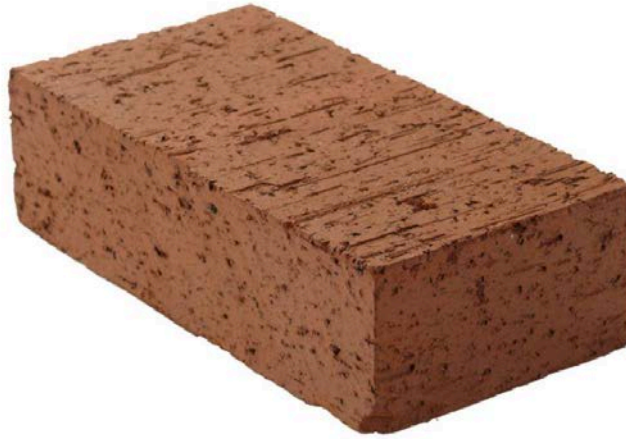
**Wants to be with her**

**Wants competitor gone**

**Plans to get rid of him**

**Kills him**

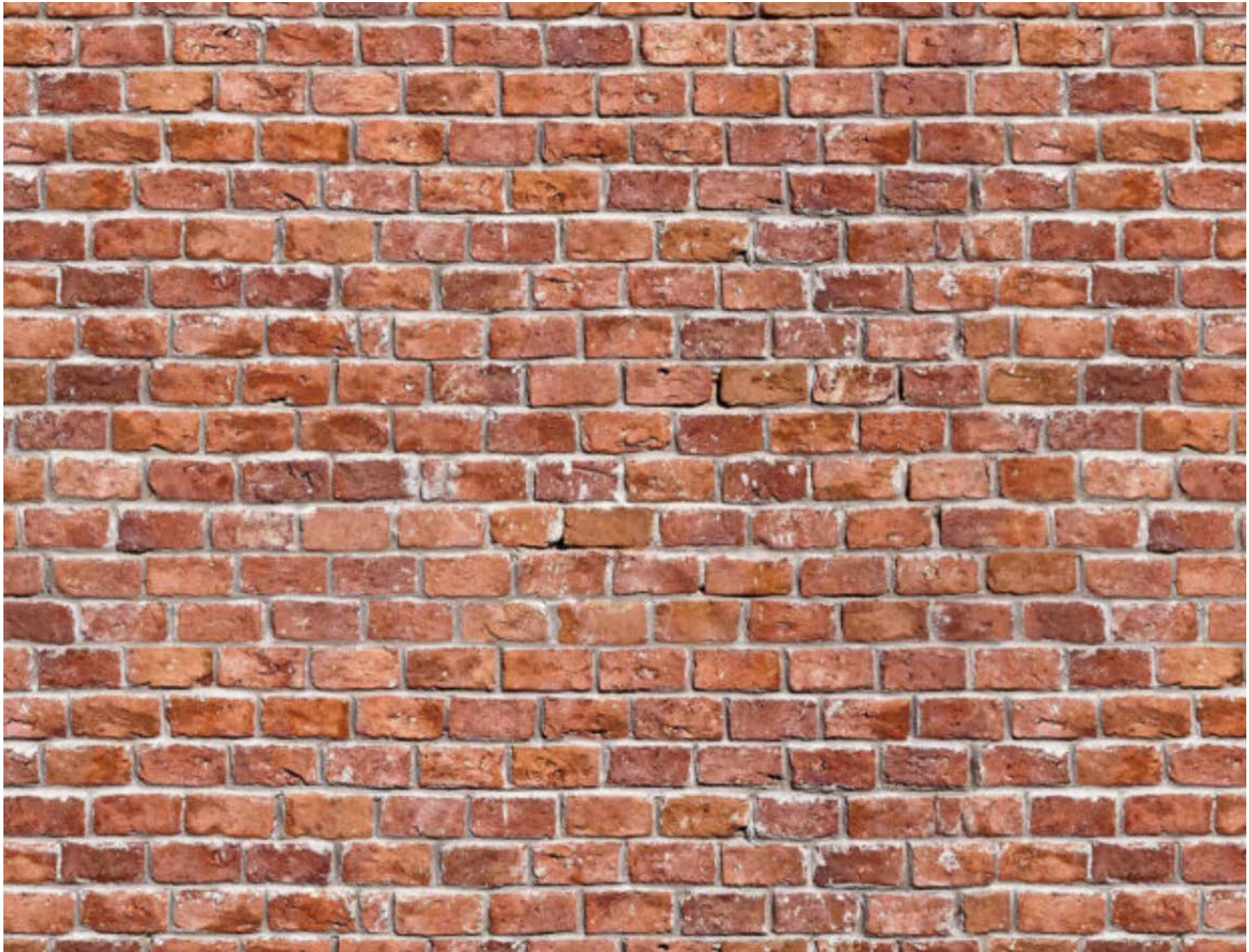




“A brick is not a wall.”

—DEAN CHARLES MCCORMICK  
MCCORMICK’S HANDBOOK ON THE LAW OF EVIDENCE





Evidence need not be conclusive to be admissible.

# Calif. Evidence Code 352

## Federal Rule 403

- Even though evidence is relevant
- Discretion to exclude it
- If probative value is
- Substantially outweighed by:
  - undue prejudice
  - confusion
  - delay
  - cumulativeness

# “Prejudice”

- The fact that damning inferences may be drawn from [an answer] does not make evidence of that unduly prejudicial. The word “prejudicial” is not synonymous with “damaging.” Rather, evidence is unduly prejudicial only if it uniquely tends to evoke an emotional bias against the [opposing party] as an individual and has very little effect on the issues, or if it invites the jury to prejudge a person or cause on the basis of extraneous factors. Painting a person faithfully is not, of itself, unfair.

People v. Poplar (1999) 70 Cal.App.4th 1129



# Probative value v. Prejudice

- The more substantial the probative value, the greater must be the prejudice to justify exclusion
- Factors considered:
  - Materiality
  - Strength of the relationship to the issue for which it is offered
  - Whether it goes to a main issue or something collateral
  - Whether it is necessary to prove the proponent's case or merely cumulative to other available and sufficient proof
  - If merely cumulative, it may be of less probative force

Approach to hearsay



## Hearsay Definition

Evid. Code 1200; Fed. Rule 801(c)

Statement made other than by a witness  
(declarant) while testifying at the hearing  
and

Offered to prove the truth of what was stated  
