

# *California Evidence Code—Federal Rules of Evidence*

## **V. Witnesses: Conforming the California Evidence Code to the Federal Rules of Evidence**

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**T**HIS ARTICLE contrasts the approaches of the California Evidence Code (“Evidence Code”), the Federal Rules of Evidence (“Federal Rules”), and, where pertinent, the Uniform Rules of Evidence to challenges to the competency of witnesses and to evidence offered to support or impeach witnesses. In addition, the Article compares the limitations imposed on the examination of witnesses, including the judge’s power to control the order and mode of interrogating witnesses.

This Article is part of a larger study commissioned by the California Law Revision Commission (“the Commission”) to assess whether the California Evidence Code should be conformed to the Federal Rules of Evidence. The Commission was created by the California Legislature in 1953 as the permanent successor to the Code Commission. Its chief responsibility is to review California statutory and decisional law to discover defects and anachronisms and to recommend legislation to make needed reforms.

The fifth paper in the series comprising the study, this Article was submitted to the Commission on September 1, 2004. The California and federal provisions compared were in effect as of December 2003. The opinions, conclusions, and recommendations contained in this Article are those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Commission.

## I. Competency of Witnesses

### A. Competency in General

The Evidence Code and the Federal Rules provide a general rule of competency.<sup>1</sup> All persons, irrespective of age, are qualified to be witnesses unless disqualified by statute.<sup>2</sup> The common law disqualifications are eliminated. That a witness may be a party, a felon, or related to a party are now grounds for impeachment, not disqualification as a witness.<sup>3</sup>

Under the Evidence Code, individuals are disqualified if they cannot testify in a manner others can understand or if they cannot appreciate the duty of a witness to tell the truth.<sup>4</sup> In addition, witnesses who do not appear as experts may not testify about a particular matter unless they have personal knowledge of the matter.<sup>5</sup>

The Federal Rules, like the Evidence Code, require witnesses to testify under oath or affirmation and, except for experts, on the basis of personal knowledge.<sup>6</sup> The Federal Rules, however, are silent on whether a witness must testify in a manner understood by the finder of fact to qualify as a witness. The Federal Rules differ from the Evidence Code in another respect. They provide that “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.”<sup>7</sup> Because of *Erie Railroad Co. v. Tompkins*,<sup>8</sup> diversity concerns do not arise in matters litigated in California courts. Therefore, no such provision is necessary in the Evidence Code.

### B. Interpreters and Translators

The Evidence Code contains detailed provisions on the qualifications and use of interpreters for non-English speaking or limited English speaking witnesses.<sup>9</sup> Interpreters are subject to all the rules of

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1. FED. R. EVID. 601; CAL. EVID. CODE § 700 (West 1995).

2. CAL. EVID. CODE § 700.

3. See FED. R. EVID. 601 advisory committee's note.

4. See CAL. EVID. CODE § 701.

5. See *id.* § 702.

6. See FED. R. EVID. 602-03.

7. See FED. R. EVID. 601.

8. 304 U.S. 64 (1938) (holding that “[in federal courts,] [e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state”).

9. CAL. EVID. CODE § 752.

law relating to witnesses.<sup>10</sup> Interpreters must take an oath swearing to “make a true interpretation to the witness in a language the witness understands.”<sup>11</sup> The interpreter must also provide a true interpretation of the witness’s answers.<sup>12</sup> In addition, the Evidence Code requires the appointment of an interpreter for a party who is not proficient in English in such Family Code proceedings as dissolutions and legal separations in which a protective order has been granted or is sought.<sup>13</sup>

The Evidence Code also contains detailed provisions on the qualifications and use of interpreters for witnesses who are deaf or hearing impaired.<sup>14</sup> It also provides for the use of translators whenever a writing offered in evidence cannot be “deciphered or understood directly.”<sup>15</sup> Translators must take an oath to translate accurately into English any writing they are asked to decipher or translate.<sup>16</sup>

In contrast, the Federal Rules have only a single provision relating to interpreters. Federal Rule 604 provides that an “interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.”<sup>17</sup> California’s detailed rules reflect the state’s experience with limited or non-English speaking witnesses and witnesses with disabilities, and therefore should be retained.

## C. Persons Disqualified from Testifying

### 1. Presiding Judges

The Federal Rules prohibit the judge presiding over the trial from testifying as a witness.<sup>18</sup> No objection needs to be made to preserve the issue for review.<sup>19</sup>

The Evidence Code, on the other hand, allows the presiding judge to testify as a witness if no party objects.<sup>20</sup> Before the presiding judge may be called as a witness, however, the judge, in a hearing outside the presence of the jury, must inform the parties of any known

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10. *Id.* § 750.

11. *Id.* § 751(a).

12. *Id.*

13. *Id.* § 755.

14. *Id.* §§ 751(b), 754–754.5.

15. *Id.* § 753.

16. *Id.* § 751(c).

17. FED. R. EVID. 604.

18. FED. R. EVID. 605.

19. *Id.*

20. CAL. EVID. CODE § 703(d).

information regarding the matters the judge will testify about.<sup>21</sup> If a party objects to the judge as a witness, the judge may not testify and must declare a mistrial and order the action to be tried before another judge.<sup>22</sup>

The Evidence Code expressly allows the parties to make an informed decision on whether to object to the judge as a witness. For this reason, the provision should be retained.

## 2. Judges, Arbitrators, and Mediators

The Evidence Code provides:

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.<sup>23</sup>

The Federal Rules do not have an equivalent provision. The Evidence Code section protects judges, arbitrators, and mediators from harassment and promotes the stability of their decisions. It should therefore be retained.

## 3. Sitting Jurors

Upon objection, a California or federal juror may not testify as a witness at the trial in which the juror is sitting.<sup>24</sup> The Evidence Code, however, provides:

Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.<sup>25</sup>

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21. *Id.* § 703(a).

22. *Id.* § 703(b).

23. *Id.* § 703.5.

24. FED. R. EVID. 606; CAL. EVID. CODE § 704(b).

25. CAL. EVID. CODE § 704(a).

The Evidence Code expressly allows the parties to make an informed decision on whether to object to the juror as a witness. If no party objects, the juror may testify. For these reasons, the Evidence Code provisions should be retained.

#### 4. Jurors and Post-Verdict Proceedings

In California post-verdict proceedings, jurors may be called to testify about "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as [are] likely to have influenced the verdict improperly."<sup>26</sup> But to protect jurors from harassment, jurors may not testify about the effect such statements, conduct, conditions, or events had in influencing the jurors to assent or dissent from the verdict or upon the mental processes by which the verdict was reached.<sup>27</sup> Thus, the Evidence Code permits evidence of misconduct by trial jurors to be received but forbids the receipt of evidence about the effect of such misconduct on the deliberations of the jurors.<sup>28</sup> Examples of permissible evidence include improper discussion by jurors of the accused's failure to testify, as well as of the sentence the court might impose if they found the accused guilty.<sup>29</sup> Evidence may also be received to show that, while sitting as a juror, the juror read, watched, heard, or discussed news accounts about the case in which he was sitting, or asked witnesses questions about any matter related to the case.<sup>30</sup>

The Federal Rules take a more restrictive approach. In addition to precluding a juror from testifying about "anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith," the Federal Rules also provide that a juror may not testify about "any matter or statement

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26. *Id.* § 1150.

27. *Id.* Other goals include preserving the stability of verdicts, discouraging post-verdict jury tampering, and protecting the privacy of jury deliberations. *In re Hamilton*, 975 P.2d 600, 613 n.18 (Cal. 1999).

28. CAL. EVID. CODE § 1150 cmt.

29. *People v. Hord*, 19 Cal. Rptr. 2d 55, 63 (Ct. App. 1993).

30. *See Province (Cassandra) v. Ctr. for Women's Health*, 25 Cal. Rptr. 2d 667, 670-71 (Ct. App. 1993) (and cases cited therein). It is not necessary for the complaining party to show that the jurors discussed the news accounts. It is misconduct for jurors just to watch, hear, or read such accounts. *Id. See also City of Pleasant Hill v. First Baptist Church*, 82 Cal. Rptr. 1, 30-31 (Ct. App. 1969) (holding that the denial of motion for mistrial and request for replacement of juror after it appeared that there had been conversation between juror and witness was not abuse of discretion).

occurring during the course of the jury's deliberations."<sup>31</sup> A juror, however, may testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."<sup>32</sup>

*Tanner v. United States*<sup>33</sup> illustrates the differences between the Evidence Code and the Federal Rules. Tanner appealed his convictions for fraud on the ground that, after the verdict, the judge erroneously denied him the opportunity to call two jurors who would testify that some of their fellow jurors had ingested alcohol, marihuana, and cocaine during the trial.<sup>34</sup> The United States Supreme Court upheld the judge's denial of a hearing on the alleged juror misconduct.<sup>35</sup> Under the Federal Rules as construed by the Court, "[J]uror intoxication is not an 'outside influence' about which jurors may testify to impeach their verdicts."<sup>36</sup>

Section 1150 of the Evidence Code would not have barred the jurors' testimony. Evidence of juror intoxication within or without the jury room may be received if it is likely to have influenced the verdict improperly.<sup>37</sup> To protect the jurors, however, the Evidence Code would have prohibited the accused from asking the jurors about the effect that the intoxication had on their deliberations. The Evidence Code affords the parties a broader basis for attacking a verdict on the basis of juror misconduct while still protecting juror deliberations, and should therefore be retained.

## 5. Hypnotized Witnesses

In *People v. Shirley*,<sup>38</sup> the California Supreme Court held that "the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward."<sup>39</sup> The court was not convinced that the use of hypnosis to restore the memory of a potential witness had been generally ac-

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31. FED. R. EVID. 606(b).

32. *Id.*

33. 483 U.S. 107 (1987).

34. *Id.*

35. *Id.* at 124-25.

36. *Id.* at 125.

37. CAL. EVID. CODE § 1150 (West 1995).

38. 723 P.2d 1354 (Cal. 1982).

39. *Id.* at 1384.

cepted as a reliable technique by the relevant scientific community.<sup>40</sup> On the contrary, the court was troubled that

[d]uring the hypnotic session, neither the subject nor the hypnotist [could] distinguish between true memories and pseudomemories . . . and when the subject [repeated the] recall in the waking state (e.g., in a trial), neither an expert nor a lay observer (e.g., the judge or jury) [could] make a similar distinction.<sup>41</sup>

The court was equally concerned with the ineffectiveness of cross-examination in exposing pseudomemories. Since a witness who has undergone hypnosis sincerely believes that his testimony on the stand is his true recollection and not the product of deliberate or inadvertent suggestion during the hypnotic session, even the most vigorous cross-examination cannot expose pseudomemories.<sup>42</sup>

The court explicitly exempted a criminal defendant who had submitted to hypnosis from the disqualification announced in *Shirley* because of concerns about a defendant's right to testify in his own defense.<sup>43</sup> Such an exemption for criminal defendants is consistent with federal constitutional law. In *Rock v. Arkansas*,<sup>44</sup> the United States Supreme Court invalidated a state evidentiary rule that precluded the use of a defendant's hypnotically refreshed testimony.<sup>45</sup> Such a blanket prohibition was held to violate the accused's right to present evidence in his own defense.<sup>46</sup>

Shortly after the *Shirley* decision was announced, the California electorate approved Proposition 8, the Victims Bill of Rights, which amended the California Constitution.<sup>47</sup> One of its provisions, the Right to Truth-in-Evidence, gives parties to criminal proceedings the state constitutional right not to have relevant evidence excluded.<sup>48</sup>

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40. *Id.* at 1383.

