

## INTRODUCTION

From its inception, the University of California at Davis Law Review has not followed the format of the traditional law review. It has, instead, been published annually in a single hardbound volume, containing only articles written entirely by students on a symposium topic. The approach is one which allows for a healthy diversity in legal topics and analysis, yet draws together a variety of efforts into a single product likely in its whole as well as its parts to be useful to those working in the field.

A single volume purporting to cover the rules of evidence would be, to say the least, an ambitious undertaking. Our goal, while challenging, is more modest in scope. Volume nine of the U.C. Davis Law Review is an attempt to provide the practitioner and the student with a readable and accessible guide to what we consider the fundamental evidentiary doctrines applicable in California. Each of the twenty-three substantive articles discusses one of these doctrines and its statutory formulation in the California Evidence Code. In addition, most articles contrast the newly-enacted Federal Rules of Evidence in those areas where the rules differ from the California statutes.

Within its particular topic, each article suggests areas of evidence law which appear in need of clarification or reform. A few articles go further and are devoted entirely to a timely reappraisal of certain evidentiary principles which seem significantly out of step with recent constitutional decisions or changing social attitudes. Though not exhaustive, we hope the volume will provide a useful tool in solving some of the more common evidentiary problems.

## FOREWORD

*The California Evidence Code and the Federal Rules: Past — and Present — Are Prologue* surveys the differences between the California Evidence Code and the newly-enacted Federal Rules of Evidence. Professor Louisell traces some of the political and constitutional forces which contributed to the reforms in the Federal Rules and suggests that even more dramatic changes in evidentiary doctrine may lie ahead.

## I. THE HEARSAY RULE AND ITS EXCEPTIONS

*Hearsay: The Threshold Question* considers the definition of hearsay, under both the common law view and the California and federal

statutes. After discussing the various elements of the definition of hearsay, and examining the rationale underlying the rule, this article focuses on some common confusions regarding hearsay evidence.

*An Advocate's Guide to Personal, Adoptive, and Judicial Admissions in Civil Cases in California and Federal Courts* describes and analyzes the use of admissions from an advocate's point of view.

*Co-Conspirator Declarations: Constitutional Defects in the Admission Procedure* examines the procedure by which courts admit statements under the co-conspirator exception. The article analyzes recent constitutional cases which indicate that the procedure is unconstitutional, and suggests solving the problem by admitting a co-conspirator's statements under California Evidence Code section 405, rather than section 403.

*Negligence at Work: Employee Admissions in California and Federal Courts* analyzes the admissibility of employee declarations under the vicarious admissions exception to the hearsay rule. Rationale and historical developments are explored, and current legal approaches to this controversial area are contrasted and evaluated.

*Declarations Against Interest in California and Federal Courts* analyzes the exception as it exists in the federal and California systems, emphasizing distinctions and problem areas.

*Admitting Recorded Hearsay: A Comparison of Past Recollection Recorded and Business Records* discusses the interchangeability of these two hearsay exceptions and their use in combination with one another and with other hearsay exceptions to admit written hearsay into evidence. Federal law (especially with regard to writings containing opinions and diagnoses) is contrasted with California law.

*Former Testimony: A Comparison of the California and Federal Rules of Evidence* is a general review of the California and federal approaches with a focus on witness unavailability standards, and on the *California v. Green* issue of sixth amendment adequacy of the preliminary hearing as a source of former testimony.

*State of Mind: The Elusive Exception* analyzes the state of mind and physical condition declarations under both the California Evidence Code and the Federal Rules of Evidence. The article considers the initial problem of classification of state of mind declarations as hearsay or nonhearsay, then examines the permissible uses of state of mind evidence and limitations when used to prove conduct.

## II. SPECIAL FORMS OF EVIDENCE

*The Opinion Rule in California and Federal Courts: A Liberal Approach* analyzes what McCormick has called “the clumsiest of all the tools” for regulating the examination of witnesses. The traditional American rule of exclusion is contrasted to the liberal federal and California rule which admits opinion evidence that is helpful to a clear understanding of the testimony.

*The Best Evidence Rule: A Critical Appraisal of the Law in California* analyzes the operation of the California best evidence rule and its statutory exceptions. The article proposes changes to provide more flexibility in the rule’s application.

