

SIMONS CALIFORNIA EVIDENCE MANUAL

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THE EXPERT SERIES



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Highlights of the 2026 Edition

- In *People v. Allen* the California Supreme Court has granted review to determine if, following a suspect's invocation of *Miranda*, incriminating statements obtained from that defendant through a *Perkins* operation are admissible as substantive proof of guilt against the defendant. In *People v. Garcia* the court has granted review on that same issue as well as on a related question: what effect, if any, does the fact that the police continued to interrogate the suspect following his invocation of his right to remain silent have on the admissibility of statements later obtained through a *Perkins* operation. See section 5:22.
- When the attorney for a juvenile expresses a doubt as to his client's competency, triggering a competency proceeding, the psychotherapist privilege is negated by Evidence Code section 2016 (*People v. T.M.*). See section 5:53.
- Health & Safety Code section 1799.110, requires experts on the standard of care for emergency medical treatment to have "substantial professional experience within the last 5 years while assigned to provide emergency medical coverage." This provision applies in malpractice actions against "physicians who remotely provide medical expertise on an expedited basis as part of an emergency department in the midst of treating an emergency department patient" (*Charlie L. v. Kangavari*). See section 4.2.
- Expertise is "relative to the subject," may be based on experience and is "not subject to rigid classification according to formal education or certification." (*Richard v. Union Pacific Railroad*). See section 4:1.
- Several cases have discussed the admissibility and sufficiency of evidence in Penal Code section 1172.6(d) cases. *People v. Patton* concluded that evidence in a preliminary hearing transcript may refute conclusory statements made in an 1172.6 petition at the prima facie hearing. Courts of Appeal are divided over whether the prosecution may rely on a grand jury transcript at an 1172.6(d)(3) hearing. *People v. Ramos* held that where one codefendant is tried separately, the prosecution may use the transcript from that separate trial against the codefendant, Ramos, who pled guilty, in Ramos's 1172.6 hearing. See section 2:101.
- In *People v. Aguirre* the California Supreme Court held that Evidence Code section 352.2 does not apply retroactively. *Aguirre* and *People v. Hin* applied the reasoning in *People v. Coneal* to cases tried before the enactment of section 352.2 to find the trial court erroneously admitted rap lyrics under section 352. See section 6:15.
- A "defendant's right to confrontation is violated if a prosecutor facing a witness who refuses to answer essentially testi-

fies for the witness by asking leading questions that convey prior statements incriminating the defendant that the witness made to police.” (*People v. Jasso*). See section 3:22.

- In *People v. Hin* the California Supreme Court set out the five factors trial courts should weigh in deciding if a *Miranda* readvisement is necessary before a custodial interrogation is resumed. See section 5:21.
- The *Pitchess* procedural requirements govern efforts to obtain *Brady* information from confidential police personnel files. (*Schneider v. Superior Court of Los Angeles County*). See section 5:79.
- The California Supreme Court held that Penal Code section 1385 (c)(2) does not create a rebuttable presumption obligating the trial court to dismiss an enhancement unless the court finds the dismissal of the enhancement would endanger public safety. (*People v. Walker*). See section 10.5

EXECUTIVE SUMMARY TO CALIFORNIA EVIDENCE MANUAL

Chapter 1. Relevant Evidence

- Evidence consists of **testimony, writings, and material objects** that are offered to **prove the existence or non-existence of a fact.** (EC 140; CEM 1:1.).
 - The first, and **most substantial limitation on admissible evidence** is the rule providing that **only relevant evidence is admissible.** (EC 350; CEM 1:9.)
- Relevancy is rooted in logic. It is **evidence**, including evidence relevant to witness credibility, **having any tendency in reason to prove or disprove a disputed fact** of consequence to the determination of an action.
 - Evidence is relevant only if it has **probative value.** (EC 210; CEM 1:4.)
- **All relevant evidence is admissible unless barred by statute.** (EC 351; CEM 1:9.)
 - The **EC consists largely of statutes that limit the admissibility of relevant evidence** and restrictions on those limitations. For example, the hearsay rule and its exceptions, discussed in Chapter 2.
- In 1982 the voters enacted Proposition 8, which added **Article 1, section 28(d) to the California Constitution reinforcing the rule in EC 351 that all relevant evidence is admissible in criminal cases.** (CEM 1:9 and 1:35.)
 - This constitutional provision **barred further legislative exceptions** to that rule unless enacted by a supermajority.
 - Post-Prop 8 examples of statutes barring relevant evidence include **EC 351.1**, barring **polygraph evidence**, **EC 351.2, 351.3 and 351.4** barring **evidence of immigration status** in civil and criminal cases under certain circumstances, and **EC 352.2 limiting the admissibility of creative expression**, including rap lyrics. (CEM 1:18, 1:19, 6:15.)
- **Evidence of an experiment** is relevant only if it is **conducted under conditions that are substantially similar** to the actual occurrence. (CEM 1:10, 1:11.)
- **Demonstrative evidence like photographs, maps and diagrams** may be relevant, but **must be authenticated as an accurate representation** of what they purport to represent. (CEM 1:14.) Authentication is discussed in CEM 8:5-8:16.

- The **entirety of an act, declaration, conversation, or writing is admissible** if the adverse party has introduced a portion, and the **remainder pertains to same subject and clarifies** entirety of the conversation. (EC 356, CEM 1:16.)
 - EC 356 often allows a party to **introduce evidence that would otherwise be subject to exclusion as hearsay**. [CEM 1:16]
- To **preserve an evidentiary objection** on appeal, it must be **timely and stated with specificity**. (EC 353(a), CEM 1:20.)
 - **In limine motions** raising evidentiary objections in trial department before trial usually **preserve an issue for appeal**. (CEM 1:21-1:22.)
- When the court sustains an objection to a question, the proponent often will need to make an **offer of proof to preserve a right to appeal**.
 - An offer of proof **sets forth evidence** not facts or conclusions. (CEM 1:23.)
- Evidence may be **admissible only as to one party or only for one purpose**. (EC 355; CEM 1:24.)
- Relevant evidence may be excluded if its **probative value is substantially outweighed** by the probability that its admission will:
 - **consume undue time** (EC 352, CEM 1:25-1:26), or
 - **create substantial danger of undue prejudice, confusion of the issues, or misleading the jury**. (EC 352, CEM 1:25-1:28.)
 - **Evidence does not unduly prejudice** a party simply because it harms that party. (CEM 1:28.)
- Among other evidence, **undue prejudice in criminal cases may stem** from
 - **photographs** of the victim (CEM 1:29),
 - **uncharged misconduct** (CEM 1:30),
 - **gang membership** (CEM 1:31), and
 - **drug use, addiction, poverty, or undocumented status** (CEM 1:32.)
- **Criminal defense evidence** may be excluded under EC 352. (CEM 1:33.)
- Defense evidence of **third-party culpability in criminal cases** is admissible if it is **capable of raising a reasonable doubt** as to guilt. (CEM 1:34.)
- **Evidence of negligence by nonparties** is inadmissible in a civil suit to prove defendant's conduct was not negligent. (CEM 1:34.)
- **Direct evidence is distinguished from circumstantial evidence**.