41. *Id.* at 1382.

42. *Id.* at 1383.

43. *Id.* at 1384.

44. 483 U.S. 44 (1987).

45. *Id.* at 62.

46. *Id.* The accused's right to present relevant evidence is not unlimited, however. Even under *Rock*, a judge may exclude a defendant's posthypnotic testimony if the state can demonstrate its unreliability in the case at hand. *Id.*

47. For a discussion of the effect of Proposition 8 on the rules of evidence that apply in criminal cases, see MIGUEL MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES—A PROBLEM APPROACH § 3.07 (2d ed. 1999).

48. Section 28(d) the California Constitution states:

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding. . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782, or 1103.



Since barring the testimony of previously hypnotized witnesses may exclude relevant evidence, a literal application of Proposition 8 would overturn *Shirley*. Concerned that the proposition would permit previously hypnotized witnesses to testify in all criminal cases, the California Legislature added section 795 to the Evidence Code in 1984.<sup>49</sup> This section strikes a middle ground between Proposition 8 and the disqualification announced in *Shirley* by permitting a previously hypnotized witness to testify if the judge finds that strict guidelines have been followed. These guidelines are designed to prevent the hypnotic session from improperly contaminating the witness's recall.<sup>50</sup>

Section 795 clarifies *Shirley* by permitting previously hypnotized witnesses to testify if their testimony is limited to those matters that they recalled and related prior to the hypnotic session, so long as the other conditions of the section are satisfied. The witnesses, however, may not testify about new matters that surfaced during the hypnotic session.

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CAL. CONST. art. I, § 28(d).

49. CAL. EVID. CODE § 795 (West 2004) (legislative history). The Right to Truth-in-Evidence provision can be amended by a super majority in each house of the Legislature. CAL. CONST. art. I, § 28(d). Section 795 complies with the super majority requirement. 2 CAL. LEGISLATURE, ASSEMBLY FINAL HISTORY, A.B. 2669, at 1656 (1983-84).

50. As amended, section 795(a) permits the use of a previously hypnotized witness's testimony if the following conditions are met:

(1) The testimony is limited to those matters which the witness recalled and related prior to the hypnosis.

(2) The substance of the prehypnotic memory was preserved in written, audiotape, or video tape form prior to the hypnosis.

(3) The hypnosis was conducted in accordance with all of the following procedures:

(A) A written record was made prior to hypnosis documenting the subject's description of the event, and information which was provided to the hypnotist concerning the subject matter of the hypnosis.

(B) The subject gave informed consent to the hypnosis.

(C) The hypnosis session, including the pre-and post-hypnosis interviews, was video tape recorded for subsequent review.

(D) The hypnosis was performed by a licensed medical doctor, psychologist, or licensed clinical social worker, or a licensed marriage and family therapist experienced in the use of hypnosis and independent of and not in the presence of law enforcement, the prosecution, or the defense.

(4) Prior to admission of the testimony, the court holds a hearing pursuant to Section 402 of the Evidence Code at which the proponent of the evidence proves by clear and convincing evidence that the hypnosis did not so affect the witness as to render the witness' prehypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness' prehypnosis recollection. At the hearing, each side shall have the right to present expert testimony and to cross-examine witnesses.

CAL. EVID. CODE § 795(a).

Unlike *Shirley*, section 795 does not expressly exempt the criminal defendant from its application. *People v. Aguilar*,<sup>51</sup> however, holds that *Shirley*, not section 795, governs the use of a criminal defendant's post-hypnotic testimony.<sup>52</sup> Since *Shirley* places no restrictions on the use of such testimony, the fact that the accused was hypnotized under circumstances that violate the conditions of section 795 is not a ground for preventing the accused from testifying.<sup>53</sup>

Section 795 applies only to criminal proceedings. But since *Shirley* does not distinguish between criminal and civil proceedings, *Shirley* governs the use of a witness's post-hypnotic testimony in civil proceedings. Accordingly, if a witness in a civil matter has been hypnotized for the purpose of restoring her memory of the events in issue, the witness's testimony is inadmissible as to all matters relating to those events from the hypnotic session forward.<sup>54</sup> *Shirley*, however, does not apply to pre-hypnotic evidence offered in a civil case. Thus, a civil "witness who has undergone hypnosis is not barred from testifying to events which the court finds were recalled and related prior to the hypnotic session."<sup>55</sup> However, because *Shirley* exempts only the accused from the testimonial disqualification, *Shirley* applies to all the parties in a civil proceeding.<sup>56</sup> Accordingly, a party in a civil case is barred from testifying if the party's recollection of the events in question first surfaced during the hypnotic session.

The Federal Rules do not contain a provision equivalent to section 795. Because section 795 preserves the holding of the most important California decision on the admissibility of previously hypnotized witnesses' testimony, the section should be retained.

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51. 267 Cal. Rptr. 879 (Ct. App. 1990).

52. *Id.* at 883.

53. Applying section 795 to criminal defendants would not necessarily violate their right to present evidence in their own defense. In *Rock v. Arkansas*, the United States Supreme Court held that a state can bar an accused's posthypnotic testimony if the state can demonstrate its unreliability in a given case. See *supra* text accompanying notes 44-46. Since section 795 is designed to prevent the hypnotic session from improperly contaminating the witness's recall, using the section to exclude a defendant's post-hypnotic testimony may not be unconstitutional.

54. *People v. Shirley*, 753 P.2d 1354, 1384 (Cal. 1982).

55. *People v. Hayes*, 783 P.2d 719, 725 (Cal. 1989). Section 795 supersedes the *Shirley-Hayes* rule only in criminal cases. See *Schall v. Lockheed Missiles & Space Co.*, 44 Cal. Rptr. 2d 191, 195 (Ct. App. 1995). Accordingly, a witness in a civil case is barred from testifying if the witness's recollection of the events in question first surfaced during the hypnotic session.

56. See *Schall*, 44 Cal. Rptr. 2d at 196.

## II. Witness Credibility

### A. Credibility in General

Trial lawyers know that the outcome of a trial will be determined in almost all cases by the witnesses the jurors choose to believe and the ones they decide to ignore. Telling jurors which witnesses to believe or disbelieve is thus a crucial part of a closing argument. But such an appeal will not be persuasive unless the lawyer can give the jurors reasons rooted in the evidence about why a witness should be believed or disbelieved. This inescapable dynamic of jury trials encourages lawyers to produce the most favorable evidence about the credibility of their witnesses and the most unfavorable about their opponents. Rules of evidence generally counter this inclination by placing strict limits on the use of evidence to support or attack the credibility of witnesses. Despite the unquestioned relevance of such evidence, the rules proceed on the assumption that the unrestrained use of evidence on witness credibility may distract and confuse jurors about the substantive issues to be decided.

The rules restrict the use of evidence on witness credibility in two ways. First, the rules limit the kind of evidence that can be used to support or attack the credibility of witnesses. Second, the rules sometimes limit the circumstances when such evidence may be used. For example, evidence that a witness has made statements consistent with his testimony on direct examination is generally inadmissible to support the witness unless the opposing party has first attacked the witness's credibility.<sup>57</sup>

A unique feature of the Evidence Code is section 780. This section provides a nonexclusive list of the matters that the finder of fact can consider in assessing the credibility of witnesses. The list is technically unnecessary. Evidence bearing on credibility is relevant, and, unless otherwise provided, all relevant evidence is admissible.<sup>58</sup> The list is nonetheless invaluable because it enables California judges and lawyers to grasp easily the broad spectrum of evidence that may be available to attack or support a witness's credibility. Section 780 provides as follows:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his

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57. FED. R. EVID. 801(d)(1)(B); CAL. EVID. CODE § 791(a) (West 1995).

58. CAL. EVID. CODE § 351.

testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- (i) The existence or nonexistence of any fact testified to by him.
- (j) His attitude toward the action in which he testifies or toward the giving of testimony.
- (k) His admission of untruthfulness.<sup>59</sup>

The Federal Rules do not contain an equivalent provision, but similar principles may be derived by applying Rule 401, which defines relevant evidence to include evidence that is probative of a witness's credibility,<sup>60</sup> and Rule 402, which declares that all relevant evidence is admissible unless otherwise excluded.<sup>61</sup> Because of the usefulness of section 780 to judges and lawyers, it should be retained.

## B. Proposition 8

In June 1982, the California electorate approved Proposition 8, an initiative entitled the Victims Bill of Rights. One of its provisions, the Right to Truth-in-Evidence, transformed the rules of evidence applicable to criminal proceedings by amending the state constitution to give the parties a right *not* to have relevant evidence excluded.<sup>62</sup> This provision, in pertinent part, reads as follows:

Except as provided by statute hereafter enacted by a two-thirds vote of the membership of each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782, or 1103.<sup>63</sup>

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59. *Id.* § 780.

60. FED. R. EVID. 401.

61. FED. R. EVID. 402.

62. CAL. CONST. art. I, § 28(d).

63. *Id.*

A literal application of the Truth-in-Evidence provision would repeal all the Evidence Code sections that ban or limit evidence bearing on the credibility of witnesses.<sup>64</sup> Since such evidence is relevant, its admissibility would be governed instead by section 352, a section expressly exempted from the operation of the Right to Truth-in-Evidence provision. Under section 352, a California judge may exclude relevant evidence if its probative value is substantially outweighed by enumerated trial concerns.<sup>65</sup> These include the risk that the evidence may consume too much time, unfairly prejudice the opposing party, confuse the issues, or mislead the jury.<sup>66</sup> A literal interpretation of the proposition would thus replace the certainty provided by specific rules governing credibility with the discretion accorded trial judges by section 352.

The effect of Proposition 8 is to create two systems of rules for governing evidence offered on witness credibility in California. The Evidence Code continues in effect in civil cases, but Proposition 8 now governs in criminal proceedings.<sup>67</sup>

The Federal Rules, in contrast, do not contain a provision equivalent to Proposition 8. The Federal Rules continue the tradition of having one set of evidentiary rules apply generally to all trials irrespective of whether the proceeding is civil or criminal.

## C. Statutory Provisions

### 1. Sexual Assault Victims—Criminal Cases

California's rape shield provisions affect defense evidence in two ways. First, section 1103(c) prohibits the use of evidence of the vic-

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64. Section 782, however, would not be affected because it is expressly exempted from the operation of Proposition 8. CAL. EVID. CODE § 782. Section 782 governs the use of a complaining witness's sexual conduct to attack her credibility in sex offense prosecutions. *Id.*

65. *Id.* § 352.

