BASIC COURSE INSTRUCTOR UNIT GUIDE

17

PRESENTATION OF EVIDENCE

June 1, 1994

THE COMMISSION
ON PEACE OFFICER STANDARDS AND TRAINING

STATE OF CALIFORNIA

1092

The curricula contained in this document is designed as a *guideline* for the delivery of performance-based law enforcement training. It is part of the POST Basic Course guidelines system developed by California law enforcement trainers and criminal justice educators in cooperation with the California Commission on Peace Officer Standards and Training.

The training specifications referenced herein express the required minimum content of this domain.

UNIT GUIDE 17

TABLE OF CONTENTS

LEARNING DOMAIN 17
Presentation of Evidence

Page

Training Specifications for Learning Domain 17

Curricula for Learning Domain 17

I. Purpose of Offering Evidence (P.O. 4.1.3) 3

II. Purpose of Rules of Evidence 5

III. Tests for Introducing Evidence (P.O. 4.1.4.) 7

IV. Types of Evidence (P.O. 4.1.4) 11

V. Direct/Circumstantial Evidence (P.O. 4.1.1) 13

VI. Exclusionary Rule (P.O. 4.6.1) 15

VII. Subpoena (P.O. 4.4.2) 17

VIII. Hearsay Evidence (P.O. 4.6.3) 19

IX. Definition of Terms (P.O. 4.1.7) 27

Performance Objectives for Learning Domain 17

Supporting Materials and References

SPECIFICATIONS FOR LEARNING DOMAIN #17: PRESENTATION OF EVIDENCE

June 1, 1994

I. INSTRUCTIONAL GOALS

The goals of instruction on Presentation of **Evidence** are to provide students with:

A. an understanding of the role that evidence plays in a criminal trial;

B. knowledge of the terminology used by the criminal courts in dealing with different types of evidence; and

C. knowledge of the rules that must be followed in order for evidence to be introduced at a criminal trial.

II. REQUIRED TOPICS

The following topics shall be covered:

A. Distinction between direct and circumstantial evidence

B. Types of evidence

C. Purpose of offering evidence

D. Criteria for admitting evidence

E. "Rules of evidence" and their purpose

F. Evidence terminology

G. Subpoenas

H. Burden of proof

I. Exclusionary rule and its purpose

J. Hearsay rule and its exceptions

K. Hearsay evidence at preliminary hearings

III. REQUIRED TESTS

The POST-constructed knowledge test for Domain #17

IV. REQUIRED LEARNING ACTIVITIES

None

V. HOURLY REQUIREMENTS

Students shall be provided with a minimum of **8 hours** of instruction on evidence.

VI. ORIGINATION DATE

July 1, 1993

VII. REVISION DATES

June 1, 1994

CURRICULUM

I. PURPOSE OF OFFERING EVIDENCE (P.O. 4.1.3)

A. Purpose of evidence

1. Evidence is offered in court for one of the following reasons:

a. As an item of proof:

(1) Evidence offered as an item of proof is that evidence offered for the purpose of proving a fact at issue in the case, as opposed to evidence offered to show provocation, establish probable cause, etc.

(2) It can be offered by the prosecution to prove one or more elements of the corpus delicti of the people's case, or by the defendant to establish a defense.

b. To impeach a witness:

(1) Means to attack the credibility of a witness.

(2) This, again, can be accomplished by further questioning the witness regarding their testimony, past convictions, and/or by calling additional witnesses to dispute or contradict the testimony.

c. Rehabilitation of witness:

(1) Rehabilitation of a witness means to restore the witness's credibility.

(2) Credibility may be restored by providing the witness the opportunity to explain away incriminating statements or by showing a previously made statement is consistent with the present testimony.

(3) A witness impeached by proof of certain prior conviction(s) may be rehabilitated by evidence of good character.

d. Determining sentence: Proof that the defendant had previous specific prior convictions will assist in determining the proper sentence.

II. PURPOSE FOR THE RULES OF EVIDENCE

A. Reasons for rules of evidence:

1. Most evidentiary rules are designed to protect jurors from being confused or misled:

a. Since juries are predominantly comprised of lay people who are only vaguely familiar with the law and also impressionable, specific rules were established to sift evidence to assure that it is dependable, credible, and trustworthy before it can be considered.

b. In both court and jury trials, the judge is charged with the responsibility of determining the admissibility of evidence (310 C.E.C.).

2. Another reason for the rules of evidence is to expedite the trial (352 C.E.C.)

B. Scope of rules of evidence:

1. The general rules of evidence are basically the same whether the case be civil or criminal.

C. Reasons for excluding evidence:

1. Considerable evidence is excluded even though it would help the jury or the court in determining the true facts concerning the matters at issue.

2. Some general reasons for excluding otherwise pertinent evidence are:

a. To reduce violations of constitutional safeguards:

(1) Even after the beginning of the present century, it was almost universally accepted that evidence would be admissible in state courts even though illegally obtained.

(2) Due primarily to the impact of U.S. Supreme Court decisions the courts now hold illegally obtained evidence is inadmissable. Mapp v. Ohio (367 U.S. 643) and the 4, 5, 6, amendments to the U.S. Constitution.

(3) Exclusionary Rule: The rationale of the court is that, by rejecting such evidence, peace officers will be less likely to violate constitutional rights and provisions.

b. To avoid undue prejudice to the accused: (C.E.C. 352):

(1) Some otherwise relevant evidence is excluded due to its prejudicial potential.

