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California Evidence Courtroom Manual

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Publication Information

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CALIFORNIA EVIDENCE 2009 Courtroom Manual

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**Covering legislative enactments through the end of the
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California Supreme Court cases through December 2008;
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1 California Evidence Courtroom Manual About the Authors

About the Authors

Eileen A. Scallen was a professor of law at the University of California, Hastings College of the Law from 1989 to 2000. She also served as associate academic dean at Hastings from 1996 to 1998. In the fall of 2000, she joined the faculty of William Mitchell College of Law, in her home state of Minnesota. She remains smitten, however, with the California Evidence Code. She has served as the chair of the Evidence Section of the American Association of Law Schools and has taught and published widely in the areas of evidence, civil procedure, and legal argumentation.

Glen Weissenberger is dean at DePaul University College of Law, beginning his tenure in July 2002. He is a recognized legal authority on evidence, civil commitment, and the insanity defense. As an author, he has penned numerous works including *Weissenberger's Federal Evidence*, which is frequently cited in law review articles and texts on evidence law. He served as an editorial consultant with Anderson Publishing Co., a Cincinnati-based legal publisher, from 1981 to 2002, and currently serves in the same capacity for LexisNexis Law School Publications. He has been the catalyst behind the development of more than 200 titles that are utilized extensively in legal education. Dean Weissenberger was the Judge Joseph P. Kinneary Professor of Law at the University of Cincinnati, where he began his career in 1975, and during his tenure he served as a special counsel to the university president and as director of the university's Center for Studies in Professional Skills. He is the recipient of numerous awards, including the Ohio State Bar Foundation Outstanding Research Award, the University of Cincinnati Faculty Achievement Award, and the University of Cincinnati Jerome P. Goldman Prize for Teaching Excellence.



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1 California Evidence Courtroom Manual Dedication

Dedication

Dedication

For Mar, who brings out the best in me. *E.A.S.*



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1 California Evidence Courtroom Manual Using This Book

Using This Book

This book has been designed specifically for courtroom use; its purpose is to provide fast, authoritative answers to the evidentiary questions that arise in the course of trials and hearings. It accomplishes this through a unique combination of features, which are discussed below.

Locating a Topic

Index--Located inside the front cover, the Quick-Reference Index refers the user directly to the section of the California Evidence Code covering each topic. When you are uncertain which section covers an issue, this is the place to begin.

Code Sections--The California Evidence Code is included in its entirety in a section at the front of the book, preceded by a complete Table of Contents. Following the Evidence Code is a comprehensive chart for quick comparison of the California Evidence Code and the Federal Rules of Evidence. The Federal Rules of Evidence can also be found in the front of the book.

Section Locator--If you know the Section or Division in which your topic is covered and need to review the authors' Analysis, cases, related statutes, or any of the book's other features, the Section Locator on the back cover directs you to the section of the book where this information is found.

Finding an Answer

Practice Tips--These provide brief, helpful techniques for analyzing the most common and troublesome evidentiary issues. *See also* the Quick-Reference Guide to Practice Tips for the location of tips throughout this manual.

Code Sections--If your question can be answered simply by reading the applicable code sections, you can find the language of the section either in the text of the Evidence Code reprinted in the front of the book, or at the beginning of the chapter in which the section is discussed. The Section Locator on the back cover will guide you to either location.

Analysis--Perhaps the most important part of this book, the authors' Analysis provides a quick overview of the section

under discussion, authoritative guidance in interpreting the section, and pointers for applying the section in actual practice. In many chapters the Analysis contains special features such as Illustrations, Practice Tips, Constitutional Considerations, and Current Trends.

Additional Authority--Following the Analysis, additional federal and California authorities are often cited. These give the user a starting point for additional research. *Also see* the Table of Sources for other reference works on California evidence law.

Comparison to Federal Rule--The California Evidence Code was one of the models for the Federal Rules of Evidence. A brief comparison of the California and federal rules in each chapter provides additional insight into the differences between the Code and the Rules. For quick comparison of the Code and the Rules, see the comprehensive charts at the front of the book.

Cases--Where available and helpful, significant federal and California cases are summarized at the end of each section. These provide support for argument and decisions required during the course of proceedings.

California Evidence Courtroom Manual is published annually. The comments and suggestions of users are welcome.



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1 California Evidence Courtroom Manual Quick-Reference Guide to Practice Tips

Quick-Reference Guide to Practice Tips

The following list provides quick access to the Practice Tips throughout this manual. These tips provide brief, helpful techniques for analyzing the most common and troublesome evidentiary issues.

Analyzing Relevancy Issues *p. 74*

Making a Section 352 Objection *p. 118*

Burden of Proof *p. 199*

Presumptions and Inferences *p. 219*

Personal Knowledge of a Witness *p. 328*

Confrontation Clause Analysis (*Crawford* and *Davis*) *p. 346*

Court-Appointed Experts *p. 364*

Objections as to Form of Question *p. 400*

Impeachment through Prior Inconsistent Statements *pp. 407, 412*

Using a Document to Refresh a Witness's Recollection Versus Using a Document Under the Hearsay Exception for Past Recollections Recorded *p. 413*

Impeachment--In General *p. 433*

Lay Opinion Testimony *p. 472*

Basis of Opinion *p. 488*

Privileges *p. 540*

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Distinguishing Among Attorney Client Privilege, Work Product Doctrine and the Ethical Obligation to Protect Client Confidences *pp. 598, 601*

Two Types of Marital Privileges *p. 623*

Character Evidence in General *p. 825*

Responding to a Character Evidence Objection *p. 825*

Other Act Evidence (Section 1101(b)) *p. 832*

Evidence Excluded by Extrinsic Policies (Sections 1150 to 1160) *p. 899*

Hearsay *p. 947*

Hearsay Exceptions *p. 975*



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Table of Sources

California Evidence Courtroom Manual is intended to be a usefully annotated version of the California Evidence Code, meant for use as an introduction to the Code, a refresher or a quick-reference source. The manual is updated annually with the most recent significant developments in California evidence law. In addition, the following sources may prove useful in exploring California evidence law in depth. Also, note that the California Evidence Code is easily searchable in computerized databases such as Lexis.com.

Robert Aitken, *California Evidentiary Objections* (1989)

Robert Aitken, *Handling Expert Witnesses in California Courts: Here's How and When to Do It*, Continuing Education of the Bar Action Guide, Spring 1996, No. 8

Moise E. Berger, *Guide to California Evidence* (2d ed. 1992)

Theodore Y. Blumoff et al., *Pretrial Discovery: The Development of Professional Judgment* (1993)

Myron H. Bright et al., *California Objections at Trial* (1992)

Ronald L. Carlson & Edward J. Imwinkelried, *Dynamics of Trial Practice: Problems and Materials* (2d ed. 1995)

Continuing Education of the Bar, *Developing Your Basic Trial Skills: Experts, Opinion Testimony, Demonstrative Evidence, and Admission of Exhibits* (1992)

Continuing Education of the Bar and State Bar Litigation Section--California, *Developing Your Basic Trial Evidence Skills: Relevance, Hearsay, and Direct Examination* (1991)

Continuing Education of the Bar, *Effective Introduction of Evidence in California* (1990)

Continuing Education of the Bar, *Proof in Competitive Business Litigation* (William C. Steffin & Andrew J. Wistrich,

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Joseph W. Cotchett & Fulton Haight, California Courtroom Evidence (1995)

William F. Flahavan et al., California Practice Guide: Personal Injury (1996)

Edwin A. Heafey et al., California Trial Objections (Cherri N. Allison & Anne Harris, eds., 4th ed. 1996)

James E. Hogan, California Civil Discovery (1996)

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Edward J. Imwinkelried, Evidentiary Foundations (3d ed. 1995)

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Edward J. Imwinkelried, Theodore Blumoff & Margaret Z. Johns, Pretrial Discovery: Strategy and Tactics (1993)

Edward J. Imwinkelried & Norman M. Garland, Exculpatory Evidence: The Accused's Constitutional Right to Introduce Favorable Evidence (2d ed. 1996)

Edward J. Imwinkelried & Timothy H. Hallahan, California Evidence Code Annotated (1995)

Edward J. Imwinkelried & Glen Weissenberger, An Evidence Anthology (1996)

Bernard S. Jefferson, California Evidence Benchbook (2d ed. 1982 & Supp. 1990)

Miguel A. Mendez, California Evidence: Highlighting the Major Differences Between the California Evidence Code and the Federal Rules of Evidence (1993)

Miguel A. Mendez, Evidence: The California Code and the Federal Rules: A Problem Approach (1995)

Donald F. Miles & Deborah Kemp, *Laying a Foundation to Introduce Evidence: Here's How and When to Do It*, Continuing Education of the Bar Action Guide, Winter 1996, No. 3

Mark B. Simons, Practical Evidence Manual: California Handbook (3d ed. 1995)

William E. Wegner et al., California Practice Guide (1996)

Robert I. Weil & Judge Ira A. Brown, California Practice Guide: Civil Procedure Before Trial (1996)

Bernard E. Witkin, California Evidence (3d ed. 1986 & Supp. 1996)



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1 California Evidence Courtroom Manual 2009 Quick California Evidence Update

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CALIFORNIA CASE LAW DEVELOPMENTS

Burden of Proof/Section 115

Bookout v. Nielsen (2007) 155 Cal. App. 4th 1131, 67 Cal. Rptr. 3d 2 (as a matter of first impression, protective orders under the Elder Abuse and Dependent Adult Civil Protection Act require proof by a preponderance of the evidence of a past act or acts of elder abuse; allocation of burden of proof requires careful analysis and interpretation of the statutory scheme).

Applicability of Evidence Code/Section 300

In re Miranda (2008) 43 Cal. 4th 541, 76 Cal. Rptr. 3d 172, 182 P.3d 513 (Evidence Code applies at reference hearings, following the issuance of an order to show cause in a criminal hearing).

Exclusion of Polygraph Examination Evidence/Section 351.1

People v. Richardson (2008) 43 Cal. 4th 959, 77 Cal. Rptr. 3d 163, 183 P.3d 1146 (Cal. Evid. Code § 351.1 is constitutional in that it prevents the admission of unreliable evidence at penalty phase; trial court did not violate defendant's rights to present a defense and to due process by refusing to admit results of polygraph examination).

Relevance/Section 352

People v. Riggs (2008) 44 Cal. 4th 248, 79 Cal. Rptr. 3d 648, 187 P.3d 363 (trial court did not abuse its discretion by permitting prosecutor to show jury a video clip from national TV show concerning defendant's crime, when clip was less than one and a half minutes long, when defendant himself used part of the clip in his argument, and defendant told police investigators he agreed with his co-defendant's versions of events).

People v. Richardson (2008) 43 Cal. 4th 959, 77 Cal. Rptr. 3d 163, 183 P.3d 1146 (Cal. Evid. Code § 352 is not a ground for excluding prosecution evidence to avoid a conflict of interest between the defendant and the defendant's attorney).

Winfred D. v. Michelin North America, Inc. (2008) 165 Cal. App. 4th 1011, 81 Cal. Rptr. 3d 756 (in a personal injury action regarding faulty tires, the trial court committed reversible error in allowing evidence of party's extramarital affair; party did not "open the door" to such evidence, nor did it have probative value on any material issue).

Monroy v. City of Los Angeles (2008) 164 Cal. App. 4th 248, 78 Cal. Rptr. 3d 738 (trial court abused its discretion by severely limiting plaintiff's cross-examination of defense experts in a vehicle negligence action; trial court permitted only one expert to testify to the same opinion, including percipient witnesses, regardless of which party elicited the testimony; trial court may not use its powers to control the orderly conduct of the proceedings and to prevent cumulative evidence if it destroys a plaintiff's evidentiary presentation).

Judicial Notice/Section 452

Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization (2008) 160 Cal. App. 4th 514, 72 Cal. Rptr. 3d 857 (although it may be appropriate for the court to take judicial notice of the existence of the Web sites of the American Coal Foundation and the U.S. Department of Energy, the court may not take judicial notice of the factual content of the Web site).

Allocation of Burden of Proof/Section 500

Williams v. Russ (2008) 167 Cal. App. 4th 1215, 84 Cal. Rptr. 3d 813 (party moving for discovery sanctions based on the spoliation of evidence must make an initial prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense; if the moving party makes that prima facie showing, the burden of proof shifts to the non-moving party because that party's wrong-doing makes it practically impossible for the moving party to prove its case).

Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157, 78 Cal. Rptr. 3d 572 (court properly shifted the burden of proof to employers when inadequate records prevented employees from proving their claims for unpaid overtime hours and unpaid meal and rest breaks).

Lay and Expert Opinion/Sections 702, 800, 801

People v. Lindberg (2008) 45 Cal. 4th 1, 82 Cal. Rptr. 3d 323, 190 P.3d 664 (although expert testimony is generally inadmissible on topics "so common" that jurors of ordinary knowledge and education could reach a conclusion as intelligently as the expert, an expert may testify on a subject about which jurors are not completely ignorant; thus, trial court did not abuse its discretion in admitting expert testimony regarding white supremacist beliefs and tenets from which they could determine, based on the material seized from defendant's bedroom, that defendant subscribed to white supremacist beliefs and tenets; this evidence could assist the jury in determining defendant's motive for killing the

victim, specifically, whether the prosecution proved the hate-murder special circumstance).

Garibay v. Hemmat (2008) 161 Cal. App. 4th 735, 74 Cal. Rptr. 3d 715 (trial court erred in granting summary judgment in medical malpractice case when defendant's expert witness filed a declaration stating that he had no personal knowledge of the breach of standard of care, but based his opinion on his review of medical records which were not filed as part of the motion; Court of Appeal reversed, holding that the expert's opinion was insufficient standing alone; defendant should have attached the medical records, which would have been admissible under the business records exception to the hearsay rule).

Redevelopment Agency of San Diego v. Mesdaq (2007) 154 Cal. App. 4th 1111, 65 Cal. Rptr. 3d 372 (trial court abused its discretion in admitting expert testimony in eminent domain action; "goodwill" had to be determined by a method that looked to the revenue of the actual business operation, not a hypothetical best use of the property).

Mardirossian & Associates, Inc. v. Ersoff (2007) 153 Cal. App. 4th 257, 62 Cal. Rptr. 3d 665 (in an action to recover attorneys fees, trial court did not err in admitting testimony of attorneys regarding hours spent on a contingency fee case even though the attorneys did not keep contemporaneous time records and they could not recall an exact number of hours spent on the matter; attorneys' testimony was based on their personal knowledge and was not speculative; also, trial court did not err in admitting expert testimony regarding the reasonableness of the fees and the amount of skill and learning necessary to produce the work expended on the case).

Confrontation Clause/Sections 711, 1204

People v. Lewis (2008) 43 Cal. 4th 415, 75 Cal. Rptr. 3d 588, 181 P.3d 947 (if co-defendants statements can be redacted so that they satisfy *Bruton's* requirement that the statements must not directly or indirectly implicate defendant such that the jury could not reasonably ignore them, then they are not admitted "against" the defendant for *Crawford* purposes).

People v. Jefferson (2008) 158 Cal. App. 4th 830, 70 Cal. Rptr. 3d 451 (suspects incarcerated in bugged cell did not make "testimonial" statements to each other within the meaning of *Crawford*; suspects made no "formal statement to government officers" because they never intended to speak to anyone connected with the government).

People v. Ramirez (2007) 153 Cal. App. 4th 1422, 64 Cal. Rptr. 3d 96 (testimony of state's gang expert that two members of defendant's gang had prior convictions for murder and attempted murder, and that their crimes were committed for the benefit of the gang, did not violate Confrontation Clause even though it was based on hearsay statements of other gang members; hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned).

People v. Saracoglu (2007) 152 Cal. App. 4th 1584, 62 Cal. Rptr. 3d 418 (complainant demonstrated sufficient distress to qualify the statements as "excited utterances," an exception to the hearsay rule, even though statements were made over 30 minutes after the incident; disagreeing with both the defendant and the attorney general's office, Court of Appeal held that even though over 30 minutes had passed since the alleged assault, complainant's statements regarding domestic abuse made to police at the station house were nontestimonial because, objectively viewed, the primary purpose of complainant's initial interrogation by police was to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial).

Court-Appointed Experts/Section 730

Verdin v. Superior Court (2008) 43 Cal. 4th 1096, 77 Cal. Rptr. 3d 287, 183 P.3d 1250 (when defendant intended to

rely on "diminished actuality" defense, trial court's order granting the prosecution access to petitioner for purposes of a mental examination by prosecution's expert was not authorized by Cal. Evid. Code § 730, when prosecution did not request the trial court to appoint an expert to conduct a mental examination under Cal. Evid. Code § 730, nor did the trial court actually issue an order appointing an expert under that section).

Impeachment by Prior Felony Conviction/Sections 780, 788

Piscitelli v. The Salesian Society (2008) 166 Cal. App. 4th 1, 82 Cal. Rptr. 3d 139 (ordinarily, a witness's felony conviction that is remote in time might have little or no bearing on the truthfulness of a witness who has since lived a commendable life, thereby moving the needle closer toward exclusion of the evidence under Cal. Evid. Code § 352, but this is not the case when the witness's prior conviction is being used to show the witness's bias in favor of a similar defendant and against a plaintiff--when the intervening years may have done nothing to reduce the witness's potential bias; if it is relevant to the issue of bias, a witness may be impeached by evidence of a prior conviction even if the underlying crime does not directly relate to the character traits of honesty and truthfulness).

Impeachment by Use of Religious Belief/Section 789

People v. Bautista (2008) 163 Cal. App. 4th 762, 77 Cal. Rptr. 3d (trial court did not err in admitting testimony regarding the church's beliefs and defendant's role in the church; evidence did not violate Cal. Evid. Code § 789 because it was not admitted for the purpose of attacking defendant's credibility or that of any witness on the basis of his or her religious beliefs but rather because the religious background provided a context for defendant's actions and the girls' delayed reporting of the incidents; thus, the evidence was relevant to determining whether defendant committed the alleged crimes, not to attack the credibility of a witness).

Waiver of Mediation Privilege/Sections 912, 1119-1124

Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 80 Cal. Rptr. 3d 83, 187 P.3d 934 (evidence of alleged oral settlement agreement in mediation arising from a malpractice-based action was inadmissible on additional breach of contract claim; the Legislature did not intend for implied waiver to apply to mediation; thus, when there was no written evidence of the oral agreement existed, there was no written agreement signed by both parties, and the parties executed no express waivers of mediation confidentiality, evidence of the oral agreement was inadmissible).

Pitchess Motions/Section 1043

Zanone v. City of Whittier (2008) 162 Cal. App. 4th 174, 75 Cal. Rptr. 3d 439 (*Pitchess* motion is only required for the types of records specified in Cal. Penal Code § 832.8; thus, plaintiff police officer could impeach police chief's testimony with a memorandum that reported the details and conclusions of an unrelated investigation into claims of racial discrimination which were made by another officer and contained in that other officer's personnel file, even though plaintiff did not obtain the memorandum through the *Pitchess* motion procedure, because that memorandum does not fall within one of the statutory classes of "personnel records").

Character Evidence/Section 1101

Bowen v. Ryan (2008) 163 Cal. App. 4th 916, 78 Cal. Rptr. 3d 128 (trial court committed reversible error in admitting testimony from 13 witnesses to describe defendant's treatment of other problem patients, some of which occurred as many as 11 years earlier and involved different circumstances and different conduct on the part of defendant; such

evidence had slight probative value in proving the allegations in the current case but it was time-consuming and essentially led to a series of mini-trials over each incident, with testimony not only from the patients and/or their parents, but also from defendant and his assistants; the evidence tended to evoke an emotional bias against defendant that clouded the relevant issues in the case).

Offers to Compromise/Section 1152

Zhou v. Unisource Worldwide (2007) 157 Cal. App. 4th 1471, 69 Cal. Rptr. 3d 273 (Cal. Evid. Code § 1152, excluding offers to compromise in settlement discussions, only applies in the litigation in which the settlement discussions took place; thus, the trial court committed harmless error in excluding correspondence between plaintiff and the insurance company involved in a separate, later accident that was not the focus of the litigation at hand).

Hearsay Exceptions/Sections 1200, 1271, 1300, 1370

Zanone v. City of Whittier (2008) 162 Cal. App. 4th 174, 75 Cal. Rptr. 3d 439 (neither exit interview questionnaires nor summaries of exit interview questionnaires qualify for business records exception to hearsay rule; although the Police Department may have conducted exit interviews and summarized them as part of the ordinary course of business, the interviewees--the departing officers--were neither employees acting on behalf of the department nor employees acting in the ordinary course of their own business when they completed their exit questionnaires, an infrequent event; because the two officers in this case were leaving to join other police departments, their exit questionnaires were not inherently trustworthy because they could have easily believed any complaints they may have made about sex discrimination--or anything less--would be communicated to their new employers and cause them to suffer adverse treatment as a result; because exit interview questionnaires did not qualify for hearsay exception, summaries of those questionnaires were equally deficient).

Principal Life Ins. Co. v. Peterson (2007) 156 Cal. App. 4th 676, 67 Cal. Rptr. 3d 584 (in a life insurer's interpleader action, the appellate court affirmed an award of summary judgment to the administrator of murder victim Laci Peterson's estate, awarding her life insurance policy proceeds to the estate; a felony conviction on appeal is admissible as "a final judgment adjudging a person guilty of a crime" within the meaning of Cal. Evid. Code § 1300 and, in the absence of evidence to the contrary, it was sufficient to establish, by a preponderance of the evidence, that the named insured, Scott Peterson, did feloniously and intentionally murder his wife making him ineligible, under Cal. Prob. Code § 254, to collect the benefits of her life insurance policy).

People v. Quitiquit (2007) 155 Cal. App. 4th 1, 65 Cal. Rptr. 3d 674 (wife's statement to physician that husband twisted her neck, made seven weeks after neck injury, was not made "at or near" time of infliction or threat of injury; Cal. Evid. Code § 1370's language explicitly requires that the statement be made at a time close to the infliction of the injury, which in most circumstances will be within hours or days, rather than weeks or months; wife's similar statement to police officer was not made under circumstances showing trustworthiness as required by Cal. Evid. Code § 1370).

FEDERAL DEVELOPMENTS

Confrontation Clause

Giles v. California, ___ U.S. ___, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (holding that the California Supreme Court's theory of "forfeiture by wrongdoing" is not an exception to Sixth Amendment's confrontation requirement because it was not established at time of founding of Bill of Rights or in American jurisprudence since that time;

although there was a common law rule of forfeiture, the manner in which the common law rule was applied makes plain that uncontroverted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying; because California's rule did not require a showing that defendant intended to prevent a witness from testifying, the case must be reversed and remanded to determine if such intent existed).

New Federal Rule of Evidence 502 Regarding Attorney-Client Privilege, Work Product Protection and Waiver

On September 19, 2008, President Bush signed into law Public Law No. 110-322, which creates a new federal evidence rule, Federal Rule of Evidence 502, limiting attorney-client privilege and work product waivers. It applies in "all proceedings commenced after" its enactment date and, "insofar as is just and practicable, in all proceedings pending" on that date.

Federal Rule of Evidence 502 was created to address the increasing problems connected to discovery of electronically stored information ("ESI"). Rule 502 needs to be read along with the December 2006 amendments to the Federal Rules of Civil Procedure, which also dealt with discovery of ESI. In particular, Fed. R. Civ. P. 26(b)(5), expressly allows parties producing discovery to "claw back" privileged material inadvertently produced. However, judges and litigants were concerned that such agreements may not be enforced because of conflicting approaches to waiver within federal courts, and because Fed. R. Civ. P. 26(b)(5) does not apply to non-parties or to parallel or overlapping state court proceedings. Thus, the Federal Rules of Evidence Advisory Committee began to draft a rule concerning waiver of attorney-client privilege and work product protection that would address these problems.

New Rule 502 has four parts. First, it limits "subject matter" waivers. When there has been an intentional disclosure in a federal proceeding that waives the attorney-client privilege or work product protection, Rule 502(a) provides that the waiver extends to undisclosed privileged or protected communications on the "same subject matter" only if "they ought in fairness to be considered together." This rule applies to both federal and state proceedings.

Second, Rule 502 provides a remedy for some cases of inadvertent production of ESI. When there has been an inadvertent disclosure of privileged or protected materials in a federal proceeding, Rule 502(b) provides that there is no waiver if the privilege-holder took "reasonable steps" both to "prevent disclosure," in the first instance, and "to rectify the error." Rule 502(b)'s inadvertent disclosure rule applies in both federal and state proceedings.

Third, when a disclosure is made in a state proceeding and is not subject to a state-court waiver order, Rule 502(c) provides that there is no waiver in a federal proceeding if either (a) there would be no waiver under Rule 502 if the disclosure had been made in a federal proceeding, or (b) there is no waiver under the state law where the disclosure occurred. This provides that the federal or state rule that is most protective against waiver applies.

Finally, Rule 502(d) provides that federal court non-waiver orders relating to federal proceedings bind other federal and state courts, and Rule 502(e) provides that a non-waiver agreement between parties to a federal proceeding binds only the parties unless the agreement is incorporated into a protective order signed by the court.

Although Rule 502 clarified a fair amount of existing law, there are still problems of interpretation that will generate litigation; for example, federal courts will still have to decide whether undisclosed material constitutes the "same subject matter" as intentionally disclosed material and whether "fairness" requires waiver. Moreover, courts will have to determine, on a case-by-case basis, whether "reasonable steps" were taken before and after the production to avoid inadvertent waiver.

Although an early draft did contain provisions addressing the issue of "selective waiver," Rule 502 as enacted does not address this problem, which arises when a party has decided, for strategic reasons, to disclose privileged or protected information to government investigators. If a third party attempts to acquire the same information, parties have claimed

that there was only a "selective waiver" as to the government. In general, federal courts have not been sympathetic to the "selective waiver" concept. So it was not surprising that, following substantial public comment on this issue, the rule drafters eliminated the selective waiver provisions of the draft rule.



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What's New

1 California Evidence Courtroom Manual Scope

Scope

HIGHLIGHTS

Release 2009 May 2009

2009 Annual Edition, Updated for Recent Legislation, Regulations, Rules of Court, and Judicial Decisions

The 2008 edition has been updated for 2007 California legislation and judicial decisions. For a more detailed summary of the most important changes incorporated into this edition, see below.

The 2009 edition of California Evidence Courtroom Manual has been updated for the following:

- Legislative enactments through the end of the 2008 Portion of the 2007-2008 Regular Session of the California Legislature, and 1st, 2nd, and 3rd Ex. Sessions;
- California Supreme Court cases through December 2008; and
- California Court of Appeal cases through June 2008.

Lay and Expert Testimony

- Limits on a trial court's discretion to control order of proceeding and presentation of evidence [*Monroy v. City of Los Angeles* (2008) 164 Cal. App. 4th 248, 78 Cal. Rptr. 3d 738].
- Acceptable testimony in an action to recover attorneys' fees [*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal. App. 4th 257, 62 Cal. Rptr. 3d 665].

Waiver of Mediation Privilege

- Admissibility of alleged oral settlement agreement in mediation arising from a malpractice-based action on additional breach of contract claim [*Simmons v. Ghaderi* (2008) 44 Cal. 4th 570, 80 Cal. Rptr. 3d 83, 187 P.3d 934].

***Pitchess* Motions**

- Applicability of *Pitchess* procedure to records and documents contained in police officer's personnel file but not within one of the statutory classes of "personnel records" [*Zanone v. City of Whittier* (2008) 162 Cal. App. 4th 174, 75 Cal. Rptr. 3d 439].

Burden of Proof Under the Elder Abuse and Dependent Adult Civil Protection Act

- *Bookout v. Nielsen* (2007) 155 Cal. App. 4th 1131, 67 Cal. Rptr. 3d 2 (as a matter of first impression, protective orders under the Elder Abuse and Dependent Adult Civil Protection Act require proof by a preponderance of the evidence of a past act or acts of elder abuse; allocation of burden of proof requires careful analysis and interpretation of statutory scheme).

Significant Federal Developments

- The U.S. Supreme Court's analysis of the "forfeiture" doctrine, reversing the California Supreme Court's decision, in *Giles v. California*, ___ U.S. ___, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).
- New Federal Rule of Evidence 502, regarding attorney-client privilege, work product protection, and inadvertent waiver.

Helpful "Practice Tips," with complete explanations and checklists, to help the reader analyze and argue some of the most difficult evidentiary issues: relevance, hearsay, character evidence, and others.

Ample illustrations, examples, and solutions for common evidentiary problems.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 1 Title

1-1 California Evidence Courtroom Manual 1.syn

§ 1.syn Synopsis to Chapter 1: Title

Scope Title

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 1 Title

1-1 California Evidence Courtroom Manual Scope

Scope Title

§ 1 reads as follows:

Rule 1 Title

This code shall be known as the Evidence Code.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 1 Title

1-1 California Evidence Courtroom Manual 1

1 ANALYSIS

In this book, all references are to the Evidence Code unless otherwise indicated.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 1 Title

1-1 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 1 is the California equivalent to Federal Rule of *Evidence 1103*.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 2 Construction of Evidence Code

1-2 California Evidence Courtroom Manual 2.syn

§ 2.syn Synopsis to Chapter 2: Construction of Evidence Code

Scope Construction of Evidence Code

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 2 Construction of Evidence Code

1-2 California Evidence Courtroom Manual Scope

Scope Construction of Evidence Code

§ 2 reads as follows:

Rule 2 Construction of Evidence Code

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. This code establishes the law of this state respecting the subject to which it relates, and its provisions are to be liberally construed with a view to effecting its objects and promoting justice.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 2 Construction of Evidence Code

1-2 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 2 sets out the broad contours for interpreting the Evidence Code against a backdrop of decades of case law. *Section 4 of the Code of Civil Procedure* contains a similar provision.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 2 Construction of Evidence Code

1-2 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 2 is substantially similar to Federal Rule of Evidence 102, which establishes a similar liberal philosophy toward construction. Despite the language of Federal Rule of Evidence 102, the United States Supreme Court has recently taken a much more restrictive, albeit inconsistent, approach to interpreting the federal rules. *See* Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 Am. U. L. Rev. 1717 (1995); Eileen A. Scallen & Andrew E. Taslitz, *Reading the Federal Rules of Evidence Realistically: A Response to Professor Imwinkelried*, 75 Or. L. Rev. 429 (1996); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 Ohio St. L.J. 1307 (1992); Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 Ohio St. L.J. 393 (1994).



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 2 Construction of Evidence Code

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3 ADDITIONAL AUTHORITY

John R. McDonough, *California Evidence Code: A Precis*, 18 *Hastings L.J.* 89 (1966).

Note, *Due Process and the California Evidence Code*, 53 *Cal. L. Rev.* 1467 (1965).



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION
SECTION 3 Severability

1-3 California Evidence Courtroom Manual 3.syn

§ 3.syn Synopsis to Chapter 3: Severability

Scope Severability

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 3 Severability

1-3 California Evidence Courtroom Manual Scope

Scope Severability

§ 3 reads as follows:

Rule 3 Severability

If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 3 Severability

1-3 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 3 allows for the repeal of comparable provisions applicable to specific sections formerly compiled in the Code of Civil Procedure (superseded Section 1928.4) that are now compiled in the Evidence Code and makes it unnecessary to include similar provisions in future amendments to the Code.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION
SECTION 3 Severability

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 3.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 4 Application of Preliminary Provisions

1-4 California Evidence Courtroom Manual 4.syn

§ 4.syn Synopsis to Chapter 4: Application of Preliminary Provisions

Scope Application of Preliminary Provisions

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 4 Application of Preliminary Provisions

1-4 California Evidence Courtroom Manual Scope

Scope Application of Preliminary Provisions

§ 4 reads as follows:

Rule 4 Application of Preliminary Provisions

Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this code.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 4 Application of Preliminary Provisions

1-4 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 4 elaborates on the basic interpretative philosophy of Section 2, explicitly directing courts not to apply the language of the Code blindly, but to consider the particular context in which the section is being applied.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 4 Application of Preliminary Provisions

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 4 in the federal rules.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 5 Construction of Headings

1-5 California Evidence Courtroom Manual 5.syn

§ 5.syn Synopsis to Chapter 5: Construction of Headings

Scope Construction of Headings

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 5 Construction of Headings

1-5 California Evidence Courtroom Manual Scope

Scope Construction of Headings

§ 5 reads as follows:

Rule 5 Construction of Headings

Division, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 5 Construction of Headings

1-5 California Evidence Courtroom Manual 1

1 ANALYSIS

The Evidence Code has a very elaborate structure, ranging from the broad "divisions," relating to general topics such as privilege, witnesses, hearsay, to "chapters" and "articles" that deal with more specific issues within the general division. A "section," the final discrete unit of organization, is comparable to a "rule" of evidence.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 5 Construction of Headings

1-5 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

The federal rules are organized in a less elaborate structure--eleven "articles" each comprised of rules around a central theme--relevance, hearsay, witnesses, etc.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 6 References to Statutes

1-6 California Evidence Courtroom Manual 6.syn

§ 6.syn Synopsis to Chapter 6: References to Statutes

Scope References to Statutes

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 6 References to Statutes

1-6 California Evidence Courtroom Manual Scope

Scope References to Statutes

§ 6 reads as follows:

Rule 6 References to Statutes

Whenever any reference is made to any portion of this code or of any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 6 References to Statutes

1-6 California Evidence Courtroom Manual 1

1 ANALYSIS

The Evidence Code and related codes, such as the Code of Civil Procedure, are constantly being revised by the California Legislature. Section 6 recognizes this and provides a directive to courts to apply the most recent version of any part of the Evidence Code or other statute referred to within a particular section.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 6 References to Statutes

1-6 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 6.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 7 Definitions

1-7 California Evidence Courtroom Manual 7.syn

§ 7.syn Synopsis to Chapter 7: Definitions

Scope Definitions

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 7 Definitions

1-7 California Evidence Courtroom Manual Scope

Scope Definitions

§ 7 reads as follows:

Rule 7 Definitions

Unless otherwise expressly stated:

- (a) "Division" means a division of this code.
- (b) "Chapter" means a chapter of the division in which that term occurs.
- (c) "Article" means an article of the chapter in which that term occurs.
- (d) "Section" means a section of this code.
- (e) "Subdivision" means a subdivision of the section in which that term occurs.
- (f) "Paragraph" means a paragraph of the subdivision in which that term occurs.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 7 Definitions

1-7 California Evidence Courtroom Manual 1

1 ANALYSIS

See discussion under Section 5.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 7 Definitions

1-7 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

See discussion under Section 5.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 8 Construction of Tenses

1-8 California Evidence Courtroom Manual 8.syn

§ 8.syn Synopsis to Chapter 8: Construction of Tenses

Scope Construction of Tenses

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 8 Construction of Tenses

1-8 California Evidence Courtroom Manual Scope

Scope Construction of Tenses

§ 8 reads as follows:

Rule 8 Construction of Tenses

The present tense includes the past and future tenses; and the future, the present.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 8 Construction of Tenses

1-8 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 8 elaborates on the rules of construction applicable to the Evidence Code.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 8 Construction of Tenses

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 8 in the federal rules.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 9 Construction of Gender References

1-9 California Evidence Courtroom Manual 9.syn

§ 9.syn Synopsis to Chapter 9: Construction of Gender References

Scope Construction of Gender References

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 9 Construction of Gender References

1-9 California Evidence Courtroom Manual Scope

Scope Construction of Gender References

§ 9 reads as follows:

Rule 9 Construction of Gender References

The masculine gender includes the feminine and neuter.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 9 Construction of Gender References

1-9 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 9 elaborates on the rules of construction applicable to the Evidence Code.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 9 Construction of Gender References

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 9 in the federal rules.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 10 Construction of Singular and Plural

1-10 California Evidence Courtroom Manual 10.syn

§ 10.syn Synopsis to Chapter 10: Construction of Singular and Plural

Scope Construction of Singular and Plural

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION
SECTION 10 Construction of Singular and Plural

1-10 California Evidence Courtroom Manual Scope

Scope Construction of Singular and Plural

§ 10 reads as follows:

Rule 10 Construction of Singular and Plural

The singular number includes the plural; and the plural, the singular.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 10 Construction of Singular and Plural

1-10 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 10 elaborates on the rules of construction applicable to the Evidence Code.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 10 Construction of Singular and Plural

1-10 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 10 in the federal rules.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 11 "Shall" and "May"

1-11 California Evidence Courtroom Manual 11.syn

§ 11.syn Synopsis to Chapter 11: "Shall" and "May"

Scope "Shall" and "May"

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 11 "Shall" and "May"

1-11 California Evidence Courtroom Manual Scope

Scope "Shall" and "May"

§ 11 reads as follows:

Rule 11 "Shall" and "May"

"Shall" is mandatory and "may" is permissive.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 11 "Shall" and "May"

1-11 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 11 elaborates on the rules of construction applicable to the Evidence Code.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION
SECTION 11 "Shall" and "May"

1-11 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 11 in the federal rules.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 12 Effective Date of Code

1-12 California Evidence Courtroom Manual 12.syn

§ 12.syn Synopsis to Chapter 12: Effective Date of Code

Scope Effective Date of Code

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 12 Effective Date of Code

1-12 California Evidence Courtroom Manual Scope

Scope Effective Date of Code

§ 12 reads as follows:

Rule 12 Effective Date of Code

(a) This code shall become effective on January 1, 1967, and shall govern proceedings in actions brought on or after that date and, except as provided in subdivision (b), further proceedings in actions pending on that date.

(b) Subject to subdivision (c), a trial commenced before January 1, 1967, shall not be governed by this code. For the purpose of this subdivision:

(1) A trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence and is terminated when the issue upon which such evidence is received is submitted to the trier of fact. A new trial, or a separate trial of a different issue, commenced on or after January 1, 1967, shall be governed by this code.

(2) If an appeal is taken from a ruling made at a trial commenced before January 1, 1967, the appellate court shall apply the law applicable at the time of the commencement of the trial.

(c) The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 12 Effective Date of Code

1-12 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 12 explains when the Evidence Code became the primary source of law regarding the admissibility of evidence.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 12 Effective Date of Code

1-12 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 12 in the federal rules. The federal rules became effective on July 1, 1975. Pub. L. No. 93-595, 88 Stat. 1926.



