

# *California Evidence Code—Federal Rules of Evidence*

## **IX. General Provisions: Conforming the California Evidence Code to the Federal Rules of Evidence**

By MIGUEL A. MÉNDEZ\*

### **Table of Contents**

I. Introduction.....	891
II. Overview .....	892
III. Scope of the Federal Rules and Evidence Code .....	892
IV. Construction of the Rules .....	896
V. Amendments .....	897
VI. Title .....	899
VII. Rulings on Evidence .....	899
VIII. Limited Admissibility .....	903
IX. Additional California Provisions .....	903

### **I. Introduction**

**T**HIS ARTICLE COMPARES the general provisions of the California Evidence Code (“Code”) and the Federal Rules of Evidence (“Rules”). It is the last part of a study commissioned by the California Law Revision Commission to assess whether the Code should be conformed to the Rules.<sup>1</sup> The California Legislature created the Commission in 1953 as the permanent successor to the Code Commission. Its chief responsibility is to review California statutory and decisional law to dis-

---

\* Adelbert H. Sweet Professor of Law, Stanford University; Martin Luther King, Jr. Hall Research Scholar and Professor of Law, U.C. Davis School of Law.

1. Cal. Law Revision Comm’n, <http://www.clrc.ca.gov/Mbg-history.html> (last visited April 2, 2009).

cover defects and anachronisms, and to recommend legislation to make needed reforms.

This Article—the ninth in the series—was submitted to the Commission on May 1, 2009.<sup>2</sup> The California and federal provisions compared were in effect as of December 2008. To assist the reader, most of the pertinent Rules and Code sections are reproduced at the beginning of each section of this Article. They are followed by a Comparative Note in which the Code sections are compared with the Rules.

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.

## II. Overview

Both the Code and the Rules have general provisions designed to guide trial judges and practitioners in the application of their respective rules. The overlapping provisions of the Code and the Rules are quite similar. The major difference between the two systems of evidence is that the Code contains many more general provisions. Most additional Code provisions respond to particular California needs and should be retained.

## III. Scope of the Federal Rules and Evidence Code

### A. Federal Rules of Evidence

#### Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

---

2. See generally Miguel Méndez, *VIII. Judicial Notice: Conforming the California Evidence Code to the Federal Rules of Evidence*, 44 U.S.F. L. REV. 141 (2009); Miguel Méndez, *VII. Relevance: Definition and Limitations—Conforming the California Evidence Code to the Federal Rules of Evidence*, 42 U.S.F. L. REV. 329 (2008); Miguel Méndez, *VI. Authentication and the Best and Secondary Evidence Rules*, 41 U.S.F. L. REV. 1 (2006); Miguel Méndez, *V. Witnesses: Conforming the California Evidence Code to the Federal Rules of Evidence*, 39 U.S.F. L. REV. 455 (2005); Miguel Méndez, *IV. Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F. L. REV. 139 (2003); Miguel Méndez, *III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. REV. 1003 (2003); Miguel Méndez, *II. Expert Testimony and the Opinion Rule: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. REV. 411 (2003); Miguel Méndez, *I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. REV. 351 (2003).

**Rule 1101. Applicability of Rules**

(a) Courts and judges.—These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court,<sup>3</sup> and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally.—These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege.—The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury.—Proceedings before grand juries.

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part.—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled “An Act to authorize association of producers of agricultural products” approved February 18, 1922 (7 U.S.C. 292), and under sec-

---

3. Act of Oct. 29, 1992, Pub. L. No. 102-572, § 902(b)(1), 106 Stat. 4516 (providing that reference in any other Federal law or any document to the “United States Claims Court” shall be deemed to refer to the “United States Court of Federal Claims”).

tions 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled “An Act authorizing associations of producers of aquatic products” approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled “An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes”, approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled “An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes”, approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.

---

## **B. California Codes**

### **1. California Evidence Code**

#### **300. Applicability of code**

Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a court of appeal or superior court, including proceedings in such actions conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.

**1203. Cross-examination of hearsay declarant**

(a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

(b) This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the statement.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for examination pursuant to this section.

**1203.1. Hearsay offered at preliminary examination; application of § 1203**

Section 1203 is not applicable if the hearsay statement is offered at a preliminary examination, as provided in Section 872 of the Penal Code.