(asserted) out of court

# Hearsay Elements

- STATEMENT (E.C. 225; Fed. Rule 801(a))
  - oral or written assertion
  - assertive conduct (nonverbal substitute)
- MADE OUT OF THIS COURT
- OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED
  - attorney wants jury to believe the declarant
  - not just the witness

# Five Questions

- Who is the Declarant?
- Who is the Witness?
- Is there a Statement?
- Was it made Out of Court?
- For what Purpose is it Offered?
  - Intended by the offering party to be used for the truth of the quote/content

REMEMBER:

Even if the declarant is on the  
stand as a witness, it CAN STILL  
BE hearsay

# STATEMENT'S Purpose?

- Relevance regardless of credibility: i.e. “not for the truth of the matter asserted”
- Do you have to believe the declarant? Does the declarant’s credibility matter?
- If yes = Hearsay
- If no = Not Hearsay
- But then ask if the “Not Hearsay” purpose is actually relevant.

# Non-Hearsay Purposes

- EXAMPLES:
- State of Mind - Effect on listener
- State of Mind - Infer Declarant's State of Mind
- Impeachment by Contradiction
- Independent Legal Significance
  - Contract / Consent / Authorization
- Ability to speak / consciousness
- Notice /warning
- Knowledge

# State of mind example

- Jane said “Oh no, here comes John towards us.”
  - Circumstantial evidence of her state of mind - fearful
  - Not offered for truth that John is coming toward them.
  - Infer from statement that Jane is afraid of John
  - Admissible as non-hearsay
- Jane also said “I am afraid of John.”
  - Direct evidence of her state of mind
  - A statement directly asserting her state of mind, so hearsay if offered for the truth.
  - Look at EC 1250 for exception.
  - Note: Jane’s state of mind must be “at issue” to meet that exception.