66. *Id.*

67. Proposition 8 permits amendments to the initiative if approved by at least a two-thirds vote of each house. In *People v. Ewoldt*, 867 P.2d 757 (Cal. 1994), the California Supreme Court held that whatever repealing effects Proposition 8 had on California Evidence Code section 1101(a) had been superseded by an amendment that had the effect of reenacting the entire section by the required super majority. *Id.* at 763. Section 1101(a) bans the use of evidence to prove conduct in conformity with a person's character. CAL. EVID. CODE § 1101(a). The reenactment of section 1101, however, leaves untouched the effects of the initiative on the code sections governing the use of character evidence to attack or support the credibility of witnesses. Section 1101(c) provides that "[n]othing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." *Id.* § 1101(c).

tim's sexual relations with others to prove that the victim consented to having sexual relations with the accused because she is the kind of person who engages in consensual sex.<sup>68</sup> The defense is limited to proving only the victim's sexual conduct with the accused.<sup>69</sup> Second, section 782 prohibits the use of evidence of the complaining witness's sexual conduct offered under section 780 to attack her credibility, unless at a separate hearing the judge concludes that the probative value of the evidence is not substantially outweighed by the concerns enumerated in section 352.<sup>70</sup> Section 352 gives California judges the discretion to exclude relevant evidence whenever its probative value is substantially outweighed by the dangers that it will consume too much time, confuse the issues, mislead the jurors, or create undue prejudice.<sup>71</sup> Section 780 allows the finder of fact to consider in determining the credibility of a witness any evidence that "has any tendency in reason to prove or disprove the truthfulness of [the witness's] testimony."<sup>72</sup>

The term "sexual conduct . . . encompasses any behavior that reflects the actor's or speaker's willingness to engage in sexual activity."<sup>73</sup> Section 782 sets out an elaborate procedure, including the filing by the accused of a written motion and offer of proof, to be followed in screening evidence offered under Section 782.<sup>74</sup> Failure to comply with the procedural requirements will preclude the accused from raising the trial judge's error in excluding evidence of the complaining witness's sexual conduct that is offered to attack her credibility.<sup>75</sup>

To obtain a hearing on the admissibility of the impeaching evidence, the accused must persuade the judge that the proposed evidence is "sufficient."<sup>76</sup> Presumably, the proffer is sufficient if it is probative of a proposition discrediting the complaining witness's cred-

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68. CAL. EVID. CODE § 1103(c). For an extended discussion of this provision, see MIGUEL A. MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES—A PROBLEM APPROACH § 3.12 (3d ed. 2004) [hereinafter MÉNDEZ, THIRD EDITION].

69. CAL. EVID. CODE § 1103(c)(3).

70. *Id.* § 782. For an extended discussion of a judge's power to exclude relevant evidence under section 352, see MÉNDEZ, THIRD EDITION, *supra* note 68, § 2.10.

71. CAL. EVID. CODE § 352.

72. *Id.* § 780.

73. *People v. Franklin*, 30 Cal. Rptr. 2d 376, 380 (Ct. App. 1994).

74. *Id.* at 379–80.

75. *People v. Sims*, 134 Cal. Rptr. 566, 572 (Ct. App. 1976) (holding the accused's failure to comply with the statutory requirements precluded his raising as error the trial judge's exclusion of evidence that the complaining witness was pregnant at the time of the alleged rape in order to prove that she had a motive to concoct the rape).

76. CAL. EVID. CODE § 782(a)(3).

ibility and the use of the proffered evidence for that purpose is not barred by the Evidence Code. Yet even if the evidence produced at the hearing is probative of the victim's lack of credibility and its use is not barred by the Evidence Code, the judge may still exclude the evidence if its probative value is substantially outweighed by the concerns enumerated in section 352. In sex offense prosecutions, the trial judge's discretion to exclude evidence impeaching the complaining witness has been upheld as constitutional.<sup>77</sup>

The Federal Rules also contain a rape shield provision. Rule 412 allows the accused to offer evidence of specific instances of his own sexual conduct with the victim to prove consent, if the judge first determines at a separate hearing that the probative value of the evidence outweighs its prejudice to the victim.<sup>78</sup> Rule 412 also allows the accused to offer evidence of specific instances of the victim's specific sexual conduct with others to prove that someone other than the accused is responsible for the assault charged.<sup>79</sup> The use of the evidence for this purpose is also subject to a finding at a separate hearing that its probative value outweighs its prejudice to the victim.<sup>80</sup> Unlike the Evidence Code, however, Rule 412 does not authorize the use of evidence of the victim's sexual conduct for impeachment purposes.<sup>81</sup>

California was among the first jurisdictions to enact a provision governing the use of the victim's sexual conduct to attack her credibility. When the Legislature enacted section 782 thirty years ago, it opted to give judges the power to screen the evidence for undue prejudice instead of banning the evidence outright. The flexible response provided by section 782 seems to have served California well and should be retained.

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77. *People v. Blackburn*, 128 Cal. Rptr. 864, 867 (Ct. App. 1976).

78. FED. R. EVID. 412 and advisory committee's note.

79. *Id.*

80. *Id.*

81. Rule 412, as enacted, barred the use of the evidence for this purpose by failing to authorize its use. The rule proceeded from the assumption that evidence of the victim's predisposition to engage in sex acts was inadmissible in a criminal case for any purpose unless otherwise authorized by the rule. *See* FED. R. EVID. 412 advisory committee's note (regarding the 1994 amendment); JACK B. WEINSTEIN ET AL., EVIDENCE: RULES, STATUTE AND CASE SUPPLEMENT 47 (1993) (citing standing committee's note).

As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress amended Rule 412 to authorize in a civil case the use of the victim's sexual behavior in certain circumstances. The amended rule, however, continues to bar evidence "relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or *impeachment*," unless otherwise authorized. FED. R. EVID. 412 advisory committee's note (emphasis added). No express authorization of the use of the evidence for impeachment is contained in the amended rule.

## 2. Sexual Assault Victims—Civil Cases

The same concerns that prompted the Legislature to enact the rape shield laws moved it to pass legislation protecting plaintiffs in sexual harassment, battery, and assault lawsuits.<sup>82</sup> Evidence Code section 1106 prohibits the defendant in such actions from offering evidence of the plaintiff's sexual conduct with others to prove consent or the absence of injury, unless the plaintiff claims loss of consortium.<sup>83</sup> As in the case of the rape shield laws, however, the prohibition does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.<sup>84</sup> Moreover, if the plaintiff introduces evidence making her own sexual conduct an issue, the defendant is entitled to offer rebuttal evidence.<sup>85</sup>

Section 783, not 1106, governs the use of a plaintiff's sexual conduct as evidence to attack the credibility of a plaintiff in a sexual harassment, battery, or assault lawsuit. Section 783 affords plaintiffs in civil actions the same protections afforded by section 782 to victims in prosecutions for sexual assault. Before a defendant may offer evidence of the plaintiff's sexual conduct to attack her credibility, the defendant must file a motion accompanied by an offer of proof setting forth the evidence the defendant wishes to introduce.<sup>86</sup> If the judge finds the offer "sufficient," the judge must hold a hearing outside the presence of the jury to allow the defendant to question the plaintiff.<sup>87</sup> At the conclusion of the hearing, the judge may either exclude the evidence or admit it subject to whatever limitations the judge imposes under section 352.<sup>88</sup>

Federal Rule 412, the federal rape shield provision, also applies in civil cases involving sexual misconduct, such as sexual harassment claims.<sup>89</sup> Rather than describe the limited purposes for which evidence of a victim's sexual behavior or predisposition may be received in civil cases, Rule 412 commits the admissibility of the evidence to the court's discretion. If the evidence is otherwise admissible under the Federal Rules, it may be received if the court finds that its probative value on contested issues substantially outweighs the danger of harm

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82. See CAL. CIV. PROC. CODE § 2036.1 (West 2004) (legislative history); CAL. EVID. CODE § 783 (West 1995) (legislative history).

83. CAL. EVID. CODE § 1106(a).

84. *Id.* § 1106(b).

85. *Id.* § 1106(c).

86. *Id.* §§ 783(a)–(b).

87. *Id.* § 783(c).

88. *Id.* § 738(d).

89. FED. R. EVID. 412 and advisory committee's note.



to the victim and of prejudice to any party.<sup>90</sup> But, as has been noted, Rule 412, unlike the Evidence Code, does not authorize the use of evidence of the plaintiff's sexual conduct for impeachment purposes.<sup>91</sup>

Section 783, like section 782, affords judges the necessary flexibility in determining whether to let in evidence of a victim's sexual conduct, and should therefore also be retained.

### 3. Impeachment by Character of the Witness—Prior Bad Acts

The common law allowed the cross-examiner to impeach a witness by inquiring into acts of misconduct by the witness that were not the subject of a conviction.<sup>92</sup> An example would be asking the witness if he cheated on his latest income tax returns. The theory of impeachment is that jurors ought to question the veracity of witnesses who engage in "bad acts." The bad acts doctrine is based on a character theory of impeachment. The misdeeds are offered as evidence of the witness's predisposition to lie under oath.

The Evidence Code rejects the prior bad acts doctrine.<sup>93</sup> Section 787 prohibits the use of specific instances of a witness's conduct to prove a character trait to attack (or support) the credibility of the witness.<sup>94</sup> In civil proceedings, section 787's ban on the use of prior bad acts continues in effect.

In criminal cases, however, Proposition 8 repeals section 787.<sup>95</sup> The Right to Truth-in-Evidence provision gives parties to criminal proceedings the state constitutional right not to have relevant evidence

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90. *Id.* Before admitting evidence under Rule 412, the judge, upon motion by the offering party, must hold an in camera hearing at which the alleged victim and all parties are entitled to be heard. The motion must be filed at least fourteen days before the trial, unless the judge for good cause requires a different time or permits filing during trial. *Id.*

91. FED. R. EVID. 412 advisory committee's note; WEINSTEIN ET AL., *supra* note 81, at 46.

92. CHARLES TILFORD McCORMICK ET AL., McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 42 (Edward W. Cleary ed., 2d ed. 1972) [hereinafter McCORMICK ET AL., SECOND EDITION].

93. Even before the Evidence Code was adopted, California did not recognize the prior bad acts doctrine. See CAL. CIV. CODE § 2051 (repealed 1967) (excluding evidence of particular acts).

94. CAL. EVID. CODE § 787 (West 1995).

95. *People v. Harris*, 767 P.2d 619, 639–41 (Cal. 1989); *People v. Adams*, 243 Cal. Rptr. 580, 584 (Ct. App. 1988) (holding that under Proposition 8 the accused was entitled to offer evidence that the complaining witness in a rape case had falsely accused others of rape).

excluded.<sup>96</sup> Evidence that a witness has cheated on his income tax returns is probative of the witness's character for lack of veracity. The proposition that the witness is the kind of person who will not tell the truth under oath is rendered more likely by evidence that he lies on his income tax returns than the proposition would be without the evidence.<sup>97</sup> Accordingly, under Proposition 8 such evidence is admissible in criminal cases unless excluded by the judge under section 352.<sup>98</sup>

The Federal Rules introduced the prior bad acts doctrine into federal practice for the first time.<sup>99</sup> The Federal Rules permit the cross-examiner to inquire into specific instances of misconduct by the witness that may be probative of the witness's bad character for truthfulness.<sup>100</sup> But to limit the doctrine, the Federal Rules preserve the common law restriction binding the examiner to the witness's answer.<sup>101</sup> If the witness denies committing the act, the examiner is prohibited from proving it extrinsically.<sup>102</sup> Moreover, federal judges have the discretionary power to prevent the examiner from inquiring into prior bad acts if their probative value regarding the witness's lack of veracity is outweighed by the concerns enumerated in Federal Rule 403.<sup>103</sup> This rule, which is the federal equivalent of Evidence Code section 352, allows a judge to take into account the prejudicial effects of the evidence. Unfair prejudice is likely to be highest when the cross-examiner seeks to impeach a criminal defendant with an act of misconduct that is identical or similar to the charges against which the accused is defending.<sup>104</sup>

The Federal Rules permit a party to inquire into specific instances of conduct that may be probative of the witness's good charac-

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96. For an extended discussion of the impact of Proposition 8 on the limitations on evidence bearing on credibility, see MÉNDEZ, *THIRD EDITION*, *supra* note 68, § 15.03.

