The Contra Costa County Bar Association proudly presents...

Breakfast Kick-Off Speaker

Justice Mark Simons,
First District Court of Appeal, Division 5

SCRAMBLED EGGS
WITH A SIDE OF EVIDENCE
Mark B. Simons

Justice Simons graduated from the University of Michigan in 1967. He then attended the University of Chicago Law School, graduating in 1970.

After serving as a law clerk to Federal District Court Judge Alvin B. Rubin in the Eastern District of Louisiana (New Orleans), he worked as an Associate at Cooley Godward from 1971-1973. He then served as a Deputy Public Defender in Contra Costa County until 1980, when he was appointed to the Mt. Diablo Municipal Court in that county. He was elevated to the Contra Costa Superior Court in April 1995, where he served as Presiding Judge in 1999 and 2000. In January 2000, he was appointed to the Court of Appeal, Division Five and was confirmed by the Commission on Judicial Appointments.

Justice Simons has devoted considerable time to teaching evidence to judges, lawyers and law students. He served as the Dean of the B.E.Witkin Judicial College in 1995 and 1996 and was an adjunct professor of law at Hastings College of the Law from 2002-2004. He was awarded the 2000 Bernard Jefferson Award for distinguished service in judicial education.

Married to Carol Simons in 1985 with two children, he enjoys reading American history and working out at the gym.
EVIDENCE  
2019 CCCBA MCLE  
SPECTACULAR

*Hon. Mark B. Simons*
First District Court of Appeal

ADMITTING  
*UNCHARGED*
MISCONDUCT

Significant  
Complex
View From 30,000 Feet

- What is “uncharged misconduct”?
- What kinds of evidence are included?
- Why introduce such evidence?
  - Prove elements directly
  - Prove credibility

Proving elements
  - Rule of exclusion (1101(a))
  - Exception w/ limited admissibility (1101(b))
  - Exception limiting that admissibility (1106)
View From 30,000 Feet

- Proving credibility
  - Rule of exclusion (1101(a))
  - Exception w/ limited admissibility (1101(c)... 780-790)
  - Exception limiting that admissibility (783)

Evidence Code 1101(a)

- Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character... (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible...to prove...conduct
Evidence Code 1101(a)

- Defines type of evidence employed to prove character
  - Opinion
  - Reputation
  - Specific Act

The General Rule:

*Character Evidence Is Not Admissible to Prove Conduct*
Evidence Code 1101(a)

**BUT MANY EXCEPTIONS**

- Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character... (*whether in the form of* an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is *inadmissible*...to prove...conduct
Evidence Code 1101(b)

- Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact (such as...) other than...disposition to commit such an act.

Evidence Code 1101(b): Evidence Admissible For Non-Character Purpose such as...
- Motive
- Opportunity
- Intent
- Preparation
- Plan
- Knowledge
- Identity
- Absence of mistake or accident
- Reasonable belief in consent (sex case)
Evidence Code 1101(b)

- Takeaways
  - Distinguish character & disputed fact
  - Definition of admissible evidence
  - Laundry list... “such as”

Who done it?

- Rare in employment cases
- P. v. Lynch (2010) 50 Cal.4th 693, 736
What was done

- Act Questioned
- No comments/ touching
- People v. Ewoldt (1994) 7 C4 380
- People v. Balcom (1994) 7 C4 414

Why was it done?

- Lowest level of similarity
- Why?
Relevant Cases—The OLD

- Beyda v. LA (1998) 65 CA4th 511, 518

Relevant Cases—And the NEW

LIMITS ON EVIDENCE OF P’S MISCONDUCT

- EC section 1106: (a) In any civil action involving sexual harassment... evidence of opinion, reputation or acts is inadmissible by D to prove consent or absence of injury... (b) inapplicable to P’s sexual conduct w/ perpetrator.

- 1106 (d): If P testifies about own sexual conduct, D may c-x and offer evidence in rebuttal. (e) D may attack P’s credibility under section 783
  - Broad definition of “sexual conduct” & “perpetrator”
View from 30,000 Feet

- Proving elements
  - Rule of exclusion (1101(a))
  - Exception with limited admissibility (1101(b))
  - Exception limiting that admissibility (1106)

EVIDENCE Code 1101(c)

- Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness
Evidence Code 780

- Except as limited by statute, ok to admit matter that has any tendency to prove or disprove truthfulness of testimony, including:
  - (e) Character for honesty/veracity or opposites
  - EC 786: Character traits other than honesty/veracity inadmissible

Evidence Code 780

- (f) Bias interest or other motive
- (i) existence or non-existence of fact testified to
Evidence Code 783

- In civil action re: sexual harassment..., following procedures apply if evidence of sexual conduct by P is offered to attack P’s credibility under EC 780:
  - (a) written motion by D
  - (b) accompanied by affidavit w/ offer of proof

Evidence Code 783

- (c) Hearing outside jury’s presence where P may be questioned
- (d) admit if court finds relevant under section 780 and not inadmissible under section 352
Evidence Code 352

- Probative value is substantially outweighed by:
  - Undue time consumption
  - Undue prejudice
  - Juror confusion

Sweetwater

  - Anti-SLAPP
  - And MSJs?