

# Black Lawyers of Ventura County

**Next Level Evidence: What Every Litigator Should Know**

Presented by

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## Presentation Outline

- I. Introduction of Topic and Panelists
  - a. Amber Lee, SDDA
  - b. Chris Chambers Goodman, Professor of Law
- II. Character Evidence Basics in California Courts
  - a. Review Evidence Code Sections (CEC 1100-1103)
  - b. Illustrations in the Courtroom
- III. Exploring the Complications in Sexual Assault Cases
  - a. Review Evidence Code Sections (CEC 1103(c)(criminal) & 1106 (civil))
  - b. Practical Implications
- IV. Supporting and Impeaching the Character of Witnesses
  - a. Code Section Review (CEC 786-791)
  - b. Continuing Impacts of the Truth-in-Evidence Amendment

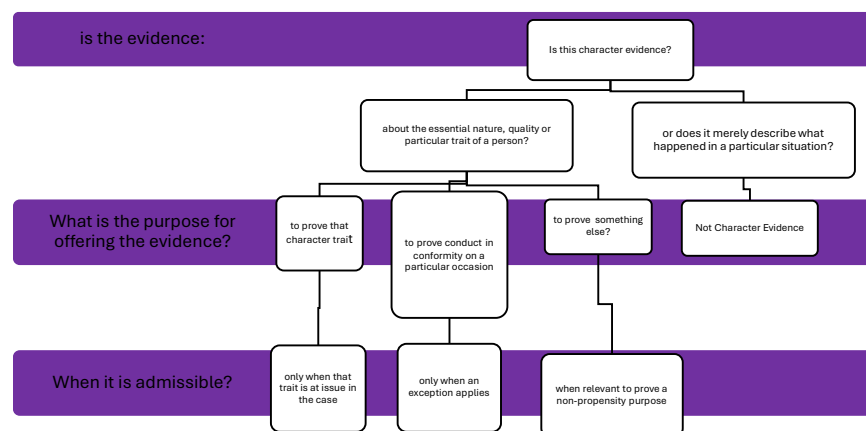
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## Presentation Outline

- V. Foundation
  - a. Laying Adequate Foundation
- VI. Conclusion
  - a. Q & A
  - b. Re-Cap Take-Aways
  - c. Wrap up

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## II. Character Evidence Basics: Review Purposes for Character Evidence



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## **Character Evidence**

- **What is it?**

- **Trait**
- **Predisposition**
- **Opinion**

- **Types**

- **Reputation**
- **Opinion**
- **Specific Instances**

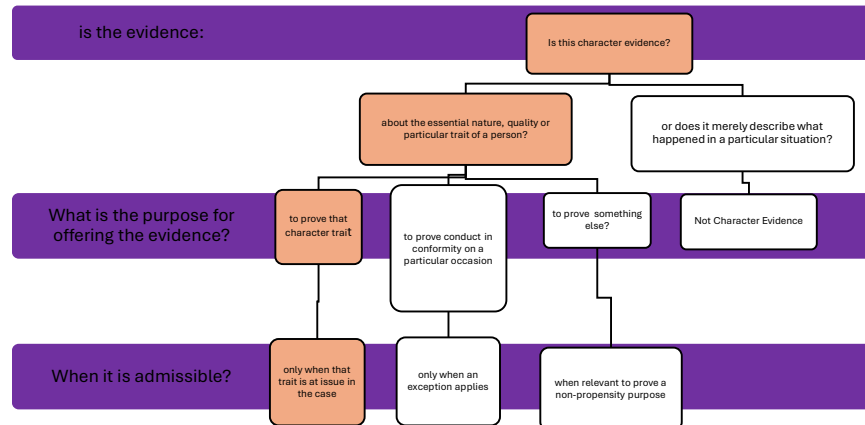
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## **Two Step Process**

- **Identify the evidence that supports a trait or predisposition**
- **Then, determine what inferences you can make from that evidence.**

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## When Character is at Issue