(2) For example, the criminal record of the accused generally may not be admitted, except to impeach the testimony of the accused, because to admit it would unduly prejudice the accused in the minds of the jurors.

(3) Likewise certain photographs, especially those depicting unusually violent injuries, are sometimes excluded for the same reason.

c. To prohibit consideration of unreliable evidence:

(1) This category includes hearsay evidence and opinion evidence.

d. To protect valued interests and relationships:

(1) Some interests and relationships are considered by law to be of sufficient social importance to justify some sacrifice of sources of facts needed in the administration of justice.

III. TESTS FOR INTRODUCING EVIDENCE IN A COURT (P.O. 4.1.4)

A. Relevancy and competency

1. Evidence is relevant if it logically relates to a legitimate issue in the case.

2. The California Evidence Code uses only the term "relevancy" rather than "relevancy and materiality." Thus, although evidence may be relevant in that it relates to or has some bearing on the issue, it might have such slight relevancy or bearing on the issue as to be excluded.

3. Problems of relevancy are most important in the area of circumstantial evidence since, when dealing with such evidence, conflicting inferences are almost always possible: (352 C.E.C.)

a. EXAMPLE: The defendant is charged with murder and attempts suicide while awaiting trial:

(1) One inference is that the defendant is manifesting a consciousness of guilt and the evidence is relevant as tending to prove the defendant committed the crime.

(2) On the other hand, perhaps the defendant is innocent and could not bear the disgrace of being falsely accused.

b. It is up to the judge to determine whether the circumstantial evidence has sufficient probative value to admit it.

c. If such evidence is relatively weak (meaning that such conflicting inferences are possible) the judge is likely to weigh its admissibility against one or more of the following policy considerations:

(1) Does the evidence tend to unduly influence the jury, arousing either hostility or sympathy?

(2) Will the evidence, and/or proof necessary to counter it, consume an undue amount of time?

(3) Will such evidence create collateral issues that distract the jury from the main point of the case?

(4) Will the evidence unfairly surprise the opponent who may in good faith be unprepared to meet this unexpected development?

d. If the evidence is excluded for one or more of the above reasons, it is said to lack legal relevancy:

(1) That is, even though the evidence may have some logical tendency to prove the point for which it is offered,

(2) Other, more important, policy considerations (as discussed above) result in it being declared inadmissible.

e. However, if the probative value of the evidence is relatively strong (meaning that the desired inference is by far the most logical one), it will rarely be excluded on the basis of such policy decisions.

4. Specific relevancy issues:

a. Character evidence (C.E.C. 1100-1104):

(1) Character evidence as an item of proof:

(a) Sometimes character evidence may be offered as tending to show a predisposition (specific character trait) on the part of one of the parties to prove that a person acted in conformity with that trait on the particular occasion in question.

(b) Character evidence generally concerns a party's predisposition toward hostility, dishonesty, immorality; or, conversely, peaceableness, sobriety, morality, etc.

(2) Evidence of good character in criminal cases:

(a) A defendant in a criminal case may offer evidence of a good reputation in the community, or opinion testimony tending to establish that the defendant has good character for the particular trait in question.

(b) EXAMPLE: Charged with driving under the influence of alcohol, the defense called a witness to testify that the defendant has a good reputation in the community for sobriety, or that, in the witness' opinion, the defendant is a person of normal or exceptional sobriety.

(3) Evidence of bad character in criminal cases:

(a) The prosecution may not offer evidence tending to establish that the defendant has a bad character for the particular trait in question unless defendant has "opened the door" by first offering evidence of good character.

(b) Prior convictions: In California, evidence of a certain prior conviction(s) is admissible only for the purpose of impeaching the defendant's credibility as a witness and therefore, if the defendant does not testify, evidence of such prior convictions will usually be

inadmissible. Prior conviction must involve moral turpitude and not be too remote in time.

(4) Character of victim in criminal cases:

(a) In a criminal action, the character of the victim may occasionally be an issue in the case.

(b) In such a case, the defense may introduce evidence of the victim's character in an attempt to justify the defendant's actions.

(c) However, where the defendant does introduce evidence of the bad character of the victim, the prosecution may rebut such evidence by introducing evidence of the victim's good character.

5. Competency: This is another test closely related to relevancy

a. To be competent, evidence must not only be logically relevant but must also be of such character as to be receivable in courts of justice (i.e., to comply with the rules of evidence).

b. Otherwise relevant evidence is considered incompetent when:

(1) Offered by an incompetent witness (i.e., one who cannot observe, recall and narrate, or one with other than first-hand knowledge, etc.).

(2) It is obtained in violation of constitutional provisions or related law.

(3) It is not the "best evidence." **Best Evidence Rule States: For a document to be admitted in court the original must be presented or its absence explained.**

(4) It is real (physical) evidence that has not been properly prepared and safeguarded (chain of evidence).

(5) It is not "authenticated" if the evidence consists of a writing. (C.E.C. 1400)

B. Court admissibility tests

1. As the trier of fact, it is primarily the responsibility of the judge to insure that all evidence admitted into the trial was legally obtained and is legally admissible.

2. As a general rule, all evidence is admissible unless there is a rule of exclusion rendering it inadmissible.

3. Admissibility tests for evidence offered as an item of proof.

a. When considering whether evidence offered as an item of proof (i.e., to prove a fact) will be admissible, the following questions must be dealt with:

(1) Is the evidence relevant?

(2) Is the evidence subject to the hearsay objection and, if so, does it qualify under some exception to the hearsay rule?