97. For an extended discussion of the meaning of relevance, see *id.* § 2.01.

98. See *People v. Hill*, 41 Cal. Rptr. 2d 39, 45 (Ct. App. 1995) (holding that the accused was entitled to impeach a prosecution witness by evidence that the witness threatened to kill a woman who had reported a criminal incident involving the witness's boyfriend to the police). For an extended discussion of the judge's discretion to exclude evidence that is admissible under Proposition 8, see MÉNDEZ, *THIRD EDITION*, *supra* note 68, § 2.11.

99. See Lester B. Orfield, *Impeachment and Support of Witnesses in Federal Criminal Cases*, 11 U. KAN. L. REV. 447, 460-64 (1964) (explaining that prior to the enactment of the Federal Rules, federal courts barred the use of prior bad acts to impeach witnesses).

100. FED. R. EVID. 608(b).

101. *Id.*

102. *Id.*

103. *Id.* at advisory committee's note.

104. *Id.*

ter for truthfulness.<sup>105</sup> The rule is oddly worded in that it limits such inquiry to the cross-examination of the witness.<sup>106</sup> Since it is unlikely that a cross-examiner will seek to support the credibility of the witness, the framers may have had redirect, rather than cross-examination, in mind.<sup>107</sup>

California's antipathy to the prior bad acts doctrine is longstanding. Section 787 of the Evidence Code is based on former section 2051 of the Code of Civil Procedure.<sup>108</sup> California cases citing section 2051 to disapprove the use of the prior bad acts doctrine date back over one hundred years.<sup>109</sup> Dean Charles McCormick opposed the doctrine "because of the dangers otherwise of prejudice (particularly if the witness is a party), of distraction and confusion, of abuse by the asking of unfounded questions, and of the difficulties, as demonstrated in the cases of appeal, of ascertaining whether particular acts relate to character for [lack of] truthfulness."<sup>110</sup> California's approach, as embodied in section 787, should thus be retained.

#### 4. Impeachment by Character of the Witness—Convictions

**California Civil Cases.** Evidence Code section 788 embodies the common law rule that a witness's credibility may be attacked by evidence that the witness has been convicted of a felony.<sup>111</sup> The reason witnesses who have been convicted of crimes should not be trusted to testify truthfully is not altogether clear. At common law, convicts were disqualified from testifying.<sup>112</sup> When the disqualification was removed, convicts could testify, but at a price: their convictions could be

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105. *Id.*

106. *Id.*

107. See *Virgin Islands v. Roldan*, 612 F.2d 775, 778 n.2 (3d Cir. 1979) (stating that the party calling the witness may rehabilitate on redirect where the bad character evidence first surfaced on cross-examination).

108. See CAL. EVID. CODE § 787 cmt. (West 1995).

109. See, e.g., *Sharon v. Sharon*, 22 P. 26, 38 (Cal. 1889).

110. MCCORMICK ON EVIDENCE § 42 (Edward W. Cleary ed., 3d ed. 1984) (footnotes omitted).

111. CAL. EVID. CODE § 788. Where the witness to be impeached is the accused, it is immaterial that the conviction offered occurred after the conduct for which the accused is on trial. Since the issue is the accused's veracity as a witness, what matters is that the conviction occur prior to the time the accused takes the stand. *People v. Halsey*, 26 Cal. Rptr. 2d 701, 702 (Ct. App. 1993). A qualifying conviction may be used to impeach even if the sentence has not been imposed at the time the conviction is offered. See *People v. Martinez*, 73 Cal. Rptr. 2d 358, 359 (Ct. App. 1998).

112. Persons convicted of any felony or misdemeanors involving dishonesty or obstruction of justice were incompetent to testify. See MCCORMICK ON EVIDENCE § 42 (John W. Strong ed., 4th ed. 1992).

used to impeach them. Section 788 follows this tradition by allowing a party to impeach a witness by evidence that the witness has been convicted of a felony.<sup>113</sup>

Both the Evidence Code and the Federal Rules justify the use of convictions to impeach witnesses based on a character theory of relevance.<sup>114</sup> They allow the finders of fact to consider the misconduct underlying the conviction as evidence of a flaw in the witness's character for truth-telling under oath. So viewed, convictions may be probative of a witness's character for lack of veracity in two circumstances. The first is where the witness committed a crime involving dishonesty or false statement. Most legal commentators would agree that convictions based on deceitful misconduct might say something about the witness's predisposition to lie under oath.<sup>115</sup> Although less plausible, the second circumstance is where the witness committed some other type of crime and the witness was aware that his conduct (1) violated the penal laws or (2) subjected others to harms the penal laws seek to avoid.<sup>116</sup> Where the witness was unaware that he was breaking the law or exposing others to criminal harms, a conviction for his misconduct would say nothing about his propensity to disregard his legal obligation to testify truthfully. Accordingly, in the absence of evidence that the witness was aware that he was violating the penal laws or subjecting others to the harms proscribed by the penal laws, convictions for negligence or strict liability offenses should be inadmissible to impeach. Only those who consciously break the penal laws may be inclined to disregard their legal obligation to tell the truth under oath. Likewise, only those who consciously subject others to criminal harms may be said to be inclined to injure others by lying under oath. The Evidence Code, however, does not distinguish between convictions predicated on negligence or strict liability and convictions based on a higher

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113. CAL. EVID. CODE § 788.

114. FED. R. EVID. 609 advisory committee's note; CAL. EVID. CODE § 788 cmt.

115. See, e.g., C. MUELLER & L. KIRKPATRICK, EVIDENCE § 6.29 (2d ed. 1999). Social scientists, however, disagree about the value of past misconduct in predicting future misconduct. The belief that "character traits" exert influence over time and across diverse situations has been challenged by some experimental psychologists, most notably Walter Mischel. See WALTER MISCHEL, PERSONALITY AND ASSESSMENT 121-22 (John Wiley & Sons, Inc. ed., 1968); MÉNDEZ, THIRD EDITION, *supra* note 68, § 3.09. Some legal scholars also question the predictive value of past misconduct. When Congress amended the Federal Rules of Evidence to include provisions allowing evidence of the accused's other sexual assaults as proof of the accused's propensity to commit the sexual assault charged, of the more than forty judges, practicing lawyers, and academics asked to review the amendments, only the representatives of the U.S. Department of Justice favored adopting the amendments. See *id.* § 3.14.

116. See MÉNDEZ, THIRD EDITION, *supra* note 68, § 15.07.

mens rea, such as recklessness, knowledge, or purpose. Section 788 permits impeachment by any felony conviction.<sup>117</sup>

The flaw in the Evidence Code's structure becomes more apparent when another consideration is taken into account. The impeaching party is not allowed to explore the details of the misconduct giving rise to the conviction.<sup>118</sup> The jurors are to infer from the conviction that the witness engaged in misconduct that is probative of his character for lack of veracity. How jurors can do this when the witness has been convicted of felonies based on strict liability or negligence is difficult to fathom.

These difficulties could have been mitigated if the California Legislature had adopted the recommendation of Professor James H. Chadbourne who, at the request of the California Law Revision Commission, prepared the study that eventually gave rise to the Evidence Code.<sup>119</sup> Professor Chadbourne recommended a rule that would have limited convictions offered to impeach a witness to those in which an essential element of the crime is dishonesty or false statement.<sup>120</sup> Perjury would be an example of a crime involving both a false statement and dishonesty. A violation requires proof that a person knowingly stated as true a material matter that the person knew to be false.<sup>121</sup> Jurors would have few problems using a conviction for this crime as proof of the witness's predisposition to lie under oath. But in enacting section 788 the Legislature rejected Professor Chadbourne's recommendation and instead retained the approach formerly contained in the Code of Civil Procedure. That approach allows a witness to be impeached by any felony conviction.<sup>122</sup>

Section 788, however, does not strip California trial judges of discretion to exclude felony convictions when offered to impeach a witness. Because section 788 merely states that a party "may" show that the witness has been convicted of a felony,<sup>123</sup> the use of the permissive term has enabled the California appellate courts in civil cases (and in criminal cases until the enactment of Proposition 8) to develop rules

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117. CAL. EVID. CODE § 788.

118. *People v. Terry*, 113 Cal. Rptr. 233, 242 (Ct. App. 1974).

119. 6 CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 715-17 (Sept. 1964).

120. *Id.* at 715 (witness testimony).

121. CAL. PENAL CODE § 118 (West 1999).

122. 6 CAL. LAW REVISION COMM'N, *supra* note 119, at 716.

123. CAL. EVID. CODE § 788 (West 1995).

disfavoring the use of convictions that say little or nothing about a witness's character for lack of veracity.<sup>124</sup>

Section 788 prohibits the use of felony convictions in four circumstances. A felony conviction may not be used to impeach a witness where (1) a pardon based on the witness's innocence has been granted by the jurisdiction in which the witness was convicted, (2) a pardon has been granted on the basis of a certificate of rehabilitation, (3) the conviction has been set aside because the felon has fulfilled the conditions of probation, or (4) the witness has been convicted by another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to procedures substantially equivalent to those described in (2) and (3).<sup>125</sup>

If a conviction offered under section 788 qualifies for use, the impeaching party may prove it in one of two ways: by asking the witness to admit the conviction or by offering the record of the judgment of conviction.<sup>126</sup> If the impeaching party uses the record, the party must satisfy the requirements of authentication<sup>127</sup> and the Secondary Evidence Rule.<sup>128</sup> The party may, however, ignore the requirements of either the business or official records exceptions to the hearsay rule. Section 788 itself creates a hearsay exception for the record and allows the record to be used as proof that the witness engaged in the conduct giving rise to the conviction.<sup>129</sup>

If the impeaching party seeks to prove the conviction through the witness, two limitations apply. First, the impeaching party may not ask about the conviction unless the party believes in good faith that the witness has been convicted of a felony.<sup>130</sup> Good faith may be demon-

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124. For extended discussion of how the California appellate courts have limited the use of felony convictions to impeach witnesses, see MÉNDEZ, THIRD EDITION, *supra* note 68, § 15.07.

