

FULL COURT PRESS

CALIFORNIA GUIDE TO CRIMINAL EVIDENCE

JUDGE ELIA V. PIROZZI (RET.)

2023

California Guide to Criminal Evidence

Judge Elia V. Pirozzi (Ret.)



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*This book is dedicated to the memory of my parents,
Anthony and Felicia Pirozzi—the two finest and best
people I have ever known—and my wife, Diane, who has
sacrificed many weekends, evenings, and vacations so
that I could write this book.*

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2023 Edition Highlights

What's New in This Edition

New legislation. All the chapters and the Evidence Code with legislation from the 2022 legislative session have been updated.

New cases. All the chapters with case law have been updated through February 1, 2023.

Expanded & added content. Content has been added or expanded in several discussions, including:

- Chapters 1 and 6: A discussion of newly enacted Evid. C. §352.2 requiring a court in a criminal proceeding to consider certain factors when balancing the probative value of evidence in the form of “creative expression” against the substantial danger of undue prejudice.
- Chapter 2: Foundation. A section on “Hashing and blockchain technology” providing concepts and potential methods for the authentication of cryptocurrencies.
- Chapter 2: Foundation. Substantive content on expert basis evidence under *People v. Sanchez*, with particular emphasis on the admissibility of expert evaluations to establish probable cause in Sexually Violent Predator proceedings and related analysis of the California Supreme Court decision in *Walker v. Superior Ct.* (2021) 12 Cal.5th 177.
- Chapter 2: Foundation. Numerous supplementary examples of matters that can be judicially noticed under Evid. C. §§451, 452.
- Chapter 3-A: Hearsay. A section on the use of hearsay evidence in gun violence restraining order hearings.
- Chapter 3-B: Exceptions to Hearsay Rule. Comprehensive discussion of the former testimony exception to the hearsay rule, including analyses of recent California Supreme Court decisions in *Berroteran v. Superior Ct.* (2022) 12 Cal.5th 867, *People v. Thomas* (2023) 14 Cal.5th 327, and *People v. Ng* (2022) 13 Cal.5th 448.
- Chapter 4-A: Character and Related Evidence. Newly added case studies on the use of specific acts or offenses for non-propensity purposes under Evid. C. §1101(b).
- Chapter 4-C: Privileges. Discussion of the right against compelled testimony under the principles of equal protection in Lanterman-Petris-Short Act proceedings and the California Supreme Court decision in *Conseruatorship of E.B.* (2022) 12 Cal.5th 1085.
- Chapter 4-C: Privileges. Expanded coverage of the work-product privilege, application of the waiver doctrine in *Batson-Wheeler* motion hearings, and recent case authority affecting the dangerous patient exception to the psychotherapist-patient privilege.
- Chapter 5: Exclusion of Evidence on Constitutional Grounds. Content on the new requirements for custodial interrogations of minors under Welfare & Inst. C. §§625.6 and 625.7. Significant new case law on the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution is also highlighted and featured in the text.

New tables of cases & statutes. We have added tables that list each case and statute cited in the book and where they can be found. These tables provide a quick and easy way to find our discussion of a particular case or statute.

Introduction

About This Book

Although the importance of a thorough working knowledge of the rules of evidence to a criminal law practitioner cannot be overstated, this is not always enough. Because of the fluid nature of a criminal proceeding, familiarity with the California Evidence Code will be inadequate unless counsel is equipped with a resource to enable him or her to quickly and efficiently address the myriad of evidentiary issues that may surface during a criminal trial or hearing. The California Guide to Criminal Evidence was written to provide such a resource for the criminal practitioner.

The *California Guide to Criminal Evidence* is organized in three distinct parts.

Part 1 is a comprehensive discussion and analysis of the Evidence Code, the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution, and all relevant case and statutory law. The discussion is organized to give the practitioner a practical and systematic approach to assessing the admissibility of evidence in a criminal trial or hearing. This approach requires the practitioner to address the following questions whenever the admissibility of evidence is in issue:

- **Chapter 1: Relevance.** Is the evidence relevant?
- **Chapter 2: Foundation.** Can the necessary foundation be established for the evidence?
- **Chapter 3: Hearsay.** Does the evidence constitute hearsay and, if so, does it fall within a recognized exception to the hearsay rule?
- **Chapter 4: Statutory Limits on Particular Evidence.** Is the evidence subject to exclusion or limitation under evidentiary rules related to character evidence, impeachment, or privilege?
- **Chapter 5: Exclusion of Evidence on Constitutional Grounds.** Is the evidence subject to exclusion under the Fourth, Fifth, or Sixth Amendment to the U.S. Constitution?
- **Chapter 6: Discretionary Exclusion Under Evid. C. §352.** Can the evidence survive exclusion under Evidence Code §352?
- **Chapter 7: Preliminary Fact Determinations.** Does the admissibility of a particular item of evidence depend on the existence or nonexistence of some other fact?
- **Chapter 8: Burdens & Presumptions.** Are there any burdens of proof or presumptions applicable to a fact or issue in the case?