# Who Can Make a Statement

- California Evidence Code 225:
  - expression
  - of a person
- Federal Rule 801:
  - assertion
  - of a person



# Speeding Trial

- Q: Did you see the car approach?
- A: Yes.
- Q: How fast was it going?
- A: 40 miles per hour in a 30 mph zone.
- Q: How could you tell?
- A: I looked at my timer reading.
- Defense: Objection, hearsay.
- Court: Overruled.





No Hearsay from Machines  
Not a statement



# HEARSAY Exceptions

Admission of party opponent

# Admission by Opponent

## Fed. Rule 801(d)(2)(a); Evid. Code 1220

- Statement made by a party
  - in his/her individual capacity
  - by his/her representative
- Showing adoption or belief by the party
  - no personal knowledge required
- Offered against the declarant party

## Remember...

- Any statement by a party, offered by an opponent overcomes the hearsay rule.
- It does not matter whether the statement was against interest when made
- Nor does the statement have to be made based upon personal knowledge.
- No requirement that declarant “admitted” something.

# EXAMPLE - Defendant's testimony

- “And I told the police I didn’t do it. I told them I wasn’t even at the bar that night.”
- Declarant is on the stand but that does not make it “not hearsay.”
- Follow the statement -
  - Made Out of court? Yes
  - Offered to prove truth of the matter asserted? Yes

# Types of Recall

- Present memory
- Refreshed memory
  - becomes “present memory” after stimulus
- Past Recollection Recorded
  - no present memory
  - but record was made when had present memory



Can refresh recollection  
with anything!



Mark Item Used to Refresh Recollection?

Check with judge

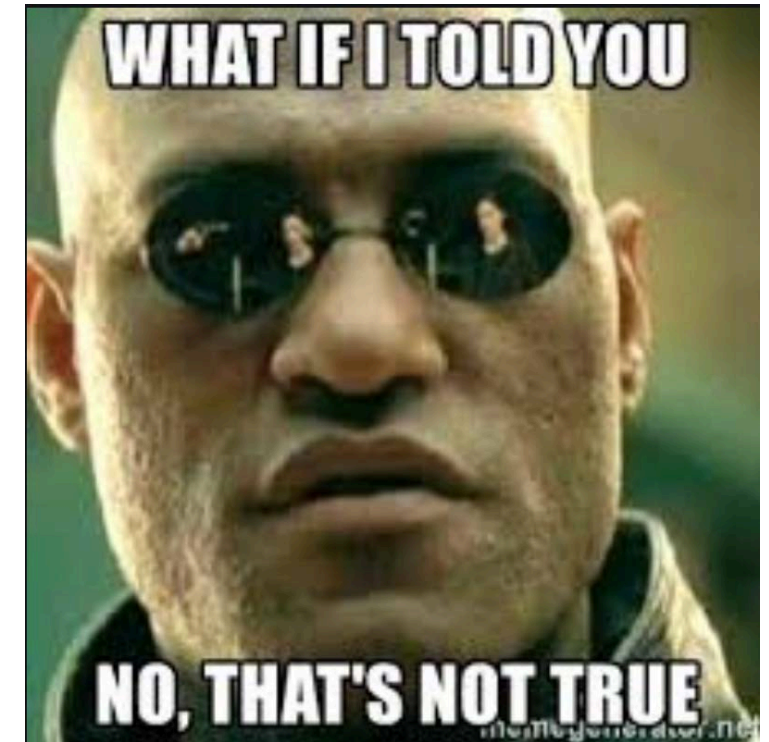
Present Memory Refreshed is  
Not a Hearsay Issue

# Common Error

Denying a Fact  
or  
Testifying Differently than Expected  
is not “failure to recall”

Not proper to ask to “refresh recollection” when  
witness denies or testifies differently to what is  
expected.

