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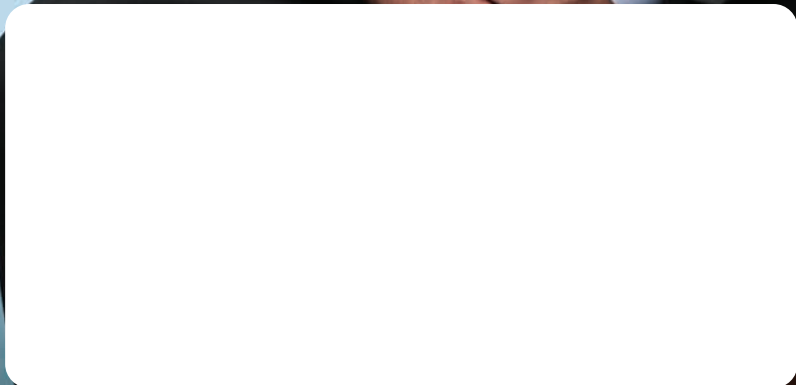
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by Michael D. Schwartz and Phillip R. Maltin

STRENGTH of Character

The admissibility of character evidence in civil trials is subject to exacting standards

CHARACTER EVIDENCE is one of the most complex and misunderstood clusters of statutes in the Evidence Code. Civil courts exclude much of it, “not because it has no appreciable probative value but because it has too much.”¹ When admitted, character evidence can supply one of the most effective moments in a civil trial. Perhaps because so few civil matters reach trial, many civil lawyers lack an understanding of what character evidence is, how to generate it, and how to use it. One aspect of this variegated and complex area of evidence is its availability in a civil action to impeach a witness. The key is knowing when and how to use character evidence for the purpose of attacking a witness’s credibility.

Character evidence reveals a person’s propensity or disposition to act a certain

way.² Legal actions are about conduct: the conduct of parties pretrial (doing something or failing to do something) and the conduct of witnesses on the stand (telling the truth or lying). Behind every assessment of a person’s character, or trait of character, is a history of behavior. That history, in turn, generates opinions and reputations. Science confirms what experience anecdotally teaches—character, as evidenced by past conduct, is one of the best predictors of future behavior.³ As one court succinctly states, “[C]haracter is a more or less permanent quality and we may make inferences from it either forward or backward.”⁴

Science and experience both recognize the power of character evidence. So why not permit a jury unlimited use of this robust predictor of human behavior to determine if a

person’s conduct conformed with his or her character? Two reasons control. First, while past conduct is one of the best predictors of behavior, it can be more persuasive than accurate. While it may prompt compelling predictions about how a person will act, the predictions often generate unwarranted confidence. According to author and psychologist B. F. Skinner, “[H]uman behavior] may be beyond the range of a predictive or controlling science.”⁵

Second, this form of proof often spawns

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unfair prejudice, surprise, and undue consumption of time.⁶ Jurors may find against a side in a case simply because they do not like one of the parties based upon their perception of that person's character.⁷ In a legal system that strives for justice and struggles for economy, character evidence can invite a jury to decide a case based on who the "better" person is, not whether someone is legally responsible or telling the truth. Even the unlikeable deserve justice in court.

Therefore, while the law severely restricts the use of character evidence in civil cases, it does not completely prohibit it. Character evidence is admissible in civil cases in three situations:

- 1) When the existence of a character trait is itself an issue to be determined in the case, character evidence is admissible to prove the trait exists.⁸
- 2) When a witness testifies, character evidence is admissible regarding the witness's honesty and veracity.⁹
- 3) When the lawsuit involves allegations of sexual misconduct, character evidence is admissible to prove the conduct of the parties.¹⁰

In contrast to the broader evidence permitted in criminal cases,¹¹ the Evidence Code permits no other instances of character evidence in civil trial practice.