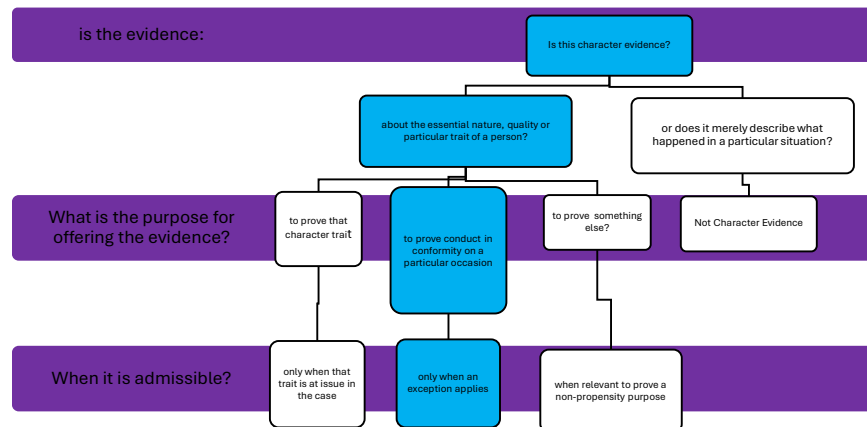
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## CEC § 1101(a): Evidence of Character to Prove Conduct

Except as provided in this section and 1102, 1103, 1108 and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is **inadmissible** when offered to prove his or her conduct on a specified occasion.

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## Purposes for Character Evidence



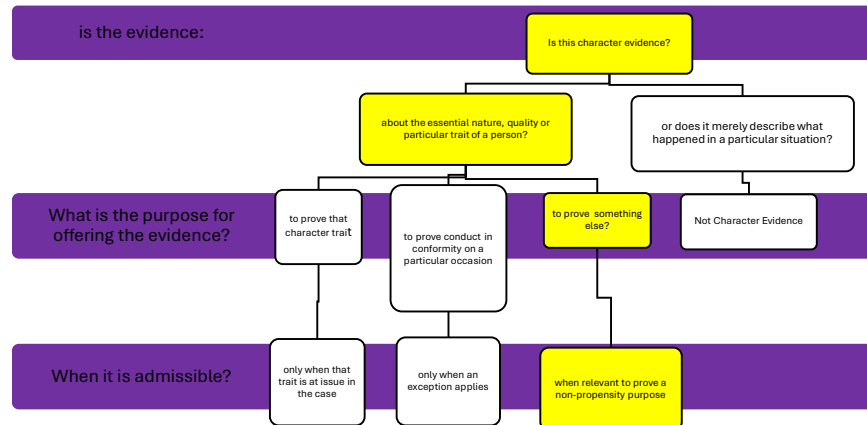
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## CEC § 1101(b)

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 motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

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## To prove something else



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## Practical Implications of the Character Evidence Rules in the Courtroom

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## **CEC § 1100 – Character Evidence (Civil)**

- Admissible in a civil action when it is an element of the charge, claim or defense
  - E.g., negligent, defamation, negligent entrustment, child custody, etc.

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## **CEC § 1102-1103 – Character Evidence (Criminal)**

- Door for character evidence can only be opened by the defendant:
  - Victim's character – R.O.S.A.
    - Once the door is opened, prosecution can offer evidence of the victim's good character
    - Homicide/violent cases – can offer victim's character for peacefulness or defendant's character for violence (CEC §1103(b))
  - Defendant's "good" character that is relevant in the case – R.O.
    - Once the door is opened, prosecution can cross examine with R.O.S.A. depending on the type of character evidence or call rebuttal witnesses using opinion or reputation (CEC §1102) on the same trait
- Non-propensity evidence is available to both sides
  - E.g., motive, identity, planning, absence of mistake, knowledge, etc.