Pursue Prior Inconsistent Statement



Attorney: Your honor, may I  
approach the witness and show  
him his report to see if it  
refreshes his recollection?

Court: No. You may not.

Prior inconsistent statements

# Purpose of Prior Inconsistent Statements

- **Impeachment only**

- inconsistency shows lacks credibility
- not depend on the truth of prior statement
- not hearsay

- **Substantive proof of the event**

- depends on the truth of prior statement
- meets traditional hearsay test

# Prior Inconsistent Statement

## Fed. Rule 801(d)(1)(a); Evid. Code 1235

- **Declarant testifies**
- **Made a prior statement**
  - California: any prior statement
  - Federal: only if under oath in a “proceeding”
- **Inconsistent with present testimony**
  - direct contradictions
  - not just lapse of memory of the “event”
  - unless deliberately evasive (implied denial)
  - whether recalls the “statement” or not

# Prior Inconsistent Statement

- **Before calling extrinsic witness who heard the statement**
  - Confront witness-declarant with prior statement to give opportunity to explain or deny
  - California: or make witness subject to recall
- **Admitted for truth of prior statement**



# Common Misconception

Witness testifies she “does not remember.”

Failure to recall / Not remembering is  
not “inconsistent.”

(Unless implied denial)

- You won't get prior inconsistent statement exception for a simple lapse of memory. Try to refresh.
- Sometimes, after refreshing, witness still doesn't remember. When that happens, lay the foundation for Past Recollection Recorded.

Past recollection recorded

# Past Recollection Recorded

## Fed Rule 803(5); Evid Code 1237

- Declarant is available AND testifies
  - (Though statute/rule says “whether declarant is available or not”)
- Witness-declarant has no present memory
- Had personal knowledge of facts at time of statement

- Made a record
  - by the witness-declarant
  - adopted by the witness-declarant
  - California only:
    - at witness-declarant's direction; or
    - for purpose of recording witness-declarant's statement
- When fresh in memory
- Recorded accurately
- Read statement aloud (document not received in evidence)

# Business Records

Fed Rule 803(6); Evid Code 1271

- Whether declarant writer is available or not
- Writing by an agent of the business
  - describing act, condition or event
  - (Federal: plus opinions or diagnosis)
- Made in the regular course of business
- At or near the time of the event described

# Business Records Continued

## Fed Rule 803(6); Evid Code 1271

- Testimony by custodian of records or other qualified witness
  - Identify the writing; explain how prepared
- Trustworthy source, method & time of preparation
  - Federal: admit unless lacks trustworthiness
  - California: admit if indicates trustworthiness

Does not make everything in the record admissible

## Practical Pointer

Example: Defense wants to admit business records that have defendant's statements in them

Those statements not admissible because not statement of party opponent

Your client's statements within will be redacted unless falls within an exception

Watch for multiple layers of hearsay in business records



S p o n t a n e o u s   s t a t e m e n t

# Spontaneous statement

## Fed. Rule 803(2); Evid. Code 1240

- A startling event occurs
  - subjective test; declarant's actual state of mind
- Statement made while under the stress of that event
  - not time to formulate a lie
- Statement "relates to" that event
  - i.e. narrates, describes, or explains

# Spontaneous statement

- Must be “spontaneous and unreflecting”
- Utterance must have been made before there has been time to contrive and misrepresent.

People v. Poggi (1988) 45 Cal.3d 306, 318

# Spontaneous statement

- In deciding admissibility, the court may consider:
  - Length of time between event and statement;
  - Whether made in response to questions; and
  - Whether questions were suggestive

