

TABLE OF CONTENTS

PREFACE TO THE SEVENTH EDITION	V
Chapter 1. Evidence in Perspective.....	1
§ 1.1 Introduction	1
§ 1.2 The Process of Proof and the Adversarial System.....	4
Questions and Problems	6
§ 1.3 Making and Meeting Objections.....	7
Questions and Problems	15
§ 1.4 Common Objections.....	16
Questions and Problems	23
§ 1.5 The Origins of the California Evidence Code and the Federal Rules of Evidence.....	23
§ 1.6 Applicability of the Code and the Federal Rules of Evidence.....	25
California Evidence Code.....	26
Federal Rules of Evidence.....	27
California Evidence Code.....	28
Federal Rules of Evidence.....	32
Chapter 2. Relevance.....	33
§ 2.1 Introduction	33
Questions and Problems	35
§ 2.2 Stipulations.....	35
Questions and Problems	38
§ 2.3 Credibility	39
Questions and Problems	40
§ 2.4 Probative Value	40
Questions and Problems	42
§ 2.5 Relevance Under the Federal Rules.....	42
§ 2.6 Relevance and Inference	42
Questions and Problems	43
§ 2.7 Conditional Admissibility	44
Questions and Problems	45
§ 2.8 Conditional Relevance and the Federal Rules.....	46
§ 2.9 Probabilistic Evidence.....	46
§ 2.10 Probative Value v. Prejudicial Effect	49
Questions and Problems	53
§ 2.11 Constitutional Constraints on the Exclusion of Relevant Defense Evidence	54
§ 2.12 Proposition 8 and § 352.....	57
Article 1 of the California Constitution	59
California Evidence Code.....	59
Federal Rules of Evidence.....	60

Chapter 3. Evidence Affected or Excluded by Extrinsic Policies— Character, Habit, and Similar Occurrences	61
§ 3.1 Introduction	62
§ 3.2 The Meaning of Character Evidence	62
§ 3.3 The Kinds of Character Evidence.....	63
§ 3.4 The Reasons for Excluding Character Evidence	64
Questions and Problems	67
§ 3.5 The Admissibility of Character Evidence Where Character Is an Issue	68
§ 3.6 Exceptions to the Character Evidence Ban—California Criminal Cases and the Mercy Rule.....	70
§ 3.7 The Character Evidence Rules and Proposition 8.....	72
§ 3.8 Proposition 8 and § 352.....	73
§ 3.9 Character Evidence and Due Process	74
Questions and Problems	76
§ 3.10 Exceptions to the Character Evidence Ban—Federal Criminal Cases and the Mercy Rule.....	77
Questions and Problems	77
§ 3.11 Exceptions to the Character Evidence Ban—California Criminal Cases and Evidence of Crime Victims’ Character	81
§ 3.12 Exceptions to the Character Evidence Ban—Federal Criminal Cases and Crime Victims	85
Questions and Problems	89
§ 3.13 Other Exceptions to the Character Evidence Ban	91
Questions and Problems	101
§ 3.14 The Use of Specific Acts to Prove Propositions Other than the Propensity to Engage in Such Acts on a Given Occasion	102
§ 3.15 Lingering Difficulties: The Common Plan Conundrum, Corroboration, and Intermediate Propositions.....	121
Questions and Problems	137
§ 3.16 Objecting to § 1101(b) Evidence	140
Questions and Problems	143
§ 3.17 Section 1101(b) and Civil Cases	144
Questions and Problems	148
§ 3.18 Habit and Custom	148
Questions and Problems	152
§ 3.19 Evidence of Similar Occurrences.....	153
Questions and Problems	156
§ 3.20 Permissible Uses of Evidence of Similar Occurrences	157
§ 3.21 Similar Occurrences and Manufacturing and Design Defects	159
Questions and Problems	160
§ 3.22 Similar Suits and Accusations.....	160
Questions and Problems	162
§ 3.23 Similar Contracts	163
Article 1 of the California Constitution	165
California Evidence Code.....	165
Federal Rules of Evidence.....	171