- o Direct evidence is evidence that **directly proves a fact without relying on an inference or presumption.**
- o Circumstantial evidence **proves one fact from which an inference of a second may be drawn.** (EC 410, CEM 1:43.)
- o An **“inference” is a deduction of fact** that may be logically and reasonably drawn from other facts. (EC **600(b)**; CEM 1:43.)
- Circumstantial evidence may be believed as against contrary direct evidence. (CEM 1:43.)
 - o The **direct evidence of a single witness** is sufficient to prove any fact, except for **accomplice testimony** that must be corroborated to support a criminal conviction. (CEM 1:44.)
- “If **weaker and less satisfactory evidence is offered** when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.” (EC **412**; CEM 1:45.)
- In a criminal case, the prosecution may not comment on the **defendant’s failure to testify.** (CEM 1:45.)
- The trier of fact may consider a **party’s failure to explain or deny evidence** in the case against him or her, or a **party’s willful suppression of evidence** relating thereto. (EC 413; CEM 1:45.)
- When the **admissibility of proffered evidence depends upon the existence of a disputed preliminary fact**, like the qualifications of a witness, or the existence of a privilege, or the voluntariness of a confession, the court resolves that dispute under **EC 400-406** (CEM 1:36-1:42.)
- Issues regarding a witness’s **credibility are left to the jury.** (EC **312(b)**, CEM 1:37, 1:38.)
- Certain questions, like the **admissibility of a criminal defendant’s confession**, must be **resolved outside the presence of the jury**, though hearings into other questions, like an **expert’s qualifications, may or may not be conducted in the jury’s presence.** (EC 402, CEM 1:37, 1:39.)
- As to certain preliminary facts the judge must admit the proffered evidence upon the introduction of **evidence sufficient to sustain a finding of the preliminary fact, and the jury then determines the existence of that fact.**
 - o **Examples** include preliminary facts regarding the **relevance** of evidence, the **existence of personal knowledge** on the part of a witness and the **authenticity of a writing.** (EC **403**, CEM 1:37, 1:40.)
- As to all other preliminary facts, the **judge must be persuaded of their existence** before admitting the prof-

ferred evidence. (EC 405, CEM 1:37, 1:42.)

Chapter 2. Hearsay Evidence

- **Hearsay** evidence is evidence of a **statement made other than by a witness while testifying** at the hearing and **offered to prove the truth** of the matter stated. (EC 1200, CEM 2:1.)
- **Identifying hearsay.** There are 4 areas where most of the mistakes occur:
- The first is the **nature of the “speaker” or hearsay declarant.**
 - A **“hearsay declarant” is a person, and neither machines nor animals may be a declarant** (EC 135, CEM 2:2), and they **may not make a “statement.”** (EC 225, CEM 2:2.)
 - An **“alert” by a narcotics canine** is not a statement by a person and is not hearsay. The same is true for **computer generated information.** (CEM 2:2.) However, information prepared by a person and stored in a computer, called **electronically stored information, is hearsay**, if a party retrieves and seeks to introduce it. (CEM 2:63.)
- Second, an **out-of-court statement made by a witness currently testifying at the hearing is hearsay.** (CEM 2:3.)
- Third, in addition to spoken or written words, **conduct intended as a substitute for such words is hearsay.** (EC 225, CEM 2:4.)
- Fourth, the statement must be **admitted for its truth.** When the **statement is introduced to prove the words were spoken and without regard for their truth**, it is not hearsay. (EC 1200, CEM 2:5.) Certain **common examples** are set out at CEM 2:6-2:15.
- If a statement has **multiple levels of hearsay**, it may be admitted only if a valid hearsay exception applies to each level. (CEM 2:16.)
- **Evidence** that would have been admissible to **attack or support the credibility of a hearsay declarant who testified**, is **admissible to attack or support the hearsay declaration.** (EC 1202, CEM 2:17.)
 - A **hearsay declarant may be called by any adverse party** and examined as if under cross-examination. (EC 1203(a), CEM 2:18.)
- **Hearsay exceptions** are located in **EC 1220-1390 as well as in other Codes.** (CEM 2:20.) Each exception either expressly requires the statement be trustworthy or has a required element that implicitly does so.
- Many common hearsay exceptions require proof that the declarant is **unavailable.** **EC 240** sets out **six different categories of unavailability.**

- None of them apply if they were **“brought about by the procurement or wrongdoing of the proponent.”** (EC 240(b), CEM 2:21) The categories are:
 - exercise of a **privilege** (CEM 2:22);
 - disqualification as **incompetent** (CEM 2:23);
 - **deceased or ill** (CEM 2:24);
 - **unable to compel attendance** by court process (CEM 2:25);
 - **Unable to compel attendance** despite use of due diligence (CEM 2:26); and
 - **refusal** to testify (CEM 2:27).
- Among the most common hearsay exceptions are:
- **Party admissions** (EC 1220, CEM 2:28). Despite the reference to “admissions,” **any statement by a party opponent qualifies.** (CEM 2:28.)
 - **Judicial admissions** have related though distinct rules. (CEM 2:28.)
- **Adopted or authorized statements.** Statements adopted or authorized by a party are admissible against that party. (EC 1221 and 1222, CEM 2:29-2:30). So are **statements by a party’s coconspirator.** (EC 1223, CEM 2:31.)
- Certain **statements by children in sexual and physical abuse cases** are admissible. Admissibility depends on **unavailability and reliability** if the child does not testify. (EC 1228, 1253, 1360, CEM 2:36, 2:37, 2:38, 2:56.)
- **Declarations against interest**, which may arise in civil cases and when the declaration either incriminates or exculpates a criminal defendant (CEM 2:40), are admissible when:
 - the **declarant has sufficient knowledge** of the subject matter;
 - is **unavailable**;
 - and the **statement is so far contrary to the declarant’s interest** that no reasonable person in that position would make the statement unless they believed it to be true. (EC 1230, CEM 2:39-2:40.)
 - The **declarant’s interest is broadly defined** to include **pecuniary** or **proprietary** or **penal** interest or the **interest in avoiding** becoming an object of hatred, ridicule, or social disgrace. The **contrary-to-interest component provides this exception’s “reliability test.”** (CEM 2:40.)
 - The determination of whether a statement is against interest is particularly fact intensive and requires proof that it is **specifically diserving to the declarant.** (CEM 2:40.).
- **Prior statements inconsistent** with the witness’s testimony and **offered in compliance with EC 770** are

admissible to impeach the witness and for the truth of the matter stated. (EC 1235, CEM 2:42.)

- **Prior statements consistent** with the witness's testimony and **offered in compliance with EC 791 are admissible to support the witness's credibility and for their truth. (EC 1236, CEM 2:43)** when:
 - the prior consistent statement is **offered after evidence of a prior inconsistent statement is introduced, and the consistent statement preceded the inconsistent;**
 - or when the opposing party **expressly or impliedly charges the testimony was fabricated or influenced by an improper motive and the consistent statement preceded the improper motive. (CEM 2:43.)**
- **Past recollection recorded. EC 1237(a)** (CEM 2:44) admits a recorded statement previously made by the witness if:
 - it would have been **admissible if made while testifying;**
 - the **witness has insufficient present recollection** of the matter;
 - a record was made by **the witness or under the witness's direction** when the **memory of the fact recorded was fresh;**
 - offered after the **witness testifies the statement was true;** and
 - the statement is **authenticated.**
 - Similar rules apply to admitting a **prior identification of a person. (EC 1238, CEM 2:45.)**
- **Spontaneous statements. EC 1240** (CEM 2:46) admits **statements describing:**
 - an **act, condition, or event;** and
 - made spontaneously **while under the stress of excitement caused by the perception.**
 - **Contemporaneous statements** are discussed in **EC 1241** (CEM 2:47.)
- **Dying declarations, made by a dying person** regarding the **circumstances of death, on personal knowledge** while under a sense of **immediately impending death** are admissible. (**EC 1242, CEM 2:48.**)
- Statements concerning the **declarant's then-existing state of mind, emotion or physical sensation or mental or physical state** (for example, "I have a terrible headache.") are **admissible to:**
 - **prove those facts at the time the statement was made, or at any other time, or to explain conduct of the declarant. (EC 1250 (a)(1), (2), CEM 2:49-2:51.)**