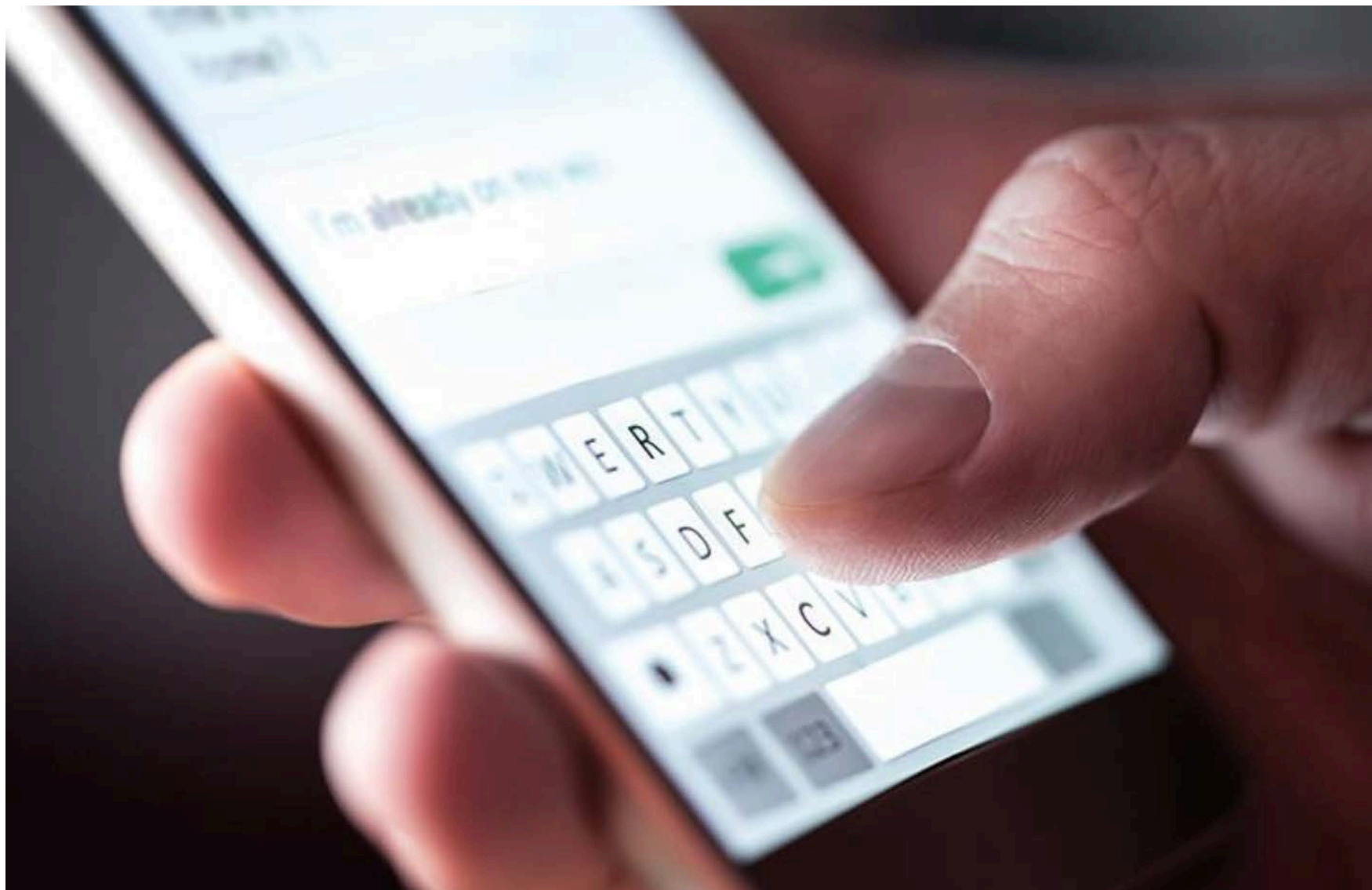
People v. Poggi (1988) 45 Cal.3d 306, 318

Sleeping Beauty awakens after 100 years and immediately cries out  
“Maleficent poisoned me!”

The High Prosecutor seeks to introduce this statement at trial as a  
Spontaneous Statement. Maleficent’s attorney objects since the statement  
was not made at or near the time of the event.

Admitted?





\*Careful with text messages\*

Written statements can be considered spontaneous if they are “not the product of processing information in a deliberative manner.”