**2. California Penal Code****872. Order holding defendant to answer; probable cause; basis of finding**

\* \* \*

(b) Notwithstanding Section 1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer or honorably retired law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted. An honorably retired law enforcement officer may only relate statements of declarants made out of court and offered for the truth of the matter asserted that were made when the honorably retired officer was an active law enforcement officer. Any law enforcement officer or honorably retired law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Stan-

dards and Training that includes training in the investigation and reporting of cases and testifying at preliminary hearings.

### C. Comparative Note

These provisions list the courts in which the Rules and the Code apply. The most notable are the trial and appellate courts. The Rules do not apply in grand jury proceedings or preliminary examinations. The Code does not apply in grand jury proceedings but does apply to preliminary hearings. Hearsay, however, that may be inadmissible at a trial may be offered in California preliminary hearings under some circumstances. As a result of Proposition 115, section 872(b) of the California Penal Code allows hearsay to be received for the truth of the matter stated at California preliminary hearings.<sup>4</sup> This provision allows a magistrate to base a probable cause finding in whole or in part upon the sworn testimony of a law enforcement officer relating out of court statements.<sup>5</sup> In *Whitman v. Superior Court*,<sup>6</sup> the California Supreme Court limited the Penal Code provision by prohibiting magistrates from relying on the hearsay unless the testifying officer has "sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement."<sup>7</sup> Section 1203.1 of the California Evidence Code implements the Penal Code provision by precluding the accused from calling and cross examining the hearsay declarant as a matter of right.<sup>8</sup>

California should retain its provisions regarding the applicability of the Code.

## IV. Construction of the Rules

### A. Federal Rules of Evidence

#### Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

---

4. CAL. PENAL CODE § 872(b) (West 2008).

5. *Id.*

6. 820 P.2d 262, 267 (Cal. 1991).

7. *Id.*

8. CAL. EVID. CODE § 1203.1 (West 1995).

**B. California Evidence Code****2. Abrogation of common law rule of strict construction; liberal construction**

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. This code establishes the law of this state respecting the subject to which it relates, and its provisions are to be liberally construed with a view to effecting its objects and promoting justice.

**C. Comparative Note**

These provisions are designed to guide judges in the construction of the Rules and the Code. The Code expressly repeals the common law rule that required statutes in derogation thereof to be strictly construed.<sup>9</sup> Although the Rules do not contain an equivalent provision, the common law rule has not been applied to the construction of the Rules.

California should retain its provisions regarding the construction of the Code.

**V. Amendments****A. Federal Rules of Evidence****Rule 1102. Amendments**

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

**B. Title 28, United States Code****2072. Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeal.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

---

9. *Id.* § 2.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

**2074. Rules of procedure and evidence; submission to Congress; effective date**

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.

**C. Comparative Note**

Unless Congress takes contrary action, the U.S. Supreme Court may amend the Rules.<sup>10</sup> However, rules proposed by the Court creating, abolishing, or modifying an evidentiary privilege require affirmative approval by Congress.<sup>11</sup>

Nothing in the Code prevents the California Legislature from amending the Code. However, as a result of an initiative approved by the California electorate in 1982, amendments restricting the introduction of some relevant evidence require a vote by at least two-thirds of the membership in each house of the Legislature.<sup>12</sup>

California has not chosen to delegate its formulation of evidence rules to a specialized body, such as the Advisory Committee that was initially created by the U.S. Supreme Court to draft the Federal Rules of Evidence. In California, changes to the Evidence Code require affirmative action by the Legislature in the form of legislation or by the electorate in the form of an initiative. When changes emanate from legislation, the California process provides ample opportunity for

---

10. 28 U.S.C. § 2074(a) (2006).

11. *Id.* § 2074(b).

12. CAL. CONST. art. I, § 28(f)(2).



comment. This opportunity is enhanced when the Legislature asks the California Law Revision Commission to undertake a study of proposed changes. However, changes made by the electorate through initiatives can be problematical because of the electorate's inability to appreciate the significance of changes proposed to the Code.<sup>13</sup> Since changes by initiatives are rare, California should retain its processes for amending the Code.