- o Such statements must be **made under trustworthy circumstances.** (EC 1252, CEM 2:57.)
- Such **statements may concern an earlier time** (for example, “Yesterday I had a terrible headache.”) and are **admissible if the declarant is unavailable and they are made under trustworthy circumstances.** (CEM 2:55, 2:57.)
- **Statements by the victim expressing a negative view of the defendant prior to the crime** may be hearsay admissible under **EC 1250** if they **directly state the declarant’s state of mind.** (CEM 2:52.)
- Or such statements may be **admissible as nonhearsay** if they relate other facts from which the **declarant’s relevant state of mind is derived circumstantially.** (CEM 2:53.)
- **Business records.** (EC 1270, 1271, CEM 2:58-2:65.) A writing **recording an act, condition, or event** (CEM 2:60) is not inadmissible if:
 - o it was made in the **regular course of business** (CEM 2:59);
 - o **at or near the time of the event** (CEM 2:61); and
 - o the **sources of information and method and time of preparation** indicate **trustworthiness.** (CEM 2:62.)
 - o The **absence of a business record** may also be admissible. (EC 1272, CEM 2:64.)
- **Official records** must be made by a **public employee**:
 - o within the **scope of the employee’s duty**, at or **near the time of the act**, with **trustworthy sources of information and a trustworthy method and time of preparation.** (EC 1280, CEM 2:66-2:71).
 - o A **writing stating the absence of such a record** may also be admissible. (EC 1284, CEM 2:70.)
 - o A **record of criminal conviction** certified under **EC 1530(a)** is **admissible to prove the commission of the underlying offense or other act, condition, or event recorded in the record, such as the service of a prison term.** (EC 452.5(b), CEM 2:104.)
 - o **Hearsay is admissible to prove the nature of an earlier conviction** for purposes of **reducing a third-strike offense** under Proposition 36 (CEM 2:106), or to **establish a basis for a sentence enhancement.** (CEM 2:107-2:109.)
- **Former testimony** (EC 1290-1291, CEM 2:72-2:79) is not inadmissible if the declarant is **unavailable** and is:
 - o **Offered against the person who offered it** in evidence in the former proceeding (EC 1291(a)(1), CEM 2:72);
 - o Offered against party in current proceeding **who was a party in the prior proceeding and who had**

- right and opportunity to cross-examine (EC 1291(a)(2), CEM 2:75) and interest and motive similar** to its interest and motive at the current hearing. (CEM 2:73, 2:76.)
- o In applying **EC 1291(a)(2)**, distinguish **prior trial testimony** from prior testimony in a **discovery deposition**. (CEM 2:76.)
 - o Such testimony may be admissible in a civil action against one not a party to the former action when a **single occurrence gives rise to numerous cases with numerous plaintiffs**. (CEM 2:79.)
 - **Forfeiture by wrongdoing**. (EC 1390, CEM 2:81.) If a party engages in **wrongdoing intended to and resulting in the unavailability of the declarant** as a witness, the declarant's out-of-court statement is admissible.
 - **Published compilations**. (EC 1340, 2:94.) A statement, other than an opinion, contained in a tabulation, list, or other **published compilation**, generally **relied on in the course of business** is admissible.
 - **Child dependency hearsay exception**. The time, content, and circumstances must provide **sufficient indicators of reliability**. (CEM 2:102)
 - Statements that narrate, **describe or explain the infliction or threat of physical injury** may be admissible. (EC 1370, CEM 2:110.)
 - Numerous **miscellaneous hearsay exceptions** exist relating to:
 - o **judgments (EC 1300-1301, CEM 2:82, 2:83);**
 - o **family history (EC 1310-1316, CEM 2:84-2:88);**
 - o **reputation** and statements concerning the community (EC 1320-1324, CEM 2:89-2:90);
 - o **dispositive instruments and ancient writings (EC 1330-1331, CEM 2:91-2:93);**
 - o facts of **general notoriety and interest (EC 1341, CEM 2:95);**
 - o **abducted or murdered witnesses** in criminal cases (EC 1350, CEM 2:96) and
 - o **gang related crimes (EC 1231, CEM 2:97).**
 - The hearsay rule has **only limited applicability** in hearings regarding:
 - o **preliminary hearings** (Penal Code 872(b) CEM 2:98);
 - o **probation violation** (CEM 2:99);
 - o **small claims** (CEM 2:100);
 - o **limited civil cases** (2:100);
 - o **certain restraining orders** (CCP 527.6, 527.8, CEM 2:100);
 - o **sentencing, re-sentencing and sexually violent predators and mentally disordered offenders** (CEM 2:101).

- Under the **Confrontation Clause** in the 6th Amendment to the US Constitution, an **accused** may **challenge the admissibility of hearsay admissible pursuant to a state hearsay exception**. (CEM 2:112.)
 - The USSC's interpretation of this clause **prohibits the admissibility of testimonial statements** unless the declarant is **unavailable** and has been **subject to earlier cross-examination**. (CEM 2:112.)
 - Simply because the **statement is reliable is insufficient**. (CEM 2:112.)
 - **Forfeiture** of this right occurs if the defendant has engaged in or acquiesced in **wrongdoing that was intended to and did procure the unavailability of the declarant**. (CEM 2:114.)
- The USSC has provided no **definitive definition of "testimonial."** (CEM 2:115.) Testimonial statements may be divided into **3 broad subsets**:
 - **Statements by victims or witnesses to law enforcement officers** who are called upon to testify about them at the trial. (CEM 2:116-2:120.)
 - **Statements to civilians** who are called to testify. (CEM 2:121.)
 - **Statements by experts contained in reports submitted to the jury or testified to by other experts who relied on the statements as true** to form an opinion. (CEM 2:122-2:123.)
 - In the latter category, the out-of-court statement is subject to exclusion only if it **relates a case specific fact and is not simply part of the testifying expert's general knowledge**. (CEM 4:31.)

Chapter 3. Witnesses

- Every person, regardless of age, is qualified to be a witness in the absence of a contrary statute. The **party challenging a witness's competency bears the burden of proving disqualification**. (EC 700-701, CEM 3:1.)
- **A witness must:**
 - be **able to communicate** in such a way as to be understood (EC 701, CEM 3:2);
 - **understand the duty to tell the truth** (EC 701, CEM 3:3);
 - have **personal knowledge** (EC 702, CEM 3:4);
 - with limited exceptions, take an **oath** (EC 710, CEM 3:9).
- A criminal defendant who **needs an interpreter must alert the court**. (CA Const. Art 1, s. 14, CEM 3:11.)
 - Such a defendant shall receive an **interpreter to translate the witness's testimony and one to serve as a personal interpreter**.