## III. IMPEACHMENT

*Impeachment by Inconsistent Statements: California Theory and Practice* explores the underlying rationale and application of the California impeachment rules. It focuses on particular problem areas such as inferred inconsistencies and impeachment of lack of recollection testimony.

*Impeaching and Rehabilitating a Witness with Character Evidence: Reputation, Opinion, Specific Acts and Prior Convictions* describes and compares the California and federal rules for impeaching a witness with character evidence. The article focuses on the extent to which a witness’ prior convictions may be used to impeach him. The authors also describe the rule regarding the rehabilitation of a witness whose credibility has been impeached with character evidence.

*“Have You Heard?” Cross Examination of a Criminal Defendant’s Good Character Witness: A Proposal for Reform* examines the safeguards on cross-examination of a good character witness and suggests modification of the rule to provide more protection for the criminal defendant.

## IV. RELEVANCE AND SOCIAL POLICY LIMITATIONS ON THE INTRODUCTION OF EVIDENCE

*Similar Facts Evidence: Balancing Probative Value Against the Probable Dangers of Admission* analyzes the Evidence Code’s three fundamental determinants of admissibility of similar facts evidence.

*Evidence of Subsequent Repairs: Yesterday, Today and Tomorrow* explains the treatment of such evidence in negligence and strict liability cases, with emphasis on the recent California Supreme Court

decision in *Ault v. International Harvester*. The article concludes that the rule against evidence of subsequent repairs should and can be abandoned.

*A Due Process Challenge to Restrictions on the Substantive Use of Evidence of a Rape Prosecutrix's Prior Sexual Conduct* discusses the constitutionality of the newly-enacted Evidence Code section that excludes evidence of a victim's prior sexual conduct in a rape trial. The article argues that the section is unconstitutional when applied to exclude prior sexual conduct when such evidence is highly probative on the issue of consent or is especially needed.

## V. PRIVILEGES AND LIMITATIONS ON THE PROTECTION THEY AFFORD

*Limitations on California Professional Privileges: Waiver Principles and the Policies They Promote* examines the attorney-client, physician-patient and psychotherapist-patient privileges. The article focuses particular attention on the court's use of waiver doctrines to balance the competing needs of confidentiality and full disclosure of relevant evidence in judicial proceedings.

*Catholic Sisters, Irregularly Ordained Women and the Clergy-Penitent Privilege* examines the possible claim of privilege by women in clergy roles even though such a privilege is not explicitly recognized by the California and federal privilege statutes. The article argues that the inclusion of Catholic sisters and irregularly ordained women is consistent with the development of the clergy-penitent privilege in the United States.

*The Dangerous Patient Exception and the Duty to Warn: Creation of a Dangerous Precedent?* explores the dangers of using an exception to an evidentiary privilege to support the finding of a duty to warn. Specifically, it deals with the California Supreme Court decision in *Tarasoff v. Regents, University of California*. In that case the court used Section 1024 of the Evidence Code, the dangerous patient exception to the psychotherapist-patient privilege, to support a finding that psychiatrists are liable for failing to warn the intended victim of a patient.

*The Marital Testimony and Communications Privileges: Improvements and Uncertainties in California and Federal Courts* describes the California and federal marital privilege statutes. The discussion emphasizes the problems created by the changes made to California's privilege and discusses application of *Erie* to federal rule 501.

*Courtroom Comment on An Accused's Reliance on the Privilege Against Self-Incrimination: California's Application of Griffin v. California* examines California courts' review of alleged comment on a defendant's decision not to testify. The article assesses the tendency of the courts to merge the separate questions of whether challenged remarks constitute *Griffin* error and whether any such error compels reversal. The article concludes that such a practice abuses the accused's fifth amendment privilege.

## VI. PRESUMPTIONS AND THE BURDEN OF PROOF

*Rebuttable Criminal and Civil Presumptions: California's Statutory Dichotomy* explores California's treatment of presumptions. The article provides an overview of presumptions with emphasis on the bifurcated system of rebuttable civil presumptions. Comparable sections of the Federal Rules of Evidence are also analyzed.

*The Burden of Proof in California Environmental Nuisance Cases* explores the traditional allocation of the burden of proof in California environmental nuisance cases and argues for a reallocation of that burden.

Thomas H. Steele  
Editor-in-Chief  
1975-76