Every time a witness testifies—whether in trial before a jury, at a hearing before a judge, in a deposition, in a declaration, through verified pleadings, or through verified responses to written discovery—that person's credibility is at issue, and his or her character traits supporting or negating honesty and veracity are admissible.¹² Evidence of a witness's propensity and disposition for telling lies (and in some instances for telling the truth¹³) is admissible as circumstantial evidence of truthfulness while testifying. Evidence of good character is admissible only after a court has admitted evidence of a witness's "bad character,"¹⁴ which is typically dishonesty. Significantly, under no circumstances may a party use a witness's religious belief to support or challenge the witness's honesty or veracity.¹⁵

Character evidence takes three different forms—opinion, reputation, and specific instances of conduct.¹⁶ Opinion evidence, whether lay or expert, is the specific impression of a person's character by someone who knows the person reasonably well, through direct contact and specific instances of conduct.¹⁷ Reputation evidence is the collective impression of a person's character, or trait of it, shared by a group close enough to the person to form reliable conclusions.¹⁸ Specific instances of conduct are just that—specific instances that reflect upon a person's character.¹⁹ Understanding how the three work, and when they are admissible, is critical to

understanding the complex rules underpinning the admission of character evidence in civil cases.

A character witness may testify to his or her opinion of another witness's trait for honesty and veracity. When character witnesses testify about their opinion of a witness's honesty and veracity, they must, as a foundational matter, know the witness well enough to deliver an informed opinion of the witness's truthfulness.²⁰ Even experts can deliver this type of opinion.²¹

Opinion evidence, while often more persuasive than reputation evidence, can be problematic under Evidence Code Section 352. While specific instances of conduct may help to formulate opinions, Section 787 prohibits the use of "evidence of specific instances of [a witness's] conduct relevant only as tending to prove a trait of his character...to attack or support the credibility of a witness."²² Thus, for instance, a court should prohibit a character witness from testifying that a party to a lawsuit is truthful simply because the party does charitable work or volunteers at a homeless shelter.

To present reputation evidence,²³ as a foundational matter, the impressions of the person's reputation must have crystallized at a time relevant to the lawsuit.²⁴ A party can establish reputation evidence only through a witness who knows the reputation²⁵ and not by proof of specific instances of conduct.²⁶ Whether the character witness knows the individual about whom he or she testifies is irrelevant.²⁷ The testimony centers on the "estimation in which an individual is held; in other words, the character imputed to an individual rather than what is actually known of him either by the witness or others."²⁸ It is "the net balance of so many debits and credits"²⁹ in a person's life that it evolves with every new action the person takes.

Admissibility of Specific Instances of Conduct

Specific instances of conduct are by far the most powerful type of character evidence for a jury. The first words out the mouths of many jurors after a verdict are typically, "Has [the defendant] done [the alleged wrongdoing] before?" Nevertheless, in civil cases California excludes specific instances of conduct as character evidence except for felony convictions reflecting honesty and veracity.³⁰ Thus the only specific instance of conduct permitted to be introduced as character evidence is a felony conviction for crime in which honesty and veracity play a part, such as grand theft, fraud, and perjury.³¹

Here is where a difference between the rules in civil and criminal cases is pronounced. In criminal cases, felony convictions used to impeach a witness's credibility are not

limited only to those that involve honesty and veracity pursuant to Evidence Code Section 786.³² With the passage of Proposition 8 in 1982, the California Constitution—under Article I, Section 28(f)—abrogated Evidence Code Sections 786 through 790 for criminal cases, allowing for the use of any felony conviction involving moral turpitude—that is, a readiness to do evil.³³ In criminal cases, any felony conviction that evidences a person's readiness to do evil, whether that felony directly reflects on honesty and veracity or not, can be used to impeach a witness, including, for example, felonies such as arson, domestic violence, and rape.³⁴ In almost every civil case, attorneys ask deponents whether they have been convicted of a felony, because that evidence, if reflecting on honesty and veracity, can be admissible at trial to impeach the witness.³⁵

California's Discovery Act permits the discovery of admissible evidence as well as any type of information reasonably calculated to lead to the discovery of admissible evidence.³⁶ In fact, it allows inquiry into specific instances of conduct beyond felony convictions reflecting on honesty and veracity despite their inadmissibility to prove character. It does this because such instances of conduct may lead to the discovery of admissible opinion and reputation evidence. Witnesses base their opinions upon, and reputations emerge from, specific instances of a person's conduct. Counsel questioning a witness during a deposition should ask whether the deponent is aware of instances of another witness's dishonest conduct.

