



25TH ANNIVERSARY
MCLE SPECTACULAR!
Friday, November 22, 2019



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

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ADMITTING UNCHARGED MISCONDUCT

Significant
Complex

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View From 30,000 Feet

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

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View From 30,000 Feet

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

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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)

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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**

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Evidence Code 1101(a)

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

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Evidence Code 1101(a)

The General Rule:
*Character Evidence
Is Not Admissible to
Prove Conduct*

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Evidence Code 1101(a)

***BUT MANY
EXCEPTIONS***

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Evidence Code 1101(a)

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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.

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Evidence Code 1101(b): Evidence Admissible For Non-Character Purpose *such as...*

Motive	Identity
Opportunity	Absence of mistake or accident
Intent	Reasonable belief in consent (sex case)
Preparation	
Plan	
Knowledge	

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Evidence Code 1101(b)

■ Takeaways

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

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Who done it?

- Rare in employment cases
- P. v. Lynch (2010) 50 Cal.4th 693, 736
- Hassoldt v. Patrick (2000) 84 CA4th 153, 165

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What was done

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

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Why was it done?

- Lowest level of similarity
- Why?

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Relevant Cases—The OLD

- Brown v. Smith (1997) 55 CA4 767, 788-796
- Beyda v. LA (1998) 65 CA4th 511, 518

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Relevant Cases—And the NEW

- Pantoja v. Anton (2011) 198 Cal.App.4th 87, 109-110
- Johnson v. UCP (2009) 173 Cal.App.4th 740, 759-767
- McCoy v. Pacific Maritime (2013) 216 Cal.App.4th 283, 297

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LIMITS ON EVIDENCE OF P'S MISCONDUCT

- Meeks v. Autozone (2018) 24 Cal.App.5th 855, 874
- 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.

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LIMITS ON EVIDENCE OF P'S MISCONDUCT

- 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
- Rieger v. Arnold (2002) 104 CAth451, 462
 - Broad definition of "sexual conduct" & "perpetrator"

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View from 30,000 Feet

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

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EVIDENCE Code 1101(c)

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

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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

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Evidence Code 780

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

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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

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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

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Evidence Code 352

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

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Sweetwater

- Sweetwater Union High School Dist. v. Gilbane Building Co., 6 Cal.5th 931, 949 (2019)
 - Anti-SLAPP
 - And MSJs?

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