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## Intersection of Reputation with Hearsay

- Know CEC § 1324
  - “Evidence of a person’s general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided, or in a group with which he then habitually associated is not made inadmissible by the hearsay rule.”
  - Reputation witness may not base their testimony on anything but hearsay (*Michelson v. US* (1948) 335 U.S. 439, 477.)
    - Cannot be based on personal opinion
- Cross examination of a reputation witness “Have you heard...” **not** “Do you know”.
  - (*People v. Tuggles* (2000) 179 Cal.App.4<sup>th</sup> 339, 358)
  - Not hearsay when challenging the reputation testimony but you are stuck with the answer

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## Opinion Evidence – lay or expert

- Lay foundation first
  - (a) the character evidence must relate to the particular character trait in the charged offense;
  - (b) the witness must be sufficiently acquainted with that trait of the defendant’s character to give an opinion;
  - (c) the witness’s testimony must be based on personal observation of the witness. (*People v. Honig* (1996) 48 Cal.App.4<sup>th</sup> 289, 348-349.)
- Cross examination of a lay opinion witness “Have you heard...” or “Do you know”.
  - *People v. Hinton* (2006) 37 Cal.4<sup>th</sup> 839, 902; *People v. Clair* (1992) 2 Cal.4<sup>th</sup> 629, 683-684; *People v. Hempstead* (1983) 148 Cal.App.3<sup>d</sup> 949, 954.)
  - Permitted to ask about specific acts of misconduct or allegations supported by good faith belief (subject to CEC §352)

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## Opinion Evidence – lay or expert

- In contrast to lay opinion witnesses, the opinion of expert witnesses “may be based on information furnished to the expert by others, provided only that it is the kind of information on which experts may reasonably rely.”
  - (CEC § 801(b); *People v. McAlpin* (1991) 53 Cal.3d at p. 1306, fn. 12.)
- Cross examination of an expert opinion witness:
  - “An expert witness may be cross-examined about ‘the matter upon which his or her opinion is based and the reasons for his or her opinion.’ (Evid. Code, § 721, subd. (a).) The scope of this inquiry is broad and includes questions about whether the expert sufficiently considered matters inconsistent with the opinion. Thus, an adverse party may bring to the attention of the jury that an expert did not know or consider information relevant to the issue on which the expert has offered an opinion.” (*People v. Doolin* (2009) 45 Cal.4th. 390, 424, 425.)

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## III. Exploring Complications in Sexual Assault Cases

Criminal and Civil

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## CEC 1103(c) CHARACTER of COMPLAINING WITNESS

<b>Type of case?</b>	→ Sexual misconduct
<b>Type of evidence</b>	→ Opinion, Reputation and specific instances of Complaining Witness's sexual conduct with D; sexual conduct <i>with others ONLY</i> if P opens the door
<b>Limitations?</b>	→ Evidence of manner of dress is inadmissible by either side unless in the interests of justice.

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## CEC § 1106: Sexual harassment, sexual assault, or sexual battery cases

- (a) In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, **is not admissible by the defendant in order to prove consent by the plaintiff** or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.
- (b) Subdivision (a) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator.

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## CHARACTER of Plaintiff in a CIVIL case CEC 1106

- **Type of case?** Civil case involving sexual assault, battery or harassment
- **Type of evidence Admissible:**
  - O, R and SI Of P's sexual conduct with D
  - Credibility evidence
- **Limitations?** conduct with other persons not admissible by D in order to prove consent or absence of injury (except loss of consortium) *conduct with others admissible by D on rebuttal only if P opens the door*

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## Practical Implications of Sexual Assault Character Rules in the Courtroom

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## **CEC § 1103 – Sexual Assault Character (Criminal)**

- “Character evidence” applies to any attempt to prove conformity with a past act, disposition or trait
  - Including past sexual behavior, dress, etc.
- Be mindful of attempts to introduce opinion, reputation or specific instances of the complaining witnesses’ sexual conduct to prove consent (CEC § 1103(c)(1))
- Discuss with the complaining witness beforehand, so they don’t open the door
- Manner of dress is not admissible to prove consent without an IOJ finding and offer of proof (CEC § 1103(c)(2))

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## **CEC § 1103 – Sexual Assault Character (Criminal)**

- Sexual history maybe admissible to prove truthfulness
  - Including misconduct or false accusations
  - (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 597-599; *People v. Tidwell* (2008) 163 Cal.App.4<sup>th</sup> 1447, 1456-1458.)
- General exclusion does not apply to evidence of victim’s sexual conduct with the defendant