(3) Does the offered evidence violate the opinion rule?

b. Each of the matters will be discussed in detail in subsequent sections.

IV. TYPES OF EVIDENCE (P.O. 4.1.2)

A. Fruits of the crime: That which was obtained by the defendant upon completion of the crime.

B. Instrumentalities of a crime: Means by which the defendant committed the crime (e.g., a crowbar used during a burglary, or a gun used in a murder).

C. Contraband: An item which by mere possession is a crime (e.g., possession of a sawed-off shotgun).

V. DIRECT/CIRCUMSTANTIAL EVIDENCE (P.O. 4.1.1)

A. Evidence defined:

1. The California Evidence Code, which was enacted January 1, 1967, defines evidence as:

a. Testimony, writings, material objects or other things presented to the senses that are offered to prove the existence or nonexistence of a fact (Evidence Code Section 140)

b. Stated another way, evidence may be defined as anything presented to the senses, when offered in a court of law, to prove a fact.

2. Evidence and proof distinguished

a. Evidence is information which is allowed in court, while proof is the effect produced by this information. (See Evidence Code Section 190)

b. Proof is the desired effect of evidence.

B. Direct Evidence defined: Direct evidence proves a fact without any inference or presumption. If the evidence is true from which the existence of another fact can be inferred.

VI. THE EXCLUSIONARY RULE

A. Definition: The **exclusionary rule** requires that any evidence obtained by the government or its agents in violation of the rights and privileges guaranteed by the U.S. Constitution be excluded at trial.

NOTE: The principle is that evidence will be rejected by the court if it has been obtained in an illegal manner.

B. Basis for the rule

1. The Fourth Amendment of the U.S. Constitution and Article 1, Section 13 of the California Constitution read, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

2. The Fourteenth Amendment, Section 1 reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

C. Purpose of the exclusionary rule

1 The primary purpose of the rule is to act as a deterrent against unlawful searches and seizures by peace officers. This is accomplished by eliminating any gains to be made by prohibiting any evidence obtained in violation of an individual's constitutional rights.

2. Another reason for the adoption of the exclusionary rule is to maintain the dignity and integrity of the courts by keeping "tainted" evidence away from the courtroom and relieving the courts from participating in the illegal conduct of the police officers.

D. Application of exclusionary rule in proceedings other than criminal trials

1. The bar against use of illegally obtained evidence applies not only to criminal prosecutions but also in other types of judicial proceedings.

EXAMPLES:

a. Juvenile proceedings

b. Narcotics commitment proceedings

2. However, there may be some types of judicial proceedings where illegally obtained evidence may be held admissible, simply because the deterrent

purpose for the exclusionary rule is deemed outweighed by public policy favoring the use of any relevant evidence, even if illegally obtained.

a. Thus, illegally obtained evidence was held admissible in parole and probation revocation proceedings. Rationale: Parole board's "critical and unique responsibilities" in protecting society from recidivist crimes outweigh Fourth Amendment considerations.

NOTE: This information input should be interlaced with class discussion mainly on effects upon police action and procedures.

b. Some courts permit the trial judge to consider illegally obtained evidence in fixing sentence after conviction, even though the same evidence was excluded during the trial leading to the conviction. Rationale: In fixing sentence any reliable evidence should be considered.

VII. SUBPOENAS

A. General information

1. A subpoena is a process by which a witness is commanded to appear before a court or grand jury or other proceeding. Depending on the circumstances involved, different persons may issue a subpoena.

   a. When a complaint has been filed (this will always involve a court case), these people may issue a subpoena:

      (1) A judge or court clerk

      (2) The district attorney or his investigator

      (3) The public defender or his investigator

   b. For Grand Jury investigations, the following people may issue a subpoena:

      (1) The district attorney or his investigator

      (2) Any judge of the Superior Court, upon the request of the Grand Jury

   c. An attorney of record may, when necessary for the defendant's case, issue a subpoena.

   d. When a defendant has no attorney, they may obtain blank subpoenas from any of the following:

      (1) The district attorney or their investigator

      (2) The public defender or their investigator

      (3) The judge or court clerk

2. A subpoena duces tecum is a process by which the court orders specified evidence to be produced or delivered to court.

3. Refusal to comply with a subpoena without showing good cause, may be punished by the court as contempt. (Penal Code Section 1331)

VIII. HEARSAY EVIDENCE

A. Hearsay defined: Evidence of a statement that was made other than by a witness while testifying at a hearing or trial and that is offered to prove the truth of the matter stated (Evidence Code Section 1200).

B. Exceptions to the Hearsay Rule:

1. In general, hearsay evidence is objectionable because it is not trustworthy.

a. Usually, hearsay evidence consists of a statement made out of court by one who is not under oath nor subject to cross examination.

b. However, certain circumstances lend reliability to hearsay statements.

c. Because of this, many types of hearsay evidence are admitted as exceptions to the rule. From a law enforcement standpoint, the most important exceptions are:

(1) Spontaneous statements

(2) Admissions

(3) Dying declarations

(4) Records

2. Spontaneous statements

a. Excited utterances

(1) Statements by any person made at or near the time some exciting event, under the stress of excitement produced by the event and relating to it, are admissible as an exception to the hearsay rule in both criminal and civil cases.

(2) The trustworthiness is provided by the fact that the declarant had no opportunity to fabricate a false story.

(3) If the statement is made after a substantial time lapse, it is assumed that the declarant has had time to reflect and thus, the statement lacks spontaneity and possible truthfulness.

b. Under this exception, there is no requirement that the declarant be unavailable to testify at the trial.