## **VI. Title**

### **A. Federal Rules of Evidence**

#### **Rule 1103. Title**

These rules may be known and cited as the Federal Rules of Evidence.

### **B. California Evidence Code**

#### **1. Short title**

This code shall be known as the Evidence Code.

### **C. Comparative Note**

These provisions state the form in which the Rules and Code may be cited.

## **VII. Rulings on Evidence**

### **A. Federal Rules of Evidence**

#### **Rule 103. Rulings on Evidence**

(a) Effect of erroneous ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

---

13. See Miguel Méndez, *Comparing the Federal Rules of Evidence with the California Evidence Code—Proposition 8 and the Wisdom of Using Initiatives as a Rule-Making Device*, 36 Sw. U. L. Rev. 571, 596–600 (2008).

(2) Offer of proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling.—The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury.—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error.—Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

## **B. California Evidence Code**

### **353. Erroneous admission of evidence; effect**

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

### **354. Erroneous exclusion of evidence; effect**

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors com-

plained of resulted in a miscarriage of justice and it appears of record that:

(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;

(b) The rulings of the court made compliance with subdivision (a) futile; or

(c) The evidence was sought by questions asked during cross-examination or recross-examination.

### C. Comparative Note

Rule 103(a) and section 353 of the Code embody the common law rule that imposes upon the opposing party the obligation to object to inadmissible evidence.<sup>14</sup> The failure to object carries a penalty: the use of erroneously admitted evidence generally may not be raised on appeal.

Under the Rules and the Code, the objection must be timely and specific.<sup>15</sup> Ordinarily, timeliness requires the party opposing the evidence to object at the conclusion of a question calling for inadmissible matter; if the inadmissible nature of the matter cannot be determined until after it has been disclosed the Rules and the Code require the opposing party to move to strike the matter.<sup>16</sup>

Specificity requires the objecting party to state the ground upon which the objection is based. Rule 103(a) dispenses with this requirement whenever the ground is apparent from the context.<sup>17</sup> The Code does not expressly allow this dispensation.

Rule 103(a)(2) and section 354(a) of the Code impose upon a party complaining about the exclusion of evidence the obligation to make an offer of proof.<sup>18</sup> The offer must inform the judge of the substance, purpose, and relevance of the excluded evidence.<sup>19</sup> The failure to make an offer like the failure to make an objection carries a penalty: the exclusion of the evidence may not be raised on appeal.<sup>20</sup>

---

14. See MIGUEL A. MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES—A PROBLEM APPROACH § 1.03 (Thomson-West 4th ed. 2008).

15. FED. R. EVID. 103(a)(1); CAL. EVID. CODE § 353(a) (West 1995).

16. FED. R. EVID. 103(a)(1); CAL. EVID. CODE § 353(a).

17. FED. R. EVID. 103(a)(1).

18. FED. R. EVID. 103(a)(2); CAL. EVID. CODE § 354(a).

19. FED. R. EVID. 103(a)(2); CAL. EVID. CODE § 354(a).

20. FED. R. EVID. 103(a)(2); CAL. EVID. CODE § 354(a).

Rule 103(d) embodies the federal plain error doctrine.<sup>21</sup> It permits federal appellate courts to notice plain errors affecting substantial rights even if they were not brought to the attention of the trial judge.<sup>22</sup> There is no counterpart under the Code. In one circumstance, however, California courts will allow a party to complain on appeal about the opponent's misconduct even if the party failed to object during the trial: where the appealing party can show that an objection and admonition would have failed to cure the effect of the misconduct.<sup>23</sup> As in the case of the federal plain error doctrine, reliance on this exception is risky. One cannot anticipate with certainty when a reviewing court will apply the exception.