- o These interpreters must be certified, though **use of a competent, uncertified interpreter** will not lead to reversal. (CEM 3:11.)
- o A deaf or hard of hearing person is entitled to an interpreter. (EC 754(a), CEM 3:13.)
- The **order of examination** normally proceeds **direct, cross, redirect, and recross**, unless the court directs otherwise. (EC 772, CEM 3:16.)
 - o **Cross-examination** is limited to the **scope of direct examination**, but **courts should exercise wide latitude** in applying this limit (EC 761, CEM 3:18.) A **more restrictive approach is appropriate** when the **witness is a criminal defendant**. (CEM 3:22.)
 - o A **witness with severe physical or mental limitations** is permitted to testify even though the adverse party's cross-examination of that person is limited. (CEM 3:20.)
 - o The court should **protect witnesses under 14** from harassment, embarrassment or emotional harm. (EC 765(b), CEM 3:21)
- A **prosecutor should refrain from** (CEM 3:22):
 - o asking a **question that implies a fact harmful to the defendant** without a reasonable basis; or
 - o asking a witness if a different **witness lied** except in certain circumstances. (CEM 3:22.)
- If any **witness refuses to be cross-examined**, the court may strike all or part of the direct examination. (CEM 3:22.)
- In numerous situations, a **prosecutor barred from introducing evidence in the case-in-chief is permitted to impeach** a defendant who has testified inconsistently. (CEM 3:23.)
- A **court may call witnesses and interrogate them**. (EC 775, CEM 3:25.)
- **Prosecution rebuttal** evidence is limited. (Penal Code 1093(d), CEM 3:26.)
- Questions asking for a **“yes” or “no “ answer are not always leading**. (CEM 3:27.)
 - o **Leading questions may be asked on direct** examination infrequently, such as when an **adverse witness** is called in a civil case, or to **introduce preliminary matters** with a witness, or when the witness has a **disability**. (EC 767 and 776, CEM 3:27.)
 - o The court should **ensure the examination of witnesses is “rapid, distinct, and effective for the ascertainment of truth,”** by sustaining objections to the form of the question. (EC 765, CEM 3:28-3:37.)
- In **questioning a witness about a writing**, it is unnecessary to show, read or disclose to the witness any part of the writing. (EC 768(a), CEM 3:38.)

- o If a witness indicates their memory on a subject is impaired, a **writing may be used to refresh recollection** and must be produced if the adverse party so requests. (EC 771, CEM 3:39-3:40.)
- During the testimony of a witness, **other witnesses may be excluded**. However, a party may not be excluded. (EC 777, CEM 3:41.)
- In determining a **witness's credibility**, the **trier of fact may consider any matter that has any tendency in reason to prove or disprove it** (EC 780, CEM 3:42-3:53) including:
 - o **Bias, interest or other motive** (EC 780(f), CEM 3:43);
 - o A witness's **ability to perceive, recollect, and communicate** (EC 780 (c) and (d), CEM 3:44);
 - o A witness's **prior consistent and inconsistent statements** (EC 780(g) and (h), CEM 3:45);
 - o **Facts inconsistent** with the testimony (EC 780(i), CEM 3:46);
 - o **Threats** to the witness (CEM 3:47);
 - o A **witness's demeanor** (EC 780(a) and (j), CEM 3:48);
 - o A witness's character for **honesty or dishonesty or their opposites** (EC 780(e), CEM 3:49-3:51.)
 - o A witness's **religious beliefs** are inadmissible for this purpose. (EC 789, CEM 3:52.)
 - o In civil and criminal **sexual assault cases, the defendant is limited in introducing the plaintiff's or victim's prior sexual conduct to attack credibility**. (EC 782-783, CEM 3:21, 3:53, 6:26.)
- Witnesses may be **impeached with evidence of prior felony convictions** involving moral turpitude, subject to EC 352. (EC 788, CEM 3:54, 3:61.)
 - o Theft convictions and crimes showing "a general readiness to do evil" are **crimes of moral turpitude** (CEM 3:55) and are **listed** in CEM 3:56.
- In determining the admissibility of such evidence under **EC 352**, courts should **consider** (CEM 3:62-3:67):
 - o **Remoteness** of the conviction (CEM 3:63);
 - o Is the impeachment **offense identical** to current charge (CEM 3:64);
 - o Will **defendant refuse** to testify (3:65);
 - o Do **multiple impeachable convictions** exist (CEM 3:66);
 - o Is **witness** to be impeached **not the defendant** (CEM 3:67);
- **Misdemeanor misconduct** may be used to impeach a witness in a criminal case (CEM 3:58), but a **juvenile adjudication** may not. (CEM 3:59.)

- Limits on examining a witness previously **hypnotized**. (EC 795, CEM 3:68.)

Chapter 4. Expert and Other Opinion Testimony

- **Before asking an expert for an opinion**, counsel should have the expert state their **qualifications**, even if opposing counsel is willing to stipulate. This enables the jury to learn of them and consider them in evaluating the opinion provided. (EC 720(a), CEM 4:1.)
 - If an objection is lodged, the proponent must establish the **precise area** of the witness's testimony and the **special knowledge, skill, experience, training, or education** on the subject of the testimony, and the witness's **prior expert testimony** on that subject. (EC 720, CEM 4:1.)
 - The factors establishing **expertise** vary and **do not always require formal education or certification**. (CEM 4:1.)
 - A **medical expert** may opine on a specialty in which the expert is not engaged and a procedure the expert has not performed. (CEM 4:2.)
- A party may require its opponent to **disclose their expert witnesses and discoverable reports and writings** by the expert (CCP 2034.210), including a brief narrative of the testimony's substance. (CCP2034.260, CEM 4:4.)
 - A failure to make a proper disclosure results in exclusion of the expert's testimony, **unless the expert is called solely to impeach another expert**. (CCP 2034.310, CEM 4:4.)
 - Expert disclosure in criminal cases is governed by PC 1054.1, 1054.3, 1054.5, CEM 4:4.)

Expert Opinions

- An expert's opinion must relate to a subject matter **sufficiently beyond common experience** to assist the judge or jury. (EC 801(a), CEM 4:7, 4:18.). Examples are set out in CEM 4:8-4:17.
 - An otherwise admissible opinion should not be barred because its **subject matter is an ultimate issue** in the case. (EC 805, CEM 4:14.)
- **Opinions on the veracity of a witness** or ones that **provide legal conclusions** are inadmissible. (CEM 4:19, 4:21.)
- An **expert opinion must be based** on matter perceived by or personally known to the expert, or related to the expert, **whether or not admissible** that reasonably may be relied on by the expert. (EC 801(b), CEM 4:22.) In addition, the court may **exclude an opinion based on reasons unsupported by that matter or speculative**.

(CEM 4:22, 426.) Where there is **too great a gap** between the data and the opinion, it should be excluded. (CEM 4:22.)

- An expert **may rely on hearsay** in forming an opinion and may relate in general terms that was done, but **may not present, as fact, case-specific hearsay that has no statutory exception.** (EC 801(b), 802, CEM 4:23.)
 - The *Sanchez* case is discussed in detail at CEM 4:31.
- Generally, if an expert’s opinion relies on hearsay, the adverse party may call the declarant and **examine as if on cross-examination.** (EC 804, CEM 4:24.)
- *Kelly* sets out the reliability standards for **new scientific techniques** that provide the basis for an expert opinion. Admissibility requires (CEM 4:27):
 - Establishing the reliability of the technique;
 - The witness who so testifies must be properly qualified as an expert;
 - Correct scientific procedures were used in current case.
 - **“New scientific technique”** is defined in CEM 4:28.
- A technique is “reliable” if it has gained general **acceptance in the relevant scientific community.** (CEM 4:27.)
 - Courts may take **judicial notice of a scientific publication**, not for its truth, but to evaluate the technique’s acceptance. (CEM 4:27.)
- Counsel may examine an expert through the use of **hypothetical questions.** (CEM 4:32.)
- An **expert may be cross-examined** to same extent as any other witness and, also, as to qualifications, the subject of the opinion, the matter on which it is based and the reasons for it. (EC 721(a), CEM4:33.)
- An expert may be **cross-examined on the content of professional publications** if (EC 721(b), CEM 4:34):
 - The witness referred to, considered, or relied on the publication;
 - The publication has already been admitted; or
 - The publication has been established as reliable authority.
- In civil and criminal cases a court may **appoint an expert** to investigate, render a report, or testify. (EC 730, CEM 4:35.)