Part 2 provides an assortment of charts and tables to assist the practitioner in addressing the evidentiary issues discussed in Part 1 quickly and effectively in the courtroom. These charts and tables cover topics such as objections, hearsay exceptions, character evidence, privileges, and numerous issues under the U.S. Constitution.

Part 3 contains a complete copy of the California Evidence Code with comments from the Law Revision Commission. Where applicable, each section of the Evidence Code also includes cross-references to where the section is discussed in more detail in Part 1.

Currency

This book provides citations to important opinions that interpret the California Evidence Code, the Penal Code, and the U.S. Constitution through February 1, 2023. All websites listed in the book were last visited in December of 2021.

Conventions

In writing this book, I have tried to produce a plain-English reference guide that is easy for attorneys and judges to use. To this end, I should point out a few things about the book. First, the Evidence Code is in double columns so it can be instantly distinguished from the commentaries. Second, we supply page headers for quick reference. Third, when other sections of this book are relevant, we cross-reference them. Fourth, I include practice tips and caution notes that are separate from the main text so they can be easily spotted. Fifth, we updated the Evidence Code to incorporate amendments from 2022 legislation.

In citing California cases, statutes, and rules, I follow the *California Style Manual* (4th ed. 2000) as closely as possible, but I vary from it occasionally to make reading easier. For example, I have added district numbering for court-of-appeal cases and omitted “supra” designations in short citations. I have also abbreviated code and rule titles. When you cite cases, rules, and statutes in a motion or brief, I suggest you use the more traditional citation forms contained in the *California Style Manual*.

Disclaimer

This book should be used only as a research guide, not for legal advice.

About the Author

Elia V. Pirozzi began his legal career serving in private practice, specializing in real estate law and litigation representing real estate brokers and agents, mortgage lending institutions, land developers, and property owners. Shortly after working as an associate in a Southern California law firm, he began a private practice, extending his specialization and expertise to include business law and the representation of business and corporate entities. He received his Juris Doctorate from Southwestern University School of Law, where he was the recipient of academic achievement awards in Advanced Corporate Law and International Business Transactions, and an LL.M. from the University of San Diego School of Law, *cum laude*, in Environmental Law and International and Comparative Law. While studying for his LL.M., he received the CALI Excellence for the Future Award for achievement in International Business Transaction studies. He was appointed to the San Bernardino County Superior Court in 2007, where he presided over numerous criminal and civil trials and served as Assistant Presiding Judge of the Appellate Division of the court. Judge Pirozzi retired from the bench in 2021 and has served as a private judge as an arbitrator, mediator, and discovery referee primarily for complex litigation matters and in 2022 was appointed by the Chief Justice of the California Supreme Court to serve as an assigned judge for select California criminal and civil trial courts. He is a respected author of a broad variety of law review articles, publications, and articles for legal journals and has designed and developed numerous materials, bench tools, and legal resources for use by judicial officers throughout California. He has also served as faculty for the Appellate Judicial Attorneys Institute on criminal law topics and as a publication consultant and faculty for the Center for Judicial Education and Research in the subject areas of criminal and civil law and evidence and for which he designed and developed program materials, bench tools, and resources for use by judicial officers throughout California.

The *California Guide to Criminal Evidence* provides a systematic approach to efficiently address evidentiary and constitutional issues as they arise throughout a criminal proceeding. Now in its Seventh Edition, this guide includes discussion and analysis related to each step of a criminal case, with updates on authentication of hashing and blockchain technology, expert basis evidence after *People v. Sanchez*, application and case studies of recent federal and California case law and statutory authority, and more. This comprehensive treatise is a must-own desk reference for California criminal law attorneys and judicial officers considering evidentiary or constitutional questions in 2023.

Elia V. Pirozzi received his Juris Doctorate from Southwestern University School of Law, where he was the recipient of academic achievement awards in Advanced Corporate Law and International Business Transactions, and an LL.M. from the University of San Diego School of Law, *cum laude*, in Environmental Law and International and Comparative Law. He was appointed to the San Bernardino County Superior Court in 2007, where he presided over numerous criminal and civil trials and served as Assistant Presiding Judge of the Appellate Division of the court. Judge Pirozzi retired from the bench in 2021 and has served as a private judge as an arbitrator, mediator, and discovery referee primarily for complex litigation matters and in 2022 was appointed by the Chief Justice of the California Supreme Court to serve as an assigned judge for select California criminal and civil trial courts. He is a respected author of a broad variety of law review articles, publications, and articles for legal journals and has designed and developed numerous materials, bench tools, and legal resources for use by judicial officers throughout California.