(1) For instance, the statement made by the defendant, "I killed my wife", shortly following a shooting can be admitted as circumstantial evidence against the defendant.

(2) It can be offered by anyone who overheard it, including a peace officer - even though the defendant invokes the right to remain silent.

3. Admissions

a. Admissions defined

(1) An admission is a statement or conduct by a party to the action which is offered against the party at the trial.

(2) Since an admission is offered into evidence against the party who made it, the admission will be inconsistent with the position the party is now taking at the trial.

b. Admissions and confessions distinguished

(1) A confession differs from an admission in that a confession is an express and complete acknowledgement of all elements of the offense. (Corpus delicti)

(2) Admissions are merely acknowledgements of some facts which tend to prove or imply guilt.

c. Express and implied admissions

(1) An express admission (or confession) consists of a statement (oral or written) by a party to the action which is introduced against the party to prove the truth of the matter asserted.

(a) Such an admission (or confession) is clearly hearsay, but is admitted into evidence as an exception to the hearsay rule.

(b) The rationale is that a person is not likely to make such a statement unless it is true.

(2) An implied admission consists of conduct by a party to the action, introduced as circumstantial evidence to establish a consciousness of guilt.

(a) Implied admissions are not subject to the hearsay objection, and their admissibility depends upon relevancy. This is because they do not involve a statement, and thus are not hearsay.

(b) Examples:

1) Flight from scene of a crime or other acts designed to prevent arrest.

2) Attempted escape from custody

3) Attempted suicide while awaiting trial

4) Attempts to corrupt witnesses or suppress evidence.

4. Dying declarations

a. Evidence of a statement made by a dying person respecting the cause and circumstances of their death is an exception to the hearsay rule if the statement was made upon their personal knowledge and under a sense of immediately impending death. (California Evidence Code, Section 1242)

b. Type of case involved

(1) Traditionally, dying declarations have been limited to homicide cases wherein the declarant was the victim of the homicide.

(2) The Evidence Code has extended the exception to all cases, civil and criminal, where the facts about the declarant's death are at issue.

(3) To be admissible the statement must be relevant to the issue of the case. Statements by the declarant which pertain to other matters are not within the exception.

(4) Any person may be a witness to a dying declaration. Under California law, the victim must actually die in order for the declaration to be admitted. The death must occur within three years and a day of the event.

C. Records

1. An exception to the hearsay rule exists for written statements of public officials made by officials with a duty to make them, made upon first-hand knowledge of the facts.

a. These statements are admissible as evidence of the facts recited in them.

b. The admissibility is largely governed by statutes which regulate the admissibility of various kinds of records and documents.

2. The special trustworthiness of official written records is found in the declarant's legal duty to make an accurate report.

a. The possibility that public inspection of some official records will reveal any inaccuracies and cause them to be corrected has been emphasized by the courts.

3. A need for this category of hearsay is found in the inconvenience of requiring public officials to appear in court and testify concerning the subject matter of their statements.

   a. The official written record will usually be more reliable than the official's present memory.

   b. For this reason, there is no requirement that the declarant be shown to be unavailable as a witness.

4. Entries in business books or records may be offered in evidence for numerous reasons:

   a. If the entry was made by a party to the action it may be entered as an admission.

   b. If made by someone other than a party, it may constitute a declaration against interest.

5. However, when some independent basis for admission does not exist, it is necessary to resort to the business record exception to the hearsay rule.

   a. In general, it provides that business entries would be admissible where:

      (1) The entry was made in the regular course of business:

         (a) Under the California Evidence Code, "business" includes any calling of any kind, whether it be for profit or not.

      (2) By one with personal knowledge:

         (a) Under the Evidence Code, the information must have been furnished by one who had a business duty to know the facts.

      (3) At or about the time of the occurrence:

         (a) The entry must be made close to the time of the transaction.

      (4) The participants in numerous entries need not be produced or be shown to be unavailable.

         (a) Under the Evidence Code, a supervisor or custodian may authenticate the record by testifying as to its mode of preparation and the fact that it was made in the regular course of business.

6. Past recollection recorded, present memory refreshed.

a. If the person making the entry is available, a writing may be used to refresh memory or as past recollection recorded:

(1) Present memory refreshed

(a) Law enforcement officers will recognize this provision as being most important when personal notes, arrest reports, or crime reports may be used as an aid to their testimony regarding the particulars of the crime by refreshing the officers memory during testimony, or, if unable to refresh the officers memory, under certain circumstances, the report may be read into the court record.

However it should be noted, when refreshing the officers memory, that approval of the court and defense is necessary prior to utilizing notes and reports, and that the defense can demand to see any material used and to cross examine regarding the contents.

(2) Past recollection recorded (C.E.C. 1237)

(a) If an available witness has insufficient memory to allow him to testify fully and accurately, and the event or facts are contained in a writing, the writing may be read into evidence if:

(1) The writing was made at the time the event occurred or was fresh in the witness' memory

(b) The writing was made by the witness, or by some other person who recorded his statements

(c) The witness must testify that the writing is a true statement

(d) The writing must be authenticated or shown to be genuine.

c. In general, reports read into the record by peace officers are inadmissible as evidence.

D. Competency of witnesses in general

1. The California Evidence Code Sections 700-702, defines persons competent to be a witness in the State of California; it states:

a. All persons capable of perception and communication may be witnesses.

b. The credibility of the witness may be drawn in question as provided in Evidence Code 780.