Lay Opinions

- A **non-expert opinion** is admissible if it is (EC 800, CEM 4:37-4:39):
 - **Rationally based** on the witness’s perception; and
 - **Helpful to understanding** the testimony

- Not only experts but the owner or spouse of property may testify to the **market value of real property or real and personal property as a unit** (EC 813, CEM 4:41).
- Such an **opinion may properly be based** on (EC 814-822, CEM 4:42, 4:43):
 - matter **personally known** to the witness or made known to the witness even if not admissible **if reasonably relied on in forming a valuation opinion**.
 - Matters listed in **EC 815-821**. (CEM 4:42.)
 - But, in eminent domain and inverse condemnation proceedings, certain matters listed in **EC 822** are excluded. (CEM 4:43.)
- A qualified witness may provide an **expert or lay opinion** of another's **sanity**. (EC 870, CEM 4:45.)

Chapter 5. Privileges

- Evidence Code privileges **apply in all proceedings**. (EC 910, CEM 5:1.)
 - **New common law privileges** may not be created. (EC 911, CEM 5:2.)
 - Courts **may not imply exceptions** to existing privileges. (CEM 5:2.)
 - The state and federal **constitutions may require judicial creation of a new privilege or limitations** on an existing one. (CEM 5:2, 5:3.)
- Certain privileges are waived when, without coercion, the **holder discloses a significant part of the communication**. (EC 912(a), CEM 5:4.)
 - **Inadvertent** disclosure during discovery is not a waiver. (CEM 5:4.)
 - **Placing a matter in issue** may waive the privilege. (CEM 5:5.)
 - **The failure to assert** a privilege may waive it. (EC 912(a), CEM 5:6.)
- The court and counsel may not **comment on a privilege's exercise**, and the trier of fact **may not draw any inference** from it. (EC 913, CEM 5:8.)
- Generally, a court may not order disclosure of information to determine if it is privileged. (EC 915(a), with certain exceptions in **EC 915(b)**, CEM 5:9.)
- Certain communications are **presumed confidential**. (EC 917(a), CEM 5:11.)

Privileges Not to be called as a Witness and Against Self-incrimination

- A **criminal defendant** has a privilege **not to be called** as a witness and **not to testify**. (EC 930, CEM 5:13.) *Griffin* error is discussed in CEM 5:14.

- The availability of the **privilege against self-incrimination** depends on the existence of 4 factors. (CEM 5:15.) The information sought must be:
 - Incriminating;
 - Personal to the defendant;
 - Obtained by compulsion; and
 - Testimonial or communicative in nature
- The privilege broadly **applies to all proceedings**. (CEM 5:16.)
- A **grant of immunity** precludes exercise of this privilege. (CEM 5:17.)
 - **Corroboration required** for testimony by **accomplices** and by **jailhouse informants**. Limits imposed on plea agreements. (CEM 5:17.)
 - **Implied use immunity** doctrine. (CEM 5:17.)
- Limits on use of **criminal defendant's** statements. (CEM 5:19-5:23.)
 - Must be given **voluntarily** (CEM 5:19);
 - In compliance with the **corpus delicti rule** (CEM 5:20); and with the
 - **Miranda** rule.
- CEM 5:21 sets out **Miranda's** general requirements.
 - Under *Miranda*, "**custodial**" is defined as depriving a person of his freedom in any significant way (CEM 5:22); and
 - "**Interrogation**" occurs when there are words or actions by the police that they should know are reasonably likely to elicit an incriminating response, including some booking questions (CEM 5:23.)

Lawyer-Client Privilege

- Whether or not a party, **clients have a privilege to refuse to disclose** and prevent another's disclosure of a **confidential communication** with their lawyer. (EC 954, CEM 5:24-5:36.)
 - A **lawyer** is one **reasonably believed** by the client to practice law. (EC 950, CEM 5:25.)
 - A **client** is one who **consults a lawyer to obtain legal services**, (EC 951, CEM 5:26.)
 - A **confidential communication** is made so that, so far as the client knows, it discloses the information to no third person **other than those present to further the client's interests** and those to whom **disclosure is necessary to accomplish the purpose of the consultation**. (EC 952, CEM 5:28.)
 - Usually **client identification** is not protected unless it exposes client to civil or criminal liability or reveals a medical condition. (CEM 5:28.)

- **Exceptions to privilege:**
 - **Crime or fraud** exception. (EC 956(a), CEM 5:29.)
 - Parties all **claim through one deceased client**. (EC 957, CEM 5:31.)
 - Communications **relevant to lawyer’s breach**. (EC 958, CEM 5:31.)
 - Where **lawyer is attesting witness**. (EC 959, 5:32.)
 - Attorney **jointly retained** by multiple clients. (EC 962, CEM 5:33.)
 - **Dangerous client** exception. (EC 956.5, CEM 5:34.)

Spousal Privileges

- There are **three spousal privileges**. The first two provide:
 - A **witness spouse has a right not to testify against the other spouse** (EC 970, CEM 5:38) if the marriage is in effect at time of testimony;
 - Where spouse is a party, **married person may not be called to testify against** that party. (EC 971, CEM 5:39);
 - These two spousal privileges **may be waived by testifying**, and are **unavailable** when a spouse brings or defends a **lawsuit for the immediate benefit of the other spouse** (EC 973, CEM 5:40) and in certain **criminal matters**, and in certain **proceedings brought by a former spouse**. (EC 972 (e) (f) and (g), CEM 5:41.)
- The third spousal privilege **protects confidential communications between the spouses** made while they were married. (EC 980, CEM 5:42.)
 - Unavailable if communication aided a crime or fraud. (EC 981, CEM 5:43.)
- **None of the spousal privileges applies** in several different types of proceedings. (EC 972, 982-986, CEM 5:44.)

Medical Privileges: Physician-Patient and Psychotherapist-Patient

- The patient has a **privilege to refuse to disclose a confidential communication with a physician (EC 994) or psychotherapist (EC 1010)** if made in the **course of the medical relationship, in confidence**, without a **waiver** and is properly **asserted**. (CEM 5:45.)
 - A **“patient”** for purposes of these privileges is one who **consults with or is examined by** a physician or psychotherapist for the **purpose of securing a diagnosis, or preventative, palliative, or curative treatment**. (EC 991, CEM 5:46.)

- The communications with the **psychotherapist must relate to a mental or emotional condition.** (EC 1011, CEM 5:46.)
- A **“physician”** is one **reasonably believed by the patient** to be authorized to practice medicine. (EC 990, CEM 5:47.)
- A **“psychotherapist”** is one **reasonably believed by the patient** to be engaged in a **long list of categories set out in EC 1010.** (CEM 5:48.)
- A **confidential communication** is made so that, so far as the patient knows, it discloses the information to no third person **other than those present to further the patient’s interests** and those to whom **disclosure is necessary to accomplish the purpose of the consultation.** (EC 994, 1012, CEM 5:49.)
- **Disclosure of patient’s name** may be required if it does not reveal the medical condition. This rule often precludes disclosure in the psychotherapist relationship. (CEM 5:49.)
- **EC 995 and 1015** discuss **when the physician or therapist must claim privilege.** (CEM 5:51.)
- **Exceptions to the medical privileges** (CEM 5:53.)
 - The **patient-litigant exception** applies when the communication is **relevant to the patient’s condition, if that condition has been tendered by the patient.** (EC 996(a), 1016(a), CEM 5:53.)
 - A **criminal defendant** who **puts mental or emotional state in issue** loses the psychotherapy privilege in sanity or incompetency proceedings. (CEM 5:53.)
 - **Crime or tort exception.** (EC 997, 1018, CEM 5:54.)
 - The **required report exception** excludes from the privilege information the medical professional must report to a public employee. (EC 1006, 1026, CEM 5:54.)
 - Where parties all **claim through deceased patient** (EC 1000, 1019, CEM 5:57), or in suits for **breach of duty by patient or doctor.** (EC 1001, 1020, CEM 5:58.)
- **Additional exceptions to physician’s privilege:**
 - A **criminal proceeding.** (EC 998, CEM 5:56, 5:62.)
 - Communications related to patient’s condition in damages suits for **patient’s misconduct if good cause shown.** (EC 999, CEM 5:61.)
 - **Commitment** proceedings. (EC 1004, CEM 5:63.)
 - **License termination or discipline** proceedings. (EC 1007, CEM 5:64.)
- **Additional exceptions to psychotherapist privilege:**