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## **CEC § 1106 – Sexual Assault Character (Civil)**

- Legislative intent:
- “[I]t is the existing policy of the State of California to ensure that the causes of action for ... sexual harassment, sexual assault, or sexual battery are given proper meaning. The discovery of sexual aspects of complainants’ lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants [which] is unnecessary and deplorable. Without protection ... , individuals whose intimate lives are unjustifiably and offensively intruded upon might face the risk of enduring further intrusions into details of their personal lives in discovery, and in open quasi-judicial or judicial proceedings.

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## **CEC § 1106 – Sexual Assault Character (Civil)**

- Legislative intent, continued:
- [A] similar state of affairs once confronted victims in criminal prosecutions for rape .... The Legislature has taken measures to curb those abuses in rape proceedings. It is the intent of the Legislature to take similar measures in sexual harassment, sexual assault, or sexual battery cases. [¶] The Legislature concludes that the use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have. Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial.” (Stats. 1985, ch. 1328, § 1, pp. 4654-4655.)

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## CEC § 1106 – Sexual Assault Character (Civil)

- Definition of “sexual conduct”:
- *Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 461-462, relied on CEC §§ 1103 and 782, which govern sexual offenses in criminal prosecutions, as well as *People v. Casas* (1986) 181 Cal.App.3d 889
- Must be a broad construction
- “‘Sexual conduct’ includes all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity.” *Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 462
- Including, but not limited to, racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits

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## CEC § 1108 – Sexual Assault Character (Criminal)

- (a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

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## **CEC § 1108 – Sexual Assault Character (Criminal)**

- Allows an argument for propensity
  - Only applies to the enumerated conduct in CEC § 1108(d)(1)(A)
- Be prepared for a CEC Section 352 analysis
  - “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury”

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## **IV. Supporting and Impeaching the Character of Witnesses at Trial**

Criminal and Civil

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## **CEC § 780**

- Except as otherwise provided, Court or jury may consider:
- any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
  - His demeanor while testifying, and the manner in which he testifies.
  - The character of his testimony.
  - The extent of his capacity to perceive, to recollect or to communicate any matter about which he testifies.
  - The extent of his opportunity to perceive any matter about which he testifies.
  - His character for honesty or veracity or their opposites.

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## **CEC § 780 (continued)**

- The existence or not, of a bias, interest, or other motive.
- A statement previously made by him that is consistent with his testimony at the hearing.
- A statement made by him that is inconsistent with any part of his testimony at the hearing.
- The existence or nonexistence of any fact testified to by him.
- His attitude toward the action in which he testifies or toward giving testimony.
- His admission of untruthfulness.

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## Prior Inconsistent Statements

- **Statement is inconsistent with witness' testimony at the hearing**
- **Was the witness given the opportunity to explain or deny?**
- **OR has the witness not been excused from testifying?**
- **Do the interests of justice require otherwise?**
- **Offer as a prior inconsistent statement.**

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## Prior Consistent Statement Checklist

- (1) If statement is consistent with witness' testimony at the hearing
- (2) And complies with § 791, which requires:
  - a. Offered after the witness was impeached with a PIS,  
And the PCS was made before the inconsistent one
  - Or
  - b. Impeaching party has been accused of bias
  - Or recent fabrication
  - Or improper motive
  - And the PCS was made before improper motive arose

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### **Attacking and Supporting Credibility with Character Evidence**

.....

- **His character for honesty or veracity or their opposites.**

....

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### **CEC § 786 Character Evidence generally**

Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness.

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**CEC § 790**  
**Good Character of Witness**

Evidence of the good character of a witness is inadmissible to support his credibility unless evidence of his bad character has been admitted for the purpose of attacking his credibility.

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**Prior Bad Acts --CEC § 787**  
**Specific Instances of Conduct**

Subject to Section 788 [for criminal convictions], evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of the witness.

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## Cal. Const. Art. I § 28 The Truth-in-Evidence provision

Relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offence, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relation to privilege or hearsay, or Evidence Code, Section 352, 782 and 1103.