(1) Section 780 allows consideration of the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

(2) A witness' veracity is always subject to question.

E. Determination of competency

1. The determination of the competency of a witness is within the sound discretion of the trial judge. This determination, if competency is in issue, is resolved through a voir dire examination, generally conducted outside the presence of the jury.

2. Every person is qualified to be a witness as to any material matter unless the judge finds that:

a. The proposed witness is incapable of expressing himself concerning the matter so as to be understood directly or through an interpreter by the judge and jury, or

b. The proposed witness is incapable of under- standing the duty of a witness to tell the truth.

3. Specific issues of competency to testify:

a. Mental incapacity

b. Children

(1) It is the duty of the trial judge to determine the competency of a child to testify.

(2) A child is competent to testify if the child possesses the capacity to observe the events and to recollect and communicate them, plus the ability to understand questions and to make intelligent answers with an understanding of the duty to speak the truth.

(3) It is not necessary to show that the child witness has religious beliefs or detailed knowledge of the nature of the oath; all that is required is that the child understand that some punishment will follow if the child does not tell the truth.

(4) There is no fixed age at which a child must have arrived in order to be a competent witness.

F. The Opinion Rule

1. Nonexpert witnesses

a. As a general rule, a nonexpert witness must confine testimony to statements of fact, and cannot properly give own personal opinions or invade the province of the jury by drawing inferences or reaching conclusions based on the facts.

b. Exception: If the facts are such that they cannot be accurately or adequately stated, so that the witness can only testify by giving an opinion, the statement of opinion, or estimate, may be admitted.

(1) Under this exception, statements of opinion are generally admissible on such matters as speed, distance, size, intoxication or questions of sanity.

(2) The determination of what opinions will be allowed--and by whom--is in the discretion of the trial judge.

(3) Additionally, a witness who gives an opinion or estimate (example: speed, distance, etc.) may be required to demonstrate ability to estimate accurately.

2. Expert witness

a. An expert witness may state an opinion as to relevant matters and may draw inferences (conclusions) from the facts where:

(1) The inferences to be drawn are so related to some specialized or technical field as to be beyond the knowledge of the average layman, and;

(2) The expert witness has special training, education and/or experience in the field which will enable him to give a valid opinion.

b. Specialized fields of knowledge

(1) What constitutes a specialized field is a factual question to be decided by the court.

(2) There is no set formula for determining whether a field of inquiry is such that expert testimony may be allowed.

c. The requirement of expertise

(1) Whether or not the witness has the necessary special training, education, or experience to qualify as an expert in the particular field under inquiry is a question for the trial court to determine.

(2) Again, there are no set minimum requirements in terms of training, education, or experience.

(3) If the court concludes, after a proper examination of the witness' qualifications (known as Voir Dire), that the witness does not possess the necessary training or ability to give an opinion it may bar the testimony of the witness as not being competent to testify as to this particular matter.

G. Officers testifying at preliminary hearings

1. Proposition 115 effects:

a. It is legal for evidence to be presented at preliminary hearings in the form of police reports.

b. An officer with at least five years of experience may read his report into evidence instead of calling the actual participants as witnesses.

c. The "reading" officer must have prepared the report himself, and/or must be personally familiar with the events described. (Reference Whitman (1991) 54 Cal.3d 1003)

IX. DEFINITIONS OF TERMS

A. **Admissions** are incriminating statements

B. The **burden of proof** is an obligation to produce evidence sufficient to prove a fact or set of facts

C. **Circumstantial evidence** proves a fact from which the existence of another fact can be inferred. For example, a defendant's fingerprints at the scene of a crime are not direct proof that he committed the crime. However, it does prove that he was present at the crime scene, and together with other information, the fingerprints may allow the trier of fact to infer that the defendant committed the crime

D. **Confessions** are statements claiming full responsibility for the commission of a crime

E. **Contraband** is an item which is illegal to possess (i.e., mere possession is a crime). For example, a sawed-off shotgun is contraband because mere possession is a crime

F. **Direct evidence** proves a fact without any inference or presumption. If the evidence is true, then the fact is established. For example, if a witness testifies that he saw the defendant commit the crime, this is direct evidence of the defendant's guilt

G. A **dying declaration** is a statement made by a dying person respecting the cause and circumstances of that person's injury or illness. The statement must be based on his or her personal knowledge and under a sense of immediate impending death.

H. **Evidence** is testimony, writings, material objects or other things presented to the senses that are offered to prove the existence or nonexistence of a fact (Evidence Code Section 140)

I. The **exclusionary rule** requires that any evidence obtained by the government or its agents in violation of the rights and privileges guaranteed by the U.S. Constitution be excluded at trial

J. The **fruits of a crime** are the material objects acquired by means of the crime or as a consequence of the crime. The fruits of a crime may be the subject matter of the crime or a collateral result of the crime

K. **Hearsay evidence** is evidence of a statement that was made other than by a witness while testifying at a hearing or trial and that is offered to prove the truth of the matter stated (Evidence Code Section 1200)

L. The **hearsay rule** generally excludes hearsay evidence from trials with several important exceptions which include admissions (including confessions), spontaneous statements, and dying declarations

M. The **instrumentalities of a crime** are the means by which the crime was committed (e.g., a crowbar used in a burglary or a gun used in a murder)

N. **Proof** is the establishment of a fact by evidence. When evidence successfully establishes a fact, the evidence is proof of the fact (Evidence Code Section 190)

O. The **rules of evidence** are rules which govern the admissibility of evidence at trials and hearings. Their purpose is to protect jurors from being confused or misled and to prohibit the introduction of tainted, unreliable or illegally obtained evidence

P. **Spontaneous statements** are statements made in response to a sudden, unnerving, startling event while the declarant is still under the stress of the event.