- o Where therapist is court-appointed. This exception is **inapplicable in criminal cases where counsel seeks assistance on mental or emotional defense.** (EC 1017(a), CEM 5:65.)
- o **Patient dangerous to self or others.** (EC 1024, CEM 5:66.)
- o Where **patient is under 16**, and therapist believes **patient is victim of a crime** and disclosure is in **child's best interest.** (EC 1027, CEM 5:67.)
- In addition to the lawyer-client and medical privileges, the code sets out several **other counseling privileges**:
 - o **Clergy-penitent.** (EC 1030-1034, CEM 5:68.)
 - o **Sexual assault counselor-victim.** (EC 1035-1036.2, CEM 5:69.)
 - o **Domestic violence counselor-victim.** (EC 1037-1037.6, CEM 5:70.) This privilege does not **limit an obligation to report child abuse.** (EC 1037.3, CEM 5:70.)
 - o **Human trafficking caseworker-victim.** (EC 1038-1038.2, CEM 5:70.)

Privileges for Official Information and Informer Identity

- **“Official information”** is information **acquired in confidence by a public employee** in the course of their duty and **not officially disclosed.** (EC 1040(a), CEM 5:71.)
- An **“informer”** is one who has **disclosed a violation of law in confidence** to one who enforces the law. (EC 1041, CEM 5:72.) The **informer's identity is protected** to promote effective law enforcement. (CEM 5:72.)
 - o These 2 categories of information are **absolutely privileged** only if required by a California or federal statute. (EC 1040(b)(1), CEM 5:73.)
 - o Otherwise a Court determines if **disclosure would be against public interest.** (EC 1040(b)(2), CEM 5:74.)
 - o Process for determining **disclosure in civil cases.** (EC 1040(a)(2), 1040(b)(2), CEM 5:75.)
 - o **Disclosure in criminal cases.** (EC 1040(a)(2), 1040(b)(2), CEM 5:76.)
 - o If a court bars disclosure, it must make a finding adverse to the government on an issue to which the information is material. (EC 1042(a), CEM 5:77.)
 - o Sealing search warrant affidavits to protect an informant. (CEM 5:78.)

Privilege for Peace or Custodial Officer Personnel Records

- The **procedure** by which a civil or criminal party, including the prosecutor, **may obtain these personnel records** is set out in **EC 1043-1045** (CEM 5:79). Certain of these personnel records may be obtained through the **Public Records Act** (CEM 5:79).
 - **“Personnel records”** are defined in Penal Code 832.8.
- A **written motion** must be filed and include a **description of the records of information sought. Affidavits showing good cause must also be submitted.** (**EC 1043(b)**, CEM 5:79.)
 - Cases on sufficient good cause are discussed in CEM 5:79.
- A **court** should not order disclosure of (**EC 1045(b)**, CEM 5:80):
 - The **conclusions of an officer investigating a complaint.**
 - **Remote facts.**
- **Where disclosure is made, it may be limited** to the name, address and phone number of the complainant. (CEM 5:80.)
- A **protective order** is appropriate to **protect an officer or agency from annoyance, embarrassment or oppression.** (**EC 1045(d)**, CEM 5:81.)

Miscellaneous privileges

- To protect the **secrecy of the vote.** (**EC 1050**, CEM 5:82.)
- To protect **trade secrets.** (**EC 1060**, CEM 5:83.)
- **Immunity of newsperson** from contempt. (**EC 1070**, CEM 5:84.)
 - This immunity **yields** when a criminal defendant shows no disclosure would **deny the defendant a fair trial.**
 - This **protects the newsperson from contempt only** and other sanctions are available. (CEM 5:84.)

Chapter 6. Evidence Affected or Excluded by Extrinsic Policies

- **EC 1101(a)** sets out the general rule **barring use of character evidence to prove conduct on a specified occasion.** It also **notes the exceptions** to that rule. (CEM 6:1).
- **The exceptions are of 2 types:**
 - **EC 1101(b) and (c) are exceptions or clarifications of that rule that apply in all cases.** (CEM 6:2-6:6 (civil), 6:10-6:19 (criminal)).
 - **EC 1102, 1103, 1108, and 1109, are exceptions to that rule that apply only in criminal cases** (CEM 6:9.)

- Three kinds of evidence may be used to prove a person's character, **evidence of opinion, reputation and specific acts**. (EC 1101(a), CEM 6:1.)
- **EC 1101(b) clarifies EC 1101(a)'s bar** in all cases. (CEM 6:2, 6:10.)
 - Under **EC 1101(b)**, evidence of a **crime, civil wrong, or other act** is admissible **when relevant to prove a fact other than the disposition to commit such an act**. (EC 1101(b), CEM 6:2, 6:10.)
 - For example, in **civil cases**, misconduct is admissible to **contradict a claim of mistake or accident**. (CEM 6:3)
 - And to show **state of mind**, like the defendant's **motive or intent** in a **civil sexual harassment or assault case**. (CEM 6: 5.)
 - **1101(b)** evidence introduced **against plaintiffs in civil sexual harassment and assault cases is limited by EC 1106**. (CEM 6:8.)
- Admissibility in a civil case of **evidence to support or attack credibility is not barred** by the general exclusion of **EC 1101(a)**. (**EC 1101(c)**, CEM 6:19.) Rules governing admissibility of credibility evidence are set out in **EC 780-790**, CEM 3:42-3:67.)
- Evidence of a person's **character with respect to care or skill is inadmissible** to prove that trait. (**EC 1104**, 6:1, 6:6.)
- **Habit or custom evidence** is admissible to prove conduct in conformity with that habit or custom in a civil case. (**EC 1105**, CEM 6:7.)
 - **Habit** is a **consistent response to a repeated situation**. (CEM 6:7.)

Restrictions on Use of Character Evidence to Prove Criminal Defendant's Conduct

- In **criminal cases**, in addition to **EC 1101(b) and (c)**, there are specified **statutory limits to the general rule of EC 1101(a)** barring evidence of uncharged misconduct. (CEM 6:9.)
- As with civil cases, in criminal cases, **EC 1101(b)** clarifies that **EC 1101(a) does not bar evidence of uncharged misconduct to prove a relevant fact in dispute, other than disposition**. (CEM 6:10, 6:21.)
 - A plea of **not guilty places all elements** of the offense in dispute. (CEM 6:10, 6:21.)
 - Prosecution evidence on the following issues is admissible if the requisite similarity is shown
 - **Identity** evidence is **admissible**, when the charged and uncharged conduct have a **high degree of similarity**. (CEM 6:11.)