Consider, for example, a case in which a female employee alleges that a supervisor discriminated against her. She hopes to admit evidence that the supervisor had discriminated against others in virtually the same way. With this evidence, the plaintiff-employee tries to show the supervisor's propensity to discriminate. The evidence is inadmissible.³⁷ A court may, however, permit the evidence for a different reason. It may determine that the evidence tends to reveal the motive or intent that prompted the supervisor's allegedly discriminatory actions against the plaintiff.³⁸ Thus, discovery of specific instances of conduct beyond felony convictions reflecting on honesty and veracity may lead to other channels for admitting probative and relevant evidence in trial, such as evidence of a "bias, interest or other motive to lie"³⁹ or evidence of a "crime, civil wrong, or other act" pursuant to Evidence Code Section 1101(b).⁴⁰

Almost never heard at a deposition, but permitted, are inquiries into a deponent's opinion about another witness's reputation for truthfulness.⁴¹ Effective use and discovery of opinion and reputation evidence are equally advantageous to the employer in defending

the claim. The plaintiff-employee, who is certainly going to testify at trial, puts her character for honesty and veracity at issue. At trial, defense counsel may call witnesses to testify to their opinions that the employee is a dishonest person or that she has a reputation for being untruthful. These opinions are discoverable pretrial. Defense counsel may not admit at trial specific instances of the employee's conduct (other than felony convictions reflecting on honesty and veracity). The Discovery Act, however, permits inquiry into instances of dishonest conduct—even though they are inadmissible—if they are likely to lead to the discovery of admissible opinions and reputations. Defense counsel may ask other employees in depositions about specific instances in which the plaintiff-employee was less than completely honest. The answers could uncover other admissible, and embarrassing, evidence and may prompt the plaintiff-employee to settle the case.

Certainly the Discovery Act does not permit attorneys unfettered inquiry into who a person is and what he or she has done. While the Discovery Act permits pretrial inquiries reasonably calculated to lead to the discovery of admissible evidence, the Evidence Code limits exploration into evidence of a "person's general reputation" to the "relevant time in the community in which [the witness] then resided...."⁴² The relevant time may encompass "a time prior to" the date on which the alleged offense or bad act occurred.⁴³ However, these inquiries, whether probing reputation or opinion, are always subject to the trial court's review and limitation.⁴⁴

An effective way to attack character witnesses is to dig into the foundations of their testimony. The inquiry should include how well the character witness knows the other witness, or whether the character witness has any biases against, or a personal relationship with, the witness about whom the character witness is delivering an opinion. Strategically, this type of foundational questioning should occur in front of the jury.

Felony Convictions at Trial

To defuse the impact of a cross-examining attorney's attack, felons testifying in trial often admit convictions when opposing counsel has the evidence to prove the conviction.⁴⁵ On direct examination, the felon-witness's attorney will typically ask, in a rehearsed exchange, "Have you been convicted of a crime?" The witness will answer with something like, "Yes. I'm embarrassed to say that, once when I was living out of my car, I stole some money from a liquor store so that I could eat." In closing argument, opposing counsel often argue that, by admitting the conviction, the witness demonstrated his or her honesty. Despite objection, courts

often allow this evidence and argument, which is why having and admitting court records regarding a felony conviction is so important.

With the records admitted, opposing counsel can respond that the felon-witness's "honesty" is nothing more than self-protection. For the felon-witness who admitted to stealing money for food, the argument would look like this: "Just like [the felon-witness] got caught stealing money, he got caught here with proof that a jury convicted him of a crime. Honesty had nothing to do with it then, and honesty

should tell a story like this:

"A few years ago, a friend told me about an Ann Landers column he read. You remember Ann Landers, the lady who gave advice on what to do. Apparently, someone had written that she could not find her brooch—a one-of-a-kind pin that her family had passed down for generations. Shockingly, she found it on a dresser at a friend's house months after it had gone missing. The woman writing for advice remembered that her friend had once commented on how much she liked and wanted to buy it. 'Dear Ann,' she asked,



has nothing to do with it now. The jury instruction states: "You have heard that a witness in this trial has been convicted of a felony. You were told about the conviction only to help you decide whether you should believe the witness. You must not consider it for any other purpose."⁴⁶

Some attorneys may find arguing the felony conviction offers an irresistible opportunity to extend the use and meaning of that conviction to suggest that the jury should not trust the witness because he or she is immoral. The jury instruction, however, contains an implied warning: counsel should not suggest the court admitted the felony conviction for any purpose other than its impact on the witness's honesty and veracity.

Counsel should turn to an example that brings the situation alive for jurors. They

"Should I confront her?" Landers wisely wrote back, "Don't bother. If she is willing to steal it, she is willing to lie about it."