125. CAL. EVID. CODE § 788. A felony conviction does not need to be "final" to be used to impeach a witness. A verdict of guilty will suffice even if the sentence has not been pronounced. *People v. Martínez*, 73 Cal. Rptr. 2d 358, 359 (Cl. App. 1998). Moreover, the fact that the sentencing judge is authorized to reduce a felony conviction to a misdemeanor conviction at sentencing does not bar the use of the verdict to impeach until such time as the sentencing judge actually reduces the conviction to a misdemeanor. *See id.*

126. CAL. EVID. CODE § 788 cmt.

127. For a discussion of the requirements of authentication, see MÉNDEZ, THIRD EDITION, *supra* note 68, § 13.01.

128. For a discussion of the requirements of the Secondary Evidence Rule, see *id.* § 13.06.

129. CAL. EVID. CODE § 788 cmt. Section 788 also creates a hearsay exception for the witness's admission of the conviction as proof that the witness engaged in the conduct giving rise to the conviction. *Id.*

130. *People v. Perez*, 373 P.2d 617, 621 (Cal. 1962).

strated by possessing a copy of the judgment or other documentary evidence of the conviction.<sup>131</sup> Second, the impeaching party, as has been noted, may not elicit the details that gave rise to the offense.<sup>132</sup> The impeaching party is limited to bringing out the nature of the crime and date and place of the conviction.<sup>133</sup> The object is to impeach the witness, not to retry the case.

**California Criminal Cases.** Until the enactment of Proposition 8, section 788 also governed the use of convictions to impeach witnesses in criminal cases. Section 788 has been superseded by two seemingly conflicting constitutional provisions enacted by Proposition 8 relating to a judge's discretionary power to exclude convictions. Section 28(f) of Article I of the California Constitution strips judges of any such discretion by requiring that felony convictions be used to impeach witnesses "without limitation."<sup>134</sup> Section 28(d), on the other hand, reaffirms a judge's discretionary power to exclude relevant evidence whenever its probative value is substantially outweighed by the concerns enumerated in section 352.<sup>135</sup> To reconcile the two provisions, the California Supreme Court in *People v. Castro*<sup>136</sup> interpreted Proposition 8 as restoring the kind of discretion judges had to exclude convictions for undue prejudice prior to Proposition 8.<sup>137</sup>

Moved in part by the Fourteenth Amendment, the court also held that due process requires the exclusion of felony convictions that do not involve "moral turpitude."<sup>138</sup> In the court's view, the use of such convictions offends due process because such convictions say nothing about the witness's character for lack of veracity.<sup>139</sup> Therefore, to permit the finder of fact to consider convictions devoid of moral turpitude would deprive the accused of a fair trial in which the finder of fact considers only relevant and competent evidence on the issue of guilt or innocence.<sup>140</sup>

Why does the court consider convictions involving moral turpitude probative of a witness's lack of veracity? Because "a witness'[s] moral depravity of any kind has some 'tendency in reason' . . . to

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131. *Id.* at 622.

132. *People v. Terry*, 113 Cal. Rptr. 233, 242 (Ct. App. 1974).

133. *Id.*

134. CAL. CONST. art. I, § 28(f).

135. *Id.* § 28(d).

136. 696 P.2d 111 (Cal. 1985).

137. *Id.* at 117-18.

138. *Id.* at 119.

139. *Id.* at 117.

140. *Id.* at 118-19.

shake one's confidence in his honesty."<sup>141</sup> Which felonies involve moral turpitude? Clearly, felonies involving false statements—of which perjury is the paradigm—since these felonies say something about a witness's willingness to lie under oath.<sup>142</sup> But according to *Castro*, any crime evincing a "readiness to do evil" involves moral turpitude.<sup>143</sup> Presumably, witnesses with such a character trait might do mischief on the stand by disregarding their obligation to testify truthfully under oath. Not surprisingly, *Castro* has spawned its own extensive jurisprudence regarding the identity of convictions involving moral turpitude and the scope of a judge's discretion to exclude convictions.<sup>144</sup>

**Federal Cases.** Under Federal Rule 609, a party may impeach any witness in any case with any timely misdemeanor or felony conviction involving dishonesty or false statement.<sup>145</sup> It is immaterial whether the case is civil or criminal or whether the witness to be impeached is the accused or some other witness. The judge has no discretion to exclude such convictions.<sup>146</sup>

If the conviction does not involve dishonesty or a false statement, then in the case of a witness other than the accused only felony convictions may be used to impeach if the judge finds that the probative value of the conviction is not substantially outweighed by the concerns enumerated in Federal Rule 403.<sup>147</sup> Federal Rule 403 is the federal equivalent of Evidence Code section 352 and includes unfair prejudice and waste of time among the enumerated grounds.<sup>148</sup> To be relevant, however, the conviction must be probative of the witness's lack of veracity.

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141. *Id.*

142. *Id.*

143. *Id.*

144. For a discussion of these points, see MÉNDEZ, THIRD EDITION, *supra* note 68, § 15.07.

145. FED. R. EVID. 609(a)(2).

146. *Id.* Under Federal Rule of Evidence 609, as construed by the Ninth Circuit, convictions involving dishonesty or false statement include only those crimes that involve deceit. *See* United States v. Brackeen, 969 F.2d 827, 830 (9th Cir. 1992) (en banc) (per curiam). Shoplifting, burglary, grand theft, bank robbery, and receiving stolen property, while disrespectful of the property rights of others, do not involve deceit in the abstract. *See* United States v. Foster, 227 F.3d 1096, 1100 (9th Cir. 2000) (and cases cited therein). However, unlike California judges, Ninth Circuit judges may consider evidence regarding the circumstances attending the commission of the convicted offense to determine whether its commission involved deceit. *See id.* at 1100 n.2.

147. FED. R. EVID. 609(a)(1).

148. FED. R. EVID. 403.



If the conviction does not involve dishonesty or false statements, then where the witness to be impeached is the accused, felony convictions may be used only if the judge determines "that the probative value of admitting [the conviction] outweighs its prejudicial effect to the accused."<sup>149</sup> Because of the risk that a jury might misuse convictions as evidence of the accused's guilt, the Federal Rules require the government to show in all cases that the probative value of the convictions, as impeachment evidence, outweighs their prejudicial effect to the accused.<sup>150</sup> Thus, this test, and not the test of Federal Rule 403, is employed.

Under the Federal Rules, convictions may not be used to attack the credibility of a witness:

[I]f a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old . . . is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such [conviction] evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.<sup>151</sup>

In federal court, juvenile adjudications are generally inadmissible to impeach witnesses. But the judge may

in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.<sup>152</sup>

A conviction may not be used to impeach if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent [felony grade] crime . . . , or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.<sup>153</sup>

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149. FED. R. EVID. 609(a)(1).

150. FED. R. EVID. 609 advisory committee's note.

151. FED. R. EVID. 609(b).

152. FED. R. EVID. 609(d).

153. FED. R. EVID. 609(c).

The pendency of an appeal from a conviction does not render evidence of the conviction inadmissible, but evidence of the pendency of an appeal is admissible.<sup>154</sup>

**Comparing the Evidence Code and the Federal Rules.** The chief difference between the Evidence Code and the Federal Rules is that the Federal Rules recognize in part the special pertinence of convictions involving dishonesty and false statement. Indeed, Federal Rule 609, as reported by the House Judiciary Committee, permitted an attack upon the credibility of a witness by conviction only if the crime involved dishonesty or false statement.<sup>155</sup> The Committee

was of the view that, because of the danger of unfair prejudice in [allowing the use of convictions without restriction as to type] and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, i.e., crimes involving dishonesty or false statement.<sup>156</sup>

This position accords with Professor Chadbourne's, who urged the same limitation in the Evidence Code.<sup>157</sup>

The House position, however, did not prevail completely. Federal Rule 609 instead reflects a compromise by the House/Senate Conference Committee.<sup>158</sup> The compromise retained the House position that any witness may be impeached by any felony or misdemeanor conviction involving dishonesty or false statement, but also incorporated the approach of a District of Columbia statute by allowing the use of any felony conviction, subject to the judge's discretionary powers described in the rule.<sup>159</sup> As the Advisory Committee noted, the compromise reflected disagreement about the probative value of convictions: "There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose."<sup>160</sup> Greater accord, however, might be reached if the purpose of the conviction is kept in mind. The conviction is offered as proof that the witness engaged in the misconduct giving rise to the conviction. That misconduct in turn is offered as evidence of the witness's predisposition to lie under oath. Therefore, only those convic-

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154. FED. R. EVID. 609(e).

155. FED. R. EVID. 609 note (House Judiciary Committee's report).

156. *Id.*

157. See 6 CAL. LAW REVISION COMM'N, *supra* note 119 and accompanying text.

158. See FED. R. EVID. 609 note (House/Senate Conference Committee's report).

159. *Id.* at advisory committee's note.

160. *Id.*

tions most directly probative of this trait—those involving dishonesty or false statement—should be used.

The point is reinforced by the California rule prohibiting the impeaching party from bringing out the details of the misconduct giving rise to the conviction.<sup>161</sup> To avoid extended inquiry into matters relating to credibility, jurors are to infer from the conviction that the witness engaged in misconduct that is probative of his character for lack of veracity. Jurors may discharge this function without much difficulty when the conviction offered is for perjury, subornation of perjury, false statement, criminal fraud, embezzlement, false pretenses, or other *crimen falsi* offenses. But jurors are less likely to accurately assess the probative value of other crimes on the witness's character for lack of veracity. While crimes such as murder and assault may say something about the offender's predisposition to commit assaultive offenses, they say much less, if anything, about the offender's propensity to lie under oath. The use of such crimes, moreover, invites jurors to apply an inappropriate "bad" person standard in assessing a witness's credibility.

Rule 609 correctly notes that misdemeanors involving dishonesty or false statement are as probative of a witness's character for lack of veracity as are felonies for the same offenses. Rule 609, however, ignores the need to give trial judges discretion in determining whether to allow a party to use such a conviction. California's experience, both before and after the enactment of Proposition 8, underscores the importance of giving trial judges discretion.<sup>162</sup> The convictions may be remote, the witness having led a blameless life since the conviction,<sup>163</sup> and, unlike Rule 609, section 788 of the Evidence Code does not contain a provision defining staleness in terms of years. Moreover, if the witness to be impeached is a party, the conviction might be identical or similar to the misconduct at issue at the trial. If so, the risk is increased that the jurors might impermissibly use the conviction as bad character evidence of a material element, as opposed to evidence of a propensity to lie under oath.<sup>164</sup> Finally, unless judges are given discretion, where the witness has many convictions involving dishonesty or false statement, the prejudice inherent in using numerous convictions would be severe, especially where the witness to be impeached is a

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161. *People v. Terry*, 113 Cal. Rptr. 233, 242 (Ct. App. 1974).

162. See MÉNDEZ, THIRD EDITION, *supra* note 68, § 15.07.

163. *Id.*

164. *Id.*

party.<sup>165</sup> The temptation for the jurors to find against that person because he is a "bad" person might prove irresistible.

Conforming section 788 to Rule 609 is only a partial solution.<sup>166</sup> A more complete solution involves rewriting the first sentence of section 788 as follows: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he or she has been convicted of a felony or misdemeanor involving dishonesty or false statement . . . ." The comment could then be rewritten to provide examples of offenses involving dishonesty and false statement. It should then be made explicit that the use of convictions to impeach a witness is subject to the exercise of the judge's discretion embodied in section 352. In addition, the comment would list the most important considerations the California courts have identified in weighing the probative value of convictions against their prejudicial effects. Finally, in light of the Commission's decision not to recommend any measures affecting the changes made by Proposition 8, the comment should include a statement that the amendment is intended to affect only civil cases.