Parties often use motions in limine to exclude matter which they believe should be inadmissible at the trial.<sup>24</sup> Motions in limine are usually made immediately before the trial. If a judge denies a motion to exclude, in California the opponent of the evidence should renew the objection at the time the evidence is offered. The failure to renew the objection can preclude appellate review of the use of the evidence.<sup>25</sup> Although this result seems surprising, renewing the objection gives the trial judge an opportunity to reconsider the earlier ruling in light of the evidence adduced at the trial.<sup>26</sup> It is unnecessary, however, for the objecting party to renew the in limine objection if the evidence presented at trial is substantially similar to the evidence presented at the in limine hearing.<sup>27</sup>

In federal courts, a 2000 amendment to Rule 103(a)(2) dispenses with need to renew the objection at trial if the in limine ruling was "definitive." The amendment is designed to avoid confusion regarding when a party must renew the objection at trial.<sup>28</sup> In California, *Summers v. A.L. Gilbert Co.*<sup>29</sup> seeks to avoid the confusion by dispensing with the objection at trial if the evidence presented is substantially similar to the evidence presented at the hearing in limine.<sup>30</sup> Because of the consequences that can ensue when a party fails to renew the

---

21. FED. R. EVID. 103(d).

22. *Id.*

23. *See* *People v. Green*, 609 P.2d 468, 483 (Cal. 1980).

24. *See generally* *Kelly v. New W. Fed. Sav.*, 56 Cal. Rptr. 2d 803 (Ct. App. 1996) (discussing the rules pertaining to motions in limine).

25. *See* *People v. Jennings*, 760 P.2d 475, 481 n.3 (Cal. 1988), *cert. denied*, 489 U.S. 1091 (1989).

26. *Id.*

27. *See* *Summers v. A.L. Gilbert Co.*, 82 Cal. Rptr. 2d 162, 179 (Ct. App. 1999).

28. FED. R. EVID. 103 advisory committee's note.

29. 82 Cal. Rptr. 2d 162 (Ct. App. 1999).

30. *See id.*

objection at trial, California should consider enacting a provision that embodies the *Summers* rule.

## VIII. Limited Admissibility

### A. Federal Rules of Evidence

#### Rule 105. Limited Admissibility

When evidence that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

### B. California Evidence Code

#### 355. Limited admissibility

When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

### C. Comparative Note

Substantively, the respective provisions of the Rules and the Code are identical.

## IX. Additional California Provisions

The Code and the Rules differ significantly in their organization of provisions of general applicability. Almost all of the Rules' provisions can be found in the first six rules, Rules 101–106. In contrast, the Code's provisions are located in three "divisions", some of which have several chapters and include many provisions not found in the Rules.

Division 1, entitled "Preliminary Provisions and Construction", contains Sections 1–12. Among other matters, these sections contain the Code's official title,<sup>31</sup> a severability provision,<sup>32</sup> and the construction of tenses,<sup>33</sup> genders,<sup>34</sup> and the terms "shall" and "may".<sup>35</sup> All of these provisions are useful and should be retained.

---

31. CAL. EVID. CODE § 1 (West 1995).

32. *Id.* § 3.

33. *Id.* § 8.



Division 2, entitled “Words and Phrases Defined”, contains Sections 100–260. Among the more important terms defined are “burden of proof,”<sup>36</sup> “conduct,”<sup>37</sup> “relevant evidence,”<sup>38</sup> “statement,”<sup>39</sup> “writing,”<sup>40</sup> “original,”<sup>41</sup> and “duplicate.”<sup>42</sup>

The definition of burden proof is especially important to understanding the Code’s provisions on presumptions. The one flaw in the definition is the Code’s insistence on using “burden of proof” when referring to the burden of persuasion. Properly understood today, burden of proof refers both to the burdens of producing evidence and persuasion.<sup>43</sup> Judges and practitioners who are not aware of the Code’s use of the term may mistakenly conclude that it refers to both burdens. The Legislature should substitute “burden of persuasion” in each instance where “burden of proof” refers to this burden.<sup>44</sup>

The meaning of “conduct” and “statement” is essential to understanding hearsay under the Code. Section 125 defines “conduct” as a term that “includes all active and passive behavior, both verbal and nonverbal.”<sup>45</sup> Section 225 defines “statement” as an “(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.”<sup>46</sup> Building on these two definitions, Section 1200(a) defines hearsay as “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.”<sup>47</sup>

The concept of relevance is the cornerstone upon which the entire Code edifice is built. Section 350 sets out the fundamental condition that all evidence must satisfy if it is to be admitted: “No evidence is admissible except relevant evidence.”<sup>48</sup> Section 351 then postulates

---

34. *Id.* § 9.