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DIVISION 1 PRELIMINARY PROVISIONS AND CONSTRUCTION

SECTION 12 Effective Date of Code

1-12 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Pitchess v. Superior Court (1974) 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305 (in view of provision of this section codifying, revising or supplanting any privileges previously available at common law, courts are no longer free to modify existing privileges or to create new privileges).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 100 Application of Definitions

1-100 California Evidence Courtroom Manual 100.syn

§ 100.syn Synopsis to Chapter 100: Application of Definitions

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 100 Application of Definitions

1-100 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 100 elaborates on the basic interpretative philosophy of Section 2, explicitly directing courts not to apply the language of the code blindly, but to consider the particular context in which the section is being applied.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 100 Application of Definitions

1-100 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 100 in the federal rules.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 105 Action

1-105 California Evidence Courtroom Manual 105.syn

§ 105.syn Synopsis to Chapter 105: Action

Scope Action

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 105 Action

1-105 California Evidence Courtroom Manual Scope

Scope Action

§ 105 reads as follows:

Rule 105 Action

"Action" includes a civil action and a criminal action.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 105 Action

1-105 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 105 makes clear that, in general, there are no separate rules for criminal and civil trials. Where the drafters wanted to treat criminal and civil cases differently, the section explicitly provides for this.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 105 Action

1-105 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no express counterpart to Section 105 under the federal rules. However, Federal Rule of *Evidence 1101(b)* is essentially similar in providing that the federal rules apply to civil actions and criminal proceedings.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 110 Burden of Producing Evidence

1-110 California Evidence Courtroom Manual 110.syn

§ 110.syn Synopsis to Chapter 110: Burden of Producing Evidence

Scope Burden of Producing Evidence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 110 Burden of Producing Evidence

1-110 California Evidence Courtroom Manual Scope

Scope Burden of Producing Evidence

§ 110 reads as follows:

Rule 110 Burden of Producing Evidence

"Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 110 Burden of Producing Evidence

1-110 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 110 defines a party's production burden, which is sometimes also called the "burden of going forward." This burden is sometimes defined in case law as the "sufficiency" test: has the party produced sufficient evidence that a reasonable person could decide in his or her favor? Another way of approaching this question is to ask whether, given the evidence produced, it would be irrational to decide in the party's favor. *See also Section 550* (assignment of burden of producing evidence); Sections 603, 604, 630 (presumptions affecting burden of producing evidence).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 110 Burden of Producing Evidence

1-110 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no direct counterpart to Section 110. However, Federal Rule of Evidence 301, which concerns presumptions, does refer to the burden of going forward (since, under that rule, presumptions affect only that burden).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 115 Burden of Proof

1-115 California Evidence Courtroom Manual 115.syn

§ 115.syn Synopsis to Chapter 115: Burden of Proof

Scope Civil Action

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 115 Burden of Proof

1-115 California Evidence Courtroom Manual Scope

Scope Civil Action

§ 115 reads as follows:

Rule 115 Burden of Proof

"Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 115 Burden of Proof

1-115 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 115 defines a party's burden of proof, which is also referred to as the party's burden of persuasion. A party may also be identified as the "party who bears the risk of nonpersuasion." Essentially, this definition provides that if a trier of fact cannot decide an issue based on the evidence, the trier must rule against the party with the burden of proof, or persuasion. Section 115 also notes that the most common standard of degree of persuasion applies--proof by a preponderance of the evidence--unless the law requires otherwise. For example, fraud cases traditionally require persuasion by "clear and convincing evidence"; criminal cases require persuasion "beyond a reasonable doubt." Note that courts and commentators sometimes use the phrase "burden of proof" to refer to both the burden of production (see *Section 110*) and the burden of persuasion. Section 115 makes clear that by "burden of proof," the drafters of the Evidence Code meant only the burden of persuasion. See also *Section 502* (instructing the jury on the applicable burden of proof).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 115 Burden of Proof

1-115 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 115 in the federal rules.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 115 Burden of Proof

1-115 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Bookout v. Nielsen (2007) 155 Cal. App. 4th 1131, 67 Cal. Rptr. 3d 2 (as a matter of first impression, protective orders under the Elder Abuse and Dependent Adult Civil Protection Act require proof by a preponderance of the evidence of a past act or acts of elder abuse; allocation of burden of proof requires careful analysis and interpretation of the statutory scheme).

People v. Englebrecht (2001) 88 Cal. App. 4th 1236, 106 Cal. Rptr. 2d 738 (the law, sometimes statutory, but more often decisional, requires the heightened burden of proof of "clear and convincing evidence" over a range of issues involving constitutional due process and more general public policy considerations).

In re Michael G. (1998) 63 Cal. App. 4th 700, 74 Cal. Rptr. 2d 642 ("clear and convincing" standard of persuasion requires a finding of high probability or evidence so clear as to leave no substantial doubt, evidence sufficiently strong to command the unhesitating assent of every reasonable mind; standard of "preponderance of the evidence" requires the trier of fact to believe the existence of a fact is more probable than its nonexistence).

In re Marriage of Peters (1997) 52 Cal. App. 4th 1487, 61 Cal. Rptr. 2d 493 (issue of burden of proof, meaning degree of persuasion required, is an issue of law subject to change through the development of the common law).

Beck Development Co. v. Southern Pacific Transp. Co. (1996) 44 Cal. App. 4th 1160, 52 Cal. Rptr. 2d 518 (in a civil case, the party with the burden of proof must convince the trier of fact that its version of a fact is more likely than not the true version).

Leslie G. v. Perry & Associates (1996) 43 Cal. App. 4th 472, 50 Cal. Rptr. 2d 785 (in deciding whether plaintiff has met burden of proof, court considers both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence, giving full consideration to negative and affirmative inferences to be drawn from all evidence, including that produced by defendant; however, court will not draw inferences from air, and when plaintiff seeks to prove essential element of case by circumstantial evidence, she cannot recover merely by showing that favorable inferences are consistent with her theory, but must show that inferences favorable to her are more reasonable or probable than those against her).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 120 Civil Action

1-120 California Evidence Courtroom Manual 120.syn

§ 120.syn Synopsis to Chapter 120: Civil Action

Scope Civil Action

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 120 Civil Action

1-120 California Evidence Courtroom Manual Scope

Scope Civil Action

§ 120 reads as follows:

Rule 120 Civil Action

"Civil action" includes civil proceedings.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 120 Civil Action

1-120 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 120 attempts to clarify the scope of those sections applying to "civil actions."



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 120 Civil Action

1-120 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 120 in the federal rules. The federal rules use the terms "civil action" and "civil proceeding" interchangeably.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 125 Conduct

1-125 California Evidence Courtroom Manual 125.syn

§ 125.syn Synopsis to Chapter 125: Conduct

Scope Conduct

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 125 Conduct

1-125 California Evidence Courtroom Manual Scope

Scope Conduct

§ 125 reads as follows:

Rule 125 Conduct

"Conduct" includes all active and passive behavior, both verbal and nonverbal.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 125 Conduct

1-125 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 125 is relevant to the determination of whether a statement is hearsay, in that "conduct" may constitute a "statement" (*see Section 225*) that is hearsay if offered for the truth of the matter asserted (*see Section 1200(a)*).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 125 Conduct

1-125 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no express counterpart to Section 125 in the federal rules. The closest analogy is Federal Rule of *Evidence* 801(a)(2), which includes "nonverbal conduct of a person, if it is intended as an assertion," as part of the definition of a "statement" that can be hearsay.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 130 Criminal Action

1-130 California Evidence Courtroom Manual 130.syn

§ 130.syn Synopsis to Chapter 130: Criminal Action

Scope Criminal Action

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 130 Criminal Action

1-130 California Evidence Courtroom Manual Scope

Scope Criminal Action

§ 130 reads as follows:

Rule 130 Criminal Action

"Criminal action" includes criminal proceedings.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 130 Criminal Action

1-130 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 130 attempts to clarify the scope of those sections applying to "criminal actions."



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 130 Criminal Action

1-130 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 130 in the federal rules. The federal rules tend to use the terms "criminal case" or "criminal prosecution."



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 135 Declarant

1-135 California Evidence Courtroom Manual 135.syn

§ 135.syn Synopsis to Chapter 135: Declarant

Scope Declarant

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 135 Declarant

1-135 California Evidence Courtroom Manual Scope

Scope Declarant

§ 135 reads as follows:

Rule 135 Declarant

"Declarant" is a person who makes a statement.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 135 Declarant

1-135 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 135 applies in the context of hearsay objections. If a "declarant" makes an out-of-court statement and it is offered for the truth of the matter asserted, the statement is hearsay. *See Section 1200(a).*



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 135 Declarant

1-135 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 135 is basically identical to Federal Rule of *Evidence 801(b)*. Note that both Federal Rule of *Evidence 801(b)* and Section 135 define a declarant as "a person," which precludes application of the hearing rule to "statements" made by machine or animals. Although "statements" made by machines (such as radar machines or breath analyzers) or animals (such as bloodhounds, drug-sniffing dogs, parrots, monkeys or apes) now raise traditional hearsay concerns such as ambiguity and--in the case of animals--sincerity, these concerns are generally treated as matters of reliability or relevance. *See Section 210.*



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 140 Evidence

1-140 California Evidence Courtroom Manual 140.syn

§ 140.syn Synopsis to Chapter 140: Evidence

Scope Evidence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 140 Evidence

1-140 California Evidence Courtroom Manual Scope

Scope Evidence

§ 140 reads as follows:

Rule 140 Evidence

"Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 140 Evidence

1-140 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 140 attempts to set the parameters of what constitutes "evidence," and is thus subject to this code.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 140 Evidence

1-140 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 140.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 140 Evidence

1-140 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

County of Alameda v. Moore (1995) 33 Cal. App. 4th 1422, 40 Cal. Rptr. 2d 18 (unsworn statements of district attorney did not constitute "evidence" in child support action); *overruled in part in* ***Elkins v. Superior Court*** (2007) 41 Cal. 4th 1337, 1361 n. 15, 63 Cal. Rptr. 3d 483, 163 P.3d 160 .

Andersen v. Howland (1970) 3 Cal. App. 3d 380, 83 Cal. Rptr. 308 (opinion of qualified expert is itself evidence although it may be based partly on other evidence already put before jury).

Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 70 Cal. Rptr. 366 (view of scene by trial judge is independent evidence on which a finding may be made and sustained).

Mann v. Higgins (1890) 83 Cal. 66, 23 P. 206 (the term "testimony," in common language, is frequently used synonymously with "evidence," though "testimony," strictly speaking, means only that evidence comes from living witnesses, who testify orally, and is included in the word "evidence," which is a more comprehensive term).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 145 The Hearing

1-145 California Evidence Courtroom Manual 145.syn

§ 145.syn Synopsis to Chapter 145: The Hearing

Scope The Hearing

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 145 The Hearing

1-145 California Evidence Courtroom Manual Scope

Scope The Hearing

§ 145 reads as follows:

Rule 145 The Hearing

"The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 145 The Hearing

1-145 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 145 merely clarifies when a statement is potentially hearsay because it "*was made other than by a witness while testifying at the hearing.*" Section 1200(a) (emphasis added).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 145 The Hearing

1-145 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 145.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 150 Hearsay Evidence

1-150 California Evidence Courtroom Manual 150.syn

§ 150.syn Synopsis to Chapter 150: Hearsay Evidence

Scope Hearsay Evidence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 150 Hearsay Evidence

1-150 California Evidence Courtroom Manual Scope

Scope Hearsay Evidence

§ 150 reads as follows:

Rule 150 Hearsay Evidence

"Hearsay evidence" is defined in Section 1200.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 150 Hearsay Evidence

1-150 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 150 merely refers the reader to the appropriate definition section for hearsay.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 150 Hearsay Evidence

1-150 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

In contrast to the California Code, the federal rules combine the definitions of "statement," "declarant" and "hearsay" in Federal Rule of *Evidence* 801(a)-(c).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 150 Hearsay Evidence

1-150 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

See Section 1200.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 160 Law

1-160 California Evidence Courtroom Manual 160.syn

§ 160.syn Synopsis to Chapter 160: Law

Scope Law

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 160 Law

1-160 California Evidence Courtroom Manual Scope

Scope Law

§ 160 reads as follows:

Rule 160 Law

"Law" includes constitutional, statutory, and decisional law.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 160 Law

1-160 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 160, when read with other provisions, such as Section 1200(b) (hearsay is inadmissible "except as defined by law") suggests that evidence "law" in California may still be derived from constitutional provisions and case law.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 160 Law

1-160 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no express federal counterpart, although the federal rules tend to use the term "law" in the inclusive sense of Section 160.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 160 Law

1-160 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (the language of *Evidence Code* section 1200, read in light of *Evidence Code* section 160 and the comments thereon, makes clear that one source of exceptions to the hearsay rule is from judicial decisions).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 165 Oath

1-165 California Evidence Courtroom Manual 165.syn

§ 165.syn Synopsis to Chapter 165: Oath

Scope Oath

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 165 Oath

1-165 California Evidence Courtroom Manual Scope

Scope Oath

§ 165 reads as follows:

Rule 165 Oath

"Oath" includes affirmation or declaration under penalty of perjury.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 165 Oath

1-165 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 165 recognizes that some individuals may object to taking a traditional oath, especially on religious grounds; thus, Section 165 provides that such an individual may swear to tell the truth or be punished under the law of perjury. A person who cannot or refuses to take an oath is subject to disqualification under Section 701.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 165 Oath

1-165 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 603 is substantially similar to Section 165.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 170 Perceive

1-170 California Evidence Courtroom Manual 170.syn

§ 170.syn Synopsis to Chapter 170: Perceive

Scope Perceive

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 170 Perceive

1-170 California Evidence Courtroom Manual Scope

Scope Perceive

§ 170 reads as follows:

Rule 170 Perceive

"Perceive" means to acquire knowledge through one's senses.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 170 Perceive

1-170 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 170 should be read in conjunction with Section 702, which requires all witnesses to have personal knowledge of the matter on which he or she testifies. Personal knowledge is traditionally based on what one has experienced through one's senses.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 170 Perceive

1-170 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 602 is substantially similar to Section 170.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 175 Person

1-175 California Evidence Courtroom Manual 175.syn

§ 175.syn Synopsis to Chapter 175: Person

Scope Person

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 175 Person

1-175 California Evidence Courtroom Manual Scope

Scope Person

§ 175 reads as follows:

Rule 175 Person

"Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1994, ch. 1010 (S.B. 2053), § 103)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 175 Person

1-175 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 175 clarifies that certain organizations or public entities may be considered "persons" for purposes of the Evidence Code. For example, a business or public agency can be a hearsay "declarant" under Section 135. In contrast, animals or machines are not encompassed within the definition of "person" and cannot be hearsay declarants. The utterances produced by animals or machines would be analyzed for their reliability under Sections 210 and 352.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 175 Person

1-175 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no express federal counterpart, but Federal Rule of *Evidence 801(b)* limits the definition of a hearsay declarant to a "person."



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 175 Person

1-175 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Hawkins (2002) 98 Cal. App. 4th 1428, 121 Cal. Rptr. 2d 627 (where computer printout at issue contains information generated by computer itself, such as a record of its internal operations, printout is not hearsay because it is not made by a "person" under Section 175; the admissibility of such evidence is controlled by Section 1552, which establishes a rebuttable presumption that the document was printed reliably and by the requirement that the proponent of the computer evidence provides foundation that the computer was operating properly; it was not error to admit computer printouts where prosecution offered foundation that computer's clock was operating accurately and where computer expert explained to jury that printout of access times could be altered in many ways and could not say how, why or by whom).

National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100 (a corporation is a person for purposes of the attorney-client privilege).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 177 Dependent Person

1-177 California Evidence Courtroom Manual 177.syn

§ 177.syn Synopsis to Chapter 177: Dependent Person

Scope Dependent Person

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 177 Dependent Person

1-177 California Evidence Courtroom Manual Scope

Scope Dependent Person

§ 177 reads as follows:

Rule 177 Dependent Person

"Dependent person" means any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. "Dependent person" includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(Added by Stats. 2004, ch. 823 (A.B. 20), § 2).

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 177 Dependent Person

1-177 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 177 provides a standard definition of the phrase "dependent person," a term that is used throughout the Evidence Code. *See Section 710* (giving court the discretion to exempt a dependent person from taking an oath, affirmation or declaration as long as the dependent person promises to tell the truth); Section 765 (requiring court to take special care to protect dependent person from undue harassment or embarrassment, to restrict the unnecessary repetition of questions, to ensure that questions are stated in a form that is appropriate to the cognitive level of the witness and, upon objection from a party, forbid the asking of a question that is not reasonably likely to be understood by a person with the cognitive level of the witness); Section 767 (authorizing examiner to ask leading questions of a dependent person); Section 1109 (expanding definition of "abuse of a ... dependent person").



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 177 Dependent Person

1-177 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 177.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 180 Personal Property

1-180 California Evidence Courtroom Manual 180.syn

§ 180.syn Synopsis to Chapter 180: Personal Property

Scope Personal Property

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 180 Personal Property

1-180 California Evidence Courtroom Manual Scope

Scope Personal Property

§ 180 reads as follows:

Rule 180 Personal Property

"Personal property" includes money, goods, chattels, things in action, and evidences of debt.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 180 Personal Property

1-180 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 180 is the more narrow term used by the drafters of the code to refer only to a limited class of property.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 180 Personal Property

1-180 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

The federal rules contain no express definition of "property," but tend to use the term in a general sense unless specifically stated otherwise.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 185 Property

1-185 California Evidence Courtroom Manual 185.syn

§ 185.syn Synopsis to Chapter 185: Property

Scope Property

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 185 Property

1-185 California Evidence Courtroom Manual Scope

Scope Property

§ 185 reads as follows:

Rule 185 Property

"Property" includes both real and personal property.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 185 Property

1-185 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 185 is the more generic term used to refer to property of all kinds.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 185 Property

1-185 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

The federal rules contain no express definition of property, but tend to use the term in a general sense unless specifically stated otherwise.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 190 Proof

1-190 California Evidence Courtroom Manual 190.syn

§ 190.syn Synopsis to Chapter 190: Proof

Scope Proof

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 190 Proof

1-190 California Evidence Courtroom Manual Scope

Scope Proof

§ 190 reads as follows:

Rule 190 Proof

"Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 190 Proof

1-190 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 190 sets out, in a more general fashion, the concept of a burden of proof. *See also* Section 115.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 190 Proof

1-190 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 195 Public Employee

1-195 California Evidence Courtroom Manual 195.syn

§ 195.syn Synopsis to Chapter 195: Public Employee

Scope Public Employee

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 195 Public Employee

1-195 California Evidence Courtroom Manual Scope

Scope Public Employee

§ 195 reads as follows:

Rule 195 Public Employee

"Public employee" means an officer, agent, or employee of a public entity.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 195 Public Employee

1-195 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 195 is particularly relevant in applying the authentication requirements of Sections 1450-1454.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 195 Public Employee

1-195 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

The federal rules contain no express definition of "public employee," but do refer in a more general sense to a public "officer or employee." *See, e.g.,* Federal Rule of Evidence 902(a).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 200 Public Entity

1-200 California Evidence Courtroom Manual 200.syn

§ 200.syn Synopsis to Chapter 200: Public Entity

Scope Public Entity

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 200 Public Entity

1-200 California Evidence Courtroom Manual Scope

Scope Public Entity

§ 200 reads as follows:

Rule 200 Public Entity

"Public entity" includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 200 Public Entity

1-200 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 200 is particularly important in applying the authentication presumptions in Sections 1450-1454.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 200 Public Entity

1-200 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 200 Public Entity

1-200 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Vallas v. Chula Vista (1976) 56 Cal. App. 3d 382, 128 Cal. Rptr. 469 (as respects definition of "public entity" under this section, each of listed entities, as well as classification found in concluding language, describes independent body politic with sovereignty and not department or office within entity; "public agency" may be part of definition of "public entity," but "public agency" must contemplate body with some degree of sovereignty).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 205 Real Property

1-205 California Evidence Courtroom Manual 205.syn

§ 205.syn Synopsis to Chapter 205: Real Property

Scope Real Property

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 205 Real Property

1-205 California Evidence Courtroom Manual Scope

Scope Real Property

§ 205 reads as follows:

Rule 205 Real Property

"Real property" includes lands, tenements, and hereditaments.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 205 Real Property

1-205 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 205 simply expands upon the definition of property in Section 185.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 205 Real Property

1-205 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 210 Relevant Evidence

1-210 California Evidence Courtroom Manual 210.syn

§ 210.syn Synopsis to Chapter 210: Relevant Evidence

Scope Relevant Evidence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 210 Relevant Evidence

1-210 California Evidence Courtroom Manual Scope

Scope Relevant Evidence

§ 210 reads as follows:

Rule 210 Relevant Evidence

"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 210 Relevant Evidence

*1-210 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 210 should always be read in conjunction with Sections 350, 351 and 352. The threshold for admissibility under Section 210 is quite low (does the evidence have "*any tendency in reason*" to prove? (emphasis added)). Section 352 provides a second layer of protection, however, by stating that even if evidence satisfies the relevancy threshold of Section 210, it may still be excluded because it is unduly dangerous due to its tendency to inflame or confuse the jury or to waste judicial resources.

Evidence may be relevant under Section 210 because the evidence is direct evidence of the event sought to be proved, for example, the eyewitness account of the murder or the exhibit establishing an element of the case, such as the executed contract or the letter constituting libel. Alternatively, evidence may be relevant because it is of a quality that leads to an inference that a provable event did or did not occur. This is called circumstantial evidence.

Determining whether evidence is relevant is ordinarily not a question of law, but one of common experience and logic. Under Section 210 the definition of relevance requires only that the evidence have any tendency to make the fact to be proved more or less likely than if the evidence were not introduced. The term "any" indicates that the slightest tendency will suffice. This broad definition is tempered, however, by Section 352, which excludes relevant evidence which is remote, misleading, or unfairly prejudicial.

No listing of all relevant evidence or irrelevant evidence would be complete, possible, or helpful. Cases on the subject of relevancy are generally legal limitations on the definition or the verbalized logic of the court deciding the case. The reasoning of the court in the latter instance is often of little authoritative value since it is so intimately related to the facts peculiar to the case. The cases cited below merely illustrate some recurring issues of relevancy.

Evidence may be irrelevant under Section 210 in two distinct ways. First, evidence may be irrelevant if it is directed at a fact not properly an issue under the substantive law of the case. If the factual proposition to which the evidence is directed is not consequential in the lawsuit, the evidence is said to be irrelevant. Some courts and commentators refer to this as the concept of "materiality," although Section 210 uses the phrase "disputed fact that is of consequence to the determination of the action." Second, if the evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant.

Illustration

In a wrongful death action by *P* against *D* based on a wrongful death statute that limits recovery of damages only to funeral expenses and pecuniary loss based on the decedent's ability to earn income, *P* seeks to introduce evidence directed toward the target issue of the deceased's loving and affectionate nature. Such evidence would be irrelevant, subject to objection and exclusion, because such a target issue is not proper in the particular lawsuit under the applicable substantive law. The statute simply does not permit recovery for the loss of love and affection. Under the traditional terminology, evidence submitted toward the target issue of the deceased's loving and affectionate nature would be termed "immaterial." Using Section 210's language, the explanation is that loss of love and affection is not an issue of consequence in the action. The result, of course, is the same.

Practice Tip for Analyzing Relevancy Issues

A helpful framework for considering the issues under Sections 210 and 352 is to ask the following questions:

(1) What evidence is being offered?

(2) Is it being offered on a disputed issue of consequence in the case?

Some courts speak in terms of whether an issue is a "material" issue in the case. To focus on the material issues of the case, look to the substantive law (especially as reflected in the pleadings), pretrial rulings (such as demurrers, summary adjudication) and pretrial orders or stipulations (which can make issues "immaterial"). As Section 210 indicates, evidence that tends to prove or disprove the credibility of other evidence is always relevant under Section 210, although it may be excluded under Section 352.

(3) Logically, does the evidence help to prove or disprove the issue it is offered upon?

Relevance, in the sense of logical connection, rests in the eye of the beholder. Or, as the eminent scholar Thayer put it, "The law furnishes no test of relevancy. For this, it tacitly refers to logical and general experience, ..." One judge may see the connection between your evidence and the issue to be determined, while another may not. The key to surviving a relevancy objection here is to stress that Section 210 merely requires that the evidence have "*any* tendency to prove." Note that the evidence need not directly establish the question in dispute--as Dean McCormick stated, "a brick is not a wall"--nor does it need to be to be relevant.

(4) Is the helpfulness of the evidence substantially outweighed by its dangers?

Litigators tend to fixate on the danger of undue prejudice of the evidence (that is, its tendency to inflame the emotions of the jury, inviting the jury to decide on an irrational basis). They ignore the other dangers listed in Section 352: undue consumption of time, confusion of the issues, or misleading the jury. To make the most of this basis for exclusion, the advocate must ground the objection in specific, concrete facts rather than rely on a "boilerplate" recitation of the language of Section 352.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 210 Relevant Evidence

*1-210 California Evidence Courtroom Manual 2***2 COMPARISON TO FEDERAL RULE**

Federal Rules of *Evidence* 401 and 403 are the counterparts to Sections 210 and 352. Federal Rule of *Evidence* 401 differs slightly in language from Section 210, in that the federal rule does not refer to "disputed" issues. Although Section 210 was a model for Federal Rule of *Evidence* 401, the Advisory Committee Note to Federal Rule of *Evidence* 401 states that background information or contextual information may not be "disputed" in the ordinary sense, but is relevant as "an aid to understanding." Thus, the federal rule drafters deleted the word "disputed."

Section 210's use of "disputed," might have made it easier for the United States Supreme Court to resolve the dispute in *Old Chief v. United States* (1997) 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574. In this case, the Supreme Court held that although defendant's prior conviction was relevant under Federal Rule of *Evidence* 401, the trial court abused its discretion under Federal Rule of *Evidence* 403 by refusing to allow defendant to concede the prior conviction and by admitting the full record of the judgment of the prior conviction where the name or nature of the prior conviction may inflame the jury and where the purpose of the judgment is simply to prove the prior conviction. Had *Old Chief* been decided under *Evidence Code* section 210, the defense could have simply argued that the prior conviction was not "disputed," and thus, evidence relating to the prior conviction was irrelevant. See *People v. Bonin* (1989) 47 Cal. 3d 808, 848-849, 54 Cal. Rptr. 298, 765 P.2d 460; *People v. Hall* (1980) 28 Cal. 3d 143, 616 P.2d 826, 167 Cal. Rptr. 844, overruled, 21 Cal. 4th 413. However, Professor Imwinkelried suggests that California courts would be unlikely to exclude evidence solely on the basis of Section 210, where the opponent has offered to concede the issue, thus removing it from dispute. Professor Imwinkelried argues that California courts "tend to treat the offer as a factor in the balancing process under [Section] 352; the offer tends to decrease the proponent's need to resort to the item of evidence and therefore increases the probability that the trial judge will exclude the item in his or her discretion." Edward J. Imwinkelried and Timothy H. Hallahan, Imwinkelried and Hallahan's California Evidence Code Annotated § 210, at 19 (1995). Professor Imwinkelried's argument thus mirrors the reasoning of the Supreme Court in *Old Chief*.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 210 Relevant Evidence

1-210 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

In General

People v. Quartermain (1997) 16 Cal. 4th 600, 66 Cal. Rptr. 2d 609 (trial court did not err in admitting evidence that defendant used racial epithets to refer to black murder victim since epithets were relevant in reflecting defendant's motive and attitude toward victim).

People v. Scheid (1997) 16 Cal. 4th 1, 65 Cal. Rptr. 2d 348 (trial court did not err in admitting grisly photographs of murder victims even though defendant was tried on felony murder theory in which the only issue of fact was whether defendant intentionally aided underlying robbery and defendant offered to stipulate to the method in which victim was murdered; although malice was not an issue in defendant's trial, photographs were relevant under Section 210 to corroborate witness statements and circumstances of crime).

Beyda v. City of Los Angeles (1998) 65 Cal. App. 4th 511, 76 Cal. Rptr. 2d 547 (evidence of other acts of sexual harassment were not admissible to prove hostile work environment where complainant did not have personal knowledge of the other incidents while in the work environment).

Andres v. Young Men's Christian Assn. (1998) 64 Cal. App. 4th 85, 74 Cal. Rptr. 2d 788 (evidence that defendant was cited two years after accident for failure to display a "No Lifeguard on Duty" sign was irrelevant; it was undisputed that no sign had been posted at the time of the accident and court had determined that no sign was required).

People v. DeJesus (1995) 38 Cal. App. 4th 1, 44 Cal. Rptr. 2d 796 (issue of relevance of evidence is left to sound discretion of trial court; exercise of that discretion will not be reversed absent showing of "abuse of discretion," which exists only where there is clear showing trial court exceeded bounds of reason, all circumstances being considered).

In re Romeo C. (1995) 33 Cal. App. 4th 1838, 40 Cal. Rptr. 2d 85 (the basic determination of whether evidence is "relevant" under Section 210 does not depend on the fact that presentation of evidence would be time-consuming or that the evidence is cumulative).

People v. Brandon (1995) 32 Cal. App. 4th 1033, 38 Cal. Rptr. 2d 751 (trial court has wide discretion in determining whether evidence is relevant).

People v. Torrez (1995) 31 Cal. App. 4th 1084, 37 Cal. Rptr. 2d 712 (evidence that does not relate to a matter in issue is "immaterial"; however, evidence that is of questionable credibility may still be relevant).

Coburn v. California State Personnel Bd. (1978) 83 Cal. App. 3d 801, 148 Cal. Rptr. 134 (although technical rules of evidence do not apply in administrative proceedings, fundamental questions of competency and relevancy remain).

Application of Relevancy Principles--Demonstrations

People v. Medina (1995) 11 Cal. 4th 694, 47 Cal. Rptr. 2d 165, 906 P.2d 2 (life-size mannequin, with wooden sticks sticking through it to represent trajectory of bullet that killed victim, was relevant to show defendant's intent to kill, as well as his identity as same person who executed two other victims; mannequin was used by prosecutor to demonstrate likelihood that victim was in kneeling position when he was shot).

People v. Gilbert (1992) 5 Cal. App. 4th 1372, 7 Cal. Rptr. 2d 660 (determination whether to admit demonstration evidence requires trial court to decide whether demonstration is relevant, its conditions and those existing at time of alleged occurrence are shown to be substantially similar, and evidence will not consume undue time or confuse or mislead jury. Party offering demonstration evidence bears burden of showing that foundational requirements have been satisfied. Ruling on admissibility will be reversed only where trial court abused its broad discretion).

--Evidence of State of Mind or Credibility

People v. Wheeler (1992) 4 Cal. 4th 284, 14 Cal. Rptr. 2d 418, 841 P.2d 938 (if past criminal conduct amounting to misdemeanor has logical bearing on veracity of witness in criminal proceeding, that conduct is admissible, subject to trial court discretion, as relevant evidence).

People v. Rowland (1992) 4 Cal. 4th 238, 14 Cal. Rptr. 2d 377, 841 P.2d 897 (in prosecution for rape and murder with felony-murder-rape special circumstance, evidence of defendant's prior convictions for sodomy, lewd conduct, and oral copulation were relevant to issue of defendant's intent with respect to charged crimes; although not identical to charged offenses, convictions did have some tendency to prove disputed fact of defendant's intent to rape and murder victim).

People v. Mickle (1991) 54 Cal. 3d 140, 284 Cal. Rptr. 511, 814 P.2d 290 (evidence that informant had written letters to judges in three separate criminal cases pending against him offering to inform on various persons in exchange for leniency was relevant in murder prosecution in which informant testified that he expected no benefit from his testimony and was testifying for purely unselfish reasons).

People v. Gutierrez (1994) 23 Cal. App. 4th 1576, 28 Cal. Rptr. 2d 897 (trial court had discretion to limit amount of defendant's cross-examination of prosecution investigator, designed to bring out evidence that investigator had not looked into whether defendant's brother had threatened witnesses because investigator believed that threats had not been made; investigator's belief concerning credibility of threats had no tendency in reason to prove or disprove any contested issue at trial).

Garfield v. Russell (1967) 251 Cal. App. 2d 275, 59 Cal. Rptr. 379 (evidence that a plaintiff suing for personal injuries is being wholly or partially compensated for medical expenses or perhaps even making money every time he sees doctor may be relevant on his motives in seeking medical help and on his credibility as witness, even if only remotely).

--Evidence Regarding Victim

People v. Crittenden (1994) 9 Cal. 4th 83, 36 Cal. Rptr. 2d 474, 885 P.2d 887 (photographs showing location and condition of murder victims' bodies, including manner in which victims were bound and gagged were relevant to issue to premeditation and deliberation in first-degree murder trial; trial court's exercise of discretion as to whether victim photographs are unduly gruesome or inflammatory will not be disturbed on appeal unless probative value of photographs is clearly outweighed by their prejudicial effect).

People v. Brown (1994) 8 Cal. 4th 746, 35 Cal. Rptr. 2d 407, 883 P.2d 949 (common law "fresh complaint doctrine," providing that victim's extrajudicial report of sex offense is admissible to prove that such complaint was made, no longer provides sound basis for admitting such evidence, as premise underlying doctrine, that true victims will report such offenses to someone, has been discredited; however, evidence of circumstances surrounding victim's reporting or disclosure of alleged crime frequently helps place incident in context and may assist jury in determining whether offense occurred and is, therefore, "relevant").

--Photographs and Videotapes

People v. Cain (1995) 10 Cal. 4th 1, 40 Cal. Rptr. 2d 481, 892 P.2d 1224 (photographs of murder victims were properly admitted where none was unduly gruesome or inherently inflammatory and each was relevant to the prosecution's case).

People v. Sims (1993) 5 Cal. 4th 405, 20 Cal. Rptr. 2d 537, 853 P.2d 992 (in some circumstances, videotape may present far more graphic, gruesome, and potentially prejudicial depiction than static photographs, and under these circumstances, videotape should be excluded).

People v. Pride (1992) 3 Cal. 4th 195, 10 Cal. Rptr. 2d 636, 833 P.2d 643 (police videotape of crime scene was relevant to help clarify extensive, potentially confusing testimony about scene and, insofar as tape showed victims' bodies, was relevant to show where they were found in relation to other physical evidence).

People v. Clair (1992) 2 Cal. 4th 629, 7 Cal. Rptr. 2d 564, 828 P.2d 705 (admission of autopsy and crime scene photographs were relevant to intent to kill in that they showed malice aforethought by revealing that perpetrator had bound the victim's hands behind her back and beaten her brutally; use of such photographs did not violate the *cruel and unusual punishments clause* or the due process clause).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 220 State

1-220 California Evidence Courtroom Manual 220.syn

§ 220.syn Synopsis to Chapter 220: State

Scope State

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 220 State

1-220 California Evidence Courtroom Manual Scope

Scope State

§ 220 reads as follows:

Rule 220 State

"State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 220 State

1-220 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 220 merely clarifies a potential ambiguity.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 220 State

1-220 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 225 Statement

1-225 California Evidence Courtroom Manual 225.syn

§ 225.syn Synopsis to Chapter 225: Statement

Scope Statement

1 COMPARISON TO FEDERAL RULE

2 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 225 Statement

1-225 California Evidence Courtroom Manual Scope

Scope Statement

§ 225 reads as follows:

Rule 225 Statement

"Statement" means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 225 Statement

1-225 California Evidence Courtroom Manual 1

1 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 801(a) is the counterpart to Section 225. The language of the two rules is quite similar, although the federal rule uses the word "assertion" in lieu of the word "expression." The California cases, however, interpret "expression" in the same manner that federal courts interpret "assertion."



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 225 Statement

1-225 California Evidence Courtroom Manual 2

2 SIGNIFICANT CASES

People v. Ventura (1991) 1 Cal. App. 4th 1515, 2 Cal. Rptr. 2d 586 (during a search of defendant's apartment, the police answered several phone calls in which the callers asked to buy drugs; the calls were not "statements" under Section 225).

People v. Nealy (1991) 228 Cal. App. 3d 447, 279 Cal. Rptr. 36 (where police called numbers on the defendant's beeper and persons answering asked for the defendant and asked to buy rock cocaine, the calls were not "statements" under Section 225).

People v. Clark (1970) 6 Cal. App. 3d 658, 86 Cal. Rptr. 106 (testimony of police officer, in prosecution for murder, that defendant's wife fainted when defendant was asked if he owned coat with fur-lined collar was admissible in that it was nonassertive conduct and not objectionable hearsay).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 230 Statute

1-230 California Evidence Courtroom Manual 230.syn

§ 230.syn Synopsis to Chapter 230: Statute

Scope Statute

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 230 Statute

1-230 California Evidence Courtroom Manual Scope

Scope Statute

§ 230 reads as follows:

Rule 230 Statute

"Statute" includes a treaty and a constitutional provision.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 230 Statute

1-230 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 230 simply clarifies a potential ambiguity.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 230 Statute

1-230 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 235 Trier of Fact

1-235 California Evidence Courtroom Manual 235.syn

§ 235.syn Synopsis to Chapter 235: Trier of Fact

Scope Trier of Fact

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 235 Trier of Fact

1-235 California Evidence Courtroom Manual Scope

Scope Trier of Fact

§ 235 reads as follows:

Rule 235 Trier of Fact

"Trier of fact" includes (a) the jury and (b) the court when the court is trying an issue of fact other than one relating to the admissibility of evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 235 Trier of Fact

1-235 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 235 simply clarifies a potential ambiguity.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 235 Trier of Fact

1-235 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 240 Unavailability as a Witness

1-240 California Evidence Courtroom Manual 240.syn

§ 240.syn Synopsis to Chapter 240: Unavailability as a Witness

Scope Unavailability as a Witness

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 240 Unavailability as a Witness

1-240 California Evidence Courtroom Manual Scope

Scope Unavailability as a Witness

§ 240 reads as follows:

Rule 240 Unavailability as a Witness

(a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

- (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
- (2) Disqualified from testifying to the matter.
- (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.
- (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
- (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering

substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1984, ch. 401, § 1; Stats. 1988, ch. 485, § 1)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 240 Unavailability as a Witness

1-240 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 240 is relevant in the context of the hearsay rule. Where the declarant is "unavailable" there is greater necessity to permit the use of hearsay. Thus, several hearsay exceptions, especially those with dubious reliability rationales such as Section 1251 (dealing with declarant's statement of past state of mind), require that the declarant be unavailable before the exception applies.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 240 Unavailability as a Witness

1-240 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 804(a)* is the counterpart to Section 240, although there are some differences between the rules. Federal Rule of *Evidence 804(a)(2)* is similar to Section 240(a)(1), but Federal Rule of *Evidence 804(a)(2)* adds that a witness is unavailable if the witness "persists in refusing to testify ... despite an order of the court." There is no direct federal counterpart to Section 240(a)(2), although a witness may be unavailable under both Section 240(a)(2) and Federal Rule of *Evidence 804(a)(1)* where the holder of a privilege, who is not the witness, prevents the witness from testifying, thus "disqualifying" the witness. Federal Rule of *Evidence 804(a)(3)* is more expansive than Section 240(a)(3). The federal rule treats as unavailable a witness who "testifies to a lack of memory." Under Section 240(a)(3), the memory lapse must amount to a mental illness or infirmity." The California Supreme Court has held that a total memory loss is a "mental infirmity." *People v. Alcala* (1992) 4 Cal. 4th 742, 15 Cal. Rptr. 2d 432, 842 P.2d 1192 . While Section 240(a)(4) requires only that the proponent show that the witness is beyond the reach of the court's process, Federal Rule of *Evidence 804(a)(5)* requires that the proponent also show that the witness cannot be procured "by other reasonable means." There is no counterpart to Section 240(c)'s ground of "psychological" unavailability in the federal rules.