##### **5. Impeachment by Character of the Witness—Reputation and Opinion Regarding Veracity**

**California Civil Cases.** California Evidence Code sections 786–87 permit a party to impeach the credibility of a witness by opinion or reputation evidence impugning the witness's character for honesty or veracity.<sup>167</sup> The same sections also permit a party to rehabilitate a witness by opinion or reputation evidence supporting the witness's character for honesty or veracity.<sup>168</sup> But evidence of the witness's good character is inadmissible unless the witness's credibility has first been attacked.<sup>169</sup> Additionally, the attack must take one of two forms—by opinion or reputation evidence impugning the witness's character for honesty or veracity<sup>170</sup> or by a felony conviction.<sup>171</sup> Unless one of these conditions is satisfied, the Evidence Code takes the position that evi-

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165. *Id.*

166. Uniform Rule of Evidence 609 generally follows Federal Rule of Evidence 609. It departs from the federal rule in substituting "untruthfulness" and "falsification" for "dishonesty" and "false statement." UNIF. RULES OF EVIDENCE 609, 13A U.L.A. 112 (1999). Uniform Rule of Evidence 609 provides: "Evidence that a witness has been convicted of a crime of untruthfulness or falsification is admissible, regardless of punishment, if the statutory elements of the crime necessarily involve untruthfulness or falsification." *Id.*

167. CAL. EVID. CODE §§ 786–87 (West 1995).

168. *Id.*

169. *Id.* § 790.

170. *Id.* § 786 law revision commission's cmt.

dence of a witness's good character for honesty and veracity merely introduces "collateral material that is unnecessary to a proper determination of any legitimate issue in the action."<sup>172</sup>

**California Criminal Cases.** In criminal cases, a literal application of Proposition 8 threatens to repeal the statutory and judicial restraints on the use of character evidence to attack and support the credibility of witnesses. Under the Right to Truth-in-Evidence provision of the initiative, parties to criminal proceedings have a state constitutional right not to have relevant evidence excluded, unless the judge determines that the probative value of the evidence is substantially outweighed by the costs of admitting it.<sup>173</sup> A strict interpretation of the proposition would have numerous significant effects.

First, it would repeal section 790, which prohibits the introduction of good character evidence until after the witness's character for honesty and veracity has been attacked. A witness's credibility becomes an issue the moment the witness takes the stand. Therefore, the calling party should be able to support the witness's credibility even though it has not been attacked. Accordingly, *People v. Taylor*<sup>174</sup> holds that a criminal defendant who takes the stand is entitled to offer good character evidence of his honesty and veracity even if the prosecution has not first attacked the defendant's character as a witness.<sup>175</sup>

Second, in proving a witness's character for honesty or dishonesty, the proponent is no longer limited to reputation or opinion evidence. Because specific instances of honesty or dishonesty are probative of a witness's character for honesty or dishonesty, the specific acts are now admissible. *People v. Harris*,<sup>176</sup> for example, holds that the prosecution may prove an informant's predisposition to testify honestly at the trial by evidence of his past reliability as an informant.<sup>177</sup> Likewise, *People v. Adams*<sup>178</sup> holds that the accused in a rape prosecution may prove the complaining witness's character for dishonesty as a witness by evidence that she had falsely accused others of

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171. Convictions are admissible on the theory that they are probative of a witness's character for lack of honesty and veracity. See *id.* § 788. Accordingly, their use permits a witness to be rehabilitated by good character evidence for honesty and veracity in the form of opinion or reputation evidence. *Id.* §§ 787, 790 & cmts.

172. *Id.* § 790 cmt.

173. For an extended discussion of this provision, see *supra* Part II.B.

174. 225 Cal. Rptr. 733 (Ct. App. 1986).

175. *Id.* at 738.

176. 767 P.2d 619 (Cal. 1989).

177. *Id.* at 639-41.

178. 243 Cal. Rptr. 580 (Ct. App. 1988).

rape.<sup>179</sup> Accordingly, Proposition 8 repeals section 787, which bans the use of specific acts (other than convictions) to prove a witness's character for veracity or lack of veracity.

The use of character evidence—whether in the form of opinion, reputation, or specific acts—is still subject to discretionary exclusion under section 352 even after Proposition 8.<sup>180</sup> A judge may exclude all or some of this evidence if its prejudicial effects substantially outweigh its probative value on the witness's character for honesty or dishonesty. Where the witness who is impeached by the character evidence is the accused, special concerns arise. A risk exists that the jury might improperly convict the accused on account of his bad character rather than upon the evidence of his guilt.<sup>181</sup> The risk is especially pronounced when the prosecution seeks to impeach the accused with specific acts of dishonesty that are similar to the offenses charged against the accused.

**Federal Cases.** The Federal Rules track the common law with respect to the use of character evidence to attack or support the credibility of a witness. Federal Rule 608(a) provides that a witness may be attacked or supported by character evidence in the form of opinion or reputation, provided the evidence refers only to "character for truthfulness or untruthfulness."<sup>182</sup> Like the Evidence Code, however, the Federal Rules prohibit the use of good character evidence unless the witness's character for truthfulness has first "been attacked by opinion or reputation evidence or otherwise."<sup>183</sup>

"Otherwise" includes impeachment by conviction as well as by prior bad acts, such as corruption, since in the Advisory Committee's view these forms of impeachment impugn the witness's character for truthfulness.<sup>184</sup> Impeachment by bias or interest does not qualify as an attack; yet whether impeachment by contradiction qualifies as an attack on the character of the witness depends on the circumstances.<sup>185</sup> Where the contradicting evidence "amounts in net effect to an attack on character for truth,"<sup>186</sup> a federal judge may permit the witness to be rehabilitated through good character evidence for truthfulness.

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179. *Id.* at 584.

180. *See supra* text accompanying notes 64–66.

181. For an extended discussion of this point, see MÉNDEZ, THIRD EDITION, *supra* note 68, § 3.04.

182. FED. R. EVID. 608(a)(1).

183. FED. R. EVID. 608(a)(2).

184. *Id.* at advisory committee's note.

185. *Id.*

186. MCCORMICK ET AL., SECOND EDITION, *supra* note 92, § 49.

In California civil cases, the Evidence Code prohibits the use of prior bad acts to attack the credibility of a witness. Accordingly, California should not adopt the “otherwise” provision of Federal Rule 608 unless the comment makes clear that the term does not embrace the prior bad acts doctrine. Whether California should adopt the “otherwise” provision to include impeachment by contradiction should depend on whether the judge is empowered, as under Federal Rule 608, to determine whether the impeaching evidence amounts to an attack on the witness’s character for lack of veracity. If in the judge’s estimate the evidence does have this effect, then the good character evidence would not merely introduce “collateral material that is unnecessary to a proper determination of any legitimate issue in the action.”<sup>187</sup> In this regard, it bears emphasizing that good character evidence for truth-telling should be admitted only to rebut evidence of the witness’s bad *character* for veracity.

## 6. Impeachment by Character of the Witness—Religious Beliefs

Both the Evidence Code and the Federal Rules prohibit the use of a witness’s religious beliefs (or lack thereof) to establish the witness’s character for veracity or lack thereof.<sup>188</sup> Neither the Evidence Code nor the Federal Rules prohibits the use of a witness’s religious affiliations if offered for some other purpose, for example, to prove bias or interest.<sup>189</sup> In California criminal cases, however, the Right-to-Truth provision of Proposition 8 appears to repeal the Evidence Code’s prohibition on the use of a witness’s religious beliefs to attack or support the credibility of the witness.

The California and federal provisions are not identically worded. Rule 610 expressly includes a witness’s “opinions” on matters of religion in addition to the witness’s religious beliefs.<sup>190</sup> Such opinions would appear to be subsumed in the Evidence Code’s use of “religious beliefs.”

## 7. Impeachment by Prior Inconsistent Statements

Both the Evidence Code and the Federal Rules recognize that a witness’s credibility may be impeached by evidence that the witness

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187. CAL. EVID. CODE § 790 cmt. (West 1995).

188. FED. R. EVID. 610; CAL. EVID. CODE § 789.

189. FED. R. EVID. 610 advisory committee’s note.

190. *Id.*

has made statements that are inconsistent with the witness's testimony at the trial.<sup>191</sup>

The Evidence Code and the Federal Rules abandon the common law requirement that before witnesses can be asked about their prior inconsistent statements, the examiner must disclose the contents of the statement to the witness.<sup>192</sup> Disclosure diminishes the attack's effectiveness by removing the element of surprise and giving the dishonest witness an opportunity to reshape his testimony in conformity with his earlier statement.<sup>193</sup> But under the Federal Rules, the examiner must show or disclose the prior inconsistent statement to opposing counsel upon request.<sup>194</sup> This provision is designed to discourage the examiner from insinuating that a statement has been made when the contrary is true.<sup>195</sup> Under the Evidence Code, the opposing party may invoke the judge's authority to control the mode of a witness's interrogation to prevent the examiner from falsely suggesting the existence of a prior inconsistent statement.<sup>196</sup> Because of the importance of preventing misconduct by counsel in this respect, consideration should be given to adopting the federal disclosure rules.

Both the Evidence Code and the Federal Rules also reject the common law requirement that a party confront the witness with the prior inconsistent statement before offering extrinsic evidence of the statement.<sup>197</sup> From an advocacy perspective, confronting the witness with the prior statement has advantages. The examiner may persuade the witness to acknowledge making the prior statement and to adopt it as reflecting the truth. If she fails in this endeavor, the examiner may still impeach the witness with the statement. If the witness admits making the statement, the witness will be placed in the unenviable position of trying to reconcile his testimony with the statement. If he denies making the statement, the examiner will be free to offer extrinsic evidence of the statement.<sup>198</sup>

In some cases, however, the examiner may not want to confront the witness with his prior inconsistent statement. Disclosure may pre-

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191. FED. R. EVID. 801(d)(1)(a) advisory committee's note; CAL. EVID. CODE § 780(h).

192. FED. R. EVID. 613(a); CAL. EVID. CODE § 769.

193. CAL. EVID. CODE § 769 cmt.

194. FED. R. EVID. 613(a).

195. *Id.* at advisory committee's note.

196. CAL. EVID. CODE § 765(a).

197. FED. R. EVID. 613(b) advisory committee's note; CAL. EVID. CODE § 770 law revision commission's cmt. "Extrinsic" evidence refers to proving the prior statement through a source other than the declarant, for example, a witness who overheard the declarant make the prior statement.

198. FED. R. EVID. 613(b); CAL. EVID. CODE § 770(a).



vent the effective cross-examination of several collusive witnesses.<sup>199</sup> Accordingly, both the Evidence Code and the Federal Rules permit the examiner to forego confronting the witness. The examiner will still be allowed to offer extrinsic evidence of the statement, so long as the witness has not been excused from giving further testimony in the action.<sup>200</sup> Since the witness remains subject to being recalled, the opposing party and the witness are afforded an opportunity to have the witness explain or deny the statement before the evidence is closed.