Chapter 4. Other Evidence Excluded by Extrinsic Policies— Subsequent Precautions, Pleas, Compromise Offers, and Liability Insurance.....	177
§ 4.1 Introduction	177
§ 4.2 Subsequent Precautions.....	178
Questions and Problems	180
§ 4.3 The Kinds of Precautionary Measures Affected by § 1151 and Rule 407	180
Questions and Problems	181
§ 4.4 Evidence of Subsequent Precautions as Proof of Propositions Other than Negligence or Culpable Conduct.....	182
Questions and Problems	184
§ 4.5 Pleas and Related Statements Under the Evidence Code	185
Questions and Problems	187
§ 4.6 Pleas and Related Statements Under the Federal Rules	187
Questions and Problems	188
§ 4.7 Pleas of Nolo Contendere	189
§ 4.8 Compromise Offers and the Evidence Code.....	190
§ 4.9 Compromise Offers and the Federal Rules.....	197
Questions and Problems	198
§ 4.10 Liability Insurance	200
Questions and Problems	203
§ 4.11 Other Evidence Excluded by Extrinsic Policies.....	204
§ 4.12 Major Differences Between the Federal Rules and the Evidence Code.....	205
California Evidence Code.....	209
Federal Rules of Evidence.....	220
Chapter 5. The Hearsay Rule.....	223
§ 5.1 Definition and Rationale.....	223
§ 5.2 Introduction to Prior Statements of Witnesses and the Hearsay Rule	225
§ 5.3 Introduction to Prior Statements of Witnesses and the Federal Rules.....	226
§ 5.4 Distinguishing Between Hearsay and Nonhearsay	227
§ 5.5 Assertive v. Nonassertive Conduct.....	239
§ 5.6 Machine and Other Nonhuman Evidence.....	245
§ 5.7 The Hearsay Rule and the Personal Knowledge Requirement	247
Questions and Problems	249
California Evidence Code.....	252
Federal Rules of Evidence.....	253
Chapter 6. Exceptions to the Hearsay Rule: General Considerations	255
§ 6.1 Introduction	255
§ 6.2 Unavailability of the Hearsay Declarant.....	261
Questions and Problems	265

§ 6.3	Hearsay and Confrontation: General Principles	266
§ 6.4	Hearsay and Confrontation: The <i>Crawford</i> Rule	268
§ 6.5	Confrontation and Police Interrogations: The <i>Davis</i> Rule.....	272
	Questions and Problems	277
§ 6.6	Forensic Evidence and Confrontation	277
	Questions and Problems	288
§ 6.7	Forfeiture of Confrontation Rights.....	288
§ 6.8	Confrontation and Nontestimonial Hearsay Statements	291
§ 6.9	Confrontation and Multiple Defendants	292
	Questions and Problems	295
	California Evidence Code.....	296
	Federal Rules of Evidence.....	298
Chapter 7. Exceptions to the Hearsay Rule: Admissions.....		301
§ 7.1	Admissions in General	301
	Questions and Problems	303
§ 7.2	Adoptive Admissions	304
	Questions and Problems	310
§ 7.3	Authorized Admissions	312
	Questions and Problems	315
§ 7.4	Co-Conspirators' Declarations.....	317
	Questions and Problems	320
§ 7.5	Co-Conspirators' Declarations and Confrontation	321
§ 7.6	The Opposing Party's Conduct and Admissions.....	322
	Questions and Problems	324
§ 7.7	Judicial Admissions in Civil Cases	325
	Questions and Problems	327
§ 7.8	Admissions as Stipulations.....	327
	Questions and Problems	328
§ 7.9	Judicial Admissions in Criminal Cases	328
	Questions and Problems	335
§ 7.10	Inadmissible Admissions	335
	Questions and Problems	336
§ 7.11	Admissions Under the Federal Rules.....	336
	Questions and Problems	337
	Article 1 of the California Constitution	338
	California Evidence Code.....	338
	Federal Rules of Evidence.....	340
Chapter 8. Exceptions to the Hearsay Rule: Prior Statements of Witnesses and Prior Recollection Recorded.....		343
§ 8.1	Prior Statements of Witnesses in General.....	343
§ 8.2	Prior Inconsistent Statements Under the Evidence Code	344
	Questions and Problems	348
§ 8.3	Prior Inconsistent Statements and Proposition 8	350
	Questions and Problems	352
§ 8.4	Inconsistent Statements Under the Federal Rules.....	353