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## Prop. 8 has an Impact!

In California criminal cases, **the limitations of Code Sections 786**(character of witnesses generally), 787 (specific instances), and 790 **do not apply.**

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## Impeachment in Criminal Cases

- Prior misdemeanor conduct but not any convictions (*People v. Wheeler* (1992) 4 Cal.4<sup>th</sup> 284)
- Felony convictions related to moral turpitude
  - Moral turpitude is conduct that indicates dishonesty, bad character, a general readiness to do evil, or moral depravity of any kind. (*People v. Castro* (1985) 38 Cal.3d 301, 306.) “ ‘Moral turpitude does not depend on honesty being an element of the felony.’ ” (*People v. Bedolla* (2018) 28 Cal.App.5th 535, 552.)
- “‘No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity.’” (*People v. Gray* (2007) 158 Cal.App.4th 635, 641)
- Another example is where a defendant or witness makes statements attempting to elicit sympathy or bolster their credibility. These statements may open the door to prior convictions and their underlying conduct even where such conviction or conduct may not be a crime of moral turpitude.

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## Impeachment in Criminal Cases

- As a result of Prop 8, may delve into the underlying facts of the felony conviction (*People v. Dalton* (2019) 7 Cal.5th 166)
- The Supreme Court in *Dalton* states: “Thus, section 28(f)(2) abrogates Evidence Code section 787’s prohibition on admission of specific instances of misconduct that are ‘relevant only as tending to prove a trait of [a witness’s] character.’ (Evid. Code, § 787.) *Evidence of circumstances underlying a conviction is admissible to impeach credibility if the proponent demonstrates that the evidence has ‘any tendency in reason’ to disprove credibility.*” (Evid. Code §§ 210, 780.)”

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## Impeachment in Civil Cases

- Witness may be impeached by evidence of a prior conviction relevant to the issue of a bias, without regard to the nature of the underlying crime as it relates to the character traits of honesty and truthfulness. (*Piscitelli v. Salesian Society* (2008) 166 Cal.App.4<sup>th</sup> 1; CEC §§ 780, 786-788)
- Subject to CEC § 352 exclusion not because it was damaging to a party's case, but "evoking an emotional response that has very little to do with the issue on which the evidence is offered." (*Rufo v. Simpson* (2001) 86 Cal.App.4<sup>th</sup> 573, 597)
  - E.g., remoteness
- Request a limiting instruction to prevent against misuse
- If evidence is admissible for any purpose it must be received, even if it is highly improper for another purpose. (*Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 544)

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## Practical Illustrations of the Character of Witnesses Rules in the Courtroom

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## **CEC § 780**

- Example: Witness testifies falsely about certain facts to portray themselves in a more favorable light, but there is contradicting evidence.
- Section 780(i) allows for specific acts of the person, contrary to the testimony, to be introduced on the issue of credibility, not character.
- “The existence or nonexistence of any fact testified to by the witness.”
- Subject to CEC 352

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## **V. Foundation**

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## Laying Adequate Foundation

- MIALO(P)
  - Mark
  - Identify
  - Authenticate
  - Lay Foundation (including relevance, personal knowledge, hearsay exceptions, expert opinion, etc.)
  - Offer into Evidence
  - P is optional- publish to the jury if applicable

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## Laying Adequate Foundation

- Identify what evidence you are seeking to admit
  - E.g., a “writing”, witness’s knowledge of issue
- Make sure you have the right person and/or people you need
- Documents vs. photos
  - The showing required for authentication “ ‘may be made by the testimony of anyone who knows that the picture correctly depicts what it purports to represent.’ ” (*People v. Chism* (2014) 58 Cal.4th 1266, 1303.)
- A writing must be relevant and authenticated before it may be received into evidence. (CEC § 1401(a))
  - To authenticate a writing, the proponent must establish the writing is what “the proponent of the evidence claims it is.” (CEC § 1400(a))

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## VI. Conclusion

Q & A

Re-cap & Takeaways

Wrap Up

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