Where the interests of justice require, both the Evidence Code and the Federal Rules permit the introduction of extrinsic evidence of an inconsistent statement even though the witness has been excused and has not had an opportunity to explain or deny the statement.<sup>201</sup> As the Law Revision Commission underscores:

An absolute rule forbidding introduction of such evidence where the specified conditions are not met may cause hardship in some cases. For example, the party seeking to introduce the statement may not have learned of its existence until after the witness has left the court and is no longer available to testify.<sup>202</sup>

The California provision makes explicit the right of the impeaching party to offer extrinsic evidence of the prior statement so long as the witness who is impeached may be recalled by the opponent before the evidence is closed. The California provision should be retained.

**California Criminal Cases.** A literal interpretation of the Right-to-Truth provision of Proposition 8 would repeal the Evidence Code limitations on the use of extrinsic evidence to prove a witness's prior inconsistent statement. Such a statement would be probative of the witness's credibility irrespective of whether the witness has been given an opportunity to explain or deny the statement before the close of the evidence. California courts, however, have not decided whether the initiative has repealed these restrictions.<sup>203</sup>

**Prior Inconsistent Statements and the Hearsay Rule.** In California, a prior inconsistent statement may be received for the truth of the matter asserted as well as to impeach the witness.<sup>204</sup> In federal court, however, the statement can be received for the truth of the matter stated only if it was made "under oath subject to the penalty of perjury

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199. FED. R. EVID. 613(b) advisory committee's note; CAL. EVID. CODE § 770 cmt.

200. CAL. EVID. CODE § 770(b).

201. *Id.* § 770; FED. R. EVID. 613(b).

202. CAL. EVID. CODE § 770 law revision commission's cmt.

203. A post-Proposition 8 decision discussing the need to give the witness an opportunity to explain or deny the statement fails to mention the impact of Proposition 8 on this requirement. *People v. Garcia*, 273 Cal. Rptr. 666, 669B70 (Ct. App. 1990).

204. CAL. EVID. CODE § 1235.

at a trial, hearing, or other proceeding, or in a deposition."<sup>205</sup> If the statement was not made under these circumstances, it can be used only to impeach the witness. The Federal Rule originally prescribed by the United States Supreme Court was identical to the Evidence Code provision.<sup>206</sup> Congress, however, placed the limitation on the substantive use of prior inconsistent statements because of concern about their reliability.<sup>207</sup> California appellate decisions do not bear out Congress's concerns. The California hearsay exception should therefore be retained.

**Prior Inconsistent Statements and Former Testimony.** Sometimes, a witness who has given helpful information to the police recants when called to testify at the preliminary hearing. A witness, for example, who tells the police that the accused was the assailant may claim at the preliminary hearing that she did not see the assailant. Under such circumstances, the prosecution may call to the stand the officer who took the statement to repeat the witness's statement. In California, the statement may be received to impeach the witness and, perhaps more importantly, to prove that the accused was the assailant.<sup>208</sup>

If the witness then fails to appear at the trial, may the prosecution offer the officer's preliminary hearing testimony for its truth under the hearsay exception for former testimony?<sup>209</sup> If at the preliminary hearing the witness had identified the accused as her assailant, then that portion of her testimony would be admissible against the accused at the trial under the former testimony exception to the hearsay rule. But where, as in this example, the witness recants her out of court identification at the preliminary hearing, then her out of court statement to the officer will not be admissible for its truth at the trial in the absence of a hearsay exception for that statement.<sup>210</sup> Since the witness does not appear at the trial, the use of the hearsay exception for prior inconsistent statements is problematic. Under sections 770 and 1235, a prior inconsistent statement may be offered for its truth only if the

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205. FED. R. EVID. 801(d)(1)(A).

206. *Id.* at advisory committee's note (regarding the 1997 amendments).

207. *Id.*

208. *See* CAL. EVID. CODE § 1235.

209. For a discussion of the admissibility of former testimony, see MÉNDEZ, THIRD EDITION, *supra* note 68, § 11.01.

210. A hearsay declarant may be impeached with a statement made by the declarant that is inconsistent with the hearsay declaration received in evidence. CAL. EVID. CODE § 1202. However, unless the declaration falls within an exception, it may not be received for the truth of the matter stated. For a discussion of this point, see MÉNDEZ, THIRD EDITION, *supra* note 68, § 15.13.

witness is afforded an opportunity to explain or deny the statement before the close of evidence.<sup>211</sup> A hearsay declarant who does not appear at the trial is not afforded such an opportunity.<sup>212</sup> To help solve this problem, section 1294 of the Evidence Code allows the prosecution at the trial to offer the witness's statement to the officer for the truth of the matter asserted after offering the witness's recantation at the preliminary hearing.<sup>213</sup>

At the trial, the prosecution is limited to proving the witness's former testimony by videotape or transcript. If at the preliminary hearing the inconsistent statement was offered through a videotape taken by the police, then the prosecution may offer the videotape at the trial. If the statement was offered through the testimony of the officer who took the statement, then the prosecution may offer that portion of the transcript of the preliminary hearing containing the statement.<sup>214</sup>

The accused may object to the introduction of the inconsistent statement on the grounds that the statement to the officer was not properly received at the preliminary hearing as a prior inconsistent statement, or that the videotape or transcript does not qualify as former testimony.<sup>215</sup> If the statement is received at the trial, the accused retains the right to call and cross-examine the witnesses who testified about the witness's prior inconsistent statement.<sup>216</sup>

The Federal Rules do not appear to provide a solution to this problem.<sup>217</sup> Therefore, the California provision should be retained.

## 8. Supporting Credibility by Prior Consistent Statements

Section 791 allows a party to support the credibility of witnesses with statements by the witnesses that are consistent with their testi-

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211. CAL. EVID. CODE §§ 770(a), 1235. Multiple hearsay is admissible if each hearsay statement meets the requirements of an exception to the hearsay rule. *Id.* § 1201. This rule is unavailable because the inconsistent statement does not meet the requirements of the exception for inconsistent statements. *See id.* §§ 770, 1235.

212. To satisfy the inconsistency requirement of the exception, the prosecution first would have to offer that portion of the witness's preliminary hearing testimony at which the witness denied having seen the assailant. *See id.* § 770.

213. CAL. EVID. CODE § 1294(b).

214. *Id.* § 1294(a)(2).

215. *Id.* § 1294(b).

216. *Id.*

217. Indeed, under the rules a prior inconsistent statement needs to be made under oath in some kind of proceeding in order to be received for the truth. *See* FED. R. EVID. 801(d)(1)(C). The exception for statements of identification presuppose the presence of the hearsay declarant for cross-examination. *See id.*

mony if one of two conditions is satisfied.<sup>218</sup> First, if the witness was impeached with a prior inconsistent statement, the witness may be rehabilitated with a consistent statement, so long as the statement was made before the alleged inconsistent statement.<sup>219</sup> Second, where the witness has been expressly or impliedly charged with fabricating his testimony or allowing bias or other improper motive to shape his testimony, the witness can be rehabilitated with a prior consistent statement if the statement was made before the motive to fabricate or other improper motive is alleged to have arisen.<sup>220</sup>

**California Criminal Cases.** As has been discussed, a literal interpretation of the Right to Truth-in-Evidence provision of Proposition 8 repeals almost all statutory barriers and limitations on the use of relevant evidence in criminal cases.<sup>221</sup> Evidence that a witness has made statements that are consistent with his testimony is as probative of the witness's credibility as is evidence that the witness has made statements that are inconsistent with his testimony. A witness's credibility, after all, becomes an issue the moment the witness takes the stand. Accordingly, a literal application of Proposition 8 would repeal section 791 and permit parties in criminal proceedings to offer prior consistent statements to support the witness's credibility even though the witness's credibility has not been attacked.

Under Proposition 8, a judge may still exclude relevant evidence under section 352 if its probative value is substantially outweighed by such concerns as waste of time.<sup>222</sup> A judge could thus find that the probative value of prior consistent statements that fail to satisfy the conditions of section 791 is so slight so as not to justify the time needed to receive them. Whether a judge will use section 352 to exclude such statements in a given trial cannot be known. The judge's decision may well depend on her assessment of the need for the evidence and the time required to receive it. The point, though, is that the certainty provided by section 791 may now have been replaced by the necessarily imprecise standards of section 352. To be sure, neither the California Supreme Court nor the Court of Appeals has decided whether Proposition 8 repeals section 791, and cases decided since

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218. CAL. EVID. CODE § 791.

219. *Id.* § 791(a).

220. *Id.* § 791(b).

221. See discussion *supra* Part II.B.

222. For an extended discussion of judicial discretion to exclude relevant evidence under section 352 after Proposition 8, see MÉNDEZ, THIRD EDITION, *supra* note 68, § 2.11.

the adoption of the initiative in June 1982 assume the continuing validity of the section.<sup>223</sup>

**Prior Consistent Statements and the Hearsay Rule.** Prior consistent statements that are admissible under section 791 may also be received for the truth of the matter stated under section 1236.<sup>224</sup>

**Prior Consistent Statements Under the Federal Rules.** Under the Federal Rules, a witness's prior consistent statements may also be received to support the witness's credibility as well as for the truth of the matter asserted.<sup>225</sup> A major difference between the Evidence Code and the Federal Rules is that under the Federal Rules a prior consistent statement may be received only to rebut an express or implied charge of recent fabrication or improper influence.<sup>226</sup> The Federal Rules do not contain a provision equivalent to section 791(a) which permits the use of a prior consistent statement to rehabilitate a witness if the witness has been impeached by a prior inconsistent statement and the consistent statement was made before the inconsistent one. The Evidence Code's additional ground for admission has served California well and should be retained.

Another difference between the Evidence Code and the Federal Rules is that the Evidence Code makes clear that, if offered to rebut an express or implied charge of recent fabrication or improper motive, the prior consistent statement can be received only if it was made before the improper motive arose. The Federal Rules are not explicit in this respect. The United States Supreme Court, however, has interpreted the Federal Rules as requiring the rehabilitating party to show that the declarant made the consistent statement before the alleged fabrication or improper motive arose.<sup>227</sup> The Evidence Code's express requirement should be retained.

## 9. Impeaching One's Own Witnesses

The Evidence Code and the Federal Rules repeal the common law rule prohibiting a party from impeaching his own witnesses. Both

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223. See, e.g., *People v. Hayes*, 802 P.2d 376, 394 (Cal. 1990); *People v. Frank*, 798 P.2d 1215, 1224 (Cal. 1990); *People v. Andrews*, 776 P.2d 285, 289-91 (Cal. 1989).

224. CAL. EVID. CODE § 1236.

225. FED. R. EVID. 801(d)(1)(B). For an extended discussion of the hearsay aspects of prior consistent statements under the Federal Rules, see MÉNDEZ, THIRD EDITION, *supra* note 68, § 8.06.

226. FED. R. EVID. 801(d)(1)(B).

227. *Tome v. United States*, 513 U.S. 150, 158-60 (1995).

provide that the credibility of a witness may be attacked by any party, including the party calling the witness.<sup>228</sup> The provisions are identical.