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SECTION 240 Unavailability as a Witness

1-240 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

In General

People v. Cromer (2001) 24 Cal. 4th 889, 103 Cal. Rptr. 2d 23, 15 P.3d 243 (appellate courts should independently review a trial court's determination that the prosecution's failure to locate an absent witness are sufficient to justify an exception to the defendant's right of confrontation; prosecution did not exercise reasonable diligence to secure witness's attendance at defendant's trial).

People v. Reed (1996) 13 Cal. 4th 217, 52 Cal. Rptr. 2d 106, 914 P.2d 184 ("unavailability" requirement of the hearsay exception of *Evidence Code* section 1291(a) for prior testimony is not to be construed strictly as referring exclusively to the kinds of legal unavailability expressly listed in Section 240, dealing with unavailability of witnesses).

People v. Sanders (1995) 11 Cal. 4th 475, 46 Cal. Rptr. 2d 751, 905 P.2d 420 (what constitutes due diligence to secure presence of witness depends upon the facts of the individual case, and term is incapable of a mechanical definition; totality of efforts of proponent to achieve presence of the witness must be considered).

People v. Cudjo (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (declarant who chose to exercise his privilege against self-incrimination was "unavailable" as witness, for purposes of statutory exception to hearsay rule for declaration against interest).

People v. Price (1991) 1 Cal. 4th 324, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (proponent of evidence offered under prior testimony exception to hearsay rule has burden of showing that declarant is unavailable to testify in current proceeding and that showing must be made by competent evidence).

People v. Avila (2005) 131 Cal. App. 4th 163, 31 Cal. Rptr. 3d 441 (prosecution did not use due diligence to locate witness on day of defendant's retrial for assault, making witness's testimony from first trial inadmissible; error in admitting prior testimony was not harmless).

People v. Thompson (1998) 61 Cal. App. 4th 1269, 76 Cal. Rptr. 2d 267 (conditional examination of witness pursuant to *Penal Code* sections 1335-1345 was not error even though witness's absence from state is not one of the grounds of unavailability listed in Section 240; Section 240 must be given flexible, pragmatic interpretation and does not contain an

exclusive list of the grounds of unavailability).

People v. Lopez (1980) 110 Cal. App. 3d 1010, 168 Cal. Rptr. 378 (previously convicted codefendant was "unavailable" for purpose of defendant's trial where his appeal was pending at time he was called to testify and took the *Fifth Amendment*; such a situation warrants extending the self-incrimination single-proceeding rule).

People v. Johnson (1974) 39 Cal. App. 3d 749, 114 Cal. Rptr. 545 (preliminary hearing testimony is admissible at trial only if witness has been cross-examined at the preliminary hearing, his testimony is necessary at trial and the prosecution has made good-faith effort with reasonable diligence to secure witness, trial attendance).

Unavailable Due to Illness, Trauma or Fear

People v. Alcala (1992) 4 Cal. 4th 742, 15 Cal. Rptr. 2d 432, 842 P.2d 1192 (witness with a total memory loss is unavailable due to a "mental infirmity").

People v. Price (1991) 1 Cal. 4th 324, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (although witness's memory of certain details was weak, he recalled far too much to justify finding that he was unavailable as a witness so as to warrant admission of transcripts of his preliminary hearing testimony under hearsay exception for prior testimony).

People v. Guerra (1984) 37 Cal. 3d 385, 208 Cal. Rptr. 162, 690 P.2d 635 (witness's prehypnotic testimony at preliminary hearing is admissible in lieu of witness's testimony at trial as to events that were subject of subsequent hypnotic session).

People v. Rojas (1975) 15 Cal. 3d 540, 125 Cal. Rptr. 357, 542 P.2d 229 (witness's refusal to testify against defendants on ground of fear for safety of his person and that of his family, even after witness was found in contempt and punished therefor, rendered his testimony "unavailable by any means whatever" and his testimony at preliminary hearing and at first trial was admissible at the second trial over objections that it was hearsay).

People v. Francis (1988) 200 Cal. App. 3d 579, 245 Cal. Rptr. 923 (witnesses who refused to testify in murder prosecution were "unavailable," and thus, incriminating testimony of witnesses at preliminary hearing was admissible; trial court had made extensive efforts to coerce the witnesses to testify, and interest and motive at preliminary hearing, where witnesses had been extensively cross-examined, was similar to that at trial).

People v. Macioce (1987) 197 Cal. App. 3d 262, 242 Cal. Rptr. 771 (trial court's ruling that witness was unavailable to testify in murder prosecution and that her preliminary examination testimony could thus be read back was supported by testimony of witness's treating physician that, although witness's symptoms of extreme stress had improved over time and she might suffer no reaction at all from testifying, there was 70 percent chance that testifying would be detrimental to her).

People v. Sul (1981) 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (trial court erred in finding that witness who was afraid to testify was "unavailable" and, thus, admission of preliminary hearing testimony, admitted pursuant to former testimony exception to hearsay rule, which testimony was critical to prosecution's case, was reversible error).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 250 Writing

1-250 California Evidence Courtroom Manual 250.syn

§ 250.syn Synopsis to Chapter 250: Writing

Scope Writing

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 250 Writing

1-250 California Evidence Courtroom Manual Scope

Scope Writing

§ 250 reads as follows:

Rule 250 Writing

"Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 2002, ch. 945 (A.B. 1962), § 1)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 250 Writing

1-250 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 250 defines "writing" very broadly, and includes motion pictures, computer records, tape recordings, artist sketches, and all means of electronic or digital information. However, courts have refused to extend the application of the definition of a "writing" (and the concomitant problems of authentication and best evidence rule) to audio and video recordings of depositions. See *People v. Watkins* (1996) 45 Cal. App. 4th 485, 53 Cal. Rptr. 2d 13 .



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 250 Writing

1-250 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 250 is substantially similar to Federal Rules of *Evidence 1001(1)-(2)*.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 250 Writing

1-250 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Watkins (1996) 45 Cal. App. 4th 485, 53 Cal. Rptr. 2d 13 (definition of "writing" does not authorize every means of recording upon any tangible thing any form of communication and, thus, does not authorize videotape recording of depositions in criminal cases; statute was not intended to authorize widely disparate modes of recording testimony, ranging from videotapes to audiotapes to computer applications).

Jones v. City of Los Angeles (1993) 20 Cal. App. 4th 436, 24 Cal. Rptr. 2d 528 (videotape is equivalent of "writing" under Evidence Code, and thus for purposes of laying foundation and to authenticate film, video should comply with all applicable requirements for admission of writing).

Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (computer records of lottery transactions compiled by private firm are "writings").

People v. Garcia (1988) 201 Cal. App. 3d 324, 247 Cal. Rptr. 94 (definition of "writing" in this section includes artist's sketch of suspect).

People v. Enskat (1971) 98 Cal. Rptr. 646 (motion picture film was "writing" under this section and pictures which officers took of portions of motion picture film being exhibited, together with testimony concerning balance of film, audio and visual, were not the best evidence in obscenity prosecution).



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 255 Original

1-255 California Evidence Courtroom Manual 255.syn

§ 255.syn Synopsis to Chapter 255: Original

Scope Original

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 255 Original

1-255 California Evidence Courtroom Manual Scope

Scope Original

§ 255 reads as follows:

Rule 255 Original

"Original" means the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(Added by Stats. 1977, ch. 708, § 1)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 255 Original

1-255 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 255 relates to the application of the best evidence rule (Section 1500 et seq.), which used to require the production of the original, a duplicate, or an excuse for not producing either one in certain circumstances. However, in 1998, the California Legislature repealed the best evidence rule and replaced it with "the secondary evidence rule." The new rule provides that the content of a writing may be proved by the original or by otherwise admissible secondary evidence except where (1) a genuine dispute exists concerning the material terms of the writing and justice requires exclusion of the evidence; or (2) admission of the secondary evidence would be unfair. *See Section 1520 et seq.*



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 255 Original

1-255 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 1001(3) is the counterpart of Section 255; however, California no longer follows the best evidence rule. *See* Analysis above.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 255 Original

1-255 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (computer printout did not violate best evidence rule because printout was considered an "original").



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 260 Duplicate

1-260 California Evidence Courtroom Manual 260.syn

§ 260.syn Synopsis to Chapter 260: Duplicate

Scope Duplicate

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 260 Duplicate

1-260 California Evidence Courtroom Manual Scope

Scope Duplicate

§ 260 reads as follows:

Rule 260 Duplicate

A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

(Added by Stats. 1977, ch. 708, § 2)

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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 260 Duplicate

1-260 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 260 relates to the application of the best evidence rule (Sections 1500 et seq.), which formerly required, in some situations, the production of the original, a duplicate, or an excuse for not producing either one. The best evidence rule has been replaced in California by a "secondary evidence rule." Sections 1520 et seq. *See also* Analysis of Section 255.



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DIVISION 2 WORDS AND PHRASES DEFINED

SECTION 260 Duplicate

1-260 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 1001(4)* is the counterpart of Section 260. A duplicate would be admissible to the extent of an original under both the federal best evidence rule and the California secondary evidence rule. *See Sections 1520 et seq.* which ordinarily makes a duplicate a permissible type of secondary evidence.



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SECTION 260 Duplicate

1-260 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Bizieff (1991) 226 Cal. App. 3d 1689, 277 Cal. Rptr. 678 (credit card receipt was not a "duplicate" of the card because the receipt does not reproduce all the card's information and receipt is often a poor reproduction).



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 1 APPLICABILITY OF CODE
SECTION 300 Applicability of Evidence Code

1-300 California Evidence Courtroom Manual 300.syn

§ 300.syn Synopsis to Chapter 300: Applicability of Evidence Code

Scope Applicability of Evidence Code

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1-300 California Evidence Courtroom Manual Scope

Scope Applicability of Evidence Code

§ 300 reads as follows:

Rule 300 Applicability of Evidence Code

Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a court of appeal or superior court, including proceedings in such actions conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1967, ch. 17, § 35. Amended by Stats. 1998, ch. 931, § 141; Stats. 2002, ch. 784 (S.B. 1316), § 101)

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1 ANALYSIS

Section 300 sets forth the applicability of the Evidence Code. In general, if proceedings take place outside of the courts, such as legislative hearings or administrative hearings, the rules of evidence do not apply. However, a legislative agency or administrative body may choose to follow the Evidence Code, in whole or in part, or a statute may expressly address the application of the Evidence Code in a specific setting. *See, e.g., Labor Code sections 5708, 5709* (hearsay is permitted in workers' compensation hearings). The 1998 amendment deleted a reference to justice courts and the 2002 amendment altered the language to reflect the unification of the superior and municipal courts.



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2 COMPARISON TO FEDERAL RULE

Although they have some similarities, Section 300 is much more cursory than Federal Rule of *Evidence 1101*. Federal Rule of *Evidence 1101* provides that the federal rules, like the Evidence Code, apply to many different kinds of proceedings. Both Section 300 and Federal Rule of *Evidence 1101(d)* exempt grand jury proceedings from the law of evidence. Federal Rule of *Evidence 1101* differs from the California Code, however, in that several other situations are exempted entirely or in part from the rules of evidence (other than privilege). Federal Rule of *Evidence 1101(d)* exempts entirely: preliminary determinations of fact made by the judge under Federal Rule of Evidence 104; grand jury proceedings, miscellaneous proceedings, such as extradition proceedings, proceedings relating to the issuance of arrest or search warrants, and bail, sentencing or probation hearings. Federal Rule of *Evidence 1101(e)* provides that the federal rules apply only in part in trial of misdemeanors by magistrate judges and proceedings under specified statutes.



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3 SIGNIFICANT CASES

In re Miranda (2008) 43 Cal. 4th 541, 76 Cal. Rptr. 3d 172, 182 P.3d 513 (Evidence Code applies at reference hearings, following the issuance of an order to show cause in a criminal hearing).

Jauregi v. Superior Court (1999) 72 Cal. App. 4th 931, 85 Cal. Rptr. 2d 553 (Evidence Code applies in civil forfeiture action brought under Uniform Controlled Substances Act, *Health and Safety Code* section 11488.4(g)).

Big Creek Lumber Co. v. County of San Mateo (1995) 31 Cal. App. 4th 418, 37 Cal. Rptr. 2d 159 (Evidence Code does not govern legislative hearings of county board of supervisors).

People v. Holmes (1993) 12 Cal. App. 4th 1094, 16 Cal. Rptr. 2d 52 (rules governing admission and use of evidence are contained principally in Evidence Code, and statutes therein govern all criminal proceedings unless overridden by constitutional concerns of specific provisions of Penal Code).

In re Marriage of Iverson (1992) 11 Cal. App. 4th 1495 (Evidence Code applies to family law proceedings).

People v. Turner (1975) 44 Cal. App. 3d 753, 118 Cal. Rptr. 924 (police report containing otherwise inadmissible hearsay was admissible in probation revocation hearing).



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CHAPTER 2 PROVINCE OF COURT AND JURY
SECTION 310 Questions of Law for the Court

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§ 310.syn Synopsis to Chapter 310: Questions of Law for the Court

Scope Questions of Law for the Court

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SECTION 310 Questions of Law for the Court

1-310 California Evidence Courtroom Manual Scope

Scope Questions of Law for the Court

§ 310 reads as follows:

Rule 310 Questions of Law for the Court

(a) All questions of law (including but not limited to questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence) are to be decided by the court. Determination of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article 2 (commencing with Section 400) of Chapter 4.

(b) Determination of the law of an organization of nations or of the law of a foreign nation or a public entity in a foreign nation is a question of law to be determined in the manner provided in Division 4 (commencing with Section 450).

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 310 assigns the role of interpreting law, including evidence rules, to the judge. Section 310 should be read in conjunction with Sections 400-403, which deal with the special problem of preliminary factual issues that must be determined before evidence can be admitted.



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2 COMPARISON TO FEDERAL RULE

Section 310(a) is somewhat similar to Federal Rule of Evidence 104(a), which assigns issues of admissibility of evidence to the judge. However, Section 310(a) does not contain the language of Federal Rule of Evidence 104(a), which allows the judge to make decisions regarding the admissibility of evidence using material that would otherwise be inadmissible, except that the judge is bound by the law of privilege.

The Federal Rules of Evidence contain no counterpart to Section 310(b), which deals with interpretation of foreign law. However, both Federal Rule of Civil Procedure 44.1 and Federal Rule of Criminal Procedure 16.1 address this problem and declare that it is a question of law that is to be determined by the judge.



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3 SIGNIFICANT CASES

People v. Lipinski (1976) 65 Cal. App. 3d 566, 135 Cal. Rptr. 451 (ruling on admissibility of evidence in a criminal case is not a factual determination, but purely a legal question).

Hom v. Clark (1963) 221 Cal. App. 2d 622, 35 Cal. Rptr. 11 (construction of statute and its applicability to given situation are matters of law for court).



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 2 PROVINCE OF COURT AND JURY
SECTION 311 Applicability of Foreign Law

1-311 California Evidence Courtroom Manual 311.syn

§ 311.syn Synopsis to Chapter 311: Applicability of Foreign Law

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Scope Applicability of Foreign Law

§ 311 reads as follows:

Rule 311 Applicability of Foreign Law

If the law of an organization of nations, a foreign nation or a state other than this state, or a public entity in a foreign nation or a state other than this state, is applicable and such law cannot be determined, the court may, as the ends of justice require, either:

- (a) Apply the law of this state if the court can do so consistently with the Constitution of the United States and the Constitution of this state; or
- (b) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 311 is more properly considered a choice of law provision than a rule of evidence.



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SECTION 311 Applicability of Foreign Law

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 311 in the federal rules.



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CHAPTER 2 PROVINCE OF COURT AND JURY
SECTION 312 Questions of Fact for the Jury

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§ 312.syn Synopsis to Chapter 312: Questions of Fact for the Jury

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SECTION 312 Questions of Fact for the Jury

1-312 California Evidence Courtroom Manual Scope

Scope Questions of Fact for the Jury

§ 312 reads as follows:

Rule 312 Questions of Fact for the Jury

Except as otherwise provided by law, where the trial is by jury:

- (a) All questions of fact are to be decided by the jury.
- (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 312 Questions of Fact for the Jury

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1 ANALYSIS

Section 312 spells out the role of the jury as the trier of fact, including issues of credibility and the weight of evidence. Section 312 implies that hearsay declarants, like any other witness, may be impeached and rehabilitated with the jury determining what weight to give their statements.



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2 COMPARISON TO FEDERAL RULE

There is no direct counterpart to Section 312 in the federal rules, although Federal Rule of Evidence 806 provides that hearsay declarants, like all other witnesses, can be impeached and rehabilitated.



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3 SIGNIFICANT CASES

People v. Mobley (1999) 72 Cal. App. 4th 761, 85 Cal. Rptr. 2d 474 , review denied, 1999 Cal. LEXIS 6181 (in determining sufficiency of the evidence to sustain a criminal conviction, appellate court does not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact); *disapproved in part on other grounds in* ***People v. Trujillo*** (2006) 40 Cal. 4th 165, 181 n. 3, 51 Cal. Rptr. 3d 718, 146 P.3d 1259 .

U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 279 Cal. Rptr. 533 (weight to be given to expert mechanic's opinion is a question for the jury).



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CHAPTER 3 ORDER OF PROOF

SECTION 320 Order of Proof

1-320 California Evidence Courtroom Manual 320.syn

§ 320.syn Synopsis to Chapter 320: Order of Proof

Scope Order of Proof

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DIVISION 3 GENERAL PROVISIONS
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SECTION 320 Order of Proof

1-320 California Evidence Courtroom Manual Scope

Scope Order of Proof

§ 320 reads as follows:

Rule 320 Order of Proof

Except as otherwise provided by law, the court in its discretion shall regulate the order of proof.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 3 GENERAL PROVISIONS

CHAPTER 3 ORDER OF PROOF

SECTION 320 Order of Proof

1-320 California Evidence Courtroom Manual 1

1 ANALYSIS

The order of proof in a trial is generally well-established, with the party who has the burden of proof presenting evidence first, with each piece of evidence or witness subject to impeachment through cross-examination and to rehabilitation through re-direct examination. Section 320 gives the trial court the discretion to rearrange this order, if, for example, witnesses are unavailable at certain times or if a different order would facilitate the comprehension of the trier of fact.



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CHAPTER 3 ORDER OF PROOF

SECTION 320 Order of Proof

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2 COMPARISON TO FEDERAL RULE

Like Section 320, Federal Rule of Evidence 611 gives the trial court discretion to alter the order of proof, but the federal rule goes much further to elaborate on the trial court's power to prevent harassment of witnesses, to enforce the limited scope of cross-examination and to regulate the use of leading questions.



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 4 ADMITTING AND EXCLUDING EVIDENCE
ARTICLE 1 GENERAL PROVISIONS
SECTION 350 Only Relevant Evidence Admissible

1-350 California Evidence Courtroom Manual 350.syn

§ 350.syn Synopsis to Chapter 350: Only Relevant Evidence Admissible

Scope Only Relevant Evidence Admissible

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ARTICLE 1 GENERAL PROVISIONS
SECTION 350 Only Relevant Evidence Admissible

1-350 California Evidence Courtroom Manual Scope

Scope Only Relevant Evidence Admissible

§ 350 reads as follows:

Rule 350 Only Relevant Evidence Admissible

No evidence is admissible except relevant evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 350 Only Relevant Evidence Admissible

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1 ANALYSIS

Sections 210, 350, 351 and 352 must be considered together. Section 350 sets forth the first principle of evidence law--as a threshold matter, evidence must be relevant to be admissible. "Relevant evidence," as defined in Section 210, means "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Please also read the Analysis of Section 210.

Section 351 adds that even though evidence is relevant, it may be excluded pursuant to another evidence rule. The first example of such a rule is Section 352, which provides that even if evidence is relevant under Section 210, it may still be excluded because the probative value of the evidence is substantially outweighed by its tendency to incite the jury to decide the facts based on passion, to confuse or mislead the jury, or to waste judicial resources.

Practice Tip for Analyzing Relevancy Issues

A helpful framework for considering relevancy objections under Sections 210 and 352 is to ask the following questions:

- (1) What evidence is being offered?
- (2) Is it being offered on a disputed issue of consequence in the case?

Some courts speak in terms of whether an issue is a "material" issue in the case. To focus on the material issues of the case, look to the substantive law (especially as reflected in the pleadings), pretrial rulings (such as demurrers, summary adjudication) and pretrial orders or stipulations (which can make issues "immaterial"). As Section 210 indicates, evidence that tends to prove or disprove the credibility of other evidence is always relevant under Section 210, although it may be excluded under Section 352.

- (3) Logically, does the evidence help to prove or disprove the issue it is offered upon?

Relevance, in the sense of logical connection, rests in the eye of the beholder. Or, as the eminent scholar

Thayer put it, "The law furnishes no test of relevancy. For this, it tacitly refers to logical and general experience" One judge may see the connection between your evidence and the issue to be determined, while another may not. The key to surviving a relevancy objection here is to stress that Section 210 merely requires that the evidence have "any tendency to prove." Note that the evidence need not directly establish the question in dispute--as Dean McCormick stated, "a brick is not a wall"--nor does it need to be to be relevant.

(4) Is the helpfulness of the evidence substantially outweighed by its dangers?

Litigators tend to fixate on the danger of undue prejudice of the evidence (that is, its tendency to inflame the emotions of the jury, inviting the jury to decide on an irrational basis). They ignore the other dangers listed in Section 352: undue consumption of time, confusion of the issues, or misleading the jury. To make the most of this basis for exclusion, the advocate must ground the objection in specific, concrete facts rather than rely on a "boilerplate" recitation of the language of Section 352.



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2 COMPARISON TO FEDERAL RULE

Federal Rules of *Evidence* 401, 402 and 403 are the counterparts to Sections 210, 350, 351 and 352. See the Comparison to Federal Rule in *Sections 210* and *352*.



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3 SIGNIFICANT CASES

See also cases cited under *Section 210*.

People v. Edwards (1991) 54 Cal. 3d 787, 1 Cal. Rptr. 2d 696, 819 P.2d 436, cert. denied, 506 U.S. 841 (evidence that two 12-year-old shooting victims were friends was neither particularly probative nor prejudicial but was admissible to provide jury with background information to help it understand circumstances surrounding defendant's shooting of the victims and to suggest that the victims were preoccupied with each other's companionship and thus not concerned about the approach of defendant's truck prior to the shooting; allowing that slight touch of humanity was well within discretion of the trial court).

People v. McElheny (1982) 137 Cal. App. 3d 396, 187 Cal. Rptr. 39 (irrelevant evidence is that which only serves to prove an ultimate issue or fact which is not in dispute, and it may not be entered into evidence).

Traxler v. Thompson (1970) 4 Cal. App. 3d 278, 84 Cal. Rptr. 211 (the first rule of admissibility is relevancy, and the only test of relevancy is logic and common sense; relevant evidence must support the verdict).



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SECTION 351 Admissibility of Relevant Evidence

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§ 351.syn Synopsis to Chapter 351: Admissibility of Relevant Evidence

Scope Admissibility of Relevant Evidence

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SECTION 351 Admissibility of Relevant Evidence

1-351 California Evidence Courtroom Manual Scope

Scope Admissibility of Relevant Evidence

§ 351 reads as follows:

Rule 351 Admissibility of Relevant Evidence

Except as otherwise provided by statute, all relevant evidence is admissible.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 351 Admissibility of Relevant Evidence

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1 ANALYSIS

Section 351 embodies an approach central to Anglo-American evidence law. Relevant evidence is admissible unless an express reason is stated to justify exclusion. Some limitations on admissibility arise from concerns over trustworthiness, such as those found in the hearsay rule. Other rules reflect the judgment that certain social policies, which are promoted through exclusion of evidence, are paramount to the accurate determination of facts in a lawsuit. Obvious examples of values of greater import are those associated with privileges, presumptions, subsequent repairs and compromise negotiations. In essence, Section 351 states that all relevant evidence comes in unless the opponent can state a good reason, grounded in the Evidence Code (or other statute), for keeping the evidence out. Thus, Section 351 puts the burden on the opponent of relevant evidence to justify why the evidence should be kept from the trier of fact. Note that only one well-founded objection need apply for the evidence to be excluded.



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SECTION 351 Admissibility of Relevant Evidence

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2 COMPARISON TO FEDERAL RULE

Section 351 is comparable to Federal Rule of *Evidence* 402, except that, in addition to the *Federal Rules of Evidence*, *Rule 402* adds the United States Constitution, other statutes passed by Congress, or other procedural rules promulgated by the Supreme Court as grounds for excluding otherwise relevant evidence. However, Section 351 has not been interpreted as providing the exclusive grounds upon which evidence can be excluded in California courts. The California and United States Constitutions provide other bases for the exclusion of evidence, as does California case law. See Kenneth W. Graham, Jr., *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 *Loy. L.A. L. Rev.* 279 (1971).



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See cases cited under Sections 210 and 350.



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ARTICLE 1 GENERAL PROVISIONS
SECTION 351.1 Exclusion of Evidence Related to Polygraph Examinations

1-351.1 California Evidence Courtroom Manual 351.1.syn

§ 351.1.syn Synopsis to Chapter 351.1: Exclusion of Evidence Related to Polygraph Examinations

Scope Exclusion of Evidence Related to Polygraph Examinations

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2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY

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ARTICLE 1 GENERAL PROVISIONS
SECTION 351.1 Exclusion of Evidence Related to Polygraph Examinations

1-351.1 California Evidence Courtroom Manual Scope

Scope Exclusion of Evidence Related to Polygraph Examinations

§ 351.1 reads as follows:

351.1 Exclusion of Evidence Related to Polygraph Examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

(Added by Stats. 1983, ch. 202, § 1, eff. July 12, 1983)

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SECTION 351.1 Exclusion of Evidence Related to Polygraph Examinations

1-351.1 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 351.1 appears in this part of the Evidence Code presumably because polygraph tests have traditionally been viewed as having marginal reliability, and thus, probative value. Moreover, courts have noted the burden on judges in assessing foundational factors for admission, the danger of the jury's reassessment of same factors in deciding whether to credit test results, and the potential for confusion and prejudice. Note that all references to polygraph tests, whether a refusal to take one or an offer to take one, are excluded unless all of the parties stipulate to the admissibility of such evidence. Of course, the fact that a person makes a statement that is otherwise relevant and admissible during the course of a polygraph test will not result in the exclusion of the evidence.



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SECTION 351.1 Exclusion of Evidence Related to Polygraph Examinations

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 351.1. In general, the federal courts have excluded polygraph test results, although some have admitted the results pursuant to stipulation. David Faigman et al., 1 *Modern Scientific Evidence* § 14 (1997). In *United States v. Scheffer* (1998) 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413, the United States Supreme Court held that Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings, does not abridge the *Sixth Amendment constitutional* right of accused members of the military to present a defense. The Court held that Rule 707 serves several legitimate interests, including ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation on collateral issues. The Court thus held that the rule was neither arbitrary nor disproportionate in achieving its purpose.



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3 ADDITIONAL AUTHORITY

Paul C. Giannelli & Edward J. Imwinkelried, 1 Scientific Evidence § 8.3 (2d ed. 1993)

David Faigman et al., 1 Modern Scientific Evidence § 14 (1997)



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4 SIGNIFICANT CASES

People v. Richardson (2008) 43 Cal. 4th 959, 77 Cal. Rptr. 3d 163, 183 P.3d 1146 (Section 351.1 is constitutional in that it prevents the admission of unreliable evidence at penalty phase; trial court did not violate defendant's rights to present a defense and to due process by refusing to admit results of polygraph examination).

People v. Koontz (2002) 27 Cal. 4th 1041, 119 Cal. Rptr. 2d 859, 46 P.3d 335 (Section 351.1, which bans admissibility of polygraph tests, applies in penalty phase as well as guilt phase of capital murder trial).

People v. Ayala (2000) 23 Cal. 4th 225, 96 Cal. Rptr. 2d 682, 1 P.3d 3, cert. denied, 532 U.S. 908 (defendant did not have constitutional right to compel polygraph, psychological or neurological examination of attempted murder victim; there is no constitutional right to present unreliable evidence).

People v. Price (1991) 1 Cal. 4th 324, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (excluding evidence of polygraph test results of prosecution witness did not deny defendant due process right to fair trial; party has no due process right to present evidence of test results if results used scientific techniques not generally accepted as reliable in scientific community).

People v. Morris (1991) 53 Cal. 3d 152, 279 Cal. Rptr. 720, 807 P.2d 949 (defendant in capital murder case was precluded from introducing evidence that an accomplice testifying against him had taken and failed a polygraph examination since defendant had not made required offer of proof as to polygraph's acceptance in scientific community).

People v. Basuta (2001) 94 Cal. App. 4th 370, 114 Cal. Rptr. 2d 285 (admission of detective's reference to state's key witness having offered to take polygraph examination was prejudicial and required reversal).

In re Aontae D. (1994) 25 Cal. App. 4th 167, 30 Cal. Rptr. 2d 176 (statutory exclusion of polygraph test results in criminal proceedings or in juvenile proceedings, absent stipulation, was founded on sound, rather than arbitrary, judgment of value and costs of polygraphs, and thus did not violate due process).

People v. Kegler (1987) 197 Cal. App. 3d 72, 242 Cal. Rptr. 897 (this Section does not violate equal protection, even if stipulation provision involves disparate treatment of defendants; legislature could have reasonably acted to permit such otherwise inadmissible evidence only in those cases in which there would be no burden on trial court to hold lengthy, contested foundational hearing).



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1-352 California Evidence Courtroom Manual 352.syn

§ 352.syn Synopsis to Chapter 352: The Court's Discretion to Exclude Evidence

Scope The Court's Discretion to Exclude Evidence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY

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SECTION 352 The Court's Discretion to Exclude Evidence

1-352 California Evidence Courtroom Manual Scope

Scope The Court's Discretion to Exclude Evidence

§ 352 reads as follows:

Rule 352 The Court's Discretion to Exclude Evidence

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.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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1 ANALYSIS

Section 352 codifies the long-standing authority of the trial judge to exclude relevant evidence where the probity of the offered evidence is substantially outweighed by one or more of certain identified countervailing considerations or "dangers."

When the court is requested to exclude evidence for one of the reasons specified under Section 352, the trial judge must determine whether the adverse effect *substantially* outweighs the probative value of the evidence. The word "substantial" is undoubtedly a word of some elasticity, and ultimately in applying that standard, the trial judge has broad discretion. Consequently, it is generally held that a trial judge's determination based on Section 352 will be overturned only upon a showing of abuse of the trial judge's discretion, for he or she is in the best position to evaluate the evidence. *People v. Hoover* (1998) 64 Cal. App. 4th 1422, 75 Cal. Rptr. 2d 862. No precise definition of the term "substantial" appears in the Code, yet it is clear that, at least symbolically, Section 352 favors a presumption of admissibility by mandating that the negative attribute of the evidence must substantially outweigh its probative value before exclusion is justified. Thus, in a "close case," the rule favors admission of the evidence.

Section 352 provides for the exclusion of evidence that is excessively prejudicial. "Prejudice" does not mean harm; in general, most evidence that is offered against a party is harmful to that party's case. Rather, "unfair prejudice" means that the evidence invites a response from the jury that borders on the irrational. Accordingly, if the evidence arouses emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish to the point where the jury may want to decide the case on a basis other than the evidence, the evidence may be unfairly prejudicial under Section 352.

When a judge considers an objection under Section 352 the judge is permitted to exclude such evidence if he or she deems it so prejudicial that a limiting instruction would not protect a party adequately and the matter in question can be proved sufficiently by other evidence. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965).

Confusion of the issues and misleading the jury may be bases for exclusion of evidence in instances where evidence is partially inadmissible or where evidence is admissible for one purpose and not for another. Exclusion based upon confusion is usually justified where the offered evidence would require the trier of fact to engage in intricate, extraordinary, or impossible mental gymnastics in order to comprehend the import of the evidence or to evaluate its weight. Similarly, if the jury is likely to ascribe excessive, unwarranted importance or weight to the evidence, the

offered evidence is susceptible to exclusion under Section 352. Finally, the danger of "undue consumption of time" is a serious concern for most trial judges. If the introduction of evidence will necessitate a "mini-trial," over its value, a judge may be far more likely to exclude it.

Section 352 does not designate unfair surprise as a ground for exclusion. While surprise may undoubtedly result in injustice in certain situations, the granting of a continuance is considered to be the more appropriate method of achieving fairness in this context.

Section 352 has taken on additional significance in the criminal context following the passage of Proposition 8, an initiative entitled the "Victims' Bill of Rights." Section 3 of this provision, called the "Right to Truth-in-Evidence," amended the California Constitution to suspend any evidentiary rule, except those exempted from Proposition 8, that would prohibit or limit the admissibility of relevant evidence. *Cal. Const. art. I, § 28(d)*. Section 352 was one of the rules exempted from Proposition 8, along with the rape shield statutes, hearsay rules and privilege rules. Thus, following Proposition 8, Section 352 became one of the only limitations on the admissibility of relevant evidence in criminal cases. Thus, in *People v. Castro* (1985) 38 Cal. 3d 301, 211 Cal. Rptr. 719, 696 P.2d 111, the California Supreme Court held that a trial judge retains the discretion under Section 352 to exclude felony convictions used to impeach a witness, despite a Proposition 8 provision allowing the use of such convictions "without limitation."

Practice Tip on Making a Section 352 Objection

Section 352 is undoubtedly the most common evidentiary objection. Hearing the rule cited over and over has a numbing effect on some judges. Thus, to be effective, a practitioner who raises a Section 352 objection must do more than simply recite the language of the rule ("Unfairly prejudicial, Your Honor!"). You should tie the language of the rule to the particular facts of the case as specifically and concretely as possible: "Your Honor, this videotape, which allegedly shows the plaintiff's son decapitating the defendant's pet ferret--complete with spurting blood and crunching bones--has very minimal, if any, probative value on the issue of the defendant's intent to defraud plaintiff and is an outrageous attempt to inflame the emotions and disgust of the jury and distract them from the real issues in the case."



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2 COMPARISON TO FEDERAL RULE

Although the language differs somewhat, Section 352 is substantially identical to Federal Rule of *Evidence* 403.



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1-352 California Evidence Courtroom Manual 3

3 ADDITIONAL AUTHORITY

Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 *Santa Clara L. Rev.* 739 (1990)

Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 *U.C. Davis L. Rev.* 59 (1984)

Hank M. Goldberg, *Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, 24 *Loy. L.A. L. Rev.* 621 (1991)



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4 SIGNIFICANT CASES

Making a 352 Objection Is Required

People v. Raley (1992) 2 Cal. 4th 870, 8 Cal. Rptr. 2d 678, 830 P.2d 712 (absent specific and timely objection based on Section 352, reviewing court will not review questions of admissibility).

Gouskos v. Aptos Village Garage (2001) 94 Cal. App. 4th 754, 114 Cal. Rptr. 2d 558 (upholding trial court's decision to exclude evidence of prior similar incidents of irregular estimate and billing practices; appellant argued only in conclusory fashion that the evidence was "highly probative" and "not prejudicial" and made no attempt to argue that trial court's decision was an abuse of discretion, meaning irrational in light of the factors supporting the decision).

People v. Williams (1991) 228 Cal. App. 3d 146, 278 Cal. Rptr. 2d 801 (court has no obligation to perform balancing test sua sponte).

Making a Record of Balancing Under Section 352

People v. Taylor (2001) 26 Cal. 4th 1155, 113 Cal. Rptr. 2d 827, 34 P.3d 937 (a court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows that the court was aware and performed its balancing functions under Section 352; admission of crime scene photographs and videotape of victim's bodies during the guilt phase of a death penalty trial proper to bolster the credibility of the witnesses, to show that a murder actually occurred and to show that a planned robbery took place).

People v. Crittenden (1994) 9 Cal. 4th 83, 36 Cal. Rptr. 2d 474, 885 P.2d 887 (when defendant objects to evidence as having prejudicial impact which outweighs its probative value, record must demonstrate affirmatively that trial court did in fact weigh prejudice against probative value, but trial judge need not expressly weigh prejudice against probative value or even expressly state that he has done so).

People v. Garceau (1993) 6 Cal. 4th 140, 24 Cal. Rptr. 2d 664, 862 P.2d 664 (trial court engaged in meaningful weighing process when it determined that probative value of various exhibits exceeded prejudicial effect; trial court

heard arguments from both sides regarding relevance and prejudice before articulating that probative value of challenged evidence outweighed any prejudicial effect).

Brown v. Smith (1997) 55 Cal. App. 4th 767, 64 Cal. Rptr. 2d 301 (court need not specifically articulate its process in weighing the probative value versus the dangers of uncharged misconduct, but the record must reflect that the trial court did evaluate the evidence under Section 352).

Balancing Section 352 Factors--Probative Value

People v. Farnam (2002) 28 Cal. 4th 107, 121 Cal. Rptr. 2d 106, 47 P.3d 988 (evidence that defendant possessed a knife, two months after the killing, similar to the knife used in the murders may have provided only weak inference of guilt, but was not irrelevant nor error to admit over Section 352 objection).

People v. Ibarra (2007) 151 Cal. App. 4th 1145, 61 Cal. Rptr. 3d 22, review denied (trial court did not err in admitting a videotape that a reality television show ("COPS") recorded as police rescued defendant's estranged girlfriend during his attempt to strangle her. The trial court did not abuse its discretion in admitting the tape over defendant's objection under Cal. Evid. Code § 352, where the tape did not distort the events and was probative of defendant's intent in holding the victim hostage for more than 30 minutes with a belt tightly wrapped around her neck. Moreover, the tape had probative value in corroborating testimony about the difficulty of the rescue and the victim's physical condition and thus undermined defendant's claim that he acted in the heat of passion).