Q. **Subpoenas** are written commands to appear at a certain time and place to give testimony

PERFORMANCE OBJECTIVES FOR LEARNING DOMAIN 17

KNOWLEDGE TEST:

4.1.1 Given a word picture depicting evidence at the scene of a crime, the student will identify, with respect to proving a specific fact, whether the evidence is direct or circumstantial. (6-1-93)

4.1.2 Given a word picture depicting a crime and the available evidence, the student will identify the evidence as "fruits of the crime," "instrumentalities of the crime," or "contraband." (7-1-92)

4.1.3 Given a direct question, the student will identify the following purposes for offering evidence in court:

A. As an item of proof
B. To impeach a witness
C. To rehabilitate a witness
D. To assist in determining sentence

4.1.4 Given a direct question, the student will identify the following minimal tests which an item of evidence must successfully pass before it may be admitted into any criminal court: (Evidence Code Section 210)

A. The evidence must be relevant to the matter in issue
B. The evidence must be competently presented in court
C. The evidence must have been legally obtained

4.1.7. Given a definition of one of the following terms, the student will identify the term that matches the definition: (6-1-93)

A. **Admissions** are incriminating statements
B. The **burden of proof** is an obligation to produce evidence sufficient to prove a fact or set of facts
C. **Circumstantial evidence** proves a fact from which the existence of another fact can be inferred. For example, a defendant's fingerprints at the scene of a crime are not direct proof that he committed the crime. However, it does prove that he was present at the crime scene, and together with other information, the fingerprints may allow the trier of fact to infer that the defendant committed the crime
D. **Confessions** are statements claiming full responsibility for the commission of a crime
E. **Contraband** is an item which is illegal to possess (i.e., mere possession is a crime). For example, a sawed-off shotgun is contraband because mere possession is a crime
F. **Direct evidence** proves a fact without any inference or presumption. If the evidence is true, then the fact is established. For example, if a witness testifies that he saw the defendant commit the crime, this is direct evidence of the defendant's guilt

G. A **dying declaration** is a statement made by a dying person respecting the cause and circumstances of that person's injury or illness. The statement must be based on his or her personal knowledge and under a sense of immediate impending death.

H. **Evidence** is testimony, writings, material objects or other things presented to the senses that are offered to prove the existence or nonexistence of a fact (Evidence Code Section 140)

I. The **exclusionary rule** requires that any evidence obtained by the government or its agents in violation of the rights and privileges guaranteed by the U.S. Constitution be excluded at trial

J. The **fruits of a crime** are the material objects acquired by means of the crime or as a consequence of the crime. The fruits of a crime may be the subject matter of the crime or a collateral result of the crime

K. **Hearsay evidence** is evidence of a statement that was made other than by a witness while testifying at a hearing or trial and that is offered to prove the truth of the matter stated (Evidence Code Section 1200)

L. The **hearsay rule** generally excludes hearsay evidence from trials with several important exceptions which include admissions (including confessions), spontaneous statements, and dying declarations

M. The **instrumentalities of a crime** are the means by which the crime was committed (e.g., a crowbar used in a burglary or a gun used in a murder)

N. **Proof** is the establishment of a fact by evidence. When evidence successfully establishes a fact, the evidence is proof of the fact (Evidence Code Section 190)

O. The **rules of evidence** are rules which govern the admissibility of evidence at trials and hearings. Their purpose is to protect jurors from being confused or misled and to prohibit the introduction of tainted, unreliable or illegally obtained evidence

P. **Spontaneous statements** are statements made in response to a sudden, unnerving, startling event while the declarant is still under the stress of the event.

Q. **Subpoenas** are written commands to appear at a certain time and place to give testimony

4.4.2 Given a direct question, the student will identify the following parties who have the power to issue subpoenas in criminal cases: (Penal Code Section 1326) (7-1-92)

A. The magistrate or his clerk
B. The district attorney or his investigator
C. The public defender or his investigator
D. The attorney for the defendant

4.6.1 Given a direct question, the student will identify the following purposes of the "exclusionary rule." (6-1-93)

A. To deter misconduct by peace officers who seize evidence illegally. The purpose of this rule is to eliminate the incentive for such behavior by prohibiting the admission of any evidence which is illegally obtained

B. To maintain the dignity and integrity of the courts by keeping "tainted" evidence out of the courtroom

4.6.3 Given a word picture depicting the use of an out-of-court statement as evidence, the student will identify if the statement is hearsay, and if it is hearsay, whether it can be

introduced as evidence under any of following exceptions to the hearsay rule contained in the California Evidence Code: (6-1-93)

A. Admissions
B. Dying declarations
C. Spontaneous statements
D. Officers testifying at preliminary hearings
E. Business/official records
F. Past recollection recorded

SUPPORTING MATERIAL

AND

REFERENCES

This section is set up as reference information for use by training institutions. These materials can be used for instruction, remediation, additional reading, viewing, or for planning local blocks of instruction. This list is not an endorsement of any author, publisher, producer, or presentation. Each training institution should establish its own list of reference materials.