- Evidence of **intent and of other states of mind** is admitted even if the offenses have only a **low degree of similarity**. (CEM 6:12.)
- **Plan** evidence is admissible, when the offenses are **sufficiently similar to show they are manifestations of the same plan**. (CEM 6:13.)
- Evidence of **motive**, requires **no showing of similarity** between offenses. (CEM 6:15.)
- **As to evidence of knowledge**, the level of required similarity varies. (CEM 6:16.)
- **As to absence of mistake or accident** evidence, a **low degree of similarity** is required. (CEM 6:17.)
- **With consciousness of guilt** evidence, **no similarity** required. (CEM 6:18.)
- Admissibility of **evidence to support or attack credibility** is **not barred** by the general exclusion of **EC 1101(a)**. (**EC 1101(c)**, CEM 6:19.)
- **Uncharged sexual offenses** are admissible against a defendant in sexual offense prosecutions if admissible **under EC 352**. (**EC 1108**, CEM 6:14.)
- Evidence of **uncharged domestic violence, or uncharged elder, or dependent person, or child abuse** is admissible against a defendant in a prosecution of that nature if admissible **under EC 352**. (**EC 1109**, CEM 6:14.)
- In a prosecution for a commercial sex act, **evidence the defendant is a victim of human trafficking and engaged in the sex act as a result of such trafficking**, precludes admissibility of the sex act. (**EC 1161**, CEM 6:40.)
- The **prosecution may introduce opinion or reputation evidence** against the defendant in limited circumstances, (**EC 1103**, CEM 6:22) and may introduce habit and custom evidence. (**EC 1105**, CEM 6:23.)

Limitations on Defense Use of Character Evidence to Prove Conduct

- The defendant may introduce opinion or reputation **evidence of his own good character**, and the **prosecution may rebut it**. (**EC 1102**, CEM 6:24.)
- The defendant may introduce **evidence of a character trait of the victim** and the **prosecution may rebut with contrary character evidence about the victim**, and, in **violence cases, evidence of the defendant's violent character**. (**EC 1103(a)(1) and (a)(2)**, CEM 6:25.)
 - In **sexual assault prosecutions**, the defendant may not use character evidence to **prove the victim consented**, but may use it to attack the **victim's credibility**. (**EC 1103(c)(1) and (c)(5)**, **782**, CEM 6:26.)

- Defendant may introduce **habit and custom** evidence. (EC 1105, CEM 6:27.)
- Limits exist on **defense evidence of the character of a third party** or codefendant. (CEM 6:28.)

Miscellaneous Limits on Evidence Resulting from Public Policies

- **Admissibility of juror declarations or testimony to challenge verdict.** No otherwise admissible evidence is admissible to show **effect of evidence on juror's verdict or juror's mental processes.** (EC 1150, CEM 6:29-6:31.)
- **Subsequent remedial conduct** is inadmissible to show fault. (EC 1151, CEM 6:32.)
- **An offer of compromise** is inadmissible to show liability. (EC 1152, CEM 6:33-6:34.)
- **An offer to plead guilty or a plea that is subsequently withdrawn** is inadmissible. (EC 1153, CEM 6:35.)
- Evidence of **statements, admissions or writings prepared in the course of a mediation** are inadmissible. Express waivers of this privilege are permitted. (EC 1115-1129, CEM 6:36.)
- Evidence of **liability insurance** at the time of an injury is inadmissible to prove wrongdoing. (EC 1155, CEM 6:37.)
- Inadmissibility of **records of medical staff or peer review committees** and preclusion of discovery of those records. (EC1156-1157.7, CEM 6:38-6:39.)
- Evidence of excited delirium is now barred in civil actions.

Chapter 7. Judicial Notice

- Judicial notice may not be taken of any matter unless authorized by law (EC 450) and may be utilized in **evidentiary hearings** and on **demurrers.** (CEM 7:1.)
- **Mandatory judicial notice** applies to (EC 451):
 - **California and federal** decisional, constitutional and statutory law (EC 451(a), CEM 7:2.)
 - **Rules, regulations, and standards** of certain state agencies. (EC 451(b), CEM 7:3.)
 - **California Rules of professional conduct and Rules of Court,** (EC 451(c), CEM 7:4) and **Rules prescribed by the USSC.** (EC 451(d), CEM 7:5.)
 - **English words and legal expressions.** (EC 451(e), CEM 7:6.)
 - **Universally known facts.** (EC 451(f), CEM 7:7.)
- **Permissive notice** may be taken of matters **similar to, but often less available** than those subject to mandatory notice, such as (CEM 7:8.):
 - **Laws of sister states** (EC 452(a), CEM 7:9.)
 - **Regulations and legislative enactments** of any public entity. (EC 452(b), CEM 7:10.)

- **Federal and state official acts.** (EC 452(c), CEM 7:11.) Notice may be taken of the **document's existence** but admitting the **contents is subject to the hearsay rule.** (CEM 7:11.)
- **Records of courts of record.** (EC 452(d)) The truth of the matter stated in such records is not subject to judicial notice. (CEM 7:12.)
- **Rules of court.** (EC 452(e), CEM 7:13.)
- **Laws of foreign nations.** (EC 452(f), 454, CEM 7:14.)
- **Common knowledge.** (EC 452(g), 7:15.)
- Facts capable of **immediate and accurate determination.** (EC 452(h), CEM 7:16.)
- **Convert** permissive to mandatory judicial notice by providing:
 - **Sufficient notice** (EC 453, CEM 7:17.)
 - **Sufficient information** (EC 453, CEM 7:18.)
- With permissive notice, **EC 454** sets out the types of **sources** a court should rely on. (CEM 7:19.) **EC 455** requires the court to give each party a **reasonable opportunity** to present information. (CEM 7:20.) Under **EC 457**, upon request, the **jury shall be instructed** to accept the judicially noticed matter as fact. (CEM 7:21.)
- **Expert advice to court on taking judicial notice.** (EC 460, CEM 7:23.)
- **Under EC 459, a reviewing court shall take notice of** matters properly noticed by trial court and those that should have been. (CEM 7:24.)

Chapter 8. Using Writings in Trial

- To be admissible, a writing must be:
 - Relevant (EC 350, CEM 8:1);
 - Authenticated. (EC 1400-1421, CEM 8:5-8:16);
 - An **original** or admissible **secondary evidence.** (EC 1520, 1521, CEM 8:17-8:24); and
 - But is subject to any exclusionary rule, like **hearsay.** (CEM 8:1.)
- **“Writing” is broadly defined**, and includes electronically stored evidence. (EC 250, CEM 8:1) and **graffiti.** (EC 1410.5, CEM 8:13.)
- **Authentication.** The proponent must show sufficient facts to **sustain a finding** that the **writing is the writing the proponent purports it to be.** (EC 1400; CEM 8:5.)
 - Resolve **competing inferences** in favor of admission. (CEM 8:5.)
 - **If a document appears altered after its execution and in a material part**, proponent must account for the alteration. (EC 1402, CEM 8:6.)

- **Writings may be authenticated by**
 - Testimony of a **subscribing witness** or **anyone who observed** the writing being made or executed. (EC 1411, 1413, CEM 8:7, 8:8.)
 - Actions by **adverse party**. (EC 1414, CEM 8:9.)
 - Evidence of **genuineness of handwriting by maker**. (EC 1415-1419, CEM 8:10.)
 - **Showing the content was unlikely to be known by anyone else**. (EC 1421, CEM 8:11.)
 - **Writing was a response to a communication**. (EC 1420, CEM 8:12.)
 - Presumption: **official signatures and seals**. (EC 1453(b), CEM 8:15.)
 - Limited presumption: **foreign officials**. (EC 1454, CEM 8:16.)
- The **secondary evidence** rule determines when **evidence of a writing other than the original** may be introduced to **prove its contents**. (EC 1521-1523, CEM 8:17-8:18.)
 - **Secondary evidence** may be a **copy**, unless there is a **genuine dispute**. (EC 1521, CEM 8:19.)
 - **Secondary evidence** may be **oral testimony** (EC 1523, CEM 8:21) in following circumstances:
 - where the writing is **lost or destroyed, or**
 - the **writings are voluminous**, or
 - the original and a copy were not **reasonably procurable** by the proponent, or
 - the writing is not **closely related to the controlling issues**.
 - in a **criminal** case, a copy or oral testimony may also be excluded if the **proponent possesses the original and did not make it reasonably available for inspection**. (EC 1522(a), CEM 8:20, 8:22.)
- Certain reproductions of the following are admissible: (CEM 8:23)
 - **business records** (EC 1550);
 - **criminal justice agency files and records** (EC 1550.1);
 - **lost or destroyed writings accompanied by EC 1531 certificate** (EC 1551);
 - **printed representations of computer-generated information** (EC 1552); and
 - **printed representations of video or digital images**. (EC 1553.)
- The **secondary evidence** rule does not apply in a **preliminary hearing** in a criminal case. (PC 872.5, CEM 8:24.)