	Questions and Problems	353
§ 8.5	Prior Consistent Statements Under the Evidence Code.....	354
	Questions and Problems	355
§ 8.6	Prior Consistent Statements Under the Federal Rules	355
	Questions and Problems	357
§ 8.7	Statements of Identification	358
	Questions and Problems	360
§ 8.8	Fresh Complaints	361
	Questions and Problems	364
§ 8.9	Prior Recollection Recorded	364
	Questions and Problems	367
	California Evidence Code.....	369
	Federal Rules of Evidence.....	371

Chapter 9. Exceptions to the Hearsay Rule: Declarations Against Interest, Dying Declarations, Excited Utterances, Contemporaneous Statements, and State of Mind

	Declarations	375
§ 9.1	Declarations Against Interest Under the Evidence Code	375
	Questions and Problems	384
§ 9.2	Declarations Against Interest Under the Federal Rules	385
	Questions and Problems	387
§ 9.3	Dying Declarations	387
	Questions and Problems	392
§ 9.4	Excited Utterances/Spontaneous Statements	394
	Questions and Problems	401
§ 9.5	Contemporaneous Statements.....	403
	Questions and Problems	405
§ 9.6	State of Mind Declarations in General	406
§ 9.7	State of Mind Declarations and the Hearsay Rule.....	406
	Questions and Problems	408
§ 9.8	Declarations Relating a Then-Existing State of Mind	409
§ 9.9	State of Mind Declarations and Statements of Remembered Facts	411
	Questions and Problems	411
§ 9.10	Declarations Concerning Future Plans.....	412
	Questions and Problems	415
§ 9.11	Declarations of Past State of Mind.....	415
	Questions and Problems	416
§ 9.12	Declarations by Crime Victims.....	417
	Questions and Problems	425
§ 9.13	Declarations Describing Physical Conditions.....	426
	Questions and Problems	430
§ 9.14	Declarations Relating to Wills and Claims Against Estates	430
§ 9.15	Declarations by Witnesses Prevented from Testifying	431
	California Evidence Code.....	434
	Federal Rules of Evidence.....	440

Chapter 10. Exceptions to the Hearsay Rule: Business and Official Records.....	443
§ 10.1 Introduction to Business and Official Records	443
§ 10.2 Business Records and the Business Duty Rule	444
§ 10.3 The Formal Evidentiary Foundation for Business Records	445
Questions and Problems	450
§ 10.4 Business Records and the Opinion Rule	450
Questions and Problems	451
§ 10.5 Business Records and Computer Evidence.....	452
Questions and Problems	454
§ 10.6 The Absence of Entries in Business Records	455
Questions and Problems	456
§ 10.7 Official Records.....	456
Questions and Problems	464
§ 10.8 Business and Official Records and the Confrontation Clause.....	466
Questions and Problems	477
§ 10.9 Other Official Writings	478
Questions and Problems	478
California Evidence Code.....	479
Federal Rules of Evidence.....	483
 Chapter 11. Exceptions to the Hearsay Rule: Former Testimony	 487
§ 11.1 Former Testimony Under the Evidence Code	487
Questions and Problems	493
§ 11.2 The Formal Evidentiary Foundation for Former Testimony.....	495
Questions and Problems	500
§ 11.3 Objecting to Specific Items of Former Testimony	501
§ 11.4 Proving Former Testimony	502
§ 11.5 Deposition Testimony.....	504
§ 11.6 Former Testimony Under the Federal Rules.....	505
Questions and Problems	507
§ 11.7 Former Testimony and the Confrontation Clause	508
Questions and Problems	512
§ 11.8 Preliminary Hearing Testimony of Minor Victims.....	512
California Evidence Code.....	514
Federal Rules of Evidence.....	516
 Chapter 12. Exceptions to the Hearsay Rule: Learned Treatises, Commercial Lists, and Judgments	 517
§ 12.1 Learned Treatises.....	517
Questions and Problems	519
§ 12.2 Commercial Lists.....	520
Questions and Problems	521
§ 12.3 Judgments.....	521
Questions and Problems	526
California Evidence Code.....	527
Federal Rules of Evidence.....	529