Counsel should then explain how what Ann Landers wrote applies to the lawsuit. "When you think about that witness, convicted of a felony, ask yourself, 'should I believe him?' Then, remember what Ann Landers said. If someone is willing to steal, she is also willing to lie. Theft and lying are acts of a dishonest person. Dishonest people lie, especially under oath."

Some lawyers try to defuse the impending attack on their felon-witness by asking the jury to give the witness credit for admitting that he or she had committed the felony. They then make the same point in their closing argument to the jury. This argument focuses on an inadmissible, specific instance

of good conduct.⁴⁷ Yet the only specific instance of conduct admissible to prove a character trait for honesty or veracity is the existence of a felony conviction, not the act of admitting to one. Opposing counsel should move to bar this argument regarding good conduct by a motion in limine.

Opinions and Reputations at Trial

In trial, on direct examination of a character witness, an attorney will usually begin by asking, “Do you know the defendant?” Answer: “Yes.” “How long have you known him?” Answer: “[A number of] years.” “Have you spent enough time with him to develop an opinion about how truthful he is?” Answer: “Yes.” “Based on your interaction with him, what is your opinion about how truthful the defendant is?” Answer: “He is a very honest guy.”⁴⁸

On cross-examination, an attorney may question the character witness about wrongdoing of which the witness may not know. The lawyer may ask do-you-know questions about conduct relating to character. For instance, after a character witness testifies that a party is honest and upstanding, the opposing lawyer could cross-examine by asking whether the witness knows that the party had been arrested for auto theft. Still, the allowable questioning in this instance is limited: “It is elementary that the misconduct inquired of must be inconsistent with the character traits attested to on direct.”⁴⁹ Asking a character witness whether he had heard that a church had excommunicated the party about whom he had testified is “not necessarily inconsistent” with the witness’s testimony that the defendant has a good reputation for “truth, honesty and integrity.”⁵⁰ At moments like these, seemingly all of a sudden, the prohibition on evidence of special instances of conduct begins to dissolve, permitting the opposing attorney to attack the opinion for truthfulness with hints about evidence of conduct involving untruthfulness.⁵¹ Of course, the lawyer must ask the impeaching questions in good faith⁵² and not suggest evidence of misconduct that did not occur.

In trial, on direct examination of a character witness, an attorney will ask, “Do you know the defendant?” Answer: “No, but I have heard of him. “How long have you known about him?” Answer: “I have heard people talk about him for about five years.” “Have you spoken with others about his reputation for honesty?” Answer: “Yes.” “What is your understanding of his reputation for honesty?” Answer: “He is a very honest guy.”⁵³ Evidence in this form tends to be the least persuasive of the three types of character evidence and is easy to attack.

On cross-examination, a lawyer may ask have-you-heard questions about conduct

relating to character.⁵⁴ The questions must appear in the same form as the evidence presented. Thus the question must seek evidence of a reputation of bad character about which people in the community may speak: “Have you heard rumors or reports that the defendant did [something dishonest]?” A lawyer may even ask, “Have you heard [derogatory information] about the witness?” Advocates may not imply that the subject about which they ask is true,⁵⁵ and they must ask the questions in good faith.⁵⁶

Excluding or Sanitizing

Courts must analyze the proffered evidence under Evidence Code Section 352 to ensure it will not take too much time, mislead the jury, or cause undue prejudice or too much confusion.⁵⁷ In general, the evidence must be sufficiently recent. It can become “too remote [in time] to have any probative value” and thus become irrelevant.⁵⁸ Recent case law suggests, however, that a felony conviction 17 years prior to the events at issue may continue to have probative value as the basis for impeachment.⁵⁹ Counsel may object to the evidence under Section 352, and the trial court must then evaluate the evidence with the guidance of the Section 352 criteria.⁶⁰ The court need not articulate its reasoning on the record, though the record must reveal that the court weighed the factors in generating its conclusion.⁶¹