Chapter 9. Burden of Proof, Burden of Producing Evidence

- The **burden of proof** involves **two distinct issues** (EC 500, CEM 9:1):
 - **Which party** must prove a fact (**allocation**), and
 - The **degree** to which the fact must be proved (**standards**).
- **Allocation:** burden is assigned to party to whom fact is essential. (EC 500, CEM 9:2.) A court may shift the normal burden. (CEM 9:2.)
- **Allocations** made by the Evidence Code:
 - Party claiming another is **guilty of crime or wrongdoing** has the burden of proof. (EC 520, CEM 9:8.)
 - Party claiming another **did not exercise due care** has the burden of proof. (EC 521, CEM 9:9.) One **exception: res ipsa loquitor**.
 - Party claiming the party or another is or was **insane** has the burden of proof. (EC 522, CEM 9:10.)
- **Standards of proof:** the trier of fact must be **convinced** to a **requisite degree**. (EC 500, CEM 9:3.) There are **four degrees of proof** (EC 115, CEM 9:3):
 - Proof sufficient to **raise a reasonable doubt**;
 - Proof by a **preponderance of the evidence**;
 - **Clear and convincing** proof; and
 - Proof **beyond a reasonable doubt**
- **Standards for selected civil issues.** (CEM 9:4.)
- **Standards for selected criminal issues.** (CEM 9:5, 9:6.)
- **Burden of producing evidence** means the obligation of a party to **introduce evidence sufficient to avoid a ruling against the party**. (EC 110, CEM 9:11.)
 - Usually placed on party with burden of proof. (CEM 9:11.)
 - **Burden of production may shift**, though burden of proof remains the same. (CEM 9:11.)
- **Presumptions** may **impact** burden of **proof** or burden of **producing** evidence. (EC 603, 604, 605, 630, CEM 9:12.)

Chapter 10. Presumptions

- A “**presumption**” is an **assumption of fact that the law requires to be made from other facts**. It is not evidence. (EC 600(a), CEM 10:1.)
- There are **three** different kinds of presumptions (EC 601, CEM 10:2):
 - **Conclusive** presumptions **require a finding of the presumed fact** regardless of the strength of opposing evidence. (CEM 10:2.) They are set out in **EC 620-624**. (CEM 10:8-10:10.)

- o **Rebuttable** presumptions can be overcome by the evidence. (EC 601, CEM 10:2.)
- o The EC distinguishes between **rebuttable presumptions** impacting the **burden of production** and the **burden of proof**. (EC 601, CEM 10:2.) **Those impacting the proof burden are more difficult to overcome.** (EC 604, 606, CEM 10:3, 10:4.) Some rebuttable presumptions are set out in EC 630-647, 660-669.5. (CEM 10:11-10:27.)
- **A presumption that implements a public policy impacts the burden of proof.** (EC 603, CEM 10:5.) **One that only facilitates the determination of the particular case, impacts the burden of production.** (EC 603, CEM 10:5.)
- Presumptions in **criminal** cases may not **lighten the prosecution's burden of proof**, and may only be **permissive, not mandatory.** (EC 607, CEM 10:6-7.)
- **Conclusive presumptions include:**
 - o **Facts recited in a written instrument.** (EC 622, CEM 10:8.)
 - o **Estoppel by own statements or conduct.** (EC 10:9, CEM 10:9.)
 - o **Title of landlord.** (EC 624, CEM 10:10.)
- The EC specifies certain **rebuttable presumptions affecting the burden of production:**
 - o **debtor-creditor** relationships (EC 631-636, CEM 10:11);
 - o **indicators of ownership** (EC 637-638, CEM 10:12);
 - o **judgments** (EC 639, CEM 10:13);
 - o **date of writing** (EC 640, CEM 10:14);
 - o **letter correctly addressed** (EC 641, CEM 10:15);
 - o **duty to convey real property** (EC 642, CEM 10:16);
 - o **authenticity of writings** (EC 643-645.1, CEM 10:17),
 - o **res ipsa loquitur, a presumption of negligence in personal injury cases** (EC 646, CEM 10:18); and
 - o **A process server's return.** (EC 647, CEM 10:19).
- The EC specifies certain **rebuttable presumptions affecting the burden of proof:**
 - o **Owner of legal title owns full beneficial title** (EC 662, CEM 10:20);
 - o **Ceremonial marriage presumed valid** (EC 663, CEM 10:21);
 - o **Official duty regularly performed** (EC 664, CEM 10:22);
 - o **One intends consequences of a voluntary act; limited applicability in criminal case** (EC 665, 668, CEM 10:23);

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- o **Court acted in lawful exercise of jurisdiction (EC 666, CEM 10:24),**
- o **Presumption of death (EC 667, CEM 10:25),**
- o **Presumption of failure to exercise due care (EC 669, CEM 10:26); and**
- o **Local growth limitation ordinances (EC 669.5, CEM 10:27);**

Dedication

This book is dedicated to my wife, Carol, who gave up some evenings and many weekends so it could be written. Her love, patience, and support were critical to its completion.

About the Author

After serving as a trial judge in the municipal and superior courts of Contra Costa County for over twenty years, the Hon. Mark B. Simons was appointed to the California Court of Appeal, First District in January 2001. He has served as the Dean of the B.E. Witkin (California) Judicial College, where he currently teaches evidence to new judges. He has lectured to numerous lawyers' and judges' groups on practical evidence problems that commonly arise in litigation. In 2000 and 2010, he received the Bernard Jefferson Award for Excellence in Judicial Education from the California Judges Association. In 2014, Justices Simons and Corrigan were joint recipients of the first annual Distinguished Service Award in Judicial Education from the California Judicial Council.

Justice Simons received his undergraduate degree from the University of Michigan in 1967 and his law degree from the University of Chicago in 1970, where he was a member of the editorial board of the law review. In addition to several law review articles, Justice Simons has written *California Preliminary Examinations* (Lexis), published annually since 1987.

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Preface

Any author of a new book on evidence has to be able to answer the question, What does this book offer that has not been offered before? Four factors combine to make this text unique. First, it is portable, that is, designed to be carried easily to court. It is unrealistic to believe that even experienced litigators will recall all the answers to the numerous evidentiary questions that arise during a hearing or trial. Judges, however, often require an answer promptly, not after an evening's research in the library. A concise description of evidence, such as the one contained here, eliminates this dilemma.

Second, this book contains a thematic discussion of evidence. It is divided into the ten primary areas of concern to the litigator and includes all Evidence Code sections and major cases discussing the subjects.

Third, this book contains an up-to-date discussion of the newest code revisions and appellate cases. (The 2026 edition discusses cases through 18 Cal.5th 576 and 113 Cal.App.5th 1292.) Emerging trends in the law of evidence are noted and commented upon. Sufficient analysis of the law is provided so that the litigator can reason from the particular fact situations discussed to the actual fact situation in the case being tried.

Finally, and of particular benefit to the new lawyer, short, common-sense examples of the application of the evidence rules are found throughout the text.

No other text combines all these features and offers the user the convenience and benefits of each.

JUSTICE MARK B. SIMONS
San Francisco, California



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