People v. Albarran (2007) 149 Cal. App. 4th 214, 57 Cal. Rptr. 3d 92 (trial court committed reversible error in admitting gang evidence on the issues of motive or intent for the underlying crimes where the evidence was not relevant to those crimes; even if that evidence was marginally relevant, it was extraordinarily prejudicial, raising the distinct potential to sway the jury to convict regardless of defendant's actual guilt. Thus, admission of that evidence violated federal due process and rendered the trial fundamentally unfair; the judgment was reversed and remanded for a new trial on all charges).

Smalley v. Baty (2005) 128 Cal. App. 4th 977, 27 Cal. Rptr. 3d 575, review denied (in a personal injury case where defendants conceded liability and contested only damages, the trial court's exclusion of evidence that plaintiff had paid his own medical bills was a prejudicial abuse of discretion; although there is an exception to the collateral source allowing defense evidence that expenses were paid by insurance in order to prove malingering, the exception has no relevance where the plaintiff has paid his own medical bills and offers that evidence in order to prove his full damages).

People v. Cajina (2005) 127 Cal. App. 4th 929, 26 Cal. Rptr. 3d 171, review denied (where defendant was convicted of failing to comply with annual registration as a sex offender, trial court did not err in denying defendant's motion in limine, based on Section 352, to delete any mention of his status as a sex offender to the jury. Defendant had offered to stipulate that he had a statutory duty to register and to stipulate to the requirements included in the registration statute, without any reference to the basis of his obligation. Alternatively, he offered to stipulate that he had a statutory duty to register because of "a felony conviction." The trial court denied defendant's motion to allow the People to prove their case, "which is that he has a prior conviction for a sexual offense and there are strict standards for registration based on that conviction." The trial court agreed to sanitize the prior conviction by having it referred to only as a "sexual offense"; the trial court did not abuse its discretion because there is a strong policy against depriving the People's case of its persuasiveness and strength by forcing the prosecutor to accept stipulations that soften the impact of the evidence in its entirety and where the effect removing certain matters from the trial is to hamper a coherent presentation of the remaining issues).

People v. Avitia (2005) 127 Cal. App. 4th 185, 24 Cal. Rptr. 3d 887 (trial court committed prejudicial error in defendant's trial on charges of discharging firearm in grossly negligent manner and possession of assault weapon; trial court abused its discretion by admitting evidence of gang graffiti, found in defendant's bedroom, where evidence was

unrelated to any issue at trial and issue of gun ownership was not disputed by defendant).

Kessler v. Gray (1978) 77 Cal. App. 3d 284, 143 Cal. Rptr. 496 (the balancing process requires consideration of relationship between evidence and relevant inferences to be drawn from it, whether evidence is relevant to main or only a collateral issue, and necessity of evidence to proponent's case as well as reasons recited in statute for exclusion).

--Unnecessary Consumption of Time

Monroy v. City of Los Angeles (2008) 164 Cal. App. 4th 248, 78 Cal. Rptr. 3d 738 (trial court abused its discretion by severely limiting plaintiff's cross-examination of defense experts in a vehicle negligence action; trial court permitted only one expert to testify to the same opinion, including percipient witnesses, regardless of which party elicited the testimony; trial court may not use its powers to control the orderly conduct of the proceedings and to prevent cumulative evidence if it destroys a plaintiff's evidentiary presentation).

Heiner v. Kmart Corp. (2000) 84 Cal. App. 4th 335, 100 Cal. Rptr. 2d 854 (trial court did not abuse its discretion in excluding evidence that plaintiff failed to comply with licensing provisions for his dental practice, and thus could not claim lost profits for his dental business, as such evidence was speculative and likely to lead to confusion and undue consumption of time on collateral issues).

DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 276 Cal. Rptr. 214 (by enacting this section, legislature gave court means to facilitate judicial economy).

--Undue Prejudice

People v. Kipp (2001) 26 Cal. 4th 1100, 113 Cal. Rptr. 2d 27, 33 P.3d 450 (for the purposes of Section 352, "prejudicial" is not synonymous with "damaging," but refers instead to evidence that "uniquely tends to evoke an emotional bias against defendant" without regard to its relevance on material issues).

People v. Millwee (1998) 18 Cal. 4th 96, 74 Cal. Rptr. 2d 418, 954 P.2d 990, cert. denied (because evidence of other, uncharged offenses can be highly prejudicial, trial courts should use particular care in performing balancing analysis under Section 352; probative value of evidence that defendant had given similar excuse for shooting of another person two days after the murder for which defendant was being tried substantially outweighed its prejudicial nature, especially since jury was told that evidence went only to impeachment of defendant's testimony and had no bearing on defendant's character).

People v. Carrillo (2004) 119 Cal. App. 4th 94, 13 Cal. Rptr. 3d 878 (trial court committed prejudicial error by admitting prosecution's evidence of defendant's poverty as a motive for her commission of the charged crime; although evidence of a defendant's poverty may be admissible to refute a claim that he did not commit the offense because he did not need the money, or to eliminate other possible explanations for sudden wealth after the occurrence of a theft offense, but courts recognize the unfairness of admitting evidence of poverty where these other issues are not at stake because a "rich man's greed is as much a motive to steal as a poor man's poverty"; evidence of either wealth or poverty is likely to amount to a great deal of unfair prejudice with little probative value).

People v. Leon (2001) 91 Cal. App. 4th 812, 110 Cal. Rptr. 2d 776 (in prosecution for committing a forcible lewd act upon a child, where key issue was whether the defendant had the intent to commit the act when he entered the victim's house, trial court erred in permitting court-appointed interpreter to testify that she had seen defendant moving his hands near his groin during victim's testimony; such testimony could confuse and inflame the jury).

Vorse v. Sarasy (1997) 53 Cal. App. 4th 998, 62 Cal. Rptr. 2d 164 (trial court erred in determining that testimony would cause undue prejudice to plaintiff's case because it would "damage" the case and hurt the reputation of plaintiff's

attorney; under Section 352, "prejudice" means "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues").

--Confusion of Issues

People v. Alcala (1992) 4 Cal. 4th 742, 15 Cal. Rptr. 2d 432, 842 P.2d 1192 (it was error to exclude defense witness's testimony that he had seen victim on the day after she allegedly disappeared on the grounds that, because he had also positively identified the picture of another person as the girl whom he had seen on the date in question, his testimony was not relevant and would only have served to confuse the issues).

--Ineffectiveness of Limiting Instruction

People v. Coleman (1985) 38 Cal. 3d 69, 211 Cal. Rptr. 102, 695 P.2d 189 (trial court abused its discretion by permitting the hearsay letters of homicide victim, defendant's wife, accusing defendant of prior threats of violence against her and expressing her fears of future violence, to be extensively quoted by prosecutor in his cross-examination of defendant; limiting instruction was not adequate to insure that the letters would be used only for purpose of impeaching defendant's credibility because of the inflammatory nature of the hearsay involved).

Illustrations of Section 352

People v. Riggs (2008) 44 Cal. 4th 248, 79 Cal. Rptr. 3d 648, 187 P.3d 363 (trial court did not abuse its discretion by permitting prosecutor to show jury a video clip from national TV show concerning defendant's crime, when clip was less than one and a half minutes long, when defendant himself used part of the clip in his argument, and defendant told police investigators he agreed with his co-defendant's versions of events).

People v. Richardson (2008) 43 Cal. 4th 959, 77 Cal. Rptr. 3d 163, 183 P.3d 1146 (Section 352 is not a ground for excluding prosecution evidence to avoid a conflict of interest between the defendant and the defendant's attorney).

People v. Cunningham (2001) 25 Cal. 4th 926, 108 Cal. Rptr. 2d 291, 25 P.3d 519 (Section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of "significant" probative value to his or her defense; defendant's due process rights were not infringed in this case; during penalty phase of capital trial, trial court retains discretion to exclude "particular items of evidence" under Section 352, but has no discretion to exclude particular incidents offered to prove defendant's violent criminality and propensity for violence, pursuant to *Penal Code* section 190.3, factor (b). In addition, defendant is not entitled to preclude admission of the graphic or sordid details of his factor (b) crimes by stipulating to any resulting conviction or to a sanitized version of the facts surrounding the offense; trial court did not abuse its discretion in allowing evidence that defendant attempted forcible sodomy on a fellow inmate while in prison awaiting the capital trial).

People v. Lewis (2001) 25 Cal. 4th 610, 106 Cal. Rptr. 2d 629, 22 P.3d 392 (the admissibility of crime scene and victim photographs are governed by the same rules of relevancy as other evidence).

People v. Anderson (2001) 25 Cal. 4th 543, 106 Cal. Rptr. 2d 575, 22 P.3d 347 (a trial court has narrower discretion to exclude, under Section 352, photographic evidence of a capital crime from the penalty phase of a trial than from the guilt phase because the circumstances of the capital crime are a statutorily relevant factor in determining whether the death penalty is warranted and guilt has already been determined so the potential for prejudice on the issue of guilt is gone; evidence is not "cumulative" in the sense of Section 352 simply because it illustrates evidence presented through other means).

People v. Memro (1995) 11 Cal. 4th 786, 47 Cal. Rptr. 2d 219, 905 P.2d 1305, cert. denied, 519 U.S. 834, 117 S. Ct. 106, 136 L. Ed. 2d 60 (probative value of photographs of young boys and pornographic magazines containing

sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult outweighed prejudicial effect in prosecution for first-degree murder on felony-murder theory; evidence showed intent to molest young boy).

People v. Sims (1993) 5 Cal. 4th 405, 20 Cal. Rptr. 2d 537, 853 P.2d 992, cert. denied, 512 U.S. 1253, 114 S. Ct. 2782, 129 L. Ed. 2d 893 (in some circumstances, videotape may present far more graphic, gruesome, and potentially prejudicial depiction than static photographs, and under these circumstances, videotape should be excluded).

People v. Cummings (1993) 4 Cal. 4th 1233, 18 Cal. Rptr. 2d 796, 850 P.2d 1, cert. denied, 511 U.S. 1046 (allowing prosecution to use mannequin to illustrate paths of six bullets through body of murder victim in capital murder prosecution was not error where issues to which evidence was relevant were hotly disputed and expert testimony was confusing at times; probative value of such evidence clearly outweighed any prejudice to defendant).

People v. Wilson (1992) 3 Cal. 4th 926, 13 Cal. Rptr. 2d 259, 838 P.2d 1212 (evidence of defendant's poverty or indebtedness is generally inadmissible to establish motive to commit robbery or theft, because reliance on poverty alone as evidence of motive is deemed unfair to the defendant, and probative value of such evidence is considered outweighed by risk of prejudice).

People v. Fauber (1992) 2 Cal. 4th 792, 9 Cal. Rptr. 2d 24, 831 P.2d 249, cert. denied, 507 U.S. 1007, 113 S. Ct. 1651, 123 L. Ed. 2d 272 (probative value of defendant's alleged refusal to plead guilty and testify in return for sentence of life without possibility of parole was outweighed by danger of confusing and misleading jury in penalty phase of capital murder prosecution).

People v. Kaurish (1990) 52 Cal. 3d 648, 276 Cal. Rptr. 788, 802 P.2d 278 (court was within its discretion in concluding that evidence of a third party's possible motive for being angry with the victim's mother and the victim, without any evidence linking the third party with actual perpetration of murder, was of such slight probative value that its possibility for jury confusion and undue delay substantially outweighed its probative value and was properly excluded).

People v. Rodriguez (1986) 42 Cal. 3d 730, 230 Cal. Rptr. 667, 726 P.2d 113, reh'g denied (evidence regarding state witness's history of drug abuse and psychiatric treatment five and six years before trial did not have sufficient bearing upon credibility of her testimony at trial to make its exclusion an abuse of discretion).

Winfred D. v. Michelin North America, Inc. (2008) 165 Cal. App. 4th 1011, 81 Cal. Rptr. 3d 756 (in a personal injury action regarding faulty tires, the trial court committed reversible error in allowing evidence of party's extramarital affair; party did not "open the door" to such evidence, nor did it have probative value on any material issue).

Greer v. Buzgheia (2006) 141 Cal. App. 4th 1150, 46 Cal. Rptr. 3d 780 (trial court did not err in admitting evidence of plaintiff's full medical costs in personal injury case, even though case law limits plaintiff's ultimate recovery to those medical expenses actually paid or incurred; the full medical expenses gave the jury a more complete picture of the plaintiff's injuries).

People v. Celis (2006) 141 Cal. App. 4th 466, 46 Cal. Rptr. 3d 139 (trial court did not abuse its discretion or violate defendant's due process right to present a defense by excluding evidence of the prison sentence that defendant's son, who was also a witness in his mother's trial, was expected to serve. The punishment had no probative value; it did not enhance the witness's credibility; in addition, where defendant was charged with the same crime as her son, the sentence would alert the jury to the punishment she would receive if found guilty, which could unduly prejudice the jury's decision-making on her guilt).

Smalley v. Baty (2005) 128 Cal. App. 4th 977, 27 Cal. Rptr. 3d 575, rehearing denied, review denied (trial court

abused its discretion by excluding the evidence that plaintiff paid his own medical expenses because that evidence was manifestly relevant to his claim for damages; the considerations of the collateral source rule, which bars evidence that insurance paid a plaintiff's medical expenses, were irrelevant to the case at hand where plaintiff was attempting to show that he was paying his own medical expenses to refute claims of malingering; the finding of undue prejudice under Section 352 was untenable; because the defense expert was allowed to speculate that plaintiff was padding his expenses in hopes of "monetary gain" for nonexistent injuries, it was error to prevent plaintiff from showing that he had lost more by continuing treatment than he would have by discontinuing it. Moreover, the error was prejudicial. Although defendants admitted liability, the jury awarded plaintiff barely more than half the amount of his medical expenses, suggesting that the jury was persuaded by the defense expert's insinuation of malingering).

People v. Escobar (2000) 82 Cal. App. 4th 1085, 98 Cal. Rptr. 2d 696 , review denied (admission of evidence of prior incident of domestic violence in which defendant had punched his wife did not render defendant's trial for murder of his wife fundamentally unfair, and thus did not violate his due process rights; prior act need not have resulted in a conviction to be admissible under this Section and trial court did not abuse its discretion in finding that probative value of prior act was not substantially outweighed by the danger of unfair prejudice).

Akers v. Miller (1998) 68 Cal. App. 4th 1143, 80 Cal. Rptr. 2d 857 (exclusion of photograph of nursing home patient in elder abuse case, taken several days after she died and offered against physician to show severity of bedsores was not abuse of discretion where court permitted extensive testimony by pathologist and plaintiff's experts regarding condition of bed sore and where refusal to allow jury to see photograph may have heightened, not diminished, the jury's belief that bed sore was too grisly to be seen).

Wineinger v. Bear Brand Ranch (1988) 204 Cal. App. 3d 1003, 251 Cal. Rptr. 681 (evidence of automobile passenger's blood alcohol level was not admissible in negligence trial to establish passenger's comparative negligence; prejudicial effect of evidence, that passenger's blood alcohol level could have been as high as 0.10 at time of accident, although measured at 0.03 within two hours of accident, outweighed its probative value).



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SECTION 352.1 Complainant's Address and Telephone Number in Criminal Sex Act Prosecution

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§ 352.1.syn Synopsis to Chapter 352.1: Complainant's Address and Telephone Number in Criminal Sex Act Prosecution

Scope Complainant's Address and Telephone Number in Criminal Sex Act Prosecution

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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1-352.1 California Evidence Courtroom Manual Scope

Scope Complainant's Address and Telephone Number in Criminal Sex Act Prosecution

§ 352.1 reads as follows:

352.1 Complainant's Address and Telephone Number in Criminal Sex Act Prosecution

In any criminal proceeding under Section 261, Section 264.1, subdivision (d) of Section 286, or subdivision (d) of *Section 288a of the Penal Code*, or in any criminal proceeding under subdivision (c) of Section 286 or subdivision (c) of *Section 288a of the Penal Code* in which the defendant is alleged to have compelled the participation of the victim by force, violence, duress, menace, or threat of great bodily harm, the district attorney may, upon written motion with notice to the defendant or the defendant's attorney, if he or she is represented by an attorney, within a reasonable time prior to any hearing, move to exclude from evidence the current address and telephone number of any victim at such hearing.

The court may order that evidence of the victim's current address and telephone number be excluded from any hearings conducted pursuant to such criminal proceeding if the court finds that the probative value of such evidence is outweighed by the creation of substantial danger to the victim.

Nothing in this section shall abridge or limit the defendant's right to discover or investigate such information.

(Added by Stats. 1985, ch. 335, § 3)

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1 ANALYSIS

Section 352.1 attempts to balance the defendant's right to full and fair confrontation of witnesses through cross-examination with a sex crime victim's fear of retribution from the defendant. Note that the victim must demonstrate "the creation of substantial danger" from the defendant in order to permit the court to balance this harm against the probative value of the victim's current address and phone number.



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2 COMPARISON TO FEDERAL RULE

There is no comparable Federal Rule of Evidence, although federal case law does permit some protection of the witness, including exclusion of questions regarding the witness's location, upon a showing of actual threat. *See United States v. Olson* (7th Cir. 1992) 978 F.2d 1472 ; *United States v. Housand* (2d Cir. 1977) 550 F.2d 818 , cert. denied, 431 U.S. 970, 97 S. Ct. 2931, 53 L. Ed. 2d 1066 .



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1-353 California Evidence Courtroom Manual Scope

Scope Effect of Erroneous Admission of Evidence

§ 353 reads as follows:

Rule 353 Effect of Erroneous Admission of Evidence

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

- (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
- (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Two important lessons are embedded in Sections 353 (improper *admission* of evidence) and 354 (improper *exclusion* of evidence). First, if a trial lawyer is going to win an evidentiary point, it better happen at the trial level because getting a reversal on appeal on an evidentiary issue is extremely unlikely. The appellate advocate has two hurdles on evidentiary matters: the reviewing court must first decide that the trial court erred, which is distinctly rare given the deferential "abuse of discretion" standard of review that applies to most evidentiary issues, and then decide that the error or errors "resulted in a miscarriage of justice." Sections 353(b) and 354. Second, if a trial lawyer loses the evidentiary point at trial, he or she better have made a good record for appeal, no matter what the likelihood of success of reversal, or risk professional liability.

Where the evidence is erroneously admitted, the error is easily preserved by stating the basis of the objection or the motion to strike. If the basis of the objection is not stated, error is waived unless the reason for the objection is apparent from the context of the testimony. Even if the court rules before hearing the basis of the objection, counsel should state the reason for the record. The reason may be abbreviated; indeed, some judges prefer this to avoid having the lawyer making speeches about evidentiary defects in front of the jury. However, counsel should be sure to make clear the ground for the objection, using the general evidentiary principle relied upon, and, if applicable, the specific foundational problem (Example: "Objection, Your Honor--improper expert opinion, no showing of qualification").



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2 COMPARISON TO FEDERAL RULE

Section 353 is somewhat similar to Federal Rule of Evidence 103 in its requirement of a record of an objection to evidence admitted, although the federal rule elaborates on the necessity of deciding evidentiary issues outside of the hearing of the jury. Moreover, the federal rule limits evidentiary errors that give rise to ground for appeal as those that affect "a substantial right of a party." Finally, Federal Rule of Evidence 103(d) states that error may be reviewed on appeal even if it has not been preserved where it falls within the category of "plain error." The Rule itself does not define "plain error," and the definition must be derived from case law. Generally, in order for the plain error doctrine to be satisfied, the error must be "obvious" and "fundamental." It appears that the threshold for invocation of the plain error doctrine is higher in civil cases than in criminal cases, and erroneous rulings are susceptible to plain error treatment in civil cases only in extreme situations. *See generally* Weissenberger's Federal Evidence § 103.5. Federal Rule of Evidence 103 was amended, effective December 1, 2000, to eliminate the requirement of a renewed or continuing objection, once the court makes a definitive ruling on admissibility on the record, whether before or during trial. Section 353 contains no such provision.



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3 SIGNIFICANT CASES

People v. Demetrulias (2006) 39 Cal. 4th 1, 45 Cal. Rptr. 3d 407, 137 P.3d 229 (objection or motion to strike must be both timely and specific as to its ground. An objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a "placeholder" objection stating general or incorrect grounds (e.g., "relevance") and revise the objection later in a motion to strike stating specific or different grounds (e.g., "improper character evidence under Section 1103").

People v. Seijas (2005) 36 Cal. 4th 291, 30 Cal. Rptr. 3d 493, 114 P.3d 742 (a defendant who fails to object to the trial court's decision to permit a witness to assert the privilege against self-incrimination may not challenge the ruling on appeal).

People v. Holt (1997) 15 Cal. 4th 619, 63 Cal. Rptr. 2d 782, 937 P.2d 213 (Section 353 applies to objections based on *Miranda*; the objection must be sufficiently specific to alert the trial judge to the nature of the evidence and the basis for exclusion).

People v. Garceau (1993) 6 Cal. 4th 140, 24 Cal. Rptr. 2d 664, 862 P.2d 664 (defendant waived any claim of error involving admission of alleged hearsay testimony in capital murder trial by reason of defense counsel's failure to object to testimony on any ground at trial).

People v. Hill (1992) 3 Cal. 4th 959, 13 Cal. Rptr. 2d 475, 839 P.2d 984 (defendant waived his claim that waiver of his rights under *Miranda* was ineffectual; defendant failed to raise ineffective-waiver argument in support of his motion under *Miranda*).

People v. Kelly (1992) 1 Cal. 4th 495, 3 Cal. Rptr. 2d 677, 822 P.2d 385 (defendant could not raise on appeal issue of whether his confession was erroneously admitted, as he did not object to its admission at trial).

People v. Wharton (1991) 53 Cal. 3d 522, 280 Cal. Rptr. 631, 809 P.2d 290 (claim by defendant that prosecutor committed prejudicial misconduct during closing argument by making five references to matters outside record, in capital murder trial, could not be raised on appeal, where defendant failed to timely object and request jury admonition).

People v. Morris (1991) 53 Cal. 3d 152, 279 Cal. Rptr. 720, 807 P.2d 949 (motion in limine to exclude evidence is sufficient manifestation of objection to protect record on appeal, making renewal of objection unnecessary, when the motion satisfies the basic requirements of Evidence Code: (1) the motion specifies legal ground for exclusion be advanced and subsequently raised on appeal; (2) the motion is directed to particular, identifiable body of evidence; and (3) the motion is made at time before or during trial when judge can determine evidentiary question in its appropriate context; if motion in limine does not satisfy these requirements, proper objection must be made during trial. In any event, defendant must press trial court to make express ruling on the motion or objection).

People v. Partida (2005) 37 Cal. 4th 428, 35 Cal. Rptr. 3d 644, 122 P.3d 765 (trial objection on Evidence Code section 352 grounds must state the specific reasons a defendant believes evidence should be excluded; if the objection is overruled, a defendant may argue on appeal that the court should have excluded the evidence only for the reasons asserted at trial, and may argue that the asserted error in overruling the trial objection violated due process).

DePalma v. Rodriguez (2007) 151 Cal. App. 4th 159, 59 Cal. Rptr. 3d 479 (trial court did not err in allowing defendant's biomechanic expert to testify at trial to opinions beyond those he had testified to at his deposition. The expert's testimony--that the nature of the low speed accident was such that one would not expect a person of normal health to have suffered any injury from the accident, including specific knee or shoulder injury--did not exceed the scope of his deposition testimony. Moreover, the expert properly disclosed the general substance of his expected testimony sufficiently so the parties could adequately prepare for trial; even assuming *arguendo* the testimony was error, it was not so prejudicial as to have resulted in a miscarriage of justice warranting a new trial).

In re Joy M. (2002) 99 Cal. App. 4th 11, 120 Cal. Rptr. 2d 714 (trial court properly considered a psychologist's report in denying reunification services; parent did not make objection in timely fashion, failing to object when report was admitted into evidence and waiting until all of the evidence was in; moreover, objection failed to adequately alert the court that parent sought to exclude the report; thus proof of an examiner's qualifications was unnecessary in the absence of adequate objections).

People v. Camacho (1993) 19 Cal. App. 4th 1737, 24 Cal. Rptr. 2d 286 (to obtain appellate review of claimed prejudicial "cross-examination" by trial court, defendants must have timely and specifically objected to that examination).

People v. Burnett (1993) 12 Cal. App. 4th 469, 15 Cal. Rptr. 2d 638 (on appeal, defendant could not claim error in trial court's comments, as defendant never objected or requested curative admonition at trial).

People v. Renteria (1992) 6 Cal. App. 4th 1076, 8 Cal. Rptr. 2d 255 (defendant who objects to use of his prior conviction for impeachment purposes must both make an explicit Section 352 objection and must testify in order to preserve the issue for appeal).

Haskell v. Carli (1987) 195 Cal. App. 3d 124, 240 Cal. Rptr. 439 (any defect in affidavit and deposition testimony used in summary adjudication issue hearing in action to determine ownership of property described in "Land Lease Purchase" agreement was waived by failure to object).

Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 139 Cal. Rptr. 888 (under rule that a judgment is not to be set aside because of improper admission of evidence unless error has resulted in a miscarriage of justice, a "miscarriage of justice" should be declared only when the reviewing court is convinced, after an examination of the entire case, including the evidence, that it is reasonably probable a result more favorable to the appellant would have been reached absent the error).



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1-354 California Evidence Courtroom Manual Scope

Scope Effect of Erroneous Exclusion of Evidence

§ 354 reads as follows:

Rule 354 Effect of Erroneous Exclusion of Evidence

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

- (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
- (b) The rulings of the court made compliance with subdivision (a) futile; or
- (c) The evidence was sought by questions asked during cross-examination or recross-examination.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Under Section 354, the advocate must make a record of the evidence that the judge has excluded. The clearest way to make this record is through "an offer of proof." The offer of proof permits the reviewing court to determine whether the trial court's decision to exclude evidence was prejudicial error. An offer of proof is simply a statement on the record, outside the hearing of the jury, summarizing the import of the offered evidence.

Illustration

Counsel:

And then what did defendant tell you?

Objection:

Hearsay.

Court:

Sustained.

Counsel:

Your Honor, I wish to make an offer of proof.

Court:

Proceed.

Counsel:

(Out of hearing of the jury) The witness would have testified that the defendant said to her, "I should have seen that

traffic signal."

It might be advisable on highly important points to voir dire the witness outside the hearing of the jury and thereby enable the witness to state his or her proffered testimony on the record. Also, a motion in limine may be used to resolve important evidentiary questions before the trial commences. Although the language of Section 354 states that the record may be preserved "by other means" than an offer of proof, a careful advocate will make an express offer of proof on the record if the issue has not already been made part of the record through a motion in limine.

See also the Analysis of Section 353.



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2 COMPARISON TO FEDERAL RULE

Section 354 bears some similarity to Federal Rule of Evidence 103, although the federal rule does not exempt objections made on cross-examination and sustained from the requirement of an offer of proof. Thus, counsel should make a record of what the evidence would have been, had the objection been overruled.



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3 SIGNIFICANT CASES

People v. Anderson (2001) 25 Cal. 4th 543, 106 Cal. Rptr. 2d 575, 22 P.3d 347 (defendant failed to properly preserve for appeal the issue of whether the spousal testimonial privilege of Section 970 applies when a spouse will be called solely to impeach the testimony of his or spouse, who is not charged with a crime but who has testified against a criminal defendant; counsel failed to make an offer of proof as to what impeachment material the witness spouse would have provided if he had taken the stand).

People v. Livaditis (1992) 2 Cal. 4th 759, 9 Cal. Rptr. 2d 72, 831 P.2d 297 (proponent of excluded evidence failed to make a record of the applicable hearsay exception and its foundational elements thus preventing appellate court from reviewing the trial court's alleged error).

People v. Carlin (2007) 150 Cal. App. 4th 322, 58 Cal. Rptr. 3d 495 (the Court of Appeals reversed the trial court's order committing the defendant to the custody of the California Department of Mental health, based on the jury's finding that the defendant is a sexually violent predator (SVP) within the meaning of California's Sexually Violent Predators Act. The trial court violated defendant's right of due process by allowing the People to use hearsay evidence, specifically 2000 and 2001 hearsay statements in an investigator's reports, to prove predicate sexually violent offenses, even if the hearsay evidence was admissible under a statutory provision. The People's failure to call the victim of a 1990 incident to the stand, or even to introduce his prior trial testimony, supported the finding that the People's reliance on the 2000 and 2001 hearsay statements was constitutionally suspect and the Court of Appeal could not conclude that the error was harmless beyond a reasonable doubt).

People v. Parrish (2007) 152 Cal. App. 4th 263 ; 60 Cal. Rptr. 3d 868 , review denied. (during murder trial concerning a shooting committed during market robbery, prosecution introduced evidence that one of defendant's two accomplices fatally shot a customer. Defendant offered evidence that he was no longer involved in his accomplices' gang and that he acted under duress, presenting evidence that he had been severely beaten by the gang and that one of his accomplices told the police that people were trying to kill defendant because he was a snitch and that defendant had not wanted to use his car in the robbery. The trial court did not err in allowing the prosecution to introduce, under *Evid. Code* § 356, rebuttal evidence consisting of other statements made by the accomplice during the same interview to put defendant's evidence in context. In addition, the prosecution's rebuttal evidence did not violate the *Confrontation Clause*

because statements offered under Section 356, unlike statements offered under hearsay exceptions, are not subject to the *Confrontation Clause*).

People v. Whitsett (1983) 149 Cal. App. 3d 213, 196 Cal. Rptr. 647 (where an entire class of evidence has been declared inadmissible, or trial court has clearly intimated that it will receive no evidence of a particular class, or upon a particular issue, an offer of proof is not a prerequisite to complaint on appeal).



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§ 355.syn Synopsis to Chapter 355: Instruction on Limited Admissibility

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1-355 California Evidence Courtroom Manual Scope

Scope Instruction on Limited Admissibility

§ 355 reads as follows:

Rule 355 Instruction on Limited Admissibility

When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 355 provides for the "limiting instruction." A party is entitled to a limiting instruction by the trial judge directed to the jury whenever evidence might be misapplied by the jury in reaching its final determination.

The following provisions of the Evidence Code illustrate that evidence may be admissible for one purpose while at the same time remaining inadmissible for another purpose:

1. Section 1151 (Subsequent Remedial Conduct)
2. Sections 1152, 1154 (Offers to Compromise and Compromise)
3. Section 1155 (Liability Insurance)
4. Section 788 (Impeachment by Evidence of Conviction of Crime)

Evidence admitted under any of these rules is subject to a limiting instruction upon the request of opposing counsel.

Trial counsel may request a limiting instruction when appropriate during the course of trial. Where anticipated prior to trial, a pretrial request for a limiting instruction is also appropriate. Where trial counsel wishes to suggest the tenor of the limiting instruction to the trial judge during the course of trial, counsel should ask to approach the bench for a sidebar conference.

Illustration

Counsel:

You have testified that many visitors to the funeral home asked to speak with you in your capacity as the manager of the funeral home, is that correct?

Witness:

Yes, that is correct.

Counsel:

What did these visitors say to you?

Witness:

They said that the steps to the funeral home were very slippery when wet.

Opposing Counsel:

Objection! Hearsay!

Counsel:

Your Honor, may we approach the sidebar? *(At the sidebar)* Your Honor, this testimony will not be offered for its truth. This testimony simply establishes that the funeral home received notice of a dangerous condition--the slipperiness of the stairs. Thus, it will be offered only to show its effect on the listener.

Judge:

Then, I will allow the answer to stand for that limited purpose, counsel.

Opposing Counsel:

May we have a limiting instruction to ensure that the jury consider the statement only for its limited purpose?

Judge:

Yes, I will instruct the jury accordingly. *(To the jury)* Ladies and gentlemen of the jury, the witness has just described statements that were made to that witness in her capacity as manager of the funeral home. If you believe this testimony, you may only use it as proof that the funeral home had notice of a complaint about the stairs. You must not consider whether the statements were actually true or false.

A limiting instruction is often used as a second line of defense after an attorney has unsuccessfully attempted to exclude evidence under Section 352, which balances probative value against such adverse influences as unfair prejudice. For example, if a party seeks to impeach a witness with a prior conviction under Section 788, the party's opponent may seek to preclude use of the conviction entirely under Section 352. If he or she fails to convince the judge that the conviction should not be used, the opponent may, as a second line of defense, ask the judge for an instruction which limits the jury's use of the prior conviction to the evaluation of the witness's credibility.

Where appropriate, a limiting instruction is mandatory on request. Likewise, a court may provide a limiting instruction in the absence of a request.



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2 COMPARISON TO FEDERAL RULE

Section 355 is substantially similar to Federal Rule of *Evidence 105*.



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3 SIGNIFICANT CASES

People v. Coleman (1985) 38 Cal. 3d 69, 211 Cal. Rptr. 102, 695 P.2d 189 (where an expert bases part of his opinion on hearsay, a limiting instruction may be used to direct the jury that the matters in which the expert based his opinion are admitted only to show the basis of the opinion and not for the truth of those matters; however, when hearsay evidence is recited in detail, a limiting instruction may not remedy the hearsay problem and the evidence should be excluded).

People v. Lomeli (1993) 19 Cal. App. 4th 649, 24 Cal. Rptr. 2d 5 (trial judge has sua sponte duty to instruct the jury on the limited purpose of a felony or misdemeanor conviction admitted for impeachment purposes).



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1-356 California Evidence Courtroom Manual Scope

Scope Admissibility of the Whole Evidence to Provide Context for Part Offered

§ 356 reads as follows:

Rule 356 Admissibility of the Whole Evidence to Provide Context for Part Offered

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

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1 ANALYSIS

Section 356 codifies the common-law doctrine of "completeness," which provides that where a proponent relies on only one part of a piece of evidence, the opponent should be permitted to introduce the rest of the evidence to provide the trier of fact with the complete picture of the evidence.

Section 356 is a powerful and potentially dangerous provision; it permits the introduction of otherwise inadmissible evidence on the same subject matter for the limited purpose of putting the originally offered evidence in context. Although, evidence admissible solely under Section 356 is to be used for the limited purpose expressed in the section, this limitation may be impractical in its application. For example, if the proponent introduces part of an out-of-court conversation, relying on a hearsay exception so that the conversation may be used for its truth, the opponent may introduce the remainder of the conversation, but the trier of fact will only be allowed to use it to place the first part of the conversation in context. A limiting instruction, if requested under Section 355, would be used to prevent the jury from improperly using the evidence. Of course, such a limiting instruction may well prove impossible to apply in this case. In this event, the opponent should insist that the entire piece of evidence be stricken under Section 352, as the evidence would be incomplete without the full context and the jury could not properly consider the complete conversation with due regard to the hearsay and nonhearsay uses.



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2 COMPARISON TO FEDERAL RULE

Section 356 bears some similarity to Federal Rule of Evidence 106, in that both provisions provide an opponent with some means of putting the evidence into its context. Thus, both provisions codify, to some degree, the common-law doctrine of "completeness." However, Federal Rule of Evidence 106 is far more restrictive than Section 356. The federal rule is limited to writings and recordings and, unlike Section 356, does not expressly include conversations or other evidence. Moreover, Federal Rule of Evidence 106 suggests that the opponent of evidence must show that the admitted evidence casts a misleading or inaccurate impression on its own, so that the remainder of the evidence should be admitted to make its meaning clear. Section 356 requires no showing of unfair or misleading impression; whenever part of a piece of evidence has been introduced, Section 356 simply permits the remaining parts on the same subject to be admitted. Finally, Federal Rule of Evidence 106 applies somewhat differently in practice. If an objection is raised under Rule 106 and sustained, the proponent of the evidence has to choose to present all of the evidence or none of it. Under Section 356, the objecting party may supply the "missing" context, generally through cross-examination, but a different witness could be used if necessary.



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SECTION 356 Admissibility of the Whole Evidence to Provide Context for Part Offered

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3 SIGNIFICANT CASES

People v. Sanchez (1995) 12 Cal. 4th 1, 47 Cal. Rptr. 2d 843, 906 P.2d 1129, cert. denied, 519 U.S. 835 (it was not error to deny defendant the chance to offer unpublished contents of interviews with murder defendant conducted by newsperson; Section 356 is subject to immunity provided under newsperson's shield law and defendant failed to show how unpublished statements would have placed newsperson's testimony in its proper context).

People v. Zapien (1993) 4 Cal. 4th 929, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (after defendant introduced portions of testimony previously given by witness to demonstrate that the testimony differed from witness's later testimony before jury and from statements she had made on other occasions, the People were entitled to introduce remainder of the testimony for purpose of placing allegedly inconsistent statements in their proper context, provided remaining testimony had some bearing upon, or connection with, inconsistent statements introduced by defendant).

People v. Sandoval (1992) 4 Cal. 4th 155, 14 Cal. Rptr. 2d 342, 841 P.2d 862 (prosecution's introduction into evidence of independent slips of paper that were clipped to victims' appointment books did not make appointment books found at victims' residence admissible in capital murder prosecution, where such books were unnecessary to understanding of slips of paper).

People v. Wharton (1991) 53 Cal. 3d 522, 280 Cal. Rptr. 631, 809 P.2d 290 (where a statement admitted into evidence is part of a conversation concerning defendant's reduced culpability, entire conversation revealing admission of guilt is admissible and is not barred by the hearsay rule).

Benson v. Honda Motor Co. (1994) 26 Cal. App. 4th 1337, 32 Cal. Rptr. 2d 322 (in products liability and negligence action against automobile manufacturer, plaintiffs were not entitled to admission of entire report regarding crash tests from which manufacturer used one photograph in its case).

People v. Douglas (1991) 234 Cal. App. 3d 273, 285 Cal. Rptr. 609 (Section 356 applies to admissions and confessions in criminal cases, and applies even if omitted portions of conversation are self-serving).



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§ 400.syn Synopsis to Chapter 400: Definition of "Preliminary Fact"

Scope Definition of "Preliminary Fact"

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SECTION 400 Definition of "Preliminary Fact"

1-400 California Evidence Courtroom Manual Scope

Scope Definition of "Preliminary Fact"

§ 400 reads as follows:

Rule 400 Definition of "Preliminary Fact"

As used in this article, "preliminary fact" means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase "the admissibility or inadmissibility of evidence" includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 400 Definition of "Preliminary Fact"

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1 ANALYSIS

Section 400 highlights the problem that, at times, the admissibility of a piece of evidence in turn depends upon the existence of certain preliminary facts. Thus, Section 400 distinguishes those preliminary facts upon which the admissibility of evidence depends from those facts sought to be proved by that evidence. The subsequent provisions of this article of the Code regulate the roles of the judge and the jury in making those preliminary determinations of fact.