Chapter 13. Authentication and the Best and Secondary Evidence	
Rules	531
§ 13.1 The Requirement of Authentication.....	531
Questions and Problems	533
§ 13.2 Authenticating Writings	533
§ 13.3 Authentication Under the Federal Rules.....	537
Questions and Problems	539
§ 13.4 Authenticating Photographs, Movies, Audio Tapes, Video Tapes, Maps, Diagrams, and Computer Reconstructions.....	539
Questions and Problems	546
§ 13.5 Authenticating Real and Demonstrative Evidence.....	547
Questions and Problems	551
§ 13.6 The Best and Secondary Evidence Rules	552
Questions and Problems	557
§ 13.7 Exceptions to the Best Evidence Rule.....	559
Questions and Problems	562
§ 13.8 The Relationship of the Best and Secondary Evidence Rules to the Requirement of Authentication.....	563
§ 13.9 The Relationship of Authentication and the Best and Secondary Evidence Rules to the Hearsay Rule	564
Questions and Problems	565
§ 13.10 The Completeness Doctrine	566
Questions and Problems	569
California Evidence Code.....	570
Federal Rules of Evidence.....	579
 Chapter 14. Competency of Witnesses	 585
§ 14.1 General Rule of Competency	585
§ 14.2 Competency and the Personal Knowledge Requirement	586
§ 14.3 Persons Disqualified by Statute or Rule	587
Questions and Problems	594
§ 14.4 Hypnotized Witnesses	594
Questions and Problems	598
§ 14.5 Child Witnesses	598
Questions and Problems	604
§ 14.6 Cognitively and Physically Impaired Witnesses	605
Questions and Problems	607
§ 14.7 Competency and the Hearsay Declarant	608
California Evidence Code.....	609
Federal Rules of Evidence.....	617
 Chapter 15A. Attacking and Supporting the Credibility of Witnesses—Part One: Statements and Specific Instances	 619
§ 15.1 Introduction	619
§ 15.2 Impeaching One's Own Witness	622
§ 15.3 Impeachment by Prior Inconsistent Statements.....	622
Questions and Problems	629

§ 15.4	Supporting Credibility with Prior Consistent Statements	630
	Questions and Problems	635
§ 15.5	Impeachment by Contradiction	637
	Questions and Problems	640
§ 15.6	Impeachment by Character of the Witness—Prior Bad Acts	640
	Questions and Problems	643
§ 15.7	Impeachment by Character of the Witness—Felony Convictions.....	644
	Questions and Problems	656
§ 15.8	Impeachment by Misdemeanor Convictions and Proposition 8. ...	657
	Questions and Problems	662
§ 15.9	Impeachment by Conviction Under the Federal Rules.....	662
	Questions and Problems	665
Chapter 15B. Attacking and Supporting the Credibility of Witnesses—Part Two: Other Methods of Impeachment.....		667
§ 15.10	Impeachment by Character of the Witness—Reputation and Opinion Concerning Veracity	667
	Questions and Problems	672
§ 15.11	Impeachment by Demonstrating an Impaired Capacity to Perceive, Recollect or Communicate	674
	Questions and Problems	679
§ 15.12	Impeachment by Evidence of Bias or Interest.....	680
	Questions and Problems	688
§ 15.13	Impeaching the Complaining Witness in Sex Offense Prosecutions.....	689
	Questions and Problems	696
§ 15.14	Impeaching the Hearsay Declarant	697
	Questions and Problems	701
§ 15.15	Ethical Constraints on Witness Examinations	701
	Article 1 of the California Constitution	703
	California Evidence Code.....	704
	Federal Rules of Evidence.....	715
Chapter 16. Expert Testimony and the Opinion Rule		721
§ 16.1	The Opinion Rule.....	721
§ 16.2	Lay Opinion	723
	Questions and Problems	725
§ 16.3	Expert Opinion	725
	Questions and Problems	735
§ 16.4	Expert Opinion and the <i>Kelly</i> Test.....	737
	Questions and Problems	751
§ 16.5	The Federal Approach.....	752
	Questions and Problems	756
§ 16.6	Satisfying the <i>Kelly</i> Test.....	756
§ 16.7	<i>Daubert v. Kelly</i>	760
	Questions and Problems	763