### III. Examination of Witnesses

#### A. The Judge's General Powers

Except as otherwise provided by law, a California trial judge has discretion to regulate the order of proof.<sup>229</sup> Discretion includes "reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment and embarrassment."<sup>230</sup>

A federal judge has similar powers over the interrogation of witnesses.<sup>231</sup> But, under the Evidence Code, a California judge owes child witnesses special solicitude.

With a witness under the age of fourteen, the court shall take special care to protect him from undue harassment and embarrassment and to restrict the unnecessary repetition of questions.<sup>232</sup> The court shall take special care to insure that questions are stated in a form that is appropriate to the age of the witness.<sup>233</sup> "The court may in the interests of justice, on objection by a party, forbid the asking of a question that is in a form that is not reasonably likely to be understood by a person of the age of the witness."<sup>234</sup>

Given the increase in prosecutions involving children, the special provision of the California Evidence Code should be retained.

#### B. The Order and Mode of Interrogation

The Federal Rules contain only two provisions regarding the mode of interrogation. Rule 611(b) provides that cross-examination "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness."<sup>235</sup> The judge, however, is given discretion to permit inquiry into additional matters as if on direct examination.<sup>236</sup> In addition, Rule 611(c) prohibits the use

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228. FED. R. EVID. 607; CAL. EVID. CODE § 785.

229. CAL. EVID. CODE § 320.

230. *Id.* § 765(a).

231. FED. R. EVID. 611(a)(1)-(3).

232. CAL. EVID. CODE § 765(b).

233. *Id.*

234. *Id.*

235. FED. R. EVID. 611(b).

236. *Id.*

of leading questions on direct examination unless needed to develop the witness's testimony.<sup>237</sup> Rule 611(c) authorizes the use of leading questions on cross-examination and specifically permits their use on direct examination when a party calls a hostile witness or a witness identified with an adverse party.<sup>238</sup>

The provisions of the Evidence Code are much more detailed. First, unlike the Federal Rules, the Evidence Code defines a leading question as one "that suggests to the witness the answer that the examining party desires."<sup>239</sup> The Evidence Code also specifies when leading questions may be asked (cross- and recross-examination) and may not be asked (direct and redirect examination).<sup>240</sup> Like federal judges, California judges have discretion to deviate from these rules in the interest of justice.<sup>241</sup> The Evidence Code, however, specifically authorizes California judges in the interests of justice to permit leading questions to be asked of child witnesses in prosecutions for various forms of child abuse.<sup>242</sup>

Second, unlike the Federal Rules, the Evidence Code specifies the order of examination of witnesses and defines each phase. The order consists of "direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination."<sup>243</sup> Further, "[u]nless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins."<sup>244</sup>

Direct examination is defined as "the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness."<sup>245</sup> Cross-examination is defined as "the examination of witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness."<sup>246</sup> Redirect examination is defined as "an examination of a witness by the direct examiner subsequent to the cross-examination of

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237. FED. R. EVID. 611(c).

238. *Id.*

239. CAL. EVID. CODE § 764.

240. CAL. EVID. CODE § 767(a) (West Supp. 2004).

241. *Id.*

242. *Id.* § 767(b).

243. CAL. EVID. CODE § 772 (West 1995). The court may prohibit the use of leading questions on cross-examination "where the witness is biased in favor of the cross-examiner and would be unduly susceptible to the influence of questions that suggested the answer." CAL. EVID. CODE § 767 cmt.

244. *Id.* § 772(b).

245. *Id.* § 760.

246. *Id.* § 761.

the witness."<sup>247</sup> Recross-examination is defined as "an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness."<sup>248</sup> Although cross-examination, redirect examination, and recross-examination are generally limited to matters within the scope of the previous examination, judges have discretion to allow parties to examine the witness about matters beyond the scope of the previous examination.<sup>249</sup>

The Evidence Code contains detailed rules regarding the examination of an adverse party or a person identified with an adverse party. As a general rule, a party or a person identified with that party may be called and examined as if under cross-examination by any adverse party.<sup>250</sup> But the party's own counsel may cross-examine the party only as if under redirect examination.<sup>251</sup> The same limitation applies to the cross-examination of a person identified with a party.<sup>252</sup> Other rules specify when a person is identified with a party.<sup>253</sup>

The Evidence Code's detailed rules on the examination of witnesses are helpful to the bench and bar, and should therefore be retained.

### C. Court Witnesses

Both the Evidence Code and the Federal Rules authorize judges to call witnesses on their own motion or upon motion of any party.<sup>254</sup> The judge may examine the witnesses and the parties may cross-examine them.<sup>255</sup> In addition, the parties may object to the judge's questions and the witnesses's answers.<sup>256</sup> In jury trials, however, a party under the Federal Rules may object to the judge's questions or the witness's answers at the next available opportunity when the jury is not present.<sup>257</sup> This provision is designed to avoid the prejudice that might ensue if a party is forced to object to the judge's examination of witnesses in the presence of the jurors.<sup>258</sup> The Evidence Code should be amended to include this protection.

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247. *Id.* § 762.

248. *Id.* § 763.

249. *Id.* § 772(c).

250. *Id.* § 776(a).

251. *Id.* § 776(b)(1).

252. *Id.* § 776(b)(2).

253. *Id.* § 776(d).

254. FED. R. EVID. 614(a); CAL. EVID. CODE § 775.

255. FED. R. EVID. 614(a)-(b); CAL. EVID. CODE § 775.

256. FED. R. EVID. 614(c); CAL. EVID. CODE § 775.

257. FED. R. EVID. 614(c).

258. *Id.* at advisory committee's note.



#### D. Exclusion of Witnesses

Both the Evidence Code and the Federal Rules seek to discourage fabrication on the stand by allowing judges “to put witnesses under the rule.” At the request of a party or on its own motion, the court may order witnesses to be excluded so that they cannot hear the testimony of other witnesses.<sup>259</sup> Under the Evidence Code and the Federal Rules, the following witnesses cannot be excluded: a party who is a natural person, or an officer or employee of a party not a natural person and designated as its representative by its attorney.<sup>260</sup> In addition, the Federal Rules forbid the exclusion of “a person whose presence is shown by a party to be essential to the presentation of the party’s cause” and “a person authorized by statute to be present.”<sup>261</sup>

A person authorized by statute to be present cannot be excluded from the proceedings. The California decisions, however, do not appear to justify adding the Federal Rules’ extra category forbidding the exclusion of an essential person. Almost all cases construing the right to exclude witnesses were decided prior to the adoption of the Evidence Code,<sup>262</sup> and the framers, who took these cases into account,<sup>263</sup> did not include the additional category found in the Federal Rules.

#### E. Refreshing Recollection

Sometimes, a witness is unable to answer a question or to answer it fully because of poor recollection. Whenever that occurs, the examining lawyer is allowed to try to refresh the witness’s recollection of the matters inquired. If the lawyer succeeds in refreshing the witness’s recollection, the lawyer is entitled to have the witness answer the question left unanswered.

The Evidence Code and the Federal Rules are quite liberal with respect to the sources that may be used to refresh a witness’s recollection: anything, including a writing, can be used.<sup>264</sup> If a writing is used, the lawyer should ask the witness to read the writing to herself.<sup>265</sup> Once the witness has done that, then the lawyer should ask the witness whether her recollection has been refreshed with respect to the sub-

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259. FED. R. EVID. 615; CAL. EVID. CODE § 777(a).

260. FED. R. EVID. 615; CAL. EVID. CODE § 777(b)–(c).

261. FED. R. EVID. 615.

262. CAL. EVID. CODE § 777 (effective Jan. 1, 1967).

263. *Id.* at law revision commission’s cmt.

264. FED. R. EVID. 612; CAL. EVID. CODE § 771.

265. See MÉNDEZ, THIRD EDITION, *supra* note 68, § 8.09.

ject matter to which the witness claimed insufficient recall.<sup>266</sup> If the witness answers in the affirmative, the lawyer may then ask the witness to answer the question that was pending.<sup>267</sup>

Before the witness may be asked any questions about the writing, the opposing party is entitled to examine it.<sup>268</sup> If the witness's recollection is in fact refreshed by the writing, the opposing party may use the writing in cross-examining the witness and may introduce such parts as are pertinent to the witness's testimony.<sup>269</sup>

If a witness uses a writing to refresh her recollection *prior* to testifying, then in California the writing must be produced at the hearing upon the request of the opposing party.<sup>270</sup> If the writing is not produced, then a California judge must strike the witness's testimony unless the writing (1) is not in the possession or control of the witness or the party eliciting the testimony, and (2) was not reasonably procurable by the party through the use of the court's process or other available means.<sup>271</sup>

In federal court, the adverse party is entitled to have the writing produced only if the court in its discretion determines that production is necessary in the interests of justice.<sup>272</sup> If the writing is not produced, a federal judge has greater latitude than a California judge to impose sanctions. The Federal Rules state, "The court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial."<sup>273</sup> In civil cases, the federal judge may in addition impose such remedies as contempt and finding issues against the offender.<sup>274</sup>

## F. Other Provisions

The Evidence Code contains four provisions relating to witnesses not found in the Federal Rules. First, a California witness who has

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266. *Id.*

267. *Id.*

268. CAL. EVID. CODE § 768(b).

269. FED. R. EVID. 612; CAL. EVID. CODE § 771(b).

270. FED. R. EVID. 612; CAL. EVID. CODE § 771.

271. CAL. EVID. CODE § 771(c).

272. FED. R. EVID. 612.

273. *Id.*

274. *Id.* at advisory committee's note.

been excused from giving further testimony may not be recalled without leave of the court,<sup>275</sup> which is discretionary.<sup>276</sup>

Second, a California witness must give answers that are responsive to the questions asked.<sup>277</sup> Answers that are not must be stricken on motion of any party.<sup>278</sup> This provision is useful for controlling witnesses who are more intent on telling their side of the story than in responding to the questions posed.<sup>279</sup> Federal practice is to allow an adverse party to strike an unresponsive answer only if it is also irrelevant. The California provision is more effective in controlling the recalcitrant witness and should be retained.

Third, the Evidence Code provides that at the trial a witness may be heard “only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.”<sup>280</sup> This provision is not limited to criminal cases, where the accused is the beneficiary of the Sixth Amendment’s Right of Confrontation,<sup>281</sup> but applies as well to all parties in both civil and criminal trials.<sup>282</sup> The provision is consistent with the ideal conditions for taking testimony—under oath and subject to cross-examination in the presence of the finder of fact<sup>283</sup>—and should be retained.

Fourth, in examining a witness about a writing, it is not necessary to show, read, or disclose any part of the writing to the witness.<sup>284</sup> But if a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning the writing can be asked of the witness.<sup>285</sup> These provisions are useful to the examining and non-examining parties, and therefore they should be retained.

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275. CAL. EVID. CODE § 778.

276. *Id.*

277. *Id.* § 766.

278. *Id.*

279. See MÉNDEZ, THIRD EDITION, *supra* note 68, § 1.04.

280. CAL. EVID. CODE § 711.

281. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

282. CAL. EVID. CODE § 711.

283. MÉNDEZ, THIRD EDITION, *supra* note 68, § 5.01.

284. CAL. EVID. CODE § 768(a).

285. *Id.* § 768(b).