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2 COMPARISON TO FEDERAL RULE

Section 400 has no direct counterpart in the federal rules, although the same general problem of whether the judge or the jury should decide "preliminary questions" is dealt with by Federal Rule of Evidence 104.



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SECTION 401 Definition of "Proffered Evidence"

1-401 California Evidence Courtroom Manual Scope

Scope Definition of "Proffered Evidence"

§ 401 reads as follows:

Rule 401 Definition of "Proffered Evidence"

As used in this article, "proffered evidence" means evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 401 Definition of "Proffered Evidence"

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1 ANALYSIS

Section 401 defines "proffered evidence" as evidence which requires a determination of preliminary facts in order to determine its admissibility or inadmissibility.

"Proffered evidence" is defined separately to minimize confusion between the evidence whose admissibility is in question and evidence offered on the preliminary fact issue.



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2 COMPARISON TO FEDERAL RULE

Section 401 has no direct counterpart in the federal rules, although the same general problem of whether the judge or the jury should decide "preliminary questions" is dealt with by Federal Rule of Evidence 104.



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SECTION 402 Procedure for Establishing Existence of Preliminary Fact

1-402 California Evidence Courtroom Manual 402.syn

§ 402.syn Synopsis to Chapter 402: Procedure for Establishing Existence of Preliminary Fact

Scope Procedure for Establishing Existence of Preliminary Fact

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1-402 California Evidence Courtroom Manual Scope

Scope Procedure for Establishing Existence of Preliminary Fact

§ 402 reads as follows:

Rule 402 Procedure for Establishing Existence of Preliminary Fact

(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 402 Procedure for Establishing Existence of Preliminary Fact

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1 ANALYSIS

This section directs the trial court to consider the admissibility of evidence which depends upon the existence of a preliminary fact under the terms of Sections 403 and 405, in particular. It gives the court discretion to decide whether a dispute over the existence of preliminary facts should be determined outside of the hearing of the jury, when possible, but it requires the judge to hold such hearings on the admissibility of a criminal confession outside the presence of the jury on the request of any party, a rule that makes sense given the prejudicial quality of such evidence.



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2 COMPARISON TO FEDERAL RULE

Section 402(b) is comparable to Federal Rule of Evidence 104(c), except that the federal rule requires the admissibility of confessions to be determined outside of the presence of the jury in all cases, with or without a request of a party. There is no federal counterpart to Sections 402(a) and (c).



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3 SIGNIFICANT CASES

People v. Williams (1997) 16 Cal. 4th 153, 66 Cal. Rptr. 2d 123, 940 P.2d 710 , cert. denied, 522 U.S. 1150 (trial court could admit expert evidence on operations of gangs without first holding foundational hearings where trial court stated it would hold such hearings "at the appropriate time" and defense counsel did not object immediately prior to officers' testimony and request hearing).



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1-403 California Evidence Courtroom Manual 403.syn

§ 403.syn Synopsis to Chapter 403: Burden of Proof on Preliminary Facts Regarding Relevance, Personal Knowledge, Authenticity, Statement or Conduct of a Person

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1-403 California Evidence Courtroom Manual Scope

Scope Burden of Proof on Preliminary Facts Regarding Relevance, Personal Knowledge, Authenticity, Statement or Conduct of a Person

§ 403 reads as follows:

Rule 403 Burden of Proof on Preliminary Facts Regarding Relevance, Personal Knowledge, Authenticity, Statement or Conduct of a Person

(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

- (1) the relevance of the proffered evidence depends on the existence of the preliminary fact;
- (2) the preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;
- (3) the preliminary fact is the authenticity of a writing; or
- (4) the proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

(c) If the court admits the proffered evidence under this section, the court:

(1) may, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)



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1 ANALYSIS

Sections 403 and 405 divide the function of determining the existence of preliminary facts that are necessary for the admissibility of the proffered evidence (as defined in Section 401) between the jury and the trial judge.

Under Section 403, the chief role goes to the jury; the trial judge plays only a very limited, screening function. The judge listens to the evidence of the preliminary fact and, assuming it is true, determines only whether it is sufficient to support a finding of that fact. The ultimate determination of the existence of the preliminary fact is left for the jury. The judge's role is only to prevent the jury from making irrational decisions regarding the existence of the preliminary fact. If the judge finds that the evidence is sufficient, the jury gets to hear the evidence of the preliminary fact and determine its credibility. On the request of a party, the jury must be instructed that they must find the existence of the preliminary fact or facts by a preponderance of the evidence or they must disregard the proffered evidence. The judge may issue this instruction even if no party requests it. In cases where the evidence regarding the preliminary fact cannot be presented all at once, the judge may conditionally allow the jury to hear the proffered evidence, but if the proponent later fails to provide sufficient evidence of the preliminary fact, the judge instructs the jury to disregard the proffered evidence.

Section 403 states several issues which are questions for the jury. The first is where the relevance of the evidence depends on the existence of the preliminary fact. This includes, for example, whether a person is an agent of another for purposes of attributing an admission by the agent to the principal. If the individual is not an agent, his or her statements have no relevance to the liability or guilt of the principal. The same reasoning applies to the identity of hearsay declarants. See *Brown v. Spencer* (1912) 163 Cal. 589, 126 P. 493. A second issue for the jury is whether a lay witness, whether testifying in person or a hearsay declarant, had personal knowledge of the facts to which he or she testifies. A third issue is whether a writing is authentic, that is, whether it is what the proponent says it is. A fourth issue is whether a person made the statement or did an action such that the proffered evidence can be admitted as his or her statement or his or her actual conduct. Thus, Section 1101(b), which permits other acts of an individual to be used for relevant non-character purposes, requires that the jury determine, as a preliminary matter, whether the individual actually engaged in the other conduct before that conduct can be used as circumstantial evidence of some other relevant issue.

Where there is any doubt about the application of Section 403, a statute will make its application explicit. For example,

Section 1223(c) explicitly requires that the jury determine the preliminary issues before a statement may be admitted under the co-conspirator exception to the hearsay rule, even though this situation could readily fall under the more general language of Section 403(a)(1). *See also Sections 1221, 1222, 1224-1227, 1235, 1236.* In addition, although the general language of Section 403 may suggest that a preliminary issue is for the jury to decide, a more specific statute may override that general language. For example, Sections 1417 and 1418, which address the authenticity of a writing through the use of comparisons or exemplars, makes the issue of the authenticity of the comparative piece or exemplar a question for the judge, on the reasoning that the jury could not distinguish the issue of the authenticity of the comparative writing or exemplar from the authenticity of the disputed writing.



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2 COMPARISON TO FEDERAL RULE

The general language of Section 403 is comparable to Federal Rule of Evidence 104(b). The rules differ in significant specific circumstances. The most significant difference is that the jury determines whether the preliminary facts exist to allow application of the co-conspirator hearsay exception under Section 1223(c), while the United States Supreme Court has given this function to the judge under Federal Rule of Evidence 104(a). *Bourjaily v. United States* (1987) 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 . In addition, the federal rules make the authenticity of a writing a question for the jury even where authenticity is established through comparisons or exemplars. Other than these examples, the jury decides the same preliminary facts under Federal Rule of Evidence 104(b) that its state counterparts would under Section 403.



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3 SIGNIFICANT CASES

People v. Carpenter (1997) 15 Cal. 4th 312, 63 Cal. Rptr. 2d 1, 935 P.2d 708 , *reh'g denied*, 1997 Cal. LEXIS 3555 , *superseded by statute on other grounds*, *Verdin v. Superior Court* (2008) 43 Cal. 4th 1096, 77 Cal. Rptr. 3d 287, 183 P.3d 1250 (Section 403 controls the process of determining whether defendant committed "other acts" used to prove an issue other than character under Section 1101(b); thus, jury was properly instructed that it must find by a preponderance of the evidence that defendant committed prior acts before the jury could consider them as evidence of intent in the case at hand).

People v. Marshall (1996) 13 Cal. 4th 799, 55 Cal. Rptr. 2d 347, 919 P.2d 1280 , *cert. denied* (trial court must determine only whether evidence is sufficient to allow the jury to find the preliminary fact by a preponderance of the evidence; in doing so, the trial court must not draw credibility determinations).

People v. Lucas (1995) 12 Cal. 4th 415, 48 Cal. Rptr. 2d 525, 907 P.2d 373 , *cert. denied* (trial court has preliminary, but not final, authority to determine question of existence of preliminary fact that bears on relevance of proffered evidence; trial court's function is merely to determine whether there is evidence sufficient to permit jury to decide question; trial court should exclude proffered evidence as irrelevant only if showing of preliminary fact is too weak to support favorable determination by jury).

People v. Kaurish (1990) 52 Cal. 3d 648, 276 Cal. Rptr. 788, 802 P.2d 278 (photographic evidence depicting testing method purportedly superior to method used by police in testing bodily fluid samples relevant to murder case was properly excluded as not material to any issue in the case; comparison would not assist jury to determine extent to which method used actually produced probative evidence or help jury assign a weight to the evidence).

People v. Saling (1972) 7 Cal. 3d 844, 103 Cal. Rptr. 698, 500 P.2d 610 (before evidence of facts and declarations of an alleged coconspirator is admissible against other conspirators, prima facie evidence of conspiracy must be proved).

People v. Herrera (2000) 83 Cal. App. 4th 46, 98 Cal. Rptr. 2d 911 (critical difference between Sections 403 and 405 is that under Section 403, the court makes a preliminary determination regarding sufficiency whereas under Section

405, the court makes a final determination regarding existence of the preliminary fact; Section 403 controls the required showing of a conspiracy, for purposes of determining admissibility of coconspirator's statement under coconspirator exception to the hearsay rule; proper showing under Section 403 is evidence sufficient to sustain a finding of fact of a conspiracy by a preponderance of the evidence).

People v. Collins (1975) 44 Cal. App. 3d 617, 118 Cal. Rptr. 864 (the identity of a person who makes a telephone call to a witness is a "preliminary fact" which the proponent of the offered testimony has the burden of establishing).



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SECTION 404 Application of Privilege Against Self-Incrimination

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§ 404.syn Synopsis to Chapter 404: Application of Privilege Against Self-Incrimination

Scope Application of Privilege Against Self-Incrimination

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1-404 California Evidence Courtroom Manual Scope

Scope Application of Privilege Against Self-Incrimination

§ 404 reads as follows:

Rule 404 Application of Privilege Against Self-Incrimination

Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 404 attempts to reconcile the need to provide testimony and evidence on preliminary facts and the constitutional protection against self-incrimination.



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2 COMPARISON TO FEDERAL RULE

There is no comparable federal rule, although Federal Rule of Evidence 104(d) provides that testimony by the accused on preliminary facts does not open the door to testimony on all other issues in the case.



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3 SIGNIFICANT CASES

People v. Seijas (2005) 36 Cal. 4th 291, 30 Cal. Rptr. 3d 493, 114 P.3d 742 (the test for the applicability of the privilege is whether a statement could incriminate a witness, even if the prosecution says that it would not prosecute the witness; the use of incriminating statements must be forbidden, as by a grant of immunity, and not merely unlikely, before the court may force a witness to make the statements at issue; trial court did not err in allowing witness to assert the privilege where it did "not clearly appear that the testimony could not possibly tend to incriminate").



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SECTION 405 Burden of Proof on Preliminary Facts in Other Instances

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1-405 California Evidence Courtroom Manual Scope

Scope Burden of Proof on Preliminary Facts in Other Instances

§ 405 reads as follows:

Rule 405 Burden of Proof on Preliminary Facts in Other Instances

With respect to preliminary fact determinations not governed by Section 403 or 404:

(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

(b) If a preliminary fact is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 405 is the counterpart to Section 403, which provides for which preliminary facts need to be determined by the jury. Section 405 provides the procedure for determining those preliminary facts that do not fall under Section 403. The trial judge is the fact-finder of preliminary issues determined under Section 405.

Examples of the preliminary fact questions that should be decided under Section 405 are: Section 701 (disqualification of a witness for lack of mental capacity); Section 720 (qualifications of an expert witness); Section 788 (conviction of a crime when offered to attack credibility where the disputed preliminary fact is whether a pardon or some similar relief has been granted to a witness convicted of a crime; however, if the issue is the identity of the person committing the crime or whether the crime actually occurred, the issue is for the jury under Section 403); Section 870 (opinion evidence on sanity); Sections 900-1070 (privileges); Sections 1152, 1154 (admissions made during compromise negotiations); Sections 1200-1341 (hearsay evidence) (when hearsay evidence is offered, two preliminary fact questions may be raised. The first question relates to the authenticity of the proffered declaration: Was the statement actually made by the person alleged to have made it? Under the California Code, this question is to be determined by the jury under Section 403. The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence, for example: Was the declaration spontaneous, the confession voluntary, the business record trustworthy? These questions are to be determined by the court under Section 405; Section 1416 (opinion evidence on handwriting); Sections 1417-1419 (comparison of writing with exemplar); Sections 1550, 1551 (photographic copy of writing). In making its determination of preliminary facts under Section 405, the court may evaluate the credibility of witnesses to the preliminary facts, and must decide whether those facts exist by a preponderance of the evidence.



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2 COMPARISON TO FEDERAL RULE

Section 405 is comparable to Federal Rule of Evidence 104(a), with one major qualification. Under the federal provision, the trial court is not bound by the rules of evidence except those related to privilege. Section 405 gives the trial court no such freedom. This means that the trial court must determine any preliminary fact to which it is obligated to determine under the restrictions of the Evidence Code provisions.



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 4 ADMITTING AND EXCLUDING EVIDENCE
ARTICLE 2 PRELIMINARY DETERMINATIONS ON ADMISSIBILITY OF EVIDENCE
SECTION 405 Burden of Proof on Preliminary Facts in Other Instances

1-405 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Herrera (2000) 83 Cal. App. 4th 46, 98 Cal. Rptr. 2d 911 (critical difference between Sections 403 and 405 is that under Section 403, the court makes a preliminary determination regarding sufficiency whereas under Section 405, the court makes a final determination regarding existence of the preliminary fact; Section 403 controls the required showing of a conspiracy, for purposes of determining admissibility of coconspirator's statement under coconspirator exception to the hearsay rule; proper showing under Section 403 is evidence sufficient to sustain a finding of fact of a conspiracy by a preponderance of the evidence).

People v. Jackson (1991) 235 Cal. App. 3d 1670, 1 Cal. Rptr. 2d 778 (whether statement is one against penal interest is preliminary fact to be determined under Section 405; test imposed is an objective one--would statement subject its declarant to criminal liability such that reasonable person would not have made statement without believing it true).

Martin v. Superior Court (1991) 230 Cal. App. 3d 1192, 281 Cal. Rptr. 682 (generally, qualification of a witness to testify is a determination to be made by trial court before witness is permitted to testify).

People v. Farley (1979) 90 Cal. App. 3d 851, 153 Cal. Rptr. 695 (if evidence on issue of capacity of a proffered witness to understand duty of a witness to tell the truth is conflicting, proffered witness must be held competent or qualified to be a witness unless the objecting party establishes, by a preponderance of evidence, a lack of capacity).



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 4 ADMITTING AND EXCLUDING EVIDENCE
ARTICLE 2 PRELIMINARY DETERMINATIONS ON ADMISSIBILITY OF EVIDENCE
SECTION 406 Evidence Regarding Weight or Credibility of Evidence

1-406 California Evidence Courtroom Manual 406.syn

§ 406.syn Synopsis to Chapter 406: Evidence Regarding Weight or Credibility of Evidence

Scope Evidence Regarding Weight or Credibility of Evidence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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CHAPTER 4 ADMITTING AND EXCLUDING EVIDENCE
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SECTION 406 Evidence Regarding Weight or Credibility of Evidence

1-406 California Evidence Courtroom Manual Scope

Scope Evidence Regarding Weight or Credibility of Evidence

§ 406 reads as follows:

Rule 406 Evidence Regarding Weight or Credibility of Evidence

This article does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 406 Evidence Regarding Weight or Credibility of Evidence

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1 ANALYSIS

Section 406 stresses that the provisions of Sections 403 and 405 relate only to the issue of admissibility. The advocates remain free to attack the credibility of the evidence in all possible ways, including those listed in Section 780.



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 4 ADMITTING AND EXCLUDING EVIDENCE
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SECTION 406 Evidence Regarding Weight or Credibility of Evidence

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 406 in the federal rules.



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 410 Definition of "Direct Evidence"

1-410 California Evidence Courtroom Manual 410.syn

§ 410.syn Synopsis to Chapter 410: Definition of "Direct Evidence"

Scope Definition of "Direct Evidence"

1 ANALYSIS

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3 SIGNIFICANT CASES



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 410 Definition of "Direct Evidence"

1-410 California Evidence Courtroom Manual Scope

Scope Definition of "Direct Evidence"

§ 410 reads as follows:

Rule 410 Definition of "Direct Evidence"

As used in this chapter, "direct evidence" means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 410 Definition of "Direct Evidence"

1-410 California Evidence Courtroom Manual 1

1 ANALYSIS

"Direct evidence," as defined in Section 410, can be compared with "circumstantial evidence." No type of evidence is inherently better than another, as a chain of circumstantial evidence may be better proof than a weak piece of direct evidence. One common illustration of the difference between the two types of evidence is the following: If the issue is whether Smith shot Jones, a witness who can testify that he saw Smith shoot Jones, provides direct evidence. If the witness can testify only that when he entered the room he saw Smith holding a smoking gun over Jones's body, then this is circumstantial evidence. The problem with circumstantial evidence is that while it makes an inference possible (because it is based on the circumstantial evidence), circumstantial evidence does not rule out other possibilities (such as that Smith, hearing the shot, rushed in and picked up the gun).



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 410 Definition of "Direct Evidence"

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 410 in the federal rules.



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 410 Definition of "Direct Evidence"

1-410 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Malbrough (1961) 55 Cal. 2d 249, 10 Cal. Rptr. 632, 359 P.2d 30 ("direct evidence" is that evidence which is applied to fact to be proved, immediately and directly, and without aid of any intervening fact or process).



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 411 Sufficiency of Direct Evidence

1-411 California Evidence Courtroom Manual 411.syn

§ 411.syn Synopsis to Chapter 411: Sufficiency of Direct Evidence

Scope Sufficiency of Direct Evidence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 411 Sufficiency of Direct Evidence

1-411 California Evidence Courtroom Manual Scope

Scope Sufficiency of Direct Evidence

§ 411 reads as follows:

Rule 411 Sufficiency of Direct Evidence

Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 411 Sufficiency of Direct Evidence

1-411 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 411 is as much a rule of procedure as a rule of evidence, setting forth the principle that direct evidence of any fact, not inherently incredible, is sufficient evidence to avoid a directed verdict.



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SECTION 411 Sufficiency of Direct Evidence

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 411 in the Federal Rules of Evidence or the Federal Rules of Civil Procedure. It is unclear whether federal courts would take the same approach as Section 411 in light of recent United States Supreme Court cases which make it easier for a party without the burden of persuasion at trial to obtain a judgment as a matter of law. See *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 ; *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 .



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 411 Sufficiency of Direct Evidence

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3 SIGNIFICANT CASES

People v. Vega (1995) 33 Cal. App. 4th 706, 39 Cal. Rptr. 2d 479 (testimony of one witness, if believed, is sufficient to prove any fact).

DeMiglio v. Mashore (1992) 4 Cal. App. 4th 1260, 6 Cal. Rptr. 2d 267 (the trier of fact may not arbitrarily disregard uncontradicted or unimpeached testimony of a witness, unless that testimony is inherently improbable).

In re Frederick G. (1979) 96 Cal. App. 3d 353, 157 Cal. Rptr. 769 (the testimony of a single witness is sufficient to uphold a judgment even if the testimony is contradicted by other evidence, or is inconsistent or false as to other portions).

Bank of Costa Mesa v. Losack (1977) 74 Cal. App. 3d 287, 141 Cal. Rptr. 550 (the direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact and this is so even though the witness is a party).



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 412 Effect of Weak Evidence

1-412 California Evidence Courtroom Manual 412.syn

§ 412.syn Synopsis to Chapter 412: Effect of Weak Evidence

Scope Effect of Weak Evidence

1 ANALYSIS

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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 412 Effect of Weak Evidence

1-412 California Evidence Courtroom Manual Scope

Scope Effect of Weak Evidence

§ 412 reads as follows:

Rule 412 Effect of Weak Evidence

If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 412 Effect of Weak Evidence

1-412 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 412 is a partial remedy for a party's spoliation of evidence or discovery abuse. It provides the legal basis for a jury instruction that permits the jury to draw negative conclusions about evidence offered by a party where the party has failed to produce stronger evidence because such evidence has been destroyed.



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SECTION 412 Effect of Weak Evidence

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 412 in the federal rules.



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 413 Adverse Inferences Regarding Evidence

1-413 California Evidence Courtroom Manual 413.syn

§ 413.syn Synopsis to Chapter 413: Adverse Inferences Regarding Evidence

Scope Adverse Inferences Regarding Evidence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 413 Adverse Inferences Regarding Evidence

1-413 California Evidence Courtroom Manual Scope

Scope Adverse Inferences Regarding Evidence

§ 413 reads as follows:

Rule 413 Adverse Inferences Regarding Evidence

In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 3 GENERAL PROVISIONS
CHAPTER 5 WEIGHT OF EVIDENCE GENERALLY
SECTION 413 Adverse Inferences Regarding Evidence

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1 ANALYSIS

Section 413 provides one of the most effective remedies for discovery abuse or spoliation of evidence. This Section is the authority for the jury instruction in CALJIC No. 2.62.



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SECTION 413 Adverse Inferences Regarding Evidence

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 413 in the federal rules.



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DIVISION 3 GENERAL PROVISIONS
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SECTION 413 Adverse Inferences Regarding Evidence

1-413 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511 (no need for tort remedy for intentional spoliation of evidence where numerous non-tort remedies, most notably Section 413, exist to punish and deter intentional spoliation of evidence).

In re Avena (1996) 12 Cal. 4th 694, 49 Cal. Rptr. 2d 413, 909 P.2d 1017 (capital murder defendant asserting ineffective assistance of trial counsel could not utilize statute providing for drawing of negative inferences arising out of his attorney's loss of his files because there was no finding that attorney had willfully suppressed file; attorney was not party to case and there was no indication that attorney's alleged misconduct would ultimately work to prosecution's detriment).

Willard v. Caterpillar, Inc. (1995) 40 Cal. App. 4th 892, 48 Cal. Rptr. 2d 607 (traditional remedies for spoliation of evidence include discretionary jury inference against spoliator, charge of obstruction of justice, and discovery sanctions).

Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 16 Cal. Rptr. 2d 787 (if evidence was willfully suppressed, jurors could be permitted to draw inference that lost evidence contained something damaging to opponent's case and such inference could be regarded as reflecting opponent's recognition of strength of adversary's case or weakness of opponent's case or both).

People v. Denney (1984) 152 Cal. App. 3d 530, 199 Cal. Rptr. 623 (party's failure to call available witness to rebut evidence presented against party raises logical inference that if witness had been called his testimony would have been adverse to party who fails to call him).



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DIVISION 4 JUDICIAL NOTICE
SECTION 450 Judicial Notice in General

1-450 California Evidence Courtroom Manual 450.syn

§ 450.syn Synopsis to Chapter 450: Judicial Notice in General

Scope Judicial Notice in General

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 4 JUDICIAL NOTICE
SECTION 450 Judicial Notice in General

1-450 California Evidence Courtroom Manual Scope

Scope Judicial Notice in General

§ 450 reads as follows:

Rule 450 Judicial Notice in General

Judicial notice may not be taken of any matter unless authorized or required by law.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 4 JUDICIAL NOTICE
SECTION 450 Judicial Notice in General

1-450 California Evidence Courtroom Manual 1

1 ANALYSIS

Judicial notice is the process by which a court takes recognition of a fact in the absence of any formal proof. Driven by the policy of efficiency, judicial notice is a substitute for formal proof where the facts sought to be proved are beyond reasonable dispute. Thus, Sections 451 and 452 do not function to exclude evidence. Rather, these rules regarding judicial notice permit an advocate to dispense with offering evidence of certain kinds.

The principles of judicial notice are employed by the trial judge at numerous points during the course of the trial, often without the awareness of the participants in the courtroom. Judicial notice is taken of the English language and of the many human qualities that permit a conclusion that testimony is relevant and material. It is virtually impossible to identify all the occasions on which judicial notice is appropriate, so the examples and cases discussed in the following sections are merely illustrative.



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DIVISION 4 JUDICIAL NOTICE
SECTION 450 Judicial Notice in General

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2 COMPARISON TO FEDERAL RULE

Federal Rule of Evidence 201 is the basic rule regarding judicial notice. Federal Rule of Evidence 201 expressly deals only with judicial notice of adjudicative facts, and does not address legislative facts or matters of law. Simply stated, adjudicative facts are those facts which concern the immediate parties and which are determinative of the outcome of the particular case. Adjudicative facts are customarily established through formal proof and only through judicial notice pursuant to the conditions identified in Federal Rule of Evidence 201. By comparison, legislative facts are those facts which are used by the court in the decisional process of a case, in the expansion of the law, or in the interpretation or construction of legislative enactments. Accordingly, when a court makes new law, it "legislates." Inevitably, this lawmaking function relies upon factual assumptions as to the way in which the world operates.

The California provisions are silent on the use of legislative facts, such as generalized social science data, to construe a statute or constitutional provision or to extend the common law. However, the California Law Revision Commission Comment to Section 450 suggests that Sections 450 et seq. were not intended to restrict or control the use of this kind of information.



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DIVISION 4 JUDICIAL NOTICE
SECTION 451 Mandatory Judicial Notice

1-451 California Evidence Courtroom Manual 451.syn

§ 451.syn Synopsis to Chapter 451: Mandatory Judicial Notice

Scope Mandatory Judicial Notice

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DIVISION 4 JUDICIAL NOTICE
SECTION 451 Mandatory Judicial Notice

1-451 California Evidence Courtroom Manual Scope

Scope Mandatory Judicial Notice

§ 451 reads as follows:

Rule 451 Mandatory Judicial Notice

Judicial notice shall be taken of the following:

- (a) The decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in section 3, 4, or 5 of Article XI of the California Constitution.
- (b) Any matter made a subject of judicial notice by *section 11343.6, 11344.6, or 18576 of the Government Code* or by *section 1507 of Title 44 of the United States Code*.
- (c) Rules of professional conduct for members of the bar adopted pursuant to *section 6076 of the Business and Professions Code* and rules of practice and procedure for the courts of this state adopted by the Judicial Council.
- (d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.
- (e) The true signification of all English words and phrases and of all legal expressions.
- (f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1971, ch. 438, § 88; Stats. 1972, ch. 764, § 1; Stats. 1982, ch. 454, § 20; Stats. 1985, ch. 106, § 32; Stats. 1986, ch. 248, § 43)

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DIVISION 4 JUDICIAL NOTICE
SECTION 451 Mandatory Judicial Notice

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1 ANALYSIS

Section 451 sets forth circumstances when the court must take judicial notice. Sections 451(a)-(d) present few problems, as these provisions deal with judicial notice of various types of law. Sections 451(e)-(f), however, deal with types of evidence that can be more controversial. As a result, one sees more diversity in court rulings that rest on these particular provisions. Section 451(e) primarily refers to dictionary definitions of words while Section 451(f) has encompassed a wide variety of factual scenarios. For example, it has been held to be common knowledge that dogs in pens bark and howl, especially at mating times; that checks pass through a bank for payment and cancellation and are then returned to the maker. It has been judicially noticed that small children have a propensity to wander from their premises into the streets, but not that it is unsafe for infants to walk in the Haight-Ashbury district at 11:30 in the morning, for presumably this latter fact is more subject to dispute or outside the realm of common knowledge (See *In re Marriage of Russo* (1971) 21 Cal. App. 3d 72, 98 Cal. Rptr. 501).



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DIVISION 4 JUDICIAL NOTICE
SECTION 451 Mandatory Judicial Notice

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2 COMPARISON TO FEDERAL RULE

One significant difference between the federal and California approaches to judicial notice is the distinction the California approach draws between mandatory and discretionary judicial notice. Under, judicial notice is mandatory only if a party requests it and supplies the court with the necessary information, while Section 451 suggests that no request is necessary to obligate the court to take judicial notice of the kinds of facts listed.

Another significant difference is the standard for taking judicial notice. The California approach in Section 451 seems narrower--requiring the material to be "universally" known, so that information that is widely but only locally known, may not be subject to judicial notice. *See Section 451(f)*. The federal approach requires only that the information be "generally known within the territorial jurisdiction of the trial court." Federal Rule of Evidence 201(b)(1). However, matters that are common knowledge within the territorial jurisdiction of the trial court may be judicially noticed at the court's discretion, as permitted under Section 452(g).



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DIVISION 4 JUDICIAL NOTICE
SECTION 451 Mandatory Judicial Notice

1-451 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Martinez (2000) 22 Cal. 4th 106, 91 Cal. Rptr. 2d 687, 990 P.2d 563 (provided it satisfies applicable rules of admissibility, evidence other than record of conviction and certified prison records is admissible to establish fact that defendant served prison terms for prior felony convictions; presumption of regular performance of official acts applied to determination of admissibility of computer-generated California Law Enforcement Telecommunications System (CLETS) printout of defendant's criminal history information as official record in connection with habitual offender allegations, where reporting obligations of law enforcement officials in connection with CLETS system were established by statutes of which court could have taken judicial notice and party against whom presumption of regular performance of official duties operates has the burden of proof as to nonexistence of the presumed fact; admission of computer-generated CLETS printout of defendant's criminal history information as official record was not abuse of discretion; admission as official record of printout generated by computer system of Los Angeles County Sheriff's Department concerning defendant's criminal history information was not abuse of discretion).

Violante v. Communities Southwest Development & Construction Co. (2006) 138 Cal. App. 4th 972 ; 41 Cal. Rptr. 3d 673 (court denied request for judicial notice under Section 452(c) of certain "legislative history;" however, the various documents were not segregated and no attempt was made in a memorandum of points and authorities to justify each request for judicial notice; some of the material was actual legislative history, but some, including some 1931 articles of the "Labor Clarion," identified as the official journal of the San Francisco Labor Council, and some pages from an undated article about prevailing wage laws published by the University of Pennsylvania were clearly not; in addition, belated request for judicial notice of documents not provided to the trial court was denied because reviewing courts generally do not take judicial notice of evidence not presented to the trial court).

Golden Security Thrift & Loan v. First American Title (1997) 53 Cal. App. 4th 250, 61 Cal. Rptr. 2d 442 (taking judicial notice of various dictionary definitions of the word "dimensions" as the best evidence of the ordinary and popular meaning, or "true signification" of the word).

Medina v. Hillshore Partners (1995) 40 Cal. App. 4th 477, 46 Cal. Rptr. 2d 871 (taking judicial notice of two matters of common knowledge: (1) that street gangs generally claim home territory and attempt to prohibit rival gang members from entering area upon threat of severe physical injury, and (2) that gang activity spawns violence).

Chang & Sons Associates v. La Casa Novato (1986) 177 Cal. App. 3d 159, 222 Cal. Rptr. 800 (holding that it is

mandatory that Court of Appeal take judicial notice of relevant provisions of Code of Federal Regulations which adequately apprise court of criteria utilized by Commissioner of Federal Housing in determining whether to approve application for rental increase under guaranteed mortgage).



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DIVISION 4 JUDICIAL NOTICE
SECTION 452 Permissive Judicial Notice

1-452 California Evidence Courtroom Manual 452.syn

§ 452.syn Synopsis to Chapter 452: Permissive Judicial Notice

Scope Permissive Judicial Notice

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2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 4 JUDICIAL NOTICE
SECTION 452 Permissive Judicial Notice

1-452 California Evidence Courtroom Manual Scope

Scope Permissive Judicial Notice

§ 452 reads as follows:

Rule 452 Permissive Judicial Notice

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

- (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.
- (b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.
- (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.
- (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (f) The law of an organization of nations and of foreign nations and public entities in foreign nations.
- (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
- (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 4 JUDICIAL NOTICE
SECTION 452 Permissive Judicial Notice

1-452 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 452 describes circumstances under which the court may, but is not required to, take judicial notice. The court may either take judicial notice on its own motion or on the request of a party who follows the procedural requirements of Section 453. Sections 452(a)-(f) do not pose much difficulty, as they deal with matters of law. However, Sections 452(g)-(h) have produced more commentary in published cases. Under Section 452(g), the judge determines what a reasonably well informed person within the jurisdiction would know to be true beyond reasonable dispute. Otherwise, resort to an authoritative source is necessary under Section 452(h). Representative authoritative sources for verification include such reference materials as historical works, science and art books, language and medical journals and dictionaries, calendars, encyclopedias, commercial lists and directories, maps and charts, statutes and legislative reports.



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DIVISION 4 JUDICIAL NOTICE
SECTION 452 Permissive Judicial Notice

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2 COMPARISON TO FEDERAL RULE

Sections 452(g)-(h) are virtually identical to Federal Rule of Evidence 201(b). However, Sections 452(a)-(f) deal with judicial notice of law, on which the federal rules are silent. However, such laws need not be proved in federal court, as the courts themselves are deemed capable of determining what is the law of another jurisdiction. *See* the Advisory Committee Note to Federal Rule of Evidence 201.



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DIVISION 4 JUDICIAL NOTICE
SECTION 452 Permissive Judicial Notice

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3 SIGNIFICANT CASES

In re Andrews (2002) 28 Cal. 4th 1234, 124 Cal. Rptr. 2d 473, 52 P.3d 656 (on petition for habeas corpus, the Supreme Court held that a manual of mental disorders and a textbook of psychiatry were not proper subjects for judicial notice; the manual and textbook constituted neither facts and propositions that were of such common knowledge that they could not reasonably be the subject of dispute, nor facts and propositions that were not reasonably subject to dispute and were capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy; psychiatry is not an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness).

Hartwell Corp. v. Superior Court (2002) 27 Cal. 4th 256, 115 Cal. Rptr. 2d 874, 38 P.3d 1098 (Supreme Court would not take judicial notice of articles found on a Department of Health Services Web site concerning chromium VI, where articles contained unauthenticated statements with no indication of author, custodian, date of creation, purpose, reliability or veracity; documents also had no apparent relevancy to chemical issues before the Court).

Hoechst Celanese Corp v. Franchise Tax Board (2001) 25 Cal. 4th 508, 106 Cal. Rptr. 2d 548, 22 P.3d 324 (California Supreme Court took judicial notice of (1) a Bill Analysis and Fiscal Impact Report from New Mexico regarding proposed legislation in that state; (2) a transcript of a hearing before the California Assembly Committee on Taxation; (3) the 1966 reprinting of the model Uniform Division of Income for Tax Purposes (UDITPA); (4) the legislative history of the California bill that became the California version of the UDITPA; and (5) various internal memoranda from the Executive Director and a commissioner of the National Conference of Commissioners on Uniform State Laws and Chair of the Special Committee on the UDITPA).

Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization (2008) 160 Cal. App. 4th 514, 72 Cal. Rptr. 3d 857 (although it may be appropriate for the court to take judicial notice of the existence of the Web sites of the American Coal Foundation and the U.S. Department of Energy, the court may not take judicial notice of the factual content of the Web site).

Ketchum v. Moses (2001) 24 Cal. 4th 1122, 104 Cal. Rptr. 2d 377, 17 P.3d 735 (Supreme Court took judicial notice of analysis of a Senate bill to amend the anti-SLAPP statute and working group report, but would not take judicial notice of certain materials concerning unrelated proposed legislation).

Jordache Enterprises, Inc. v. Brobeck (1998) 18 Cal. 4th 739, 76 Cal. Rptr. 2d 749, 958 P.2d 1062 (Court took notice of Assembly Committee on Judiciary digest of Assembly Bill regarding statute of limitations for malpractice, but would not take notice of legislative history materials and case law regarding language from other state and federal statutes because notice would not be necessary, helpful or relevant and would not take notice of biographical data from popular directory of attorneys regarding partners in a law firm that was party to malpractice action where no showing was made that directory satisfied requirements for judicial notice).

People v. Wiley (1995) 9 Cal. 4th 580, 38 Cal. Rptr. 2d 347, 889 P.2d 541 (judicial notice could be taken of portions of municipal court record pertaining to alleged prior serious felony convictions in order to determine whether prior serious felonies were "brought and tried separately," for purposes of imposing five-year enhancement of sentence for subsequent conviction of serious felony for each such prior conviction).

Mushrush v. State Bar of California (1976) 17 Cal. 3d 487, 131 Cal. Rptr. 1, 551 P.2d 321 (court in disciplinary proceeding would take judicial notice of legal malpractice action brought by client).

Honig v. San Francisco Planning Depart. (2005) 127 Cal. App. 4th 520, 25 Cal. Rptr. 3d 649 (refusing to take permissive judicial notice of a State Bar of California attorney profile of an attorney who was a landowner party to the lawsuit under Section 452(h), pertaining to "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.").

People v. Belcher (1974) 11 Cal. 3d 91, 113 Cal. Rptr. 1, 520 P.2d 385 (certified copies of federal indictment and of judgment of acquittal were records of a court of the United States of which Supreme Court would take judicial notice on appeal from judgment of conviction).

People v. Munoz (2005) 129 Cal. App. 4th 421, 28 Cal. Rptr. 3d 295, *reh'g denied* (fact finder may take judicial notice of a prior sexually violent predator (SVP) finding if there is a relevant legal consequence to it; however the factual truth of any prior determination that the defendant then had a mental disorder and was as a result dangerous are not the proper subject of judicial notice; nothing must be done to suggest the defendant is required to prove he is no longer an SVP; thus the trial court erred in a SVP recommitment case in allowing evidence and argument concerning defendant's two prior SVP commitments).

Conservatorship of Levitt (2001) 93 Cal. App. 4th 544, 113 Cal. Rptr. 2d 294 (in determining an award of fees to an attorney representing elderly persons, a court may take judicial notice of the fact that elderly persons with modest estates do not have ready access to legal advice and assistance that would enable them to protect themselves against financial and other elder abuse; appellate court held, however, that legislature is the proper venue to address this problem and upheld trial court's reduction of fee request).

Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal. App. 4th 875, 110 Cal. Rptr. 2d 877 (holding that trial court erred in taking judicial notice of the truth of a factual statement contained in an earlier appellate opinion in the case; judicial notice is appropriate only for matters that are assumed to be indisputably true and thus require no formal proof, but appellate court's statements of fact regarding a case are not "indisputably true"; only fact that appellate opinion was rendered and that the opinion contained factual findings would be subject to judicial notice; the truth of those factual findings cannot be judicially noticed).

Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 104 Cal. Rptr. 2d 439 (official acts, as defined in Section 452(c), include records, reports and orders of administrative agencies).

Heavenly Valley Ski Resort v. El Dorado County Board of Equalization (2000) 84 Cal. App. 4th 1323, 101 Cal. Rptr. 2d 591 (in a dispute regarding the plaintiff's right to administrative review after the defendants' business property audit, the appellate court refused to take judicial notice of certain letters to the Governor and proposed (but withdrawn)

legislation because the proponents had not shown that the items were cognizable legislative history indicating the legislature's intent).

Evans v. Pillsbury, Madison & Sutro (1998) 65 Cal. App. 4th 599, 76 Cal. Rptr. 2d 679 (attorney's declaration, filed in opposition to disqualification motion was not a proper subject for judicial notice because it does not fall within class of subjects of mandatory judicial notice and trial court was not asked to take judicial notice of the declaration).

Empire Fire and Marine Ins. Co. v. Bell (1997) 55 Cal. App. 4th 1410, 64 Cal. Rptr. 2d 749 (declaration of county official stating that no notice was received of modification of automobile liability insurance policy issued to ambulance service was not proper subject for judicial notice as it was not an official act).

Fowler v. Howell (1996) 42 Cal. App. 4th 1746, 50 Cal. Rptr. 2d 484 (court may not take judicial notice of truth of factual finding made in another action).

Smith v. Premier Alliance Ins. Co. (1995) 41 Cal. App. 4th 691, 48 Cal. Rptr. 2d 461 (on appeal from summary judgment, Court of Appeal took judicial notice of superior court file).

Estate of Castiglioni (1995) 40 Cal. App. 4th 367, 47 Cal. Rptr. 2d 288 (in action for release of one half of joint tenancy property by joint tenant wife who feloniously and intentionally killed husband, Court of Appeal would take judicial notice of record in criminal case against wife).

San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal. App. 4th 523, 45 Cal. Rptr. 2d 117 (trial court properly took judicial notice of legal opinion of Secretary of Resources).

People v. Goodloe (1995) 37 Cal. App. 4th 485, 44 Cal. Rptr. 2d 15 (1995) (Court of Appeal took judicial notice of administrative bulletin issued by Department of Corrections regarding its interpretation of statute under which certain violent offenders are ineligible to earn any credit on terms of imprisonment which stated that Department administratively applies provisions of section).

Henry v. Clifford (1995) 32 Cal. App. 4th 315, 38 Cal. Rptr. 2d 116 (trial court properly took judicial notice of prior action filed by patient in dismissing patient's second medical malpractice action against physician based on statute of limitations, even though court had erred in taking judicial notice of letter which had been sent by patient's counsel to physician prior to filing of second action in which he stated that patient intended to sue for negligence).

Masters v. San Bernardino County Employees Retirement Assn. (1995) 32 Cal. App. 4th 30, 37 Cal. Rptr. 2d 860 (in reviewing dismissal of applicant's claims against county employees retirement association, arising out of association's alleged failure to promptly award disability retirement pension, Court of Appeal would take judicial notice of association's bylaws, adopted by Board of Retirement and by county board of supervisors pursuant to statute).

Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal. App. 4th 1137, 37 Cal. Rptr. 2d 718 (existence of contract between private parties cannot be established by judicial notice under statute providing that judicial notice may be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy).

Baldwin v. County of Tehama (1994) 31 Cal. App. 4th 166, 36 Cal. Rptr. 2d 886 (court would not take judicial notice of bulletin of Department of Water Resources for purpose of purported references therein to state's grant to local agencies of limited authority to deal with groundwater basins; proper manner of demonstrating existence and nature of such grants of authority was citation to appropriate statutes).

Willis v. State (1994) 22 Cal. App. 4th 287, 27 Cal. Rptr. 2d 413 (judicial notice of sections of state administrative

manual, wherein agencies are directed to make payment to designee provided there are no competing claims to delivery of payroll warrants, was not mandatory in action brought by state employee's wife who made competing claim to delivery of warrants since manual had not been adopted as regulation pursuant to Administrative Procedure Act).

1119 Delaware v. Continental Land Title Co. (1993) 16 Cal. App. 4th 992, 20 Cal. Rptr. 2d 438 (recorded conditional use permit and portion of municipal code were matters which were properly subject of judicial notice and, therefore, could be treated as having been pled).

Powell v. Superior Court (1991) 232 Cal. App. 3d 785, 283 Cal. Rptr. 777 (in determining size of jury pool, as factor bearing on need for change of venue, court took judicial notice of statistical data provided by Jury Services Division of Los Angeles County Superior Court).

Krusi v. Bear, Stearns & Co. (1983) 144 Cal. App. 3d 664, 192 Cal. Rptr. 793 (Court of Appeal would take judicial notice of the final report and accounting of trustee appointed under Securities Investor Protection Act to liquidate stock brokerage firm and of the United States district court order approving the final report).



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DIVISION 4 JUDICIAL NOTICE

SECTION 452.5 Computer-Generated Records of Criminal Convictions

1-452.5 California Evidence Courtroom Manual 452.5.syn

§ 452.5.syn Synopsis to Chapter 452.5: Computer-Generated Records of Criminal Convictions

Scope Computer-Generated Records of Criminal Convictions

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 4 JUDICIAL NOTICE

SECTION 452.5 Computer-Generated Records of Criminal Convictions

1-452.5 California Evidence Courtroom Manual Scope

Scope Computer-Generated Records of Criminal Convictions

§ 452.5 reads as follows:

452.5 Computer-Generated Records of Criminal Convictions

(a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to *Section 69844.5 of the Government Code* at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

(Added by Stats. 1996, ch. 642 (A.B. 1387), § 3; Stats. 2002, ch. 784 (S.B. 1316), § 102)

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DIVISION 4 JUDICIAL NOTICE

SECTION 452.5 Computer-Generated Records of Criminal Convictions

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1 ANALYSIS

Section 452.5 specifies that certified computer-generated official court records relating to criminal convictions may be the subject of judicial notice under Section 452. Moreover, Section 452.5(b) makes clear that an official record of the conviction, certified under Section 1530(a), is admissible to prove the truth of its contents under Section 1280. The purpose of the legislation was to streamline the proof of prior convictions, particularly for the purpose of sentencing enhancement under the California "Three Strikes" legislation. However, Section 452.5 may result in more confusion than time-saving. By singling out a particular type of court document as covered by Section 452, Section 452.5 raises all sorts of questions about what other documents are or are not covered by Section 452 and the degree to which they are subject to authenticity and hearsay problems.



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DIVISION 4 JUDICIAL NOTICE

SECTION 452.5 Computer-Generated Records of Criminal Convictions

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 452.5.



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DIVISION 4 JUDICIAL NOTICE

SECTION 452.5 Computer-Generated Records of Criminal Convictions

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3 SIGNIFICANT CASES

People v. Duran (2002) 97 Cal. App. 4th 1448, 119 Cal. Rptr. 2d 272 (trial court did not err in admitting a certified minute order to prove gang member's drug activity, since Section 452.5(b) creates a hearsay exception allowing admission of an official record of conviction to prove not only the fact of conviction, but also that the offense reflected in the record occurred; a certified minute order constitutes an official record of conviction).



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DIVISION 4 JUDICIAL NOTICE

SECTION 453 Requests Making Judicial Notice Mandatory

1-453 California Evidence Courtroom Manual 453.syn

§ 453.syn Synopsis to Chapter 453: Requests Making Judicial Notice Mandatory

Scope Requests Making Judicial Notice Mandatory

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 4 JUDICIAL NOTICE

SECTION 453 Requests Making Judicial Notice Mandatory

1-453 California Evidence Courtroom Manual Scope

Scope Requests Making Judicial Notice Mandatory

§ 453 reads as follows:

Rule 453 Requests Making Judicial Notice Mandatory

The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

- (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and
- (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 4 JUDICIAL NOTICE
SECTION 453 Requests Making Judicial Notice Mandatory

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1 ANALYSIS

Section 453 states the procedural elements a party must satisfy to require a court to take judicial notice of a fact or matter permitted under Section 452.

Illustration

Counsel:

Your Honor, may I approach the sidebar? *(At the sidebar)* Your Honor, I would like the court to take judicial notice of the fact that January 19, 1989 occurred on a Thursday.

Judge:

Are you suggesting that the day of the week on which January 19 occurred is a matter of common knowledge?

Counsel:

No, Your Honor, I am providing you with an almanac as well as a calendar which will conclusively demonstrate that January 19 fell on a Thursday in 1989.

Judge:

Does opposing counsel have any objection?

Opposing Counsel:

Your Honor, it would appear that this should be a matter of testimony from a witness sworn under oath. Consequently, I object to your taking judicial notice of this fact.

Judge:

I will overrule the objection. These sources are essentially beyond dispute as to the day of the week on which January 19 occurred in 1989. Regardless of what a witness's memory may indicate, these sources are sufficient bases for judicial

notice, and I will so instruct the jury. No formal evidence will be necessary.



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DIVISION 4 JUDICIAL NOTICE

SECTION 453 Requests Making Judicial Notice Mandatory

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2 COMPARISON TO FEDERAL RULE

Although there are some differences in the language used, Federal Rule of Evidence 201 is similar to Section 453 in all essential aspects.



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DIVISION 4 JUDICIAL NOTICE

SECTION 453 Requests Making Judicial Notice Mandatory

1-453 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 11 Cal. Rptr. 2d 330, 834 P.2d 1148 (notwithstanding choice-of-law clause stating that agreement was to be "construed in accordance with Hong Kong law," question of whether choice-of-law clause was ambiguous as to its scope was not one of Hong Kong law, as would normally be the case, but was one of state law, as parties did not request judicial notice of Hong Kong law on that question of interpretation or supply court with evidence of relevant aspects of that law).

Willis v. State (1994) 22 Cal. App. 4th 287, 27 Cal. Rptr. 2d 413 (decision of trial judge not to take judicial notice will be upheld on appeal unless reviewing court determines that party furnished information to judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter).

Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley (1986) 180 Cal. App. 3d 152, 225 Cal. Rptr. 364 (trial court would not take judicial notice of appraisal treatises in action for writ of mandate to set aside city mobile home park rent review commission's decision regarding rent increase where sufficient information was not provided to ensure that treatises cited were source of reasonably indisputable accuracy).



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DIVISION 4 JUDICIAL NOTICE

SECTION 454 Determining Whether Judicial Notice Is Appropriate

1-454 California Evidence Courtroom Manual 454.syn

§ 454.syn Synopsis to Chapter 454: Determining Whether Judicial Notice Is Appropriate

Scope Determining Whether Judicial Notice Is Appropriate

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 4 JUDICIAL NOTICE

SECTION 454 Determining Whether Judicial Notice Is Appropriate

1-454 California Evidence Courtroom Manual Scope

Scope Determining Whether Judicial Notice Is Appropriate

§ 454 reads as follows:

Rule 454 Determining Whether Judicial Notice is Appropriate

(a) In determining the propriety of taking judicial notice of a matter, or the tenor thereof:

(1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(2) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

(b) Where the subject of judicial notice is the law of an organization of nations, a foreign nation, or a public entity in a foreign nation and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, shall be in writing.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 4 JUDICIAL NOTICE

SECTION 454 Determining Whether Judicial Notice Is Appropriate

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1 ANALYSIS

Section 454 sets forth the resources and procedures a judge may use to determine whether it is proper to take judicial notice of a matter permitted under Sections 451 and 452.



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DIVISION 4 JUDICIAL NOTICE

SECTION 454 Determining Whether Judicial Notice Is Appropriate

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2 COMPARISON TO FEDERAL RULE

There is no comparable federal evidence rule directly on point, although other federal rules are relevant. Federal Rule of Evidence 104(a) permits a judge, in determining whether evidence is admissible, to consider evidence that might otherwise be inadmissible, except that the judge is bound, as in Section 454, by the law of privilege. Moreover, Federal Rule of Evidence 1101(c) provides that the law of "privileges applies at all stages of all actions, cases, and proceedings." Federal Rule of Evidence 706 permits a judge to appoint experts to assist the court, with or without a request from a party, and this would presumably apply to the determination of whether judicial notice is appropriate. Finally, like Section 454(b), Federal Rule of Civil Procedure 44.1 and *Federal Rule of Criminal Procedure 26.1*--which deal with the determination of foreign law--permit the court to consider any relevant resources, even if such materials would not be admissible under the Federal Rules of Evidence. Unlike the California provision, however, these federal rules do not expressly require the expert testimony to be in writing.



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DIVISION 4 JUDICIAL NOTICE
SECTION 455 Opportunity to Respond

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§ 455.syn Synopsis to Chapter 455: Opportunity to Respond

Scope Opportunity to Respond

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 4 JUDICIAL NOTICE
SECTION 455 Opportunity to Respond

1-455 California Evidence Courtroom Manual Scope

Scope Opportunity to Respond

§ 455 reads as follows:

Rule 455 Opportunity to Respond

With respect to any matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action:

(a) If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 4 JUDICIAL NOTICE
SECTION 455 Opportunity to Respond

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1 ANALYSIS

Section 455 ensures basic elements of due process in the taking of judicial notice--an opportunity to respond and preservation in the record of any material used in the taking of judicial notice so that parties may be adequately heard on the issue.



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DIVISION 4 JUDICIAL NOTICE
SECTION 455 Opportunity to Respond

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2 COMPARISON TO FEDERAL RULE

Federal Rule of Evidence 201(e) is substantially similar to Section 455 in all essential aspects.



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DIVISION 4 JUDICIAL NOTICE
SECTION 456 Denial of Request to Take Judicial Notice

1-456 California Evidence Courtroom Manual 456.syn

§ 456.syn Synopsis to Chapter 456: Denial of Request to Take Judicial Notice

Scope Denial of Request to Take Judicial Notice

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 4 JUDICIAL NOTICE
SECTION 456 Denial of Request to Take Judicial Notice

1-456 California Evidence Courtroom Manual Scope

Scope Denial of Request to Take Judicial Notice

§ 456 reads as follows:

Rule 456 Denial of Request to Take Judicial Notice

If the trial court denies a request to take judicial notice of any matter, the court shall at the earliest practicable time so advise the parties and indicate for the record that it has denied the request.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 4 JUDICIAL NOTICE
SECTION 456 Denial of Request to Take Judicial Notice

1-456 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 456 ensures that a proper record is made of the judge's ruling regarding the taking of judicial notice. The provision clarifies what proof in the case was provided by the parties or was provided through judicial notice. Note, however, that under Section 458 the trial court's refusal to take judicial notice is not binding on the appellate court.



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DIVISION 4 JUDICIAL NOTICE
SECTION 456 Denial of Request to Take Judicial Notice

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2 COMPARISON TO FEDERAL RULE

There is no direct federal counterpart to Section 455. Federal Rules of Evidence 103(a)-(b), which apply to all forms of proof, allow for the making of an offer of proof and record of the ruling where evidence is excluded for purposes of appeal. Yet unlike California Section 456, these federal provisions are not mandatory--a party must be careful to make a clear record of the type of proof offered under the judicial notice provisions as well as a record of the court's ruling.



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DIVISION 4 JUDICIAL NOTICE

SECTION 457 Instructing the Jury on Matter Judicially Noticed

1-457 California Evidence Courtroom Manual 457.syn

§ 457.syn Synopsis to Chapter 457: Instructing the Jury on Matter Judicially Noticed

Scope Instructing the Jury on Matter Judicially Noticed

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 4 JUDICIAL NOTICE

SECTION 457 Instructing the Jury on Matter Judicially Noticed

1-457 California Evidence Courtroom Manual Scope

Scope Instructing the Jury on Matter Judicially Noticed

§ 457 reads as follows:

Rule 457 Instructing the Jury on Matter Judicially Noticed

If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the trial court may, and upon request shall, instruct the jury to accept as a fact the matter so noticed.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 4 JUDICIAL NOTICE

SECTION 457 Instructing the Jury on Matter Judicially Noticed

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1 ANALYSIS

Section 457 authorizes the court to issue a binding instruction to the jury in civil cases if the matter is conclusively established by the taking of judicial notice. A corollary of this rule is that if a fact is subject to judicial notice and a binding instruction, the opponent may not introduce evidence to contradict the fact.

However, judicial notice may operate differently in a criminal case. If the fact to be judicially noticed is one which would be determined by the jury and is one which the prosecution must prove, conclusive judicial notice would violate the federal constitution. The United States Supreme Court has held that the prosecution must prove beyond a reasonable doubt all facts "necessary to constitute the crime with which [the accused] is charged." *In re Winship (1970) 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368*. Thus, if the fact to be judicially noticed falls within the prosecutor's burden of proof, the jury cannot be given a binding instruction on the fact.



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DIVISION 4 JUDICIAL NOTICE

SECTION 457 Instructing the Jury on Matter Judicially Noticed

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2 COMPARISON TO FEDERAL RULE

The only counterpart to California Section 457 is Federal Rule of Evidence 201(g), which provides that once a fact has been judicially noticed in a civil action, it is conclusively established and the adverse party may not introduce evidence to contradict the noticed fact. Section 457 has the same effect as Federal Rule of Evidence 201(g).

There is, however, a slight difference in the treatment of criminal cases. The federal rule explicitly respects the constitutional principle that a conviction may only rest upon a finding that each element of the charged offense has been proved beyond a reasonable doubt. In accordance with this doctrine, Federal Rule of Evidence 201(g) expressly provides that in criminal cases the jury should be instructed "that it may, but is not required to, accept as conclusive any fact judicially noticed." Section 457 is silent regarding its special application in criminal cases, but California courts are bound by the constitutional dictates of *In re Winship*, discussed above.



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DIVISION 4 JUDICIAL NOTICE
SECTION 458 Judicial Notice in Subsequent Proceedings

1-458 California Evidence Courtroom Manual 458.syn

§ 458.syn Synopsis to Chapter 458: Judicial Notice in Subsequent Proceedings

Scope Judicial Notice in Subsequent Proceedings

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 4 JUDICIAL NOTICE
SECTION 458 Judicial Notice in Subsequent Proceedings

1-458 California Evidence Courtroom Manual Scope

Scope Judicial Notice in Subsequent Proceedings

§ 458 reads as follows:

Rule 458 Judicial Notice in Subsequent Proceedings

The failure or refusal of the trial court to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the trial court in subsequent proceedings in the action from taking judicial notice of the matter in accordance with the procedure specified in this division.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 4 JUDICIAL NOTICE
SECTION 458 Judicial Notice in Subsequent Proceedings

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1 ANALYSIS

Section 458 makes clear that the trial court's decision to take or to refuse to take judicial notice does not become binding on that judge or a trial judge in a subsequent proceeding, such as when the case has been remanded for a new trial.



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DIVISION 4 JUDICIAL NOTICE
SECTION 458 Judicial Notice in Subsequent Proceedings

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2 COMPARISON TO FEDERAL RULE

There is no express federal counterpart to Section 458. Federal Rule of Evidence 201(f) provides that "judicial notice may be taken at any stage of the proceedings," which suggests that judicial notice may be taken by appellate courts, but this does not answer the question of how subsequent courts should treat a situation where the trial court has actually ruled on a request for judicial notice. Presumably federal courts would apply normal principles of judicial review and "law of the case" in determining whether to follow the initial ruling on a request for judicial notice.



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DIVISION 4 JUDICIAL NOTICE
SECTION 459 Judicial Notice by Appellate Court

1-459 California Evidence Courtroom Manual 459.syn

§ 459.syn Synopsis to Chapter 459: Judicial Notice by Appellate Court

Scope Judicial Notice by Appellate Court

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DIVISION 4 JUDICIAL NOTICE
SECTION 459 Judicial Notice by Appellate Court

1-459 California Evidence Courtroom Manual Scope

Scope Judicial Notice by Appellate Court

§ 459 reads as follows:

Rule 459 Judicial Notice by Appellate Court

(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

(b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454.

(c) When taking judicial notice under this Section of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 4 JUDICIAL NOTICE
SECTION 459 Judicial Notice by Appellate Court

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1 ANALYSIS

Section 459 requires the appellate court to take judicial notice of matters subject to mandatory judicial notice (under Sections 451 and 453) and matters of which the trial court appropriately took permissive judicial notice (under Section 452). However, following general rules of appellate practice, the appellate court will not take permissive judicial notice of matters that were not considered by the trial court. Section 459 is clear that appellate courts are bound by the same procedural constraints in taking judicial notice that bind trial courts, such as providing the opponent of the evidence an opportunity to be heard on the propriety of taking judicial notice.



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DIVISION 4 JUDICIAL NOTICE
SECTION 459 Judicial Notice by Appellate Court

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2 COMPARISON TO FEDERAL RULE

The counterpart to Section 459 is Federal Rule of Evidence 201(f), which provides only that "judicial notice may be taken at any stage of the proceeding," thus including appeals. However, Section 459 is far more explicit that all of the conditions and procedural requirements for taking judicial notice that apply to trial courts also apply to appellate courts. Moreover, the federal rule is silent as to how appellate courts should treat a trial court's ruling on request for judicial notice. One might fairly presume that this issue is subject to general principles of appellate review.



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SECTION 459 Judicial Notice by Appellate Court

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3 SIGNIFICANT CASES

Brosterhous v. State Bar of California (1995) 12 Cal. 4th 315, 48 Cal. Rptr. 2d 87, 906 P.2d 1242 (appellate court may properly decline to take judicial notice of a matter which should have been presented to trial court for its consideration in the first instance).

People v. Sanchez (1995) 12 Cal. 4th 1, 47 Cal. Rptr. 2d 843, 906 P.2d 1129 , *modified*, 12 Cal. 4th 825b , *cert. denied*, (Supreme Court would not take judicial notice of record and exhibits filed in prosecution of third party in connection with murders with which defendant was charged, as doing so would improperly augment appellate record).

People v. Padilla (1995) 11 Cal. 4th 891, 47 Cal. Rptr. 2d 426, 906 P.2d 388 , *cert. denied*, (unpublished opinion in codefendant's case was subject to judicial notice on appeal in capital murder case).

Evans v. Pillsbury, Madison & Sutro (1998) 65 Cal. App. 4th 599, 76 Cal. Rptr. 2d 679 (attorney's declaration, filed in opposition to disqualification motion was not a proper subject for judicial notice because it does not fall within class of subjects of mandatory judicial notice and trial court was not asked to take judicial notice of the declaration).

Williams v. Wraxall (1995) 33 Cal. App. 4th 120, 39 Cal. Rptr. 2d 658 (Court of Appeal may take judicial notice of existence of judicial opinions and court documents, along with truth of results reached, in documents such as orders, statements of decision and judgments, but may not take judicial notice of truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact).



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DIVISION 4 JUDICIAL NOTICE
SECTION 460 Court's Appointment of Experts

1-460 California Evidence Courtroom Manual 460.syn

§ 460.syn Synopsis to Chapter 460: Court's Appointment of Experts

Scope Court's Appointment of Experts

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DIVISION 4 JUDICIAL NOTICE
SECTION 460 Court's Appointment of Experts

1-460 California Evidence Courtroom Manual Scope

Scope Court's Appointment of Experts

§ 460 reads as follows:

Rule 460 Court's Appointment of Experts

Where the advice of persons learned in the subject matter is required in order to enable the court to take judicial notice of a matter, the court on its own motion or on motion of any party may appoint one or more such persons to provide such advice. If the court determines to appoint such a person, he shall be appointed and compensated in the manner provided in Article 2 (commencing with Section 730) of Chapter 3 of Division 6.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 4 JUDICIAL NOTICE
SECTION 460 Court's Appointment of Experts

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1 ANALYSIS

Section 460 makes clear that a court may use expert testimony in order to determine whether taking judicial notice is appropriate under the circumstances.



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SECTION 460 Court's Appointment of Experts

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2 COMPARISON TO FEDERAL RULE

There is no direct federal counterpart to Section 450, although courts have a general power to appoint experts under Federal Rule of Evidence 706. Such a judicially appointed expert presumably could be used to assist the court in determining whether to take judicial notice.



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DIVISION 5 BURDEN OF PROOF; BURDEN OF PRODUCING EVIDENCE; PRESUMPTIONS AND
INFERENCES
CHAPTER 1 BURDEN OF PROOF
ARTICLE 1 GENERAL

1 California Evidence Courtroom Manual Scope

Scope

Practice Tip

In dealing with the topics covered by Division 5 of the Evidence Code--the burden of proof and presumptions--it is essential to have a firm understanding of the terms used by the Code, as these phrases are often confusing and misused. Moreover, as elaborated within specific sections below, the California approach to these topics sometimes differs considerably from the federal practice, so it is helpful to grasp the different possible interpretations of these phrases. Finally, unlike many of the other Evidence Code provisions, the sections on burden of proof and presumptions operate primarily through jury instructions. While some problems arising under these provisions might be handled through motions in limine, most will be dealt with as the judge and the parties prepare jury instructions.

Burden of production: This is sometimes also called the "burden of going forward." The party who carries this burden (as determined by the substantive law) must introduce enough evidence, on each essential element of the party's claim or defense, sufficient to permit a reasonable person to find that issue in the party's favor. As explained below, a party who has the benefit of a presumption may use it as a "boost" toward meeting the party's production burden.

Prima facie: Under *Evidence Code* section 602, a statute's reference to a fact as prima facie evidence of another fact means that the statute is establishing a *rebuttable presumption* (described below). The phrase "prima facie" is sometimes used in another sense; a party who *satisfies the burden of production on each essential element of the party's claim* can be said to have made out a "prima facie" case. In other words, based only on the party's evidence, it would not be unreasonable for the finder of fact to find in the party's favor on the claim asserted.

Burden of persuasion: In the Evidence Code, this is generally referred to as the *burden of proof*. Courts sometimes also refer to the party who bears "*the risk of nonpersuasion*." For if a party fails to satisfy its burden of persuasion, it will lose the case through an adverse verdict or through judgment as a matter of law (directed verdict or judgment notwithstanding the verdict). The party who carries this burden must present enough evidence to convince the trier of fact to one of *three degrees of persuasion*: (1) by a

1 California Evidence Courtroom Manual Scope

preponderance of the evidence, (2) by clear and convincing evidence or (3) by evidence beyond a reasonable doubt. In criminal cases, the prosecution must prove each element of its case beyond a reasonable doubt. In civil cases, a party will be required to prove its case either by a preponderance of the evidence or by clear and convincing evidence. A party who bears the production burden will normally also bear the burden of persuasion. However, in California, the effect of certain presumptions, discussed in detail below, is to shift the burden of persuasion to the other party.

Burden of proof: This phrase is often used in different ways. Some courts and commentators use the phrase to mean a party's collective burden of production and burden of persuasion. In the Evidence Code, the phrase is used as a synonym for *the burden of persuasion*.

Inference: An inference is a conclusion that may be drawn from facts admitted in evidence as to a matter material to the case. An inference exists as a matter of common experience and logic, and while it may be recognized or even specifically authorized as a matter of law, its function is limited to permitting the trier of fact to find the facts sought to be established. An inference is the basic ingredient of all circumstantial evidence. Sometimes statutes use the term "inference" when either prima facie evidence or presumptive evidence is intended.

Conclusive presumption: A conclusive presumption is in reality a rule of substantive law, not a rule of evidence. It is, by definition, not rebuttable. Once the facts giving rise to the conclusive presumption are established, there is no further evidentiary function involved. It is, in effect, a policy determination that removes an issue from factual contest. For example, a conclusive presumption that a child under a specified age is incapable of committing a felony precludes any attempt to prove that such a child committed a felony, once the child's age has been established.

Rebuttable presumption: This is the area in which California and federal practice differ significantly. One type of rebuttable presumption affects only the production burden of the party relying on the presumption. The other type of rebuttable presumption affects the persuasion burden (the burden of proof). Federal practice recognizes only presumptions affecting the production burden, while California has both types of presumptions. See the Practice Tip preceding Section 600 of this manual for more on handling presumptions in California.



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DIVISION 5 BURDEN OF PROOF; BURDEN OF PRODUCING EVIDENCE; PRESUMPTIONS AND
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ARTICLE 1 GENERAL

SECTION 500 Allocation of Burden of Proof in General

1-500 California Evidence Courtroom Manual 500.syn

§ 500.syn Synopsis to Chapter 500: Allocation of Burden of Proof in General

Scope Allocation of Burden of Proof in General

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CHAPTER 1 BURDEN OF PROOF

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SECTION 500 Allocation of Burden of Proof in General

1-500 California Evidence Courtroom Manual Scope

Scope Allocation of Burden of Proof in General

§ 500 reads as follows:

Rule 500 Allocation of Burden of Proof in General

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

The allocation of the burden of proof is essentially determined by the substantive law. Section 500 thus provides that, in general, a party who relies on a particular claim or defense must prove each element required under the substantive law. Hence, a prosecutor who charges a defendant with first-degree murder must prove each element of that crime. A plaintiff who alleges she was defrauded in the purchase of an air-conditioning unit must prove each element of fraud. Generally, a defendant bears no burden of proof. Nevertheless, a defendant in a civil case who raises an affirmative defense, such as estoppel, must prove the elements of that defense. The obligations of a defendant in a criminal case are discussed in *Section 501*, as this situation presents potential constitutional problems.

These general principles regarding the allocation of the burden of proof can be modified by decisional law. The California Supreme Court noted that specific policy considerations are relevant in allocating the burden of proof. The Court has held that when evidence lies within the peculiar knowledge of the opposing party, public policy and fairness can require alteration of the allocation of burden of proof. Thus, the defendants who have special access to evidence or who have special competence in the subject of the dispute can bear the burden of proof even though they are not the party asserting a claim. *Morris v. Williams* (1967) 67 Cal. 2d 733, 63 Cal. Rptr. 689, 433 P.2d 697. The Law Revision Commission states that other factors that may be considered in allocating the burden of proof, such as "the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact." Comment to Section 500. Thus, for example, a court may probably consider the effect that shifting the burden would have in weakening the statute at issue in a case. *S.D.W. v. Holden* (1969) 275 Cal. App. 2d 313, 80 Cal. Rptr. 269. See also *Evidence Code section 115* (defining burden of proof).



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CHAPTER 1 BURDEN OF PROOF

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SECTION 500 Allocation of Burden of Proof in General

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 500 in the Federal Rules of Evidence.



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3 SIGNIFICANT CASES

Samuels v. Mix (1999) 22 Cal. 4th 1, 91 Cal. Rptr. 2d 273, 989 P.2d 701 (the plain language of Section 500, along with *Code of Civil Procedure* section 340.6(a), places the burden of proving client's actual or constructive discovery of attorney's negligence on the defendant raising the one-year-from-discovery limitation defense to malpractice).

Adams v. Murakami (1991) 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348 (punitive damages provide "windfall recovery," therefore it is not too much for a plaintiff seeking such a windfall to be the party required to introduce evidence of defendant's financial condition. Further, it would be unfair to make defendant "bid against himself").

Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 209 Cal. Rptr. 682, 693 P.2d 261 (a provision in a city rent control ordinance that an eviction within six months of a tenant's assertion of rights under the ordinance would be presumed to be a retaliatory eviction by the landlord, and that a court must "find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence," created a presumption affecting the burden of proof. Since Section 500 allocates the burden of proof of a fact to the party whose claim for relief or defense relies on the existence or nonexistence of the fact, and since the Legislature deliberately excluded ordinances from those sources of law that may, under the terms of Section 500, change the traditional allocation of the burden of proof, the provision was thus in direct conflict with Section 500, and therefore invalid).

Williams v. Russ (2008) 167 Cal. App. 4th 1215, 84 Cal. Rptr. 3d 813 (party moving for discovery sanctions based on the spoliation of evidence must make an initial prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense; if the moving party makes that prima facie showing, the burden of proof shifts to the non-moving party because that party's wrong-doing makes it practically impossible for the moving party to prove its case).

Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157, 78 Cal. Rptr. 3d 572 (court properly shifted the burden of proof to employers when inadequate records prevented employees from proving their claims for unpaid overtime hours and unpaid meal and rest breaks).

Conservatorship of Hume (2006) 140 Cal. App. 4th 1385 ; 44 Cal. Rptr. 3d 906 ("The burden of proof is to law what inertia is to physics--a built-in bias in favor of the status quo That is, if you want the court to do something, you have to present evidence sufficient to overcome the state of affairs that would exist if the court did nothing;" thus, burden of proof rested with the objector to a conservator's appraisal, because the objector was seeking relief by trying to change the result that would normally obtain without intervention, which would be acceptance of the appraisal).

People v. Lopez (1997) 52 Cal. App. 4th 233, 60 Cal. Rptr. 2d 511 (this section does not govern pretrial motions).

Webster v. Trustees of Cal. State Univ. (1993) 19 Cal. App. 4th 1456, 24 Cal. Rptr. 2d 150 (when evidence lies within the peculiar knowledge of the opposing party, public policy and fairness dictate the allocation of burden of proof, so trustees of California State University have burden as to the unfitness of professor, as trustees have greater access to records which would detail such unfitness).

Fisher v. Superior Court (1980) 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (once party makes a showing that a settlement has been made which is not unreasonable on its face, the burden of going forward with the evidence on the issue of the good faith of the settlor shifts to the party who claims that the settlement was not made in good faith; such an allocation of proof produces the most desirable effect in terms of public policy).

Fields v. Riley (1969) 1 Cal. App. 3d 308, 81 Cal. Rptr. 671 (accrual of damages does not necessarily follow from an admission of liability; the burden of proof is on the plaintiff to prove his damages with reasonable certainty, and such burden is in no way lessened by his presentation of a prima facie case of negligence against the defendant).

County of Ventura v. Channel Islands State Bank (1967) 251 Cal. App. 2d 240, 59 Cal. Rptr. 404 (in actions in which tax assessments are challenged as illegal, there is a presumption in favor of the validity of the assessment and the burden of showing the contrary is on the one claiming to be aggrieved, so that proof of the assessment puts on defendant the burden of showing that it was not the owner of the property assessed).

Magan Medical Clinic v. Board of Medical Examiners (1967) 249 Cal. App. 2d 124, 57 Cal. Rptr. 256 (if there is a state of facts that can reasonably be conceived that would sustain the constitutionality of a statute, the existence of such state of facts is presumed, and the burden of showing arbitrariness is on the party claiming unconstitutionality).

People v. Valverde (1966) 246 Cal. App. 2d 318, 54 Cal. Rptr. 528 (the phrase "burden of persuasion" means the burden of making the trier of fact believe the facts asserted. This burden is commonly referred to as the burden of proof by a preponderance of the evidence. The phrase "burden of going forward" means the burden of producing evidence on an issue sufficient to avoid an adverse peremptory finding on a material issue of fact).

Vaughn v. Coccimiglio (1966) 241 Cal. App. 2d 676, 50 Cal. Rptr. 876 (plaintiff must prove his case and may not, by merely bringing case to trial and sitting silent in courtroom, place on defendant duty of proving or disproving plaintiff's case or appearing as witness for plaintiff unless subpoenaed. Opponent whose case is denial of other party's affirmation may legally sit inactive, and expect proponent to prove his own case, and until burden of producing evidence has shifted, opponent has no call to bring forward any evidence at all. His failure to produce evidence cannot at this stage afford any inference as to his lack of it).



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CHAPTER 1 BURDEN OF PROOF

ARTICLE 1 GENERAL

SECTION 501 Allocation of Burden of Proof in Criminal Cases

1-501 California Evidence Courtroom Manual 501.syn

§ 501.syn Synopsis to Chapter 501: Allocation of Burden of Proof in Criminal Cases

Scope Allocation of Burden of Proof in Criminal Cases

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SECTION 501 Allocation of Burden of Proof in Criminal Cases

1-501 California Evidence Courtroom Manual Scope

Scope Allocation of Burden of Proof in Criminal Cases

§ 501 reads as follows:

Rule 501 Allocation of Burden of Proof in Criminal Cases

Insofar as any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to *Penal Code section 1096*.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 501 makes clear that in criminal cases, the prosecutor has the burden of proving the defendant's guilt beyond a reasonable doubt, which is defined in *Penal Code section 1096*. Courts and commentators, such as the Law Revision Commission, may occasionally refer to the defendant's "burden" of raising a reasonable doubt as to his or her guilt. *See, e.g., California Law Revision Commission Comment to Section 522*. However, this "burden" never applies to an element of the crime, all of which the prosecution must prove beyond a reasonable doubt, as required by Section 501 and the constitutional requirement of due process. *See In re Winship (1970) 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368*. References to the defendant's burden or obligation of raising a reasonable doubt, to be constitutional, can only mean the defendant's ability to point to the flaws or gaps in the prosecutor's evidence. However, a defendant may assume an obligation of providing proof when the defendant interjects an issue independent of the elements of the crime, such as the affirmative defense of entrapment, insanity or where the defendant accuses another person of being an accomplice (thus falling under Section 520). *See also Penal Code section 189.5* (discussing burden of proving mitigating circumstances, justification or excuse); *Penal Code section 1026.2* (burden of proving sanity, restoration thereof). The degree of the defendant's burden in these cases is less than the "beyond a reasonable doubt" standard and is determined by case law or by statute.



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2 COMPARISON TO FEDERAL RULE

There is no comparable rule in the Federal Rules of Evidence.



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3 SIGNIFICANT CASES

People v. Mower (2002) 28 Cal. 4th 457, 122 Cal. Rptr. 2d 326, 49 P.3d 1067 (a defendant raising a statutory medical-marijuana defense to a charge of illegal cultivation or possession of marijuana must merely raise a reasonable doubt as to the facts because the defense relates to an element of the crime of possession or cultivation with which defendant is charged; only when a fact is collateral to the defendant's guilt or innocence may the defendant be required to prove the fact by a preponderance of the evidence; the trial court must give an instruction on the allocation and the degree of the burden of proof even if no such instruction is requested).

People v. Perez (1972) 27 Cal. App. 3d 352, 103 Cal. Rptr. 669 (it was not error to instruct the jury that defendant had the burden of proving entrapment by a preponderance of the evidence).