If a court appears disinclined to permit character evidence, counsel may wish to sanitize it, by making the evidence less prejudicial or inflammatory.⁶² If the evidence seems “too good” to disregard, it is probably an easy target for reversal on appeal. For example, a family sued a telephone company for wrongful death, claiming that the tension on telephone wires flung a large piece of a cut tree on to the decedent, who was also the family’s financial provider.⁶³ The trial court permitted the defendant to try to minimize the damages it could owe the family by presenting evidence that the decedent had had an extramarital affair, and lived with, a 16-year-old girl. He had also been imprisoned for two years for passing worthless checks. During these times, the decedent had not financially supported the family. The jury found for the defendant, but the court of appeal reversed the trial court’s judgment finding this evidence unfairly prejudicial.⁶⁴

The reviewing court reasoned that, while the defendant had the right to show that the decedent had not provided for the family for periods of time, the reasons were “potentially inflammatory.” It hinted that the trial court could have sanitized the evidence: “It would have been simple to establish that the decedent left his wife and children for a period...and did not provide for their support

during that time, without referring to the fact that his reason for leaving was to live with a minor girl. Similarly, nonsupport of his family during [his] incarceration could have been proved without reference to the deceased’s conviction....”⁶⁵ Even if trial counsel is poised to win the opportunity to admit highly prejudicial evidence, he or she may wish to consider preserving the case on appeal by not overreaching. Counsel opposing the admission of character evidence may also consider suggesting that the court sanitize the evidence if the court appears ready to admit the harmful evidence.

Trials are a search for the truth. Knowing which witnesses testified truthfully, and which did not, is critical to getting to the truth of the matters at issue. Honest people tend to tell the truth, and dishonest people tend to lie. Knowing when the rules of evidence permit the discovery, and admission, of character evidence gives counsel a great advantage, both at trial and pretrial. In many ways, character evidence is the sleeping giant of civil litigation. ■

¹ *Beyda v. City of Los Angeles*, 65 Cal. App. 4th 511, 518 (1998) (quoting 1A WIGMORE ON EVIDENCE §58.2, at 1212 (Tillers rev. 1983)).

² *People v. McAlpin*, 53 Cal. 3d 1289, 1305 (1991).

³ Megan Kurlychek, Robert Brame & Shawn Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, CRIMINOLOGY & PUB. POL’Y 5:3:483-504 (2006).

⁴ *People v. Shoemaker*, 135 Cal. App. 3d 442, 446-47 (1982).

⁵ B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 17 (2005).

⁶ See KENNETH S. BROUN, MCCORMICK ON EVIDENCE §187 (Update 2006).

⁷ *People v. Willoughby*, 164 Cal. App. 3d 1054, 1062 (1985).

⁸ *Carr v. Pacific Tel. Co.*, 26 Cal. App. 3d 537, 544 (1972); EVID. CODE §1100, Cal. Law Revision Commission cmt.

⁹ The meanings of “honesty” and “veracity” are similar but not identical. Honesty refers to truth telling. Veracity refers to a commitment to truth telling. See <http://www.bartleby.com/61/33/T0393300.html>; EVID. CODE §1101(c).

¹⁰ EVID. CODE §1106.

¹¹ Rules permitting character evidence are more relaxed in criminal practice compared to civil practice. See EVID. CODE §1101(c) (Character evidence may be used to impeach a witness.); EVID. CODE §782 (Character evidence is admissible to show consent in prosecution for sexual misconduct.); EVID. CODE §1102 (A defendant may present evidence of his or her own good character.); EVID. CODE §1103 (A defendant may attack the victim’s character.); and EVID. CODE §1109 (Character evidence is admissible in cases alleging domestic violence, including violence against children, and cases alleging elder abuse or abuse of a dependent adult.).

¹² EVID. CODE §§785, 786. Even the honesty and veracity of hearsay declarants can be at issue and thus attacked. EVID. CODE §1202; *People v. Jacobs*, 78 Cal. App. 4th 1444 (2000).

¹³ EVID. CODE §790.

¹⁴ *Id.*

¹⁵ EVID. CODE §789.

¹⁶ EVID. CODE §§786-790, 1101(c).

¹⁷ EVID. CODE §§800, 801; *People v. Stoll*, 49 Cal. 3d 1136, 1152 (1989).

¹⁸ *People v. McAlpin*, 53 Cal. 3d 1289, 1310 (1991).

¹⁹ *People v. Zambrano*, 124 Cal. App. 4th 228 (2004).

²⁰ *People v. Smith*, 214 Cal. App. 3d 904, 915 (1989).

²¹ *Stoll*, 49 Cal. 3d at 1152; EVID. CODE §§800, 801.

²² EVID. CODE §787.