§ 16.8	Cross-Examining the Expert Witness.....	763
	Questions and Problems	767
§ 16.9	Expert Testimony and Credibility.....	767
	Questions and Problems	777
§ 16.10	Ethical and Constitutional Constraints on the Use of Expert Testimony by Prosecutors	778
§ 16.11	Court Appointed Experts	779
	California Evidence Code.....	780
	Federal Rules of Evidence.....	783
	Uniform Rules of Evidence (1999).....	785
 Chapter 17. The Role of Judge and Jury		787
§ 17.1	Allocating Power Between Judge and Jury	787
	Questions and Problems	792
§ 17.2	Preliminary Matters Governed by § 403.....	793
	Questions and Problems	797
§ 17.3	Preliminary Matters Governed by § 405.....	797
	Questions and Problems	802
§ 17.4	The Burden of Proof in § 405 Determinations.....	803
§ 17.5	The Rules of Evidence and §§ 403 and 405 Determinations	805
	Questions and Problems	807
§ 17.6	Conditional Admissibility	807
	Questions and Problems	808
§ 17.7	Preliminary Fact Determinations Involving Ultimate Issues.....	808
	Questions and Problems	810
§ 17.8	Limiting Instructions and § 403 Determinations.....	810
§ 17.9	Other Provisions Relating to Admissibility	812
§ 17.10	Preliminary Fact Determinations Under the Federal Rules of Evidence	813
§ 17.11	Jury Instructions: Allocating Power Between Judge and Jury.....	815
§ 17.12	Witness Examination: Allocating Power Between Counsel and Jury	818
	California Evidence Code.....	820
	Federal Rules of Evidence.....	822
 Chapter 18. Presumptions and Burden of Proof		823
§ 18.1	Burden of Proof.....	823
§ 18.2	The Standards of Persuasion.....	824
	Questions and Problems	826
§ 18.3	Allocating the Production and Persuasion Burdens	827
	Questions and Problems	828
§ 18.4	Presumptions and Inferences	828
	Questions and Problems	834
§ 18.5	Distinguishing Between Rebuttable Presumptions	834
	Questions and Problems	840
§ 18.6	Conclusive Presumptions.....	840
§ 18.7	Presumptions in Criminal Cases.....	842

	Questions and Problems	848
§ 18.8	Legislative Reallocation of the Burden of Proof in Criminal Cases	849
	Questions and Problems	850
§ 18.9	Inferences in Criminal Cases.....	851
	Questions and Problems	852
§ 18.10	Presumptions Under the Federal Rules	853
	Questions and Problems	854
	California Evidence Code.....	854
	Federal Rules of Evidence.....	856
Chapter 19. Judicial Notice.....		857
§ 19.1	Judicial Notice Under the Evidence Code	857
	Questions and Problems	870
§ 19.2	Judicial Notice Under the Federal Rules.....	871
§ 19.3	Jury Notice.....	872
	California Evidence Code.....	874
	Federal Rules of Evidence.....	877
Chapter 20. Privileges: An Introduction.....		879
§ 20.1	An Overview.....	879
	Questions and Problems	883
§ 20.2	Applicability of Privileges	884
	Questions and Problems	885
§ 20.3	Privilege Claims and Burden of Proof.....	885
	Questions and Problems	887
§ 20.4	Ruling on Privilege Claims	888
	Questions and Problems	893
§ 20.5	Waiver of Privileges.....	893
	Questions and Problems	906
	California Evidence Code.....	907
	Federal Rules of Evidence.....	911
Chapter 21. The Attorney-Client Privilege		921
§ 21.1	Nature of the Privilege.....	921
	Questions and Problems	926
§ 21.2	The Communication Must Be Between an Attorney and a Client.....	927
	Questions and Problems	933
§ 21.3	Information Must Be Transmitted Between Client and Lawyer in the Course of Attorney-Client Relationship	933
	Questions and Problems	936
§ 21.4	Information Must Be Transmitted in Confidence	937
	Questions and Problems	948
§ 21.5	Claiming the Privilege	949
	Questions and Problems	951
§ 21.6	Exceptions	951