The statements must be written down before the declarant has had time to “contrive and misrepresent.”

See People v. Gutierrez (2000) 78 Cal.App.4th 170

# Present State of Mind or Physical Condition

Fed Rule 803(3); Evid Code 1250(a)(1)

- Whether declarant is available or not
- When state of mind or physical condition is a “material issue” (ie malice, reasonable belief, knowledge [ie possession stolen property], pain, lack of consent)
- Statement of existing (present) state of mind or physical condition
  - not expressing memory or past belief
- Unless it is untrustworthy (California)

EXPERTS



# Basis evidence

- **RULE FOR BASIS EVIDENCE:**
- An expert's testimony regarding the basis for an opinion must be considered for its truth by the jury.

# Basis evidence

- NEW LITMUS TEST FOR BASIS EVIDENCE:
- Admissibility of expert testimony incorporating hearsay as basis evidence depends on whether the prosecution seeks to elicit “case-specific hearsay” or part of “general background information” acquired by the expert.
- So if:
  - Case-specific fact and no personal knowledge; and
  - No hearsay exception applies and expert treats fact as true...
    - Expert **Cannot** Testify to the Fact

# Basis evidence

- NEW APPROACH TO BASIS EVIDENCE
- An expert may not (1) relate the out-of-court statement of another as independent proof of the facts; and (2) testify to “case-specific out-of-court statements” of which she has no personal knowledge - but may...
  - Rely on hearsay in forming an opinion, and tell the jury in general terms that she did so; and
  - Testify concerning background information regarding her knowledge and expertise.

# Case-specific facts defined

- Facts relating to the particular events and participants alleged to have been involved in the case being tried.

# TWO APPROACHES

- FOR BACKGROUND INFORMATION AND KNOWLEDGE:

- Is hearsay
- Expert may rely upon it in forming his or her opinion
- Expert may relay it to the jury

- FOR CASE-SPECIFIC FACTS:

- Is hearsay
- Expert may rely on it in forming his or her opinion
- Expert may “tell the jury in general terms that he [relied on hearsay],” but may only “describe the type or source of the matter relied upon” (Sanchez, at 685-686)
- Expert may not relay it to the jury

Right of confrontation in criminal  
cases  
(crawford)

# Crawford Test

CRAWFORD V. WASHINGTON (2004) 541 U.S. 36

- Hearsay statement that meets an exception
- Testimonial in nature
  - no constitutional concern over non-testimonial hearsay
- Declarant is not cross examined (at some time)
- Exception:
  - forfeiture by wrongdoing by the defendant designed/intended to prevent testimony
  - dying declaration



# “Testimonial” Hearsay Davis v. Washington



- POLICE INTERROGATION

- No ongoing emergency
- Primary purpose: establish past events that may be relevant to prosecution

- COMPARE TO NON-TESTIMONIAL

- Primary purpose: provide assistance to meet ongoing emergency
- Caution: lack of police interrogation not automatically mean non-testimonial



# “Primary Purpose” Analysis

- Circumstances surrounding the encounter (scene v. police station)
- Ongoing emergency
- Formality of the encounter
- Statements and actions of the actors

Michigan v. Bryant (2011) 131 S.Ct. 1143

# Future of Crawford



- Statement is more likely “testimonial” where the two worlds of (1) primary purpose to target or accuse individual of engaging in criminal conduct; AND (2) formality or solemnity come together.
- We need formality because we need to adopt Justice Thomas’ “formality” to the plurality of US Supreme Court.

Williams v. Illinois (2012) 132 S.Ct. 2221

## Final Thoughts

# GOOD EVIDENCE RESOURCES

- CALIFORNIA GUIDE TO CRIMINAL EVIDENCE, 2019 ED. - HON. ELIA PIROZZI
- CALIFORNIA EVIDENCE MANUAL - JUSTICE MARK B. SIMONS
- JEFFERSON'S CALIFORNIA EVIDENCE BENCHBOOK - BERNARD S. JEFFERSON