²³ *People v. McDaniel*, 59 Cal. App. 2d 672, 676 (1943).

²⁴ EVID. CODE §1324.

²⁵ *Pyper v. Jennings*, 47 Cal. App. 623, 630 (1920).

²⁶ EVID. CODE §786; *Pyper*, 47 Cal. App. at 630.

²⁷ *McDaniel*, 59 Cal. App. 2d 672.

²⁸ *People v. McAlpin*, 53 Cal. 3d 1289, 1310–11 (1991).

²⁹ *Michelson v. United States*, 335 U.S. 469, 482–83 (1948).

³⁰ EVID. CODE §787; *Piscitelli v. Salesian Soc’y*, 166 Cal. App. 4th 1 (2008).

³¹ EVID. CODE §788; *Robbins v. Wong*, 27 Cal. App. 4th 261 (1994); *Piscitelli*, 166 Cal. App. 4th 1.

³² *Robbins*, 27 Cal. App. 4th 261.

³³ *People v. Harris*, 47 Cal. 3d 1047 (1989); *People v. Castro*, 38 Cal. 3d 301, 306 (1985).

³⁴ *People v. Miles*, 172 Cal. App. 3d 474 (1985); *People v. Abilez*, 41 Cal. 4th 472 (2007); *People v. Rodriguez*, 5 Cal. 4th 1398, 1402 (1992); *People v. Bonilla*, 168 Cal. 3d 201 (1985).

³⁵ EVID. CODE §788.

³⁶ CODE CIV. PROC. §2017.010.

³⁷ EVID. CODE §1101(a), (b).

³⁸ *Johnson v. United Cerebral Palsy/Spastic Children’s Found. of L.A.*, 173 Cal. App. 4th 740, 763–67 (2009).

³⁹ *Piscitelli v. Salesian Soc’y*, 166 Cal. App. 4th 1, 9 (2008).

⁴⁰ EVID. CODE §1101(b) (Evidence is admissible if it is “relevant to prove some fact []such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident....”). See Phillip R. Maltin & Michael D. Schwartz, *Second Acts*, LOS ANGELES LAWYER, June 2004, at 31.

⁴¹ EVID. CODE §786.

⁴² EVID. CODE §1324.

⁴³ *People v. Fernandez*, 222 Cal. App. 2d 760, 766 (1963), *disapproved on other grounds*, *People v. Wetmore*, 22 Cal. 3d 318, 324 (1978).

⁴⁴ CODE CIV. PROC. §§2017.010, 2025.420(b).

⁴⁵ The evidence usually takes the form of certified records from the clerk of the court.

⁴⁶ CACI 211.

⁴⁷ EVID. CODE §787.

⁴⁸ See 1 MCCORMICK ON EVIDENCE §43 (6th ed.).

⁴⁹ *People v. Marsh*, 58 Cal. 2d 732, 745 (1962).

⁵⁰ *Id.*

⁵¹ *People v. Hurd*, 5 Cal. App. 3d 865, 877–81 (1970).

⁵² *People v. Eli*, 66 Cal. 2d 63, 79 (1967).

⁵³ See 1 MCCORMICK ON EVIDENCE §43 (6th ed.).

⁵⁴ *Thornton v. Rhoden*, 245 Cal. App. 2d 80, 85 (1966).

⁵⁵ *Marsh*, 58 Cal. 2d at 745.

⁵⁶ *Eli*, 66 Cal. 2d at 79.

⁵⁷ *Robbins v. Wong*, 27 Cal. App. 4th 261, 271 (1994); *People v. Clair*, 2 Cal. 4th 629, 654 (1992); *People v. Castro*, 38 Cal. 3d 301 (1985).

⁵⁸ *People v. Shoemaker*, 135 Cal. App. 3d 442, 448, n.4 (1982).

⁵⁹ *Piscitelli v. Salesian Soc’y*, 166 Cal. App. 4th 1, 10 (2008).

⁶⁰ *Robbins*, 27 Cal. App. 4th at 274.

⁶¹ *Michail v. Fluor Mining & Metals, Inc.*, 180 Cal. App. 3d 284, 287 (1986).

⁶² See *Carr v. Pacific Tel.*, 26 Cal. App. 3d 537, 545 (1972).

⁶³ *Id.*

⁶⁴ *Id.* at 545–46.

⁶⁵ *Id.*





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