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ARTICLE 1 GENERAL

SECTION 502 Instructing the Jury on the Burden of Proof

1-502 California Evidence Courtroom Manual 502.syn

§ 502.syn Synopsis to Chapter 502: Instructing the Jury on the Burden of Proof

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SECTION 502 Instructing the Jury on the Burden of Proof

1-502 California Evidence Courtroom Manual Scope

Scope Instructing the Jury on the Burden of Proof

§ 502 reads as follows:

Rule 502 Instructing the Jury on the Burden of Proof

The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 502 Instructing the Jury on the Burden of Proof

1-502 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 502 uses the term "burden of proof" in the sense of carrying the ultimate burden of persuasion, as well as the initial burden of production of evidence. Section 502 identifies the key mechanism for the allocation of the burden of proof: jury instructions. The judge will give the jury an instruction telling the jury which party bears the burden of proof and to what degree the jury must be persuaded in order to return a verdict for that party. The degree of persuasion required of a party bearing the burden of persuasion in a particular case is a function of substantive law. In criminal cases, the degree of persuasion required will always be "beyond a reasonable doubt." In civil cases, the most common degree of persuasion required is proof by "a preponderance of the evidence." In special types of civil cases such as the establishment of a conservatorship, defamation cases or obscenity cases, the proof must be "clear and convincing." The most common application of this heightened standard of persuasion in civil cases in California is the requirement that a plaintiff seeking punitive damages prove that the defendant was guilty of oppression, fraud or malice by clear and convincing evidence. *See Civil Code section 3294.*

Advocates need to make explanation of the burden of proof a key part of their closing argument, especially incorporating the idea of a "burden of proof" into the advocate's story about the case. Thus, in the criminal trial of O. J. Simpson, the defense talked about the prosecution's "rush to judgment" as a way of explaining the prosecution's failure to provide proof beyond a reasonable doubt. The concept of the burden of proof and the degrees of persuasion required for different types of cases are particularly abstract and difficult for juries to understand. The standard jury instructions defining these concepts are of little edification for most lay persons. Hence the need for the advocate to be especially careful of language chosen to explain these concepts in a way that will mesh with the advocate's story.

See also Evidence Code section 115 (defining burden of proof).



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CHAPTER 1 BURDEN OF PROOF

ARTICLE 1 GENERAL

SECTION 502 Instructing the Jury on the Burden of Proof

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2 COMPARISON TO FEDERAL RULE

There is no comparable rule in the Federal Rules of Evidence.



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3 SIGNIFICANT CASES

Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 74 Cal. Rptr. 2d 510 (BAJI No. 2.62, jury instruction defining "clear and convincing evidence" was not erroneous or misleading).

In re Michael G. (1998) 63 Cal. App. 4th 700, 74 Cal. Rptr. 2d 642 ("clear and convincing" standard of persuasion requires a finding of high probability or evidence so clear as to leave no substantial doubt, evidence sufficiently strong to command the unhesitating assent of every reasonable mind; standard of "preponderance of the evidence" requires the trier of fact to believe the existence of a fact is more probable than its nonexistence).

Brown v. Watt (1967) 256 Cal. App. 2d 44, 63 Cal. Rptr. 815 (the court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt).



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SECTION 520 Claim of Crime or Wrongdoing

1-520 California Evidence Courtroom Manual 520.syn

§ 520.syn Synopsis to Chapter 520: Claim of Crime or Wrongdoing

Scope Claim of Crime or Wrongdoing

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SECTION 520 Claim of Crime or Wrongdoing

1-520 California Evidence Courtroom Manual Scope

Scope Claim of Crime or Wrongdoing

§ 520 reads as follows:

Rule 520 Claim of Crime or Wrongdoing

The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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SECTION 520 Claim of Crime or Wrongdoing

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1 ANALYSIS

Section 520 has obvious application to criminal cases in which the prosecution must prove all elements of the crime beyond a reasonable doubt, as required by Section 501 and the constitutional requirement of due process. See *In re Winship* (1970) 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 . However, Section 520 has also been applied in civil cases, such as where an insurance company accuses its insured of wrongdoing as a defense for the insurer's failure to pay benefits.



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SECTION 520 Claim of Crime or Wrongdoing

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2 COMPARISON TO FEDERAL RULE

There is no comparable rule in the Federal Rules of Evidence.



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SECTION 520 Claim of Crime or Wrongdoing

1-520 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098 (in an action brought by victims of slaying to collect judgment against insurer of slayer, trial court properly relied on Section 520 in imposing burden of proof on insurer to prove that the killing was a willful act of the slayer, and thus not covered by the policy).

Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 109 Cal. Rptr. 473, 513 P.2d 353 (the burden of proving misrepresentation of medical history by a life insurance applicant rests upon the insurer).

Rylander v. Karpe (1976) 60 Cal. App. 3d 317, 131 Cal. Rptr. 415 (under *Evidence Code* sections 500 and 520, an accusation in disciplinary proceedings against a real estate licensee has to be proved by the accuser, not disproved by the licensee).

People v. Johnson (1971) 18 Cal. App. 3d 458, 95 Cal. Rptr. 316, 96 Cal. Rptr. 695 (where a defendant asserts that a witness is an accomplice, he necessarily claims that the witness is guilty of a crime; therefore the burden of proof is on the defendant to establish that a witness is an accomplice).



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SECTION 521 Claim of Failure to Use Due Care

1-521 California Evidence Courtroom Manual 521.syn

§ 521.syn Synopsis to Chapter 521: Claim of Failure to Use Due Care

Scope Claim of Failure to Use Due Care

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2 ADDITIONAL AUTHORITY

3 SIGNIFICANT CASES



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SECTION 521 Claim of Failure to Use Due Care

1-521 California Evidence Courtroom Manual Scope

Scope Claim of Failure to Use Due Care

§ 521 reads as follows:

Rule 521 Claim of Failure to Use Due Care

The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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SECTION 521 Claim of Failure to Use Due Care

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1 ANALYSIS

Section 521 eliminates the common-law approach that required a person to prove his or her own due care in order to recover for the negligence of another. However, there is no longer a common-law presumption that a person who has been injured was acting with due care. Under Section 521, each of the parties to an accident must prove a lack of due care by the other in order to sustain their respective claims of negligence. *See also Evidence Code section 646* (presumptions regarding res ipsa loquitur).



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2 ADDITIONAL AUTHORITY

There is no comparable rule in the Federal Rules of Evidence.



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1-521 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Hogue v. Southern Pac. Co. (1969) 1 Cal. 3d 253, 81 Cal. Rptr. 765, 460 P.2d 965 (there is no longer a presumption that a person who dies as the result of an accident exercised due care for his own safety; thus in a wrongful death action involving a railroad crossing collision between a switch engine and decedent's car, the sufficiency of the evidence to support the jury's implied finding that the decedent was not guilty of contributory negligence, an issue on which the trial court gave full instructions, had to be determined without according to plaintiffs the benefit of a due care presumption).

Griffin v. Sardella (1967) 253 Cal. App. 2d 937, 61 Cal. Rptr. 834 (while the doctrine of res ipsa loquitur does not shift the burden of proof to the defendant and the plaintiff must still prove his case by a preponderance of the evidence, once a case has been made for the application of the doctrine the defendant must produce evidence sufficient to meet the inference of negligence by offsetting or balancing it).



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SECTION 522 Claim of Insanity

1-522 California Evidence Courtroom Manual 522.syn

§ 522.syn Synopsis to Chapter 522: Claim of Insanity

Scope Claim of Insanity

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2 COMPARISON TO FEDERAL RULE

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SECTION 522 Claim of Insanity

1-522 California Evidence Courtroom Manual Scope

Scope Claim of Insanity

§ 522 reads as follows:

Rule 522 Claim of Insanity

The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 522, which applies in both criminal and civil matters, places the burden of proof on the issue of insanity on the party who raises it. As an initial matter, however, it is important to distinguish between the issues of mental competency and insanity. The prosecution cannot try a defendant who is mentally incompetent, meaning that "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." *Penal Code section 1367*. Under *Penal Code section 1369(f)*, a defendant is presumed "mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." *Id.* The presumption of mental competency has been held to be constitutional because it does not relieve the prosecution from proving all elements of a crime, including any requirement relating to the defendant's mental state. See *Medina v. California* (1992) 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 .

A defendant may be mentally competent to stand trial and still raise the issue of insanity as a defense to the crime charged. *Evidence Code section 522* places the burden of proving that issue on the defendant. *Penal Code section 25(b)* requires that the defendant prove his or her insanity "by a preponderance of the evidence." However, during the guilt phase of the trial, the defendant is presumed to have been sane at the time the offense was committed. See *Penal Code section 1026(a)*. This presumption and the allocation of the burden of proof to the defendant who raises the insanity defense have been held to be constitutional, for the prosecution must still prove the defendant's mental state as required under the criminal statute beyond a reasonable doubt. Moreover, the defendant is free to dispute that proof of his or her mental state with evidence of mental illness. See *People v. Wetmore* (1978) 22 Cal. 3d 318, 326 n. 6, 149 Cal. Rptr. 265, 583 P.2d 1308 ; *People v. Drew* (1978) 22 Cal. 3d 333, 149 Cal. Rptr. 275, 583 P.2d 1318 (constitutionality of *Evidence Code section 522*).



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 522 in the Federal Rules of Evidence. Nonetheless, *18 U.S.C. § 17(b)* allocates the burden of proof to the accused when the accused raises insanity as a defense to a crime.



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1-522 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Martin (1981) 114 Cal. App. 3d 739, 170 Cal. Rptr. 840 (Evidence Code section 522 is not unconstitutional).

Estate of Goetz (1967) 253 Cal. App. 2d 107, 61 Cal. Rptr. 181 (in a will contest, competency to make a will is presumed, and the burden is on the contestant to prove that at the very time of the execution of the will, the testatrix was incompetent).



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SECTION 523 Claim Regarding Land Patented or Granted by State

1-523 California Evidence Courtroom Manual 523.syn

§ 523.syn Synopsis to Chapter 523: Claim Regarding Land Patented or Granted by State

Scope Claim Regarding Land Patented or Granted by State

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SECTION 523 Claim Regarding Land Patented or Granted by State

1-523 California Evidence Courtroom Manual Scope

Scope Claim Regarding Land Patented or Granted by State

§ 523 reads as follows:

Rule 523 Claim Regarding Land Patented or Granted by State

In any action where the state is a party, regardless of who is the moving party, where (a) the boundary of land patented or otherwise granted by the state is in dispute, or (b) the validity of any state patent or grant dated prior to 1950 is in dispute, the state shall have the burden of proof on all issues relating to the historic locations of rivers, streams, and other water bodies and the authority of the state in issuing the patent or grant.

This section is not intended to nor shall it be construed to supersede existing statutes governing disputes where the state is a party and regarding title to real property.

(Stats. 1994, ch. 128, § 2 (S.B. 1429)).

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ARTICLE 2 BURDEN OF PROOF ON SPECIFIC MATTERS

SECTION 523 Claim Regarding Land Patented or Granted by State

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1 ANALYSIS

This special statute is directed at disputes between private property owners and the State Lands Commission. Such disputes occur when a property owner seeks to develop his or her property and the State Lands Commission, which receives notice of the permit application, asserts a public trust claim because of the manner in which the development could affect state water or land rights. Section 523 ensures that the State, which arguably has the greater access to information and experience in dealing with these matters, will bear the burden of proof in resolving the dispute.



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SECTION 523 Claim Regarding Land Patented or Granted by State

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2 COMPARISON TO FEDERAL RULE

There is no comparable rule in the Federal Rules of Evidence.



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3 ADDITIONAL AUTHORITY

Commentary: Review of 1994 Legislation, 26 Pacific L.J. 315



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CHAPTER 2 BURDEN OF PRODUCING EVIDENCE

SECTION 550 Party Who Bears the Burden of Producing Evidence

1-550 California Evidence Courtroom Manual 550.syn

§ 550.syn Synopsis to Chapter 550: Party Who Bears the Burden of Producing Evidence

Scope Party Who Bears the Burden of Producing Evidence

1 ANALYSIS

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SECTION 550 Party Who Bears the Burden of Producing Evidence

1-550 California Evidence Courtroom Manual Scope

Scope Party Who Bears the Burden of Producing Evidence

§ 550 reads as follows:

Rule 550 Party Who Bears the Burden of Producing Evidence

(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on the fact would be required in the absence of further evidence.

(b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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CHAPTER 2 BURDEN OF PRODUCING EVIDENCE

SECTION 550 Party Who Bears the Burden of Producing Evidence

1-550 California Evidence Courtroom Manual 1

1 ANALYSIS

Just as every child's dream is to get to Disneyland, the dream of every party with a burden of production is to get to "juryland"--the land of reasonable people. Section 550 sets forth the general rules: a party who bears the burden of proof (persuasion burden) will initially bear the burden of production. A party who fails to meet this production burden will suffer from a directed verdict. A directed verdict is a procedural device for keeping the case away from the jury when a party has failed to provide enough evidence to allow reasonable persons to find in that party's favor. Sometimes judges will wait until a jury returns a verdict to decide whether the production burden has been satisfied; if it has not, the judge will grant j.n.o.v., or judgment notwithstanding the verdict. In so ruling, the judge has determined that no reasonable person could find in favor of the party with the production burden based on the evidence put forth. In other words, if reasonable people cannot be convinced based on the evidence presented, the case (and the parties) have no place being in "juryland."



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2 COMPARISON TO FEDERAL RULE

There is no comparable Federal Rule of Evidence. In federal court, both the directed verdict and j.n.o.v. are called "judgment as a matter of law." Federal Rule of *Civil Procedure* 50.



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CHAPTER 2 BURDEN OF PRODUCING EVIDENCE

SECTION 550 Party Who Bears the Burden of Producing Evidence

1-550 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

In re Krystle D. (1994) 30 Cal. App. 4th 1778, 37 Cal. Rptr. 2d 132 (upholding trial court's finding that termination of the mother's parental rights would not be detrimental to the child. Although the mother's tribe produced evidence on the psycho-social benefits of tribal upbringing and membership, the tribe did not produce evidence on other benefits to which membership would have entitled the child and the effect of the severance of the parent-child relationship on her tribal membership. This justified a finding adverse to the party with the burden of production).



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CHAPTER 3 PRESUMPTIONS AND INFERENCES
ARTICLE 1 GENERAL

1 California Evidence Courtroom Manual Scope

Scope

Practice Tip

The first step in understanding the application of presumptions is to be able to distinguish an inference from a presumption, and then to distinguish among the various types of presumptions.

Inference: An inference is a conclusion that *may*, but is *not required*, to be drawn from facts admitted in evidence as to a matter material to the case. An inference exists as a matter of common experience and logic, and while it may be recognized or even specifically authorized as a matter of law, its function is limited to permitting the trier of fact to find the facts sought to be established.

Presumption: A presumption is essentially a mandatory inference. If the proponent of a presumption proves the prerequisite basic facts, the law requires the trier of fact to find the presumed fact true, in the absence of contrary evidence of the presumed fact. The opponent of a presumption may only present evidence to contradict the presumed fact if the presumption is rebuttable, as is discussed further below. If the presumption is deemed by law to be conclusive, no evidence can be introduced to controvert the presumed fact.

Conclusive presumption: A conclusive presumption is in reality a rule of substantive law, not a rule of evidence. It is, by definition, not rebuttable. Once the basic facts are established, then the presumed fact is established conclusively as a matter of law. A conclusive presumption is, in effect, a policy determination that removes an issue from factual contest. For example, if the jurisdiction recognizes a conclusive presumption that a child under a specified age is incapable of committing a felony the presumption precludes any attempt to prove that such a child committed a felony, once the child's age has been established. Of course, the opposing party may attempt to rebut the basic fact (the child's actual age), but once that fact is established, the presumption operates as a matter of law to preclude felony prosecution. *Evidence Code sections 620 to 624* are conclusive presumptions.

Rebuttable presumption: This is the area in which California and federal practice differ significantly. One type of rebuttable presumption affects only the production burden of the party relying on the

1 California Evidence Courtroom Manual Scope

presumption. The other type of rebuttable presumption affects the persuasion burden. Federal practice recognizes only presumptions affecting the production burden while California has both types of presumptions. *Evidence Code sections 630 to 647* deal with presumptions that only affect the production burden of the proponent of the presumption. *Evidence Code sections 660 to 670* alter the persuasion burden on the issue involving the presumption, shifting it to the opponent of the presumption.

A rebuttable presumption permits the opponent of the presumption to dispute the basic facts, the presumed facts or both. The jury instruction given on the presumption depends on what type of evidence has been presented and disputed, as well as what type of rebuttable presumption is at issue--one affecting only the production burden or one affecting the persuasion burden (or the burden of proof, as the California Code refers to it).



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CHAPTER 3 PRESUMPTIONS AND INFERENCES

ARTICLE 1 GENERAL

SECTION 600 Presumption and Inference Defined

1-600 California Evidence Courtroom Manual 600.syn

§ 600.syn Synopsis to Chapter 600: Presumption and Inference Defined

Scope Presumption and Inference Defined

1 ANALYSIS

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ARTICLE 1 GENERAL

SECTION 600 Presumption and Inference Defined

1-600 California Evidence Courtroom Manual Scope

Scope Presumption and Inference Defined

§ 600 reads as follows:

Rule 600 Presumption and Inference Defined

(a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

(b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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ARTICLE 1 GENERAL

SECTION 600 Presumption and Inference Defined

1-600 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 600 draws a distinction between a presumption and inference. This distinction can be summed as follows: if a presumption applies in a given case, the jury must draw the conclusion required by law; if an inference applies in a given case, the jury may, but does not have to, infer the conclusion suggested by the facts. For example, if one properly addresses a letter, affixes the appropriate postage, and mails the letter at a post office, most individuals would conclude, as a matter of reason and experience, that the letter will be delivered to the addressee. Most individuals would, in other words, draw the inference of receipt from the facts of proper mailing. However, without more, those individuals are not required to find that the letter was received. The effect of a presumption, such as *Evidence Code section 641*, is to make such an inference mandatory. The presumption itself is not evidence--it is a legal catalyst to proof, using the basic facts presented and the law establishing a presumption. Of course, if the opponent of the presumption introduces evidence to contest the presumed fact, here the issue of receipt, then we must go on to ask whether the presumption is conclusive or rebuttable, and if rebuttable, what type of rebuttable presumption is at stake. Those issues are discussed in the appropriate sections below.

Another important distinction between presumptions and inferences is that matters that the jury are told are just permissive inferences are more likely to withstand constitutional scrutiny, as discussed in connection with Section 607.



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SECTION 600 Presumption and Inference Defined

1-600 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no comparable definition of presumption and inference in the Federal Rules of Evidence. As discussed in connection with *Evidence Code sections 630 to 647*, the federal rules only recognize one type of rebuttable presumption, the type affecting the burden of production, although other statutory presumptions created by Congress or state law may be applied in federal courts. See Federal Rules of Evidence 301, 302.



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1-600 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Ortega v. Kmart Corp. (2001) 26 Cal. 4th 1200, 114 Cal. Rptr. 2d 470, 36 P.3d 11 (evidence that supermarket had not inspected aisle where patron slipped on milk for at least 15 to 30 minutes and that milk could have been on floor for as long as two hours permitted reasonable inference, under Section 600(b), that the dangerous condition existed long enough to be discovered by the owner of the premises).

Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc. (1967) 66 Cal. 2d 782, 59 Cal. Rptr. 141, 427 P.2d 805 (when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court).

In re Ivey (2000) 85 Cal. App. 4th 793, 102 Cal. Rptr. 2d 447 (the imputation of notice of attorney to alleged party in criminal contempt may be utilized as a permissive inference, but not as a mandatory presumption, even if it is sometimes labeled "disputable" or "rebuttable").

Collin v. American Empire Ins. Co. (1994) 21 Cal. App. 4th 787, 26 Cal. Rptr. 2d 391 (an inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action. An inference cannot be made from thin air, and when there is no evidence or not even slight evidence of an essential fact to be proved by the plaintiff, a conclusion of a trial court or jury based thereon becomes mere conjecture and does not rise to the dignity of an inference. The absence of critical evidence does not give rise to an inference that the missing evidence exists; rather, it indicates a failure of proof. Thus, if the existence of an essential fact on which a party relies is left in doubt or uncertainty, the party on whom the burden rests to establish that fact should suffer, and not his or her adversary. Moreover, a judgment cannot be based on guesses or conjectures).

Bristow v. Ferguson (1981) 121 Cal. App. 3d 823, 175 Cal. Rptr. 571 (the validity of an inference, that is, a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in an action, must be measured against the legal purposes it serves, and thus an inference is generally measured by its relevancy to the issues tendered in an action).

People v. Warner (1969) 270 Cal. App. 2d 900, 76 Cal. Rptr. 160 (it is not too remote to infer that phone calls made to bookmaking establishment referred to illegal betting; one inference may be based upon another where the first is properly drawn from sufficient evidence and the second inference is not too remote or speculative).

Estate of Rowley (1967) 257 Cal. App. 2d 324, 65 Cal. Rptr. 139 (a plaintiff relying on circumstantial evidence does not have to preclude the possibility of all other possible inferences but simply has to establish the reasonableness of his inference by a preponderance of the evidence).

Examples of Presumptions

Conti v. Board of Civil Service Comm'rs (1969) 1 Cal. 3d 351, 82 Cal. Rptr. 337, 461 P.2d 617 (unreasonable delay of a discharged public employee in seeking reinstatement does not give rise to a presumption of prejudice to the public agency).

Griffiths v. Superior Court (2002) 96 Cal. App. 4th 757, 117 Cal. Rptr. 2d 445 (physician discipline statute employed valid conclusive presumption of unprofessional conduct).

Estate of Gelonese (1974) 36 Cal. App. 3d 854, 111 Cal. Rptr. 833 (in a will contest, the elements that must be concurrently present to raise a presumption of undue influence are the existence of a confidential fiduciary relationship between the testator and the person alleged to have exerted undue influence; active participation by such person in preparation or execution of the will; and an undue benefit to such person or another person under the will thus procured. The presumption, when established, is a rebuttable one).

Kropp v. Sterling Sav. & Loan Assn. (1970) 9 Cal. App. 3d 1033, 88 Cal. Rptr. 878 (a gift that is beneficial to the donee is presumed to be accepted).

Wilkenson v. Linnecke (1967) 251 Cal. App. 2d 291, 59 Cal. Rptr. 290 (in an action based on fraud, nonperformance of a promise creates an inference that it was made without intention of performing it).

Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 55 Cal. Rptr. 610 (during the existence of the fiduciary relationship shared by joint adventurers, any transaction by which any one of them secures an advantage over the other or others is presumptively fraudulent and casts a burden on the party gaining the advantage to show fairness and good faith in all respects).

Inferences in Criminal Proceedings

People v. Milton (1969) 270 Cal. App. 2d 408, 75 Cal. Rptr. 803 (falsehoods as to material facts produce an inference of consciousness of guilt and constitute an implied admission).

People v. Duty (1969) 269 Cal. App. 2d 97, 74 Cal. Rptr. 606 (to infer one fact from another is consistent with due process if there is a rational connection between the two and that kind of inference in no way impairs the presumption of innocence).

People v. Perez (1968) 267 Cal. App. 2d 275, 72 Cal. Rptr. 746, *overruled*, 71 Cal. 2d 18 (flight after an alleged offense affords some basis for an inference that a defendant thereby evidenced a consciousness of guilt).

People v. Jones (1968) 258 Cal. App. 2d 652, 65 Cal. Rptr. 878 (finding of contraband in a room occupied by an accused raises a reasonable inference that the illegal drug is his even though he may share the room with another).

People v. Williams (1967) 252 Cal. App. 2d 147, 59 Cal. Rptr. 905 (the element of intent in a criminal prosecution is

rarely susceptible of direct proof and usually must be inferred from all the facts and circumstances disclosed by the evidence and, where the evidence is sufficient to justify a reasonable inference that intent exists, a verdict will not be disturbed for failure to establish it).

People v. Lauria (1967) 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (the element of intent necessary for a conspiracy may be inferred from knowledge where the volume of business with a buyer is grossly disproportionate to any legitimate demand, or where sales for illegal use amount to a high proportion of the seller's total business. Moreover, a supplier who furnishes equipment which he knows will be used to commit a serious crime may be deemed from that knowledge alone to have intended to produce the result; such proof may justify an inference that the furnisher intended to aid the execution of the crime and that he thereby became a participant).



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SECTION 601 Classification of Presumptions

1-601 California Evidence Courtroom Manual 601.syn

§ 601.syn Synopsis to Chapter 601: Classification of Presumptions

Scope Classification of Presumptions

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2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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ARTICLE 1 GENERAL

SECTION 601 Classification of Presumptions

1-601 California Evidence Courtroom Manual Scope

Scope Classification of Presumptions

§ 601 reads as follows:

Rule 601 Classification of Presumptions

A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 601 Classification of Presumptions

1-601 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 601 identifies three different types of presumptions recognized in California: conclusive (dealt with in Sections 620 to 624); rebuttable and affecting only the production burden (dealt with in Sections 630 to 647); and rebuttable and affecting the persuasion burden, here called the burden of proof (dealt with in Sections 660 to 670).



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SECTION 601 Classification of Presumptions

1-601 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no comparable distinction among types of presumptions in the Federal Rules of Evidence. As discussed in connection with *Evidence Code sections 630 to 647*, the federal rules only recognize one type of rebuttable presumption, the type affecting the burden of production.



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1-601 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Plaza Hollister v. County of San Benito (1999) 72 Cal. App. 4th 1, 84 Cal. Rptr. 2d 715 (Revenue and Taxation Code section 80(a)(3) creates a conclusive presumption; a conclusive presumption is an evidentiary concept whereby once foundational facts upon which the presumption is based are established, the assumed fact may not be controverted by contrary evidence).



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SECTION 602 Statute Making One Fact Prima Facie Evidence of Another Fact

1-602 California Evidence Courtroom Manual 602.syn

§ 602.syn Synopsis to Chapter 602: Statute Making One Fact Prima Facie Evidence of Another Fact

Scope Statute Making One Fact Prima Facie Evidence of Another Fact

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SECTION 602 Statute Making One Fact Prima Facie Evidence of Another Fact

1-602 California Evidence Courtroom Manual Scope

Scope Statute Making One Fact Prima Facie Evidence of Another Fact

§ 602 reads as follows:

Rule 602 Statute Making One Fact Prima Facie Evidence of Another Fact

A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 602 Statute Making One Fact Prima Facie Evidence of Another Fact

1-602 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 602 recognizes that there are several statutes, scattered throughout the various Codes of California law, that refer to "prima facie evidence" and clarifies that this language establishes a rebuttable presumption, rather than a conclusive presumption. *See, e.g., Code of Civil Procedure section 2011* (an affidavit is prima facie evidence of facts stated therein); *Code of Civil Procedure section 273* (court reporter's transcript prima facie evidence of testimony and proceedings); *Corporations Code section 209* (certified copies of articles of incorporation are prima facie evidence); *Corporations Code section 1002* (secretary's certificate); *Corporations Code section 314* (corporate by-laws and minutes); *Corporations Code section 15007* (profit sharing as prima facie evidence of partnership); *Fish and Game Code section 8664* (finding net in prohibited area is prima facie evidence of unlawful use); and *Evidence Code section 1600* (official record as prima facie evidence).



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1-602 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no comparable Federal Rule of Evidence.



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1-602 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Kronemyer (1987) 189 Cal. App. 3d 314, 234 Cal. Rptr. 442 (the presumption under *Code of Civil Procedure* section 273 that a certified reporter's transcript correctly reflects the contents of the proceedings was not overcome by a judge's testimony that it was his habit and custom to read instructions verbatim from a printed form).



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SECTION 603 Presumption Affecting the Burden of Producing Evidence Defined

1-603 California Evidence Courtroom Manual 603.syn

§ 603.syn Synopsis to Chapter 603: Presumption Affecting the Burden of Producing Evidence Defined

Scope Presumption Affecting the Burden of Producing Evidence Defined

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1-603 California Evidence Courtroom Manual Scope

Scope Presumption Affecting the Burden of Producing Evidence Defined

§ 603 reads as follows:

Rule 603 Presumption Affecting the Burden of Producing Evidence Defined

A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 603 Presumption Affecting the Burden of Producing Evidence Defined

1-603 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 603 recognizes that some presumptions are created as matters of convenience, rather than to promote an important social policy. In the words of the Law Revision Commission:

[t]he presumptions described in Section 603 are not expressions of policy; they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact. [7 Cal. L. Rev. Comm. Rep. 1 (Stats. 1965).]

The identification of a presumption as one affecting only the production burden has an important effect on its implementation. Because the presumption has been created merely as a convenience, the presumption is easier to defeat than one that has a public policy concern behind it. This is discussed further in the Analysis of Sections 604 and 606 in this manual. *See also Section 110* (defining burden of production).



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1-603 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Sections 603 and 604 are comparable to Federal Rule of Evidence 301, which governs the effect of presumptions on the allocation of the burden of proof in civil actions and other civil proceedings. Rule 301's scope is thus somewhat limited, leaving to case law the resolution of corollary issues that are raised by the invocation of a presumption. The California approach is different, in that it recognizes a second type of rebuttable presumption, one that affects the burden of persuasion (also called the burden of proof).



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3 SIGNIFICANT CASES

Xebec Development Partners, Ltd. v. National Union Fire Ins. Co. (1993) 12 Cal. App. 4th 501, 15 Cal. Rptr. 2d 726 (mere production of evidence sufficient to support a finding that presumed facts were untrue does not dispel presumption; injured party has burden of producing by a preponderance of the evidence the foundational facts of the settlement).

Barbera v. Sokol (1980) 101 Cal. App. 3d 725, 161 Cal. Rptr. 843 (Civil Code section 1671, relating to liquidated damages clauses, created a rebuttable presumption that affected the burden of producing evidence, imposing on the party utilizing the presumption the burden of establishing, by a preponderance of the evidence, the foundational facts required to invoke the presumption).



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SECTION 604 Effect of Presumption Affecting Burden of Producing Evidence

1-604 California Evidence Courtroom Manual 604.syn

§ 604.syn Synopsis to Chapter 604: Effect of Presumption Affecting Burden of Producing Evidence

Scope Effect of Presumption Affecting Burden of Producing Evidence

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ARTICLE 1 GENERAL

SECTION 604 Effect of Presumption Affecting Burden of Producing Evidence

1-604 California Evidence Courtroom Manual Scope

Scope Effect of Presumption Affecting Burden of Producing Evidence

§ 604 reads as follows:

Rule 604 Effect of Presumption Affecting Burden of Producing Evidence

The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 604 Effect of Presumption Affecting Burden of Producing Evidence

1-604 California Evidence Courtroom Manual 1

1 ANALYSIS

The best way to remember the type of presumption recognized by Sections 603 and 604 is to think of it as "the bursting bubble" type of presumption. This is also known as a "Thayer" presumption, after Professor James Thayer, who argued that if the proponent of a presumption could prove the basic facts underlying the presumption, the burden of production should shift to the opponent of the presumption. For example, if a party proves that an envelope was properly addressed and mailed, we should presume the letter was received. If the opponent of the presumption protests that it was not received, the burden should be on the proponent to produce evidence that it was not received. However, because this presumption only exists for reasons of convenience in moving the case along, if the opponent does produce evidence contrary to the presumed fact--here that the letter was not received--the value of the presumption "bursts." Its value has been destroyed, and nothing is said to the trier of fact about the presumption. The "bursting bubble" or "Thayer" presumption should be distinguished from the second type of rebuttable presumption in California, the "social policy" or "Morgan" presumption, discussed in *Sections 605 and 606*.



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1-604 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

The "bursting bubble" type of presumption recognized by *Evidence Code* sections 603 and 604 is the only type of presumption recognized under Federal Rule of Evidence 301. The theory is the same--a presumption is a procedural device that operates to shift the evidentiary burden of producing evidence, *i.e.*, the burden of going forward, to the party against whom the presumption is directed. The burden of producing evidence operates generally to expose a party to an adverse result on a directed verdict where evidence on the issue has not been advanced. The burden of proof, *i.e.*, the risk of non-persuasion, is not affected under the "bursting bubble" or Thayer presumption, and it remains on the party on whom it was originally cast by the law and the pleadings. However, Federal Rule of Evidence 302, recognizing the substantive policy choices embedded within some presumptions, avoids the clash between federal and state law by providing that in civil cases, where state law provides the rule for decision, federal courts must look to state law if a presumption affects a fact that is an element of a claim or defense.

A possible difference between the federal and California approaches to "bursting bubble" presumptions is the form of the jury instruction provided. Under both federal and California law, if the opponent of the presumption introduces sufficient evidence to rebut the presumed fact, the "bursting" of the presumption means that the jury may be given no instruction regarding the presumption. However, under federal law, there is some authority that the judge may give the jury a watered-down instruction that they "may" infer the presumed fact, turning a mandatory presumption into a permissive inference. *See* Federal Rule of Evidence 301, Advisory Committee Note. Sample: "If you believe that the letter was properly addressed and mailed, you *may* find that the letter was received by the addressee." This instruction tells them that they *can* draw this inference, but are not required to. There is no authority suggesting that a California judge may instruct the jury as to this permissive inference.



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1-604 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Craig v. Brown & Root, Inc. (2000) 84 Cal. App. 4th 416, 100 Cal. Rptr. 2d 818 (in a wrongful termination and sexual harassment and gender discrimination case, plaintiff opposed employer's petition to compel arbitration on the grounds that she had never agreed to arbitrate and had never received arbitration agreement materials; appellate court noted that Sections 604 and 641, in conjunction with defendant's evidence showing that copies of mandatory arbitration agreement had been mailed to plaintiff, created a presumption that the plaintiff received the materials and shifted to plaintiff the burden of producing contrary evidence; plaintiff provided contrary evidence in her declaration, denying receipt of materials; thus, if, as here, the presumption disappears because of conflicting evidence, the trier of fact is still required to weigh the plaintiff's denial of receipt of the materials against a reasonable inference of receipt arising from the defendant's proof of mailing; the appellate court held that the trial court had substantial evidence before it to determine the contested fact--whether materials were received--in favor of the defendant).

Bonzer v. City of Huntington Park (1993) 20 Cal. App. 4th 1474, 25 Cal. Rptr. 2d 278 (trial court erred in denying defendant's motion to set aside the judgment on the ground that defendant had not received actual notice of the hearing. The only evidence that notice had actually been received was a proof of service declaration. This declaration created a rebuttable presumption that the notice had been received, but, upon presentation of defendant's evidence of no actual notice, which consisted of six declarations that were neither impeached nor contradicted, the presumption ceased to exist pursuant to *Evidence Code section 604*. Since, in the face of defendant's declarations, any inference that notice had actually been received would have been, as a matter of law, inappropriate, the trial court's denial of defendant's motion was a clear abuse of discretion).



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SECTION 605 Presumption Affecting the Burden of Proof Defined

1-605 California Evidence Courtroom Manual 605.syn

§ 605.syn Synopsis to Chapter 605: Presumption Affecting the Burden of Proof Defined

Scope Presumption Affecting the Burden of Proof Defined

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ARTICLE 1 GENERAL

SECTION 605 Presumption Affecting the Burden of Proof Defined

1-605 California Evidence Courtroom Manual Scope

Scope Presumption Affecting the Burden of Proof Defined

§ 605 reads as follows:

Rule 605 Presumption Affecting the Burden of Proof Defined

A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1975, ch. 1244, § 12)

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SECTION 605 Presumption Affecting the Burden of Proof Defined

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1 ANALYSIS

In contrast to the type of rebuttable presumption based on convenience recognized by Sections 603 and 604, Sections 604 and 605 recognize that some presumptions are based on important social policies and ought not be so easily neutralized. This type of rebuttable presumption reflects the views of Professor Edmund Morgan, who argued that when a presumption is created because of strong social policy considerations, its power should not "burst" on the introduction of rebuttal evidence. Rather, he argued that the presumption should shift the burden of persuasion; so, once the proponent of the presumption introduces evidence of the basic fact, the presumption requires the opponent of the presumed fact to prove by a preponderance of the evidence that it does not exist. *See also* Section 115 (defining burden of proof).



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SECTION 605 Presumption Affecting the Burden of Proof Defined

1-605 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Sections 605 and 606 in the Federal Rules of Evidence. However, Federal Rule of Evidence 301 notes that presumptions can be established by an "Act of Congress." Some of these statutory presumptions do affect the burden of persuasion. See 1 Weinstein 2d §§ 301.01-.30. Moreover, under Federal Rule of Evidence 302, federal courts may be obligated to apply state presumptions that affect the burden of persuasion, where state law provides the rule for decision on the fact concerned. This could occur where the basis of federal jurisdiction is diversity of citizenship or where the federal court is hearing a state claim under the supplemental jurisdiction provisions.



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SECTION 606 Effect of Presumption Affecting Burden of Proof

1-606 California Evidence Courtroom Manual 606.syn

§ 606.syn Synopsis to Chapter 606: Effect of Presumption Affecting Burden of Proof

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SECTION 606 Effect of Presumption Affecting Burden of Proof

1-606 California Evidence Courtroom Manual Scope

Scope Effect of Presumption Affecting Burden of Proof

§ 606 reads as follows:

Rule 606 Effect of Presumption Affecting Burden of Proof

The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

At this point, it might be helpful to contrast an example of the application of a Section 603/604 presumption (the "bursting bubble" presumption) with the application of a Section 605 and 606 presumption (a "social policy" presumption).

Assume that Alisha wants to prove that Brenda got a certain letter. Alisha testifies that she properly addressed the letter to Brenda and mailed it. However, Alisha's secretary testifies that Alisha told him that she did not actually mail the letter. In addition, Brenda testifies, "I never got the letter." Here, the proponent of the "mailbox" presumption of Section 641, has introduced evidence that the notice was placed in an envelope, properly addressed and mailed. The opponent of the presumption rebuts this testimony by providing testimony that impeaches the proponent's evidence and directly supports her contention that the letter was not received. At this point, the effect of the presumption "bursts," and the jury is told nothing about the presumption. No jury instruction is given on this presumption.

To see how a presumption affecting the burden of proof operates, assume that the relevant issue is whether Connie has died. Paula, the proponent of the presumption of death in Section 667, introduces evidence of the basic facts--that there has been no communication from or sighting of Connie in over five years. Oliver, the opponent of this presumption, rebuts this presumption by providing evidence that Connie has been heard from during the five year period and testimony that Connie is conspiring with Paula to fake Connie's death. However, because of the social importance of finality in dealing with a deceased's affairs, this rebuttal evidence does not "burst" or destroy the effect of the presumption; Oliver, the opponent of the presumption, will ultimately have to persuade the finder of fact that Connie is alive. The jury could be given an instruction along these lines: "You have heard evidence that Connie has not been seen or heard from for over five years. You have also heard evidence disputing that fact. If you believe that Connie has not been seen or heard from in over five years, then you must find that she is dead, *unless* Oliver has persuaded you by a preponderance of the evidence that Connie is still alive. If you believe that Connie has not been seen or heard from for over five years, but you cannot decide whether she is alive, then Oliver has failed to carry his burden of proof and you must find that Connie is dead."