TOPICAL LIST OF SUPPORTING MATERIALS AND REFERENCES INCLUDED IN THIS SECTION

Privilege Against Self Incrimination
Privileged Communications

PRIVILEGE AGAINST SELF INCRIMINATION

1. This testimonial privilege is predicated upon a constitutional guarantee.

   a. The Fifth Amendment to the U.S. Constitution and Article 1 Section 15 of the California Constitution provides that "no person...shall be compelled in any criminal case to be a witness against himself."

      Note: See Child Abuse Reporting Laws beginning with Penal Code Section 11165; see also Peo. v. Stritzinger (1983) 34 C. 3d 505.

      (2) This privilege is twofold:

         (a) It protects an accused from being required to testify against himself. Moreover, his failure to do so may not be made the subject of adverse comment.

PRIVILEGED COMMUNICATIONS

A. Testimonial privileges

1. Evidence which is relevant and competent may still be excluded from court on the grounds that it is privileged.

2. Certain interests and relationships are considered by law to be of sufficient importance to justify the exclusion of otherwise relevant evidence in order to protect those interests.

3. A testimonial privilege essentially means that a witness will not be required to testify in court if the privilege is properly claimed by the person protected. If the privilege is not asserted by the holder, it is considered to have been waived.

4. Privilege Against Self Incrimination:

   a. This testimonial privilege is predicated upon a constitutional guarantee.

      (1) The Fifth Amendment to the U.S. Constitution and Article 1 Section 15 of the California Constitution provides that "no person...shall be compelled in any criminal case to be a witness against himself."

      Note: See Child Abuse Reporting Laws beginning with P.C. 11165; see also Peo. v. Stritzinger (1983) 34 C. 3d 505.

      (2) This privilege is twofold:

         (a) It protects an accused from being required to testify against himself. Moreover, his failure to do so may not be made the subject of adverse comment.

         (b) It also protects a witness from being required to give testimony which might subject the witness to criminal liability.

      (3) Immunity from prosecution:

         (a) In order to secure testimony which, because of the privilege, could not otherwise be procured, federal and state legislative bodies have enacted legislation to grant immunity to witnesses.

         (b) These statutes provide that if a witness claims a protection as granted by the Fifth Amendment, and the government still seeks answers, immunity can be granted by the proper authorities and the person will then be required to testify.

         (c) The theory is that, if immunity is granted, there is no longer any reason to claim the privilege.

         (d) These statutes have been challenged as violating the Constitution but, if the statutes give complete immunity, the

witness can be required to testify and this does not violate any constitutional provisions.

(4) Limitations of the privilege:

(a) This privilege applies to specified communication only.

(b) Consequently, the privilege is not violated by requiring the accused to model articles of clothing, to stand in a line-up, to submit to a blood test to obtain evidence of the presence of alcohol, to submit to routine fingerprinting, to submit to the taking of handwriting exemplars, or to perform other functions not involving communication.

(c) Nor does the privilege extend to routine (nonincriminating) information, such as that customarily required during the booking process.

5. The attorney-client privilege

a. A client, whether or not a party to an action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication with the attorney in the course of the attorney-client relationship.

(1) This privilege is set forth in the California Evidence Code, Section 954.

(2) It is based on the theory that a client should be encouraged to make a full disclosure to the attorney so that the attorney will be able to represent the client in the best way possible.

b. The professional relationship

(1) The client is any person who consults a lawyer for the purpose of retaining or securing legal advice from the attorney.

(2) No actual employment need result, and the payment or agreement to pay a fee is not essential.

(3) Even if the person consulted is not in fact an attorney, it has been held sufficient if the client had good faith reasonable belief that the person was an attorney.

c. The subject matter of the privilege includes:

(1) Oral communications made by a client to the attorney

(2) Demonstrative acts intended to convey meaning to the attorney, such as:

(a) Displaying a scar, or

(b) Opening a drawer to reveal a weapon

(3) Written communications between the two, including reports and documents prepared by the client for the attorney's use

(4) All related communications between the attorney and client

(5) This does not include physical evidence given by the client to the attorney. While required to surrender the evidence, the attorney may do so without comment.

d. Confidential nature of the communication

(1) The privilege is limited to those communications which the client has expressly made confidential, or

(2) Those which could reasonably, and in good faith, be assumed would be understood by the attorney to be so intended.

(3) Known presence of third persons:

(a) The known presence of a third party will not destroy the confidential nature of the communi- cation if the persons are present to further the client's interest, or are reasonably necessary to accomplish the purpose of consultant, such as:

1) Client's close family members

2) Attorney's staff

(b) However, the known presence of a casual, unnecessary third person would indicate that the communication was not intended to be confidential, and thus not privileged.

(c) The Evidence Code takes the position that the holder of the privilege may prevent testimony by eavesdroppers to confidential communications, but cannot prevent testimony by disinterested third parties who were knowingly present–or within hearing distance–at the time of the conversation.

e. Holder of the privilege

(1) The privilege belongs to the client and the client alone can waive it. Normally, the attorney will claim the privilege on behalf of the client.

f. Waiver of the privilege

(1) The client or representative waives the privilege automatically by failing to object to testimony regarding the privileged communication when an opportunity to do so exists.

(2) Further, a voluntary disclosure of privileged information to a third person made by the client, or by the attorney with the client's consent, operates as a waiver except under the following conditions:

(a) Where the disclosure is made by the attorney for the purpose of furthering the client's interest, or

(b) Where the disclosure is itself privileged, as where the client tells his wife in confidence what he related to his attorney.