35. *Id.* § 11.

36. *Id.* § 115.

37. *Id.* § 125.

38. *Id.* § 210.

39. *Id.* § 225.

40. *Id.* § 250.

41. *Id.* § 255.

42. *Id.* § 260.

43. See MÉNDEZ, *supra* note 14, § 18.01.

44. See Miguel Méndez, *IV. Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F. L. REV. 139, 142 (2003) (making the same recommendation).

45. CAL. EVID. CODE § 125 (West 1995).

46. *Id.* § 225.

47. *Id.* § 1200(a).

48. *Id.* § 350.

the general rule of admissibility: “Except as otherwise provided by statute, all relevant evidence is admissible.”<sup>49</sup> Section 210 adds flesh to these principles by defining relevant evidence as “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.”<sup>50</sup>

The definitions of “writing,” “original,” and “duplicate” are essential to understanding California’s Secondary Evidence Rule. Although the Rules continue to apply the classic formulation of the Best Evidence Rule,<sup>51</sup> the California Legislature replaced the Best Evidence Rule with the Secondary Evidence Rule in 1999. Under the new rule, any secondary evidence of an original writing is as admissible as the original to prove the contents of the writing unless (1) “[a] genuine dispute exists concerning material terms of the [original] writing and justice requires the exclusion,” or (2) “[a]dmission of the secondary evidence would be unfair.”<sup>52</sup> The meanings of “writing,”<sup>53</sup> “original,”<sup>54</sup> and “duplicate”<sup>55</sup> are indispensable to the application of the Secondary Evidence Rule. Other terms defined in Division 2, although not as critical, are useful and should be retained.

Division 3, entitled “General Provisions,” has two chapters with provisions not included in the Rules. Chapter 2 allocates power between court and jury.<sup>56</sup> It provides that questions of law are for the judge<sup>57</sup> and questions of fact are for the jurors.<sup>58</sup> Section 312 sets out the important principle that the credibility of hearsay declarants, as well as in-court witnesses, is to be determined by the jurors.<sup>59</sup> Chapter 3 empowers the court with discretion to regulate the order of proof.<sup>60</sup> These chapters should be retained.

---

49. *Id.* § 351.

50. *Id.* § 210.

51. FED. R. EVID. 1002 (requiring the original writing, recording, or photograph to prove its content, except as otherwise provided in the federal rules or by Act of Congress).

52. CAL. EVID. CODE § 1521(a) (West 1995).

53. *Id.* § 250.

54. *Id.* § 255.

55. *Id.* § 260.

56. *Id.* §§ 310–312.

57. *Id.* § 310.

58. *Id.* § 312.

59. *Id.*

60. *Id.* § 320. An analogous federal provision, Federal Rule of Evidence 611(a), gives federal judges the power to control the “order of interrogating witnesses and presenting evidence . . . .” Rule 611, however, is not located among the general provisions of the Federal Rules. *See* FED. R. EVID. 101–106.

Other chapters in Division 3 have been examined in previous parts of this series. These parts should be consulted for recommendations on whether the Code provisions should be retained or modified. Chapter 4 excludes irrelevant evidence<sup>61</sup> and empowers trial judges to exclude relevant evidence whenever in their estimation its probative value is substantially outweighed by countervailing considerations, such as undue prejudice.<sup>62</sup> Chapter 4 also deals with proof of foundational facts.<sup>63</sup> A final chapter is devoted to the definition of direct evidence and related concepts.<sup>64</sup>

---

61. CAL. EVID. CODE § 350 (West 1995).

62. *Id.* § 352. See Miguel Méndez, *VII. Relevance: Definition and Limitations—Conforming the California Evidence Code to the Federal Rules of Evidence*, 42 U.S.F. L. REV. 329, 330–33 (2007) (discussing various Code and Rule provisions that deal with evidentiary relevance).

63. CAL. EVID. CODE §§ 400–406 (West 1995). See generally Miguel Méndez, *III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. REV. 1003 (2003) (comparing the various Code and Rule provisions that deal with establishing evidentiary foundation).

64. CAL. EVID. CODE §§ 410–413 (West 1995). See Méndez, *supra* note 62, at 352 (recommending California should retain sections of the Code that deal with direct evidence).