Sections 660 to 670 list several presumptions that affect the burden of proof. However, from the case law, it is clear that these are not an exhaustive list of possible presumptions. When the trial court identifies a rebuttable presumption, the

court must also decide whether the basis for the presumption is merely one of convenience in providing proof, or whether the presumption was created to promote a social policy. If the judge decides that an important social policy aside from or in addition to convenience underlies the presumption, then the court must identify it as a presumption that shifts the burden of proof.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Sections 605 and 606 in the Federal Rules of Evidence.



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3 SIGNIFICANT CASES

In General

People v. Martinez (2000) 22 Cal. 4th 106, 91 Cal. Rptr. 2d 687, 990 P.2d 563 (provided it satisfies applicable rules of admissibility, evidence other than record of conviction and certified prison records is admissible to establish fact that defendant served prison terms for prior felony convictions; presumption of regular performance of official acts applied to determination of admissibility of computer-generated California Law Enforcement Telecommunications System (CLETS) printout of defendant's criminal history information as official record in connection with habitual offender allegations, where reporting obligations of law enforcement officials in connection with CLETS system were established by statutes of which court could have taken judicial notice and party against whom presumption of regular performance of official duties operates has the burden of proof as to nonexistence of the presumed fact; admission of computer-generated CLETS printout of defendant's criminal history information as official record was not abuse of discretion; admission as official record of printout generated by computer system of Los Angeles County Sheriff's Department concerning defendant's criminal history information was not abuse of discretion).

Haycock v. Hughes Aircraft Co. (1994) 22 Cal. App. 4th 1473, 28 Cal. Rptr. 2d 248, review denied (Section 606 indicates that a presumption affecting the burden of proof imposes on the opponent the burden of proof as to the nonexistence of the presumed fact, while Section 115 makes it clear that the obligation exists for that party to establish by evidence a requisite degree of belief concerning the fact in the minds of the jury or the court. Hence, the presumption requires the party against whom it operates to prove its case to the trier of fact).

Hernandez v. Superior Court (1992) 9 Cal. App. 4th 1183, 12 Cal. Rptr. 2d 55 (the difference between a presumption affecting the burden of proof and one affecting the burden of producing evidence is that the former is established to implement some public policy other than the mere facilitation of the particular action, thus presumption favoring parent-child relationship is one which affects the burden of proof).

Examples of Presumptions Affecting the Burden of Proof

Shadow Traffic Network v. Superior Court (1994) 24 Cal. App. 4th 1067, 29 Cal. Rptr. 2d 693 (the proper rule and its application for disqualification based on nonlawyer employee conflicts of interest is as follows: The party seeking disqualification must show that its present or past attorney's former employee possesses confidential attorney-client information materially related to the proceedings before the court. The party should not be required to disclose the actual information alleged to be confidential. However, the court should be provided with the nature of the information and its material relationship to the proceeding. Once this showing has been made, a rebuttable presumption arises that the information has been used or disclosed in the current employment. The presumption is a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff. As the purpose of the presumption is to implement the public policy of protecting confidential information, the presumption is one affecting the burden of proof under *Evidence Code section 605*).

Cornwall v. Santa Monica Dairy Co. (1977) 66 Cal. App. 3d 250, 135 Cal. Rptr. 761 (on appeal from an order dismissing an action for plaintiff's willful failure to respond to interrogatories, rebuttable presumption applies that failure to respond was willful and plaintiff has the burden of proving that his failure to respond was not willful).

Elliott v. City of Pacific Grove (1975) 54 Cal. App. 3d 53, 126 Cal. Rptr. 371 (the presumption that rates fixed by a lawful rate-fixing body are reasonable, fair and lawful, is a rebuttable presumption affecting the burden of proof, the effect of which, under *Evidence Code section 606*, "is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact").

Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 125 Cal. Rptr. 804 (the presumption that property conveyed to a husband and wife as joint tenants is held by them in joint tenancy is one that affects the burden of proof as it is established to implement a public policy other than to facilitate the determination of the particular action in which the presumption is to be applied; the public policy involved is that of favoring the stability of titles to property. The opponent thus has the burden of establishing that the ownership interests in the property are held in some other capacity such as single ownership, tenancy in common, or as community property).



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1-607 California Evidence Courtroom Manual 607.syn

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1-607 California Evidence Courtroom Manual Scope

Scope Effect of Certain Presumption in a Criminal Action

§ 607 reads as follows:

Rule 607 Effect of Certain Presumption in a Criminal Action

When a presumption affecting the burden of proof operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt, and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 607 Effect of Certain Presumption in a Criminal Action

1-607 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 607 concerns the special role that presumptions which affect the burden of proof may play in criminal cases because of the due process constitutional considerations. The United States Supreme Court has made clear that conclusive presumptions are unconstitutional, for they remove the prosecution's burden of proving all essential elements of the crime beyond a reasonable doubt, including the presumed fact. *Sandstrom v. Montana* (1979) 442 U.S. 510, 523, 99 S. Ct. 2450, 61 L. Ed. 2d 39. The California Supreme Court extended the reasoning of *Sandstrom* to presumptions that affect the burden of proof in *People v. Roder* (1983) 33 Cal. 3d 491, 189 Cal. Rptr. 501, 658 P.2d 1302. There the California Supreme Court held that even if the prosecution proves the basic facts beyond a reasonable doubt, a jury instruction that does not make clear to the jury that they *may* find the presumed facts based on the basic facts, but that they are not required to do so, is unconstitutional. In other words, only permissive inferences are constitutional when used against the accused in a criminal case.

Section 607 should be distinguished from Section 522, which allocates the burden of proof on the issue of sanity to the defendant; there is no "presumption" of sanity. Hence, notwithstanding the provisions of Section 607, a defendant who pleads insanity has the burden of proving by a preponderance of the evidence that he was insane.



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2 COMPARISON TO FEDERAL RULE

Federal law on the operation of presumptions in criminal cases has some similarity and some differences to California law. Conclusive presumptions are unconstitutional whether one is in federal or state court. *Sandstrom v. Montana* (1979) 442 U.S. 510, 523, 99 S. Ct. 2450, 61 L. Ed. 2d 39, which recognizes only presumptions affecting the burden of production, is inapplicable to criminal cases. Although the Supreme Court promulgated Proposed Rule 303 which, if adopted, would have governed the instructions attendant to and circumstances under which a presumption could be submitted to the jury in a criminal action, the Rule was deleted by Congress because the subject of presumptions in criminal cases was addressed in several bills pending to amend the pertinent provisions of the federal criminal code. The revision of the federal code pertaining to these matters was not adopted, however, and thus in federal criminal cases the operation of presumptions currently is controlled by principles of federal common law as circumscribed by constitutional limitations. In criminal actions, due process prevents presumptions from operating to obviate the state's burden of providing each element of an offense to the requisite standard of "beyond a reasonable doubt." Correlatively, in criminal cases the court may not direct the jury to make certain findings even where the base or supportive facts are conclusively established, because the court cannot direct a verdict against the accused.

Federal law on the constitutionality of permissive inferences differs from the California approach; the controlling case is *County Court of Ulster County, N.Y. v. Allen* (1979) 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777. The constitutionality of a permissive inference is determined "as applied" in each particular case. The test is whether the foundational fact makes the existence of the inferred fact more likely than not; the prosecution may rely on any evidence to prove the foundational fact. However, when the inference is the only possible basis for a guilty verdict, the foundational fact must establish the inferred fact's existence beyond a reasonable doubt. In addition, the Federal Rules of Evidence and federal case law do not contain the language of California Section 607, requiring the prosecution to prove the basic (or foundational) facts beyond a reasonable doubt before the jury may be instructed on the inference they may draw from those facts.



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SECTION 620 Conclusive Presumptions

1-620 California Evidence Courtroom Manual 620.syn

§ 620.syn Synopsis to Chapter 620: Conclusive Presumptions

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SECTION 620 Conclusive Presumptions

1-620 California Evidence Courtroom Manual Scope

Scope Conclusive Presumptions

§ 620 reads as follows:

Rule 620 Conclusive Presumptions

The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 620 Conclusive Presumptions

1-620 California Evidence Courtroom Manual 1

1 ANALYSIS

A conclusive presumption is in reality a rule of substantive law, not a rule of evidence. A conclusive presumption is, by definition, not rebuttable. Once the facts giving rise to the conclusive presumption are established, there is no further evidentiary function involved. It is, in effect, a policy determination that removes an issue from factual contest; although the opponent of the presumption may introduce evidence to rebut the basic facts, the opponent may not introduce evidence disputing the presumed fact. However, courts have been known to refuse to apply a conclusive presumption where to do so would be contrary to the policy reason for the creation of the presumption. *See, e.g., County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 17 Cal. Rptr. 2d 797*. There, to avoid paying child support, the biological father of a child attempted to use conclusive presumption that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be the child of the marriage. The mother of the child was married and living with her husband at the time she conceived the child with the biological father. The husband later divorced her. The court refused to apply the presumption, holding that to do so would defeat the policy for the presumption--to promote the stability of families and to protect the child. The conclusive presumption at issue in the case, Section 621, was repealed in 1994 and enacted into the Family Code at Sections 7540-7541.



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SECTION 620 Conclusive Presumptions

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 620 in the Federal Rules of Evidence. However, there are statutes and case law recognizing conclusive presumptions. *See Legille v. Dam (D.C. Cir. 1976) 544 F.2d 1 ; 1 Weinstein 2d §§ 301.01-.30.*



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Sandstrom v. Montana (1979) 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (it is unconstitutional to permit a conclusive presumption of an element of the charged offense to operate against a criminal defendant).

Plaza Hollister v. County of San Benito (1999) 72 Cal. App. 4th 1, 84 Cal. Rptr. 2d 715 (Revenue and Taxation Code section 80(a)(3) creates a conclusive presumption; a conclusive presumption is an evidentiary concept whereby once foundational facts upon which the presumption is based are established, the assumed fact may not be controverted by contrary evidence).

People v. Forrester (1994) 30 Cal. App. 4th 1697, 37 Cal. Rptr. 2d 19 (conclusive presumption that a defendant who fails to appear within 14 days of the date assigned for his or her appearance intends to evade the process of the court is unconstitutional).



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SECTION 622 Facts Recited in Written Instrument

1-622 California Evidence Courtroom Manual 622.syn

§ 622.syn Synopsis to Chapter 622: Facts Recited in Written Instrument

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1-622 California Evidence Courtroom Manual Scope

Scope Facts Recited in Written Instrument

§ 622 reads as follows:

Rule 622 Facts Recited in Written Instrument

The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 622 recognizes the principle of "estoppel by contract," a common-law principle that bestowed finality on written legal documents; it is essentially a variation on the parol evidence rule, prohibiting terms or conditions outside the contract from contradicting the terms in the written instrument.



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There is no counterpart to Section 622 in the Federal Rules of Evidence.



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3 SIGNIFICANT CASES

Estate of Wilson (1976) 64 Cal. App. 3d 786, 134 Cal. Rptr. 749 (a written agreement between a decedent and his wife contained in decedent's will transmuting all property held in joint tenancy by him and his wife to community property, was a conclusive presumption within the meaning of this section. The conclusive presumption of Section 622 is nothing more than the doctrine of estoppel by contract).



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§ 623.syn Synopsis to Chapter 623: Estoppel by Own Statement or Conduct

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SECTION 623 Estoppel by Own Statement or Conduct

1-623 California Evidence Courtroom Manual Scope

Scope Estoppel by Own Statement or Conduct

§ 623 reads as follows:

Rule 623 Estoppel by Own Statement or Conduct

Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 623 Estoppel by Own Statement or Conduct

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1 ANALYSIS

The common-law doctrine of equitable estoppel is codified in Section 623 as a conclusive presumption. The basic facts that must be proven in order to give rise to the conclusion of estoppel (such as the intentional and deliberate statement or conduct leading the other to believe it and rely upon it to his or her detriment) are likely to be vigorously contested in any situation where estoppel is claimed.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 623 in the Federal Rules of Evidence.



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Southern Cal. First Nat. Bank v. Quincy Cass Associates (1970) 3 Cal. 3d 667, 91 Cal. Rptr. 605, 478 P.2d 37 (four things are essential to the application of the doctrine of equitable estoppel: the party to be estopped must be apprised of the facts, he must intend his conduct to be acted on or must so act that the party asserting estoppel had a right to believe it was so intended, the party asserting estoppel must be ignorant of the true state of facts, and he must rely on the conduct to his injury).

Long Beach v. Mansell (1970) 3 Cal. 3d 462, 91 Cal. Rptr. 23, 476 P.2d 423 (the doctrine of equitable estoppel may be applied against the government where justice and right require it, but an estoppel will not be so applied if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public).

Knowles v. Tehachapi Valley Hosp. Dist. (1996) 49 Cal. App. 4th 1083, 57 Cal. Rptr. 2d 192 (surgeon could retract recitals made in earlier stipulation surgeon made with medical malpractice plaintiffs in later litigation against hospital as that trial was not "litigation arising out of" the surgeon's judicial admission).

Aragon-Haas v. Family Security Ins. Services, Inc. (1991) 231 Cal. App. 3d 232, 282 Cal. Rptr. 233 (elements of reliance and detriment are necessary to estop any party from contradicting statement or conduct in litigation arising out of such statement or conduct).

Lucas v. Board of Trustees (1971) 18 Cal. App. 3d 988, 96 Cal. Rptr. 431 (when one is under a duty to speak, and has an opportunity to do so, knowing the circumstances require it, an estoppel may arise from his silence).

H.W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc. (1971) 14 Cal. App. 3d 848, 92 Cal. Rptr. 669 (a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise).

Elliano v. Assurance Co. of America (1970) 3 Cal. App. 3d 446, 83 Cal. Rptr. 509 (the elements essential to the

application of the doctrines of waiver and equitable estoppel are sufficiently indicated by their definitions: waiver is an express or implied voluntary relinquishment of a known right and depends on the intent of one party only, whereas equitable estoppel is based on the fundamental principle that one's conduct has induced another to take such a position that he will be injured if the first party is permitted to repudiate his acts).

Department of Mental Hygiene v. Lucas (1966) 243 Cal. App. 2d 464, 52 Cal. Rptr. 552 (whether equitable estoppel exists is primarily a question of fact for the trial court, unless the opposite conclusion is the only one that can reasonably be drawn from the facts).



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ARTICLE 2 CONCLUSIVE PRESUMPTIONS

SECTION 624 Estoppel of Tenant to Deny Title of Landlord

1-624 California Evidence Courtroom Manual 624.syn

§ 624.syn Synopsis to Chapter 624: Estoppel of Tenant to Deny Title of Landlord

Scope Estoppel of Tenant to Deny Title of Landlord

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SECTION 624 Estoppel of Tenant to Deny Title of Landlord

1-624 California Evidence Courtroom Manual Scope

Scope Estoppel of Tenant to Deny Title of Landlord

§ 624 reads as follows:

Rule 624 Estoppel of Tenant to Deny Title of Landlord

A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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ARTICLE 2 CONCLUSIVE PRESUMPTIONS

SECTION 624 Estoppel of Tenant to Deny Title of Landlord

1-624 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 624 reflects the common law bias favoring the property interests of land owners against tenants by establishing this conclusive presumption in favor of the landlord.



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SECTION 624 Estoppel of Tenant to Deny Title of Landlord

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 624 in the Federal Rules of Evidence.



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SECTION 630 Presumption Affecting the Burden of Producing Evidence

1-630 California Evidence Courtroom Manual 630.syn

§ 630.syn Synopsis to Chapter 630: Presumption Affecting the Burden of Producing Evidence

Scope Presumption Affecting the Burden of Producing Evidence

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SECTION 630 Presumption Affecting the Burden of Producing Evidence

1-630 California Evidence Courtroom Manual Scope

Scope Presumption Affecting the Burden of Producing Evidence

§ 630 reads as follows:

Rule 630 Presumption Affecting the Burden of Producing Evidence

The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 603, are presumptions affecting the burden of producing evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 630 Presumption Affecting the Burden of Producing Evidence

1-630 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 630 makes clear that the presumptions listed in Article 3 are not an exhaustive list. Presumptions affecting the burden of production can be created by statute or by decisional law. Where the legislature does not state what type of rebuttable presumption is intended, courts must compare the presumption to the criteria of Section 603: has the presumption been created simply to make the presentation of evidence more convenient and efficient? If so, then the court would treat the presumption as one only affecting the burden of production.



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SECTION 630 Presumption Affecting the Burden of Producing Evidence

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2 COMPARISON TO FEDERAL RULE

Federal Rule of Evidence 301 is similar to Section 630 in recognizing that rebuttable presumptions affect the burden of production.



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SECTION 630 Presumption Affecting the Burden of Producing Evidence

1-630 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Estate of Obernolte (1979) 91 Cal. App. 3d 124, 153 Cal. Rptr. 798 (a rebuttable presumption of revocation of a will is not expressly categorized in the Evidence Code, so its classification is left to the courts which have determined that it is a presumption affecting the burden of producing evidence, existing only until rebutted by substantial evidence).



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SECTION 631 Money Delivered by One to Another

1-631 California Evidence Courtroom Manual 631.syn

§ 631.syn Synopsis to Chapter 631: Money Delivered by One to Another

Scope Money Delivered by One to Another

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SECTION 631 Money Delivered by One to Another

1-631 California Evidence Courtroom Manual Scope

Scope Money Delivered by One to Another

§ 631 reads as follows:

Rule 631 Money Delivered by One to Another

Money delivered by one to another is presumed to have been due to the latter.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 631 Money Delivered by One to Another

1-631 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 631 reflects the common-law bias favoring the property holder against other claimants, including those who delivered the property to the holder.



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SECTION 631 Money Delivered by One to Another

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 631 in the Federal Rules of Evidence.



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ARTICLE 3 PRESUMPTIONS AFFECTING THE BURDEN OF PRODUCING EVIDENCE

SECTION 632 Thing Delivered by One to Another

1-632 California Evidence Courtroom Manual 632.syn

§ 632.syn Synopsis to Chapter 632: Thing Delivered by One to Another

Scope Thing Delivered by One to Another

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ARTICLE 3 PRESUMPTIONS AFFECTING THE BURDEN OF PRODUCING EVIDENCE

SECTION 632 Thing Delivered by One to Another

1-632 California Evidence Courtroom Manual Scope

Scope Thing Delivered by One to Another

§ 632 reads as follows:

Rule 632 Thing Delivered by One to Another

A thing delivered by one to another is presumed to have belonged to the latter.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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Section 632 reflects the common-law bias favoring the property holder against other claimants, including those who delivered the property to the holder.



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SECTION 632 Thing Delivered by One to Another

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SECTION 633 Obligation Delivered Up to the Debtor

1-633 California Evidence Courtroom Manual 633.syn

§ 633.syn Synopsis to Chapter 633: Obligation Delivered Up to the Debtor

Scope Obligation Delivered Up to the Debtor

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SECTION 633 Obligation Delivered Up to the Debtor

1-633 California Evidence Courtroom Manual Scope

Scope Obligation Delivered Up to the Debtor

§ 633 reads as follows:

Rule 633 Obligation Delivered Up to the Debtor

An obligation delivered up to the debtor is presumed to have been paid.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 633 Obligation Delivered Up to the Debtor

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1 ANALYSIS

Section 633 reflects the common-law principle that if a debtor possesses the note evidencing the debt, the debtor has likely paid the debt.



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SECTION 633 Obligation Delivered Up to the Debtor

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 633 in the Federal Rules of Evidence.



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SECTION 634 Person in Possession of Order on Himself

1-634 California Evidence Courtroom Manual 634.syn

§ 634.syn Synopsis to Chapter 634: Person in Possession of Order on Himself

Scope Person in Possession of Order on Himself

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SECTION 634 Person in Possession of Order on Himself

1-634 California Evidence Courtroom Manual Scope

Scope Person in Possession of Order on Himself

§ 634 reads as follows:

Rule 634 Person in Possession of Order on Himself

A person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 634 Person in Possession of Order on Himself

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1 ANALYSIS

Section 634 reflects the common-law principle that the holder of a receipt is likely to have taken the action, paying the money or delivering a chattel, giving rise the evidence of a receipt.



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SECTION 634 Person in Possession of Order on Himself

1-634 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 634 in the Federal Rules of Evidence.



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SECTION 635 Obligation Possessed by Creditor

1-635 California Evidence Courtroom Manual 635.syn

§ 635.syn Synopsis to Chapter 635: Obligation Possessed by Creditor

Scope Obligation Possessed by Creditor

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SECTION 635 Obligation Possessed by Creditor

1-635 California Evidence Courtroom Manual Scope

Scope Obligation Possessed by Creditor

§ 635 reads as follows:

Rule 635 Obligation Possessed by Creditor

An obligation possessed by the creditor is presumed not to have been paid.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 635 Obligation Possessed by Creditor

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1 ANALYSIS

Section 635 reflects the common-law principle that the holder of a note owns the rights evidenced by it.



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SECTION 635 Obligation Possessed by Creditor

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 635 in the Federal Rules of Evidence.



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SECTION 636 Payment of Earlier Rent or Installments

1-636 California Evidence Courtroom Manual 636.syn

§ 636.syn Synopsis to Chapter 636: Payment of Earlier Rent or Installments

Scope Payment of Earlier Rent or Installments

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SECTION 636 Payment of Earlier Rent or Installments

1-636 California Evidence Courtroom Manual Scope

Scope Payment of Earlier Rent or Installments

§ 636 reads as follows:

Rule 636 Payment of Earlier Rent or Installments

The payment of earlier rent or installments is presumed from a receipt for later rent or installments.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 636 Payment of Earlier Rent or Installments

1-636 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 636 reflects the common-law principle that the holder of a receipt is likely to have taken consistent action over time, such as paying rent installments, giving rise to the evidence of a receipt.



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SECTION 636 Payment of Earlier Rent or Installments

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2 COMPARISON TO FEDERAL RULE

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SECTION 637 Ownership of Things Possessed

1-637 California Evidence Courtroom Manual 637.syn

§ 637.syn Synopsis to Chapter 637: Ownership of Things Possessed

Scope Ownership of Things Possessed

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SECTION 637 Ownership of Things Possessed

1-637 California Evidence Courtroom Manual Scope

Scope Ownership of Things Possessed

§ 637 reads as follows:

Rule 637 Ownership of Things Possessed

The things which a person possesses are presumed to be owned by him.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 637 Ownership of Things Possessed

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1 ANALYSIS

Section 637 reflects the common-law bias favoring the property holder against other claimants.



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SECTION 638 Ownership of Property by Person Who Exercises Acts of Ownership

1-638 California Evidence Courtroom Manual 638.syn

§ 638.syn Synopsis to Chapter 638: Ownership of Property by Person Who Exercises Acts of Ownership

Scope Ownership of Property by Person Who Exercises Acts of Ownership

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SECTION 638 Ownership of Property by Person Who Exercises Acts of Ownership

1-638 California Evidence Courtroom Manual Scope

Scope Ownership of Property by Person Who Exercises Acts of Ownership

§ 638 reads as follows:

Rule 638 Ownership of Property by Person Who Exercises Acts of Ownership

A person who exercises acts of ownership over property is presumed to be the owner of it.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 638 Ownership of Property by Person Who Exercises Acts of Ownership

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1 ANALYSIS

Section 638 reflects the common-law bias favoring the property holder against other claimants.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 638 in the Federal Rules of Evidence.



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3 SIGNIFICANT CASES

Kunza v. Gaskell (1979) 91 Cal. App. 3d 201, 154 Cal. Rptr. 101 (possession creates a presumption of ownership that must prevail in the absence of any other evidence of title so that plaintiff's possession of land conferred upon him superior title to all unable to establish a more superior title).

People ex rel. Department of Pub. Works v. Shasta Pipe & Supply Co. (1968) 264 Cal. App. 2d 520, 70 Cal. Rptr. 618 (in a condemnation action by the state the trial court erred in requiring defendants to prove adverse possession of the disputed land and in assuming the state had title to the land, where defendants were entitled to and did make a showing of title by occupancy, which gave rise to a prevailing presumption of ownership in the absence of any other evidence of title).



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SECTION 639 Judgment Correctly Determines Rights of Parties

1-639 California Evidence Courtroom Manual 639.syn

§ 639.syn Synopsis to Chapter 639: Judgment Correctly Determines Rights of Parties

Scope Judgment Correctly Determines Rights of Parties

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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SECTION 639 Judgment Correctly Determines Rights of Parties

1-639 California Evidence Courtroom Manual Scope

Scope Judgment Correctly Determines Rights of Parties

§ 639 reads as follows:

Rule 639 Judgment Correctly Determines Rights of Parties

A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 639 provides that while a judgment represents the resolution of a dispute, it does not purport to be a conclusive representation of the facts that gave rise to the judgment. In some instances, a judgment may be used as evidence of the facts necessarily determined by the judgment. *See, e.g., Sections 1300-1302.* However, even in these cases the judgments do not presumptively and conclusively establish the facts determined; they are merely evidence.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 639 in the Federal Rules of Evidence.



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3 ADDITIONAL AUTHORITY

Hiroshi Motomura, *Judgments as Evidence*, 70 Minn. L. Rev. (1986).



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SECTION 640 Writing Truly Dated

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§ 640.syn Synopsis to Chapter 640: Writing Truly Dated

Scope Writing Truly Dated

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SECTION 640 Writing Truly Dated

1-640 California Evidence Courtroom Manual Scope

Scope Writing Truly Dated

§ 640 reads as follows:

Rule 640 Writing Truly Dated

A writing is presumed to have been truly dated.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 640 Writing Truly Dated

1-640 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 640 is a clear example of a presumption created as a convenience and to speed the trial process. If a party has evidence that the writing was not dated as indicated, it is more efficient to simply make that party come forward with such evidence.



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SECTION 640 Writing Truly Dated

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 640 in the Federal Rules of Evidence.



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SECTION 641 Letter Received in Ordinary Course of Mail

1-641 California Evidence Courtroom Manual 641.syn

§ 641.syn Synopsis to Chapter 641: Letter Received in Ordinary Course of Mail

Scope Letter Received in Ordinary Course of Mail

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SECTION 641 Letter Received in Ordinary Course of Mail

1-641 California Evidence Courtroom Manual Scope

Scope Letter Received in Ordinary Course of Mail

§ 641 reads as follows:

Rule 641 Letter Received in Ordinary Course of Mail

A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 641 Letter Received in Ordinary Course of Mail

1-641 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 641 is a clear example of a presumption created as a convenience and to speed the trial process. If a party has evidence that a letter or notice was not received, it is more efficient to simply make that party come forward with such evidence.



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2 COMPARISON TO FEDERAL RULE

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SECTION 641 Letter Received in Ordinary Course of Mail

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3 SIGNIFICANT CASES

Bear Creek Master Assn. v. Edwards (2005) 130 Cal. App. 4th 1470 , review denied ("mailbox" presumption applies to service of lien notice; even if receipt of notice is disputed and the presumption vanishes, the trial court is still entitled to weigh the denial of receipt against the inference of receipt that arises from the proof of mailing and to decide whether the notice was received).

Craig v. Brown & Root, Inc. (2000) 84 Cal. App. 4th 416, 100 Cal. Rptr. 2d 818 (in a wrongful termination and sexual harassment and gender discrimination case, plaintiff opposed employer's petition to compel arbitration on the grounds that she had never agreed to arbitrate and had never received arbitration agreement materials; appellate court noted that Sections 604 and 641, in conjunction with defendant's evidence showing that copies of mandatory arbitration agreement had been mailed to plaintiff, created a presumption that the plaintiff received the materials and shifted to plaintiff the burden of producing contrary evidence; plaintiff provided contrary evidence in her declaration, denying receipt of materials; thus, if, as here, the presumption disappears because of conflicting evidence, the trier of fact is still required to weigh the plaintiff's denial of receipt of the materials against a reasonable inference of receipt arising from the defendant's proof of mailing; the appellate court held that the trial court had substantial evidence before it to determine the contested fact--whether materials were received--in favor of the defendant).

Glasser v. Glasser (1998) 64 Cal. App. 4th 1004, 75 Cal. Rptr. 2d 621 (whether this presumption, that a letter properly addressed and mailed was received, has been rebutted is a factual question to be determined by the trial court).

Bonzer v. City of Huntington Park (1993) 20 Cal. App. 4th 1474, 25 Cal. Rptr. 2d 278 (upon presentation of credible evidence by the alleged recipient of no actual delivery, the presumption of receipt ceases to exist).

Thompson, Curtis, Lawson & Parrish v. Thorne (1971) 21 Cal. App. 3d 797, 98 Cal. Rptr. 753 (where the filing of notice of appeal is effectuated through mailing, it is complete when the document is delivered to the clerk by the postal service, not when it is deposited in the mail. The presumption that a mailed document has been received has no application to the filing of a notice of appeal).

Goodson v. Bogerts, Inc. (1967) 252 Cal. App. 2d 32, 60 Cal. Rptr. 146 (where the proof of service by mail alleges under oath that on a certain date the cross-complaint was served by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail, addressed to the plaintiff at a given address, it is presumed that the envelope containing the pleading duly directed and mailed was received in the regular course of the mail).



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SECTION 642 Conveyance by Person Having Duty to Convey Real Property

1-642 California Evidence Courtroom Manual 642.syn

§ 642.syn Synopsis to Chapter 642: Conveyance by Person Having Duty to Convey Real Property

Scope Conveyance by Person Having Duty to Convey Real Property

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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SECTION 642 Conveyance by Person Having Duty to Convey Real Property

1-642 California Evidence Courtroom Manual Scope

Scope Conveyance by Person Having Duty to Convey Real Property

§ 642 reads as follows:

Rule 642 Conveyance by Person Having Duty to Convey Real Property

A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 642 Conveyance by Person Having Duty to Convey Real Property

1-642 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 642 is a clear example of a presumption created as a convenience and to speed the trial process. If a party has evidence that title was not timely conveyed, it is more efficient to simply make that party come forward with such evidence.



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SECTION 642 Conveyance by Person Having Duty to Convey Real Property

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 642 in the Federal Rules of Evidence.



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SECTION 643 Authenticity of Ancient Document

1-643 California Evidence Courtroom Manual 643.syn

§ 643.syn Synopsis to Chapter 643: Authenticity of Ancient Document

Scope Authenticity of Ancient Document

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SECTION 643 Authenticity of Ancient Document

1-643 California Evidence Courtroom Manual Scope

Scope Authenticity of Ancient Document

§ 643 reads as follows:

Rule 643 Authenticity of Ancient Document

A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it:

- (a) Is at least 30 years old;
- (b) Is in such condition as to create no suspicion concerning its authenticity;
- (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and
- (d) Has been generally acted upon as authentic by persons having an interest in the matter.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 643 Authenticity of Ancient Document

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1 ANALYSIS

Section 643 is a clear example of a presumption created as a convenience and to speed the trial process. It is often difficult to present formal proof as to the authenticity of an old document. Moreover, such proof may not be really material to the resolution of the dispute--it is less likely that a party would fabricate or alter a document 30 or more years before litigation is initiated than that the document is genuine. Thus, if a party has evidence that an old document as been tampered with or fabricated, it is more efficient to simply make that party come forward with such evidence.



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SECTION 643 Authenticity of Ancient Document

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2 COMPARISON TO FEDERAL RULE

The Federal Rules of Evidence put this presumption among the rules concerning authentication of documents. The basic thrust of Federal Rule of *Evidence* 901(b)(8) is similar to Section 643, however there are several differences between the provisions. The California Code restricts the application of this presumption to documents relating to property, while the federal rule applies to all types of documents. For a document to be eligible for the "ancient" document presumption, as this is known, it must be at least 30 years old in California, but must only be 20 years old under the federal rule. In either instance, it is a peculiarly American approach to consider something even 30 years old "ancient." Finally, the California Code requires that the document has been relied upon as authentic, while the federal rule has no such requirement.



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3 SIGNIFICANT CASES

Devereaux v. Frazier Mountain Park & Fisheries Co. (1967) 248 Cal. App. 2d 323, 56 Cal. Rptr. 345 (in determining whether documents dated in 1927, relied on by the plaintiff in a quiet title action to show that his grantor had title to certain real property, should be admitted into evidence, the trial judge should test the evidence by the criteria enunciated in *Evidence Code* section 643).



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SECTION 644 Book Purporting to be Published by Public Authority

1-644 California Evidence Courtroom Manual 644.syn

§ 644.syn Synopsis to Chapter 644: Book Purporting to be Published by Public Authority

Scope Book Purporting to be Published by Public Authority

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SECTION 644 Book Purporting to be Published by Public Authority

1-644 California Evidence Courtroom Manual Scope

Scope Book Purporting to be Published by Public Authority

§ 644 reads as follows:

Rule 644 Book Purporting to be Published by Public Authority

A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 644 Book Purporting to be Published by Public Authority

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1 ANALYSIS

Section 644 is a clear example of a presumption created as a convenience and to speed the trial process. If a party has evidence that a book is a forgery, it is more efficient to simply make that party come forward with such evidence than to make the proponent of the book drag in the publisher to authenticate the book.



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SECTION 644 Book Purporting to be Published by Public Authority

1-644 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

The counterpart to Section 644 in the Federal Rules of Evidence is Federal Rule of *Evidence* 902(5), which states that such books are self-authenticating--essentially raising a rebuttable presumption of authenticity.



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SECTION 645 Books Purporting to Contain Reports of Cases

1-645 California Evidence Courtroom Manual 645.syn

§ 645.syn Synopsis to Chapter 645: Books Purporting to Contain Reports of Cases

Scope Books Purporting to Contain Reports of Cases

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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SECTION 645 Books Purporting to Contain Reports of Cases

1-645 California Evidence Courtroom Manual Scope

Scope Books Purporting to Contain Reports of Cases

§ 645 reads as follows:

Rule 645 Books Purporting to Contain Reports of Cases

A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of such cases.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 645 Books Purporting to Contain Reports of Cases

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1 ANALYSIS

Section 645 is a clear example of a presumption created as a convenience and to speed the trial process. If a party has evidence that a case reporter is a forgery, it is more efficient to simply make that party come forward with such evidence than to make the proponent of the case reporter drag in the publisher to authenticate it.



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2 COMPARISON TO FEDERAL RULE

Section 645 is similar to Federal Rule of *Evidence* 902(5), which states that such reporters are self-authenticating--essentially raising a rebuttable presumption of authenticity. However, the California Code uses more general terms, applying the presumption to any type of reporters; Federal Rule of *Evidence* 902(5) is restricted to reporters issued by public authorities. Thus, the presumption issued by Section 645 could arguably apply to unofficial reporters, such as the *Pacific Reporter* or *West's California Reporter* versions of California case reports.



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SECTION 645.1 Printed Materials Purporting to be Particular Newspaper or Periodical

1-645.1 California Evidence Courtroom Manual 645.1.syn

§ 645.1.syn Synopsis to Chapter 645.1: Printed Materials Purporting to be Particular Newspaper or Periodical

Scope Printed Materials Purporting to be Particular Newspaper or Periodical

1 ANALYSIS

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SECTION 645.1 Printed Materials Purporting to be Particular Newspaper or Periodical

1-645.1 California Evidence Courtroom Manual Scope

Scope Printed Materials Purporting to be Particular Newspaper or Periodical

§ 645.1 reads as follows:

645.1 Printed Materials Purporting to be Particular Newspaper or Periodical

Printed materials, purporting to be a particular newspaper or periodical, are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months.

(Stats. 1986, ch. 330, § 1)

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SECTION 645.1 Printed Materials Purporting to be Particular Newspaper or Periodical

1-645.1 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 645.1 is a clear example of a presumption created as a convenience and to speed the trial process. If a party has evidence that a newspaper or periodical is a forgery, it is more efficient to simply make that party come forward with such evidence.



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SECTION 645.1 Printed Materials Purporting to be Particular Newspaper or Periodical

1-645.1 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 902(6) is similar to Section 645.1, except that the federal rule contains no requirement that the newspaper or periodical be published at regular intervals.



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SECTION 646 Res Ipsa Loquitur

1-646 California Evidence Courtroom Manual 646.syn

§ 646.syn Synopsis to Chapter 646: Res Ipsa Loquitur

Scope Res Ipsa Loquitur

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SECTION 646 Res Ipsa Loquitur

1-646 California Evidence Courtroom Manual Scope

Scope Res Ipsa Loquitur

§ 646 reads as follows:

Rule 646 Res Ipsa Loquitur

- (a) As used in this section, "defendant" includes any party against whom the res ipsa loquitur presumption operates.
- (b) The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence.
- (c) If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:
 - (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and
 - (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

(Stats. 1970, ch. 69, § 1)

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SECTION 646 Res Ipsa Loquitur

1-646 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 646 is a slightly different type of presumption than many of the others in this Article, containing presumptions that affect the burden of production. Although Section 646 is based on notions of efficiency and convenience in proof, it has a more substantive flavor. The presumption operates in many instances to shift liability to a defendant where the events surrounding the injury are unclear, but where the circumstances indicate that the defendant is far more likely than not to be responsible for the injury. The substantive quality of the presumption is underscored by the authority, including the Law Revision Commission comment, supporting the position that even if the defendant produces evidence rebutting the basic facts, the jury may be instructed that negligence is a permissive inference--what one court has called "a conditional res ipsa loquitur instruction." *Cline v. Lund* (1973) 31 Cal. App. 3d 755, 107 Cal. Rptr. 629. Ordinarily in California, when a presumption affecting the production burden is rebutted, the presumption "bursts" and the jury is given no instruction regarding the subject of the presumption.

The operation of the res ipsa loquitur doctrine is clearly set forth in the Law Revision Commission Comment to Section 646 and is worth quoting at length:

The doctrine of res ipsa loquitur, as developed by the California courts, is applicable in an action to recover damages for negligence when the plaintiff establishes three conditions: (1) that it is the kind of accident/injury which ordinarily does not occur in the absence of someone's negligence; (2) that it was caused by an agency or instrumentality in the exclusive control of the defendant; and (3) that the accident or injury was not due to any voluntary action or contribution on the part of the plaintiff.

When the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. If evidence is produced that would support a contrary finding, the presumptive effect of the doctrine vanishes. However, the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption.

The requirements of res ipsa loquitur are merely those that must be met to give rise to a compelled conclusion of negligence. However, an inference of negligence may well be warranted from all of the evidence in the case even

though the plaintiff fails to establish all the elements of *res ipsa loquitur*. In such cases