	Questions and Problems	960
§ 21.7	Confidentiality and Conflicts of Interest	961
§ 21.8	Search Warrants and Confidential Client Files	961
§ 21.9	Federal Rules of Evidence.....	962
	California Evidence Code.....	963
	Federal Rules of Evidence.....	966
Chapter 22. The Work Product Doctrine		979
§ 22.1	Nature of the Doctrine	979
	Questions and Problems	983
§ 22.2	Particular Applications	983
	Questions and Problems	990
§ 22.3	Waiver, Exceptions, Search Warrants, and Burden of Proof	990
	Questions and Problems	994
§ 22.4	The Federal Work Product Doctrine	995
§ 22.5	Treating Experts Like Percipient Witnesses.....	997
	California Civil Procedure Code	1000
	Federal Rules of Civil Procedure	1002
Chapter 23. The Psychotherapist-Patient and Physician-Patient Privileges		1007
§ 23.1	Overview of the Privileges	1007
§ 23.2	Nature of the Psychotherapist-Patient Privilege	1008
	Questions and Problems	1015
§ 23.3	Claiming the Psychotherapist-Patient Privilege.....	1015
	Questions and Problems	1016
§ 23.4	Exceptions to the Psychotherapist-Patient Privilege.....	1017
	Questions and Problems	1030
§ 23.5	Nature of the Physician-Patient Privilege.....	1032
	Questions and Problems	1036
§ 23.6	Claiming the Physician-Patient Privilege	1037
	Questions and Problems	1039
§ 23.7	Exceptions to the Physician-Patient Privilege	1039
	Questions and Problems	1044
	California Evidence Code.....	1045
	Federal Rules of Evidence.....	1054
Chapter 24. Other Counseling Privileges		1059
§ 24.1	Overview of the Counseling Privileges	1059
§ 24.2	Nature of the Sexual Assault Counselor-Victim Counselor Privilege	1060
	Questions and Problems	1062
§ 24.3	Claiming the Sexual Assault Counselor-Victim Privilege	1063
	Questions and Problems	1063
§ 24.4	Compelling Sexual Assault Counselor-Victim Disclosures.....	1063
	Questions and Problems	1065

§ 24.5	Nature of the Domestic Violence Counselor-Victim Privilege	1065
	Questions and Problems	1067
§ 24.6	Claiming the Domestic Violence Counselor-Victim Privilege.....	1068
	Questions and Problems	1068
§ 24.7	Compelling Domestic Violence Counselor-Victim Disclosures	1069
	Questions and Problems	1070
§ 24.8	Nature of the Human Trafficking Caseworker-Victim Privilege	1071
§ 24.9	Claiming the Human Trafficking Caseworker-Victim Privilege	1071
§ 24.10	Compelling Human Trafficking Caseworker-Victim Disclosures	1072
	Questions and Problems	1072
§ 24.11	Nature of the Clergy-Penitent Privileges	1073
	Questions and Problems	1075
§ 24.12	Claiming the Clergy-Penitent Privileges	1076
	Questions and Problems	1076
	California Evidence Code.....	1077
	Federal Rules of Evidence.....	1087
Chapter 25. Spousal Privileges		1091
§ 25.1	Overview of the Spousal Privileges	1091
§ 25.2	Nature of the Confidential Marital Communications Privilege	1091
	Questions and Problems	1094
§ 25.3	Claiming the Privilege	1095
	Questions and Problems	1095
§ 25.4	Exceptions	1095
	Questions and Problems	1098
§ 25.5	Nature of the Spousal Testimonial Privileges.....	1098
	Questions and Problems	1101
§ 25.6	Claiming and Waiving the Spousal Privileges	1101
	Questions and Problems	1105
§ 25.7	Exceptions to the Spousal Testimonial Privileges	1106
	Questions and Problems	1108
	California Evidence Code.....	1108
	Federal Rules of Evidence.....	1111
INDEX.....		1115