6. The husband and wife privileges

a. There are two husband and wife privileges which must be distinguished--the testimonial privilege and the confidential communications privilege:

(1) The testimonial privilege relates to the question of whether one spouse can be compelled to testify for or against the other during the marriage.

(2) The confidential communications privilege deals with the question of whether one spouse may withhold testimony or prevent disclosure of confidential communications made to the other.

b. The testimonial privilege--testimony by one spouse AGAINST (not for) the other:

(1) This privilege was designed to protect the marriage relationship.

(2) The privilege to refuse to testify belongs to the witness spouse (not the defendant) (C.E.C. 970):

(a) This is logical since the witness spouse is in a better position to evaluate the probable effect of the testimony on the marital relationship.

(b) The privilege does not apply, however, if the witness knew or should have known of a criminal act that occurred prior to the marriage. (C.E.C 922)

(3) The validity of the marriage:

(a) The privilege to refuse to testify against a spouse may be claimed only if there is a valid marriage in existence at the time the testimony is sought. The privilege terminates upon divorce or annulment.

(b) The confidential communications privilege (discussed below), however, may continue after the marriage has been terminated.

c. The confidential communications privilege:

(1) Basic rule:

(a) A spouse, whether or not a party to the action has a privilege both during and after the marriage, to refuse to disclose and to prevent another from disclosing a confidential communication between the spouses while they were married. (California Evidence Code, Section 980)

(b) This privilege is considered necessary to promote domestic harmony through a free exchange of confidence between the spouses.

(c) The privilege applies only to confidential communications made between the spouses while they were married.

(d) However, as long as such communication was made during the marriage, the privilege survives the marriage and can be asserted after the marriage is terminated.

(2) Subject matter of the privilege:

(a) In California the privilege applies only to confidential communications between the spouses.

(b) It includes spoken words, writings from one to the other, or other conduct intended as communication.

(3) Confidential nature of the communication:

(a) Only confidential communications are protected by the privilege. Observations made by a spouse are generally not protected by this privilege.

(b) The known presence of third per-sons is likely to destroy the confidential nature of the communication, unless their presence is unavoidable and precautions have been taken by the spouses to insure their privacy.

1) If the communication is not confidential, it may be testified to by both spouses or by anyone hearing the communication.

2) If the communication is confidential, California Evidence Code Section 980 allows a spouse to prevent an eavesdropper (or interceptor of a written communication) from disclosing such confidential communication.

NOTE: Otis Trammel vs U.S. 100 Sup Ct. Rtr. 906

(4) Holder of the privilege:

(a) Under the Evidence Code, the privilege belongs to both spouses and either may assert it.

(b) There is one exception to this rule:

1) California Evidence Code Section 987 provides that where one spouse is a defendant in a criminal proceeding and calls the other spouse to testify to a confidential communication, the witness spouse cannot refuse to do so.

2) This is based on the theory that the witness spouse should not be privileged to withhold information that the defendant spouse deems necessary to his defense.

(5) Waiver of privilege:

(a) A party spouse waives the privilege by failing to object to disclosures of confidential communications made by the witness spouse on the stand.

(b) Further, if one spouse makes a voluntary, out-of-court disclosure to a third person, that spouse is deemed to have waived the privilege.

(c) However, the other spouse has not waived the privilege and this spouse can still prevent testimony by the spouse and third person as to the confidential communication.

(6) Exceptions to the testimonial and confidential communications privilege

(a) This privilege does not apply to civil actions between spouses, or to criminal actions wherein one spouse is charged with a crime against the person or property of the other, or a child of either.

(b) In addition, the privilege does not apply to inter-spouse communications made for the purpose of obtaining assistance in the commission of a crime or fraud.

Note: (Evidence Code 998)

7. There is no physician-patient privilege in criminal matters. The privilege applies only to civil actions. Note: See other exceptions in C.E.C. 985

8. Psychotherapist privilege

a. The defendant may prevent a psychotherapist, registered psychological assistant, a registered marriage, family, and child counselor intern, and a person registered as an apprentice clinical social worker from testifying against him, unless the psychotherapist was court appointed. (C.E.C. 1010)

"Psychotherapist" includes psychiatrists, licensed psychologist, clinical social workers, school psychologists, and marriage and family counselors.

b. Exceptions

(1) Where the patient is under 16 years of age and is a victim of a crime, where disclosure would be in the best interest of the patient. (C.E.C. 1023)

(2) Where the patient is a danger to himself or others, and the disclosure is necessary to prevent the danger. (C.E.C 1024).

Note: Tarasoff vs. Regents of University of California 17 C3d 425 (1976)

9. The clergyman-penitent privilege:

a. In California, the confidential communications between a clergyman and penitent are privileged.

b. To qualify, the privileged communication must be communicated to the clergyman or priest in a confidential manner, properly entrusted to him in his professional capacity, wherein the person so communicating is seeking spiritual counsel and advice.

c. The term "clergyman" includes a minister, priest, a rabbi, or other similar functionary of a religious organization, or a person the penitent reasonably believes to be such.

d. Holder of the privilege:

(1) Although the privilege belongs to the communicating person, the clergyman may claim the privilege on behalf of the person or religious order. (C.E.C. 1034).

e. Limit of the privilege:

(1) While the privilege covers confessions for crimes already committed--it does not protect actions amounting to conspiracy between the penitent and clergyman.

(2) Additionally, the clergyman cannot claim the privilege for himself, should he be the accused.

ADDITIONAL REFERENCES

POST Video Catalog. (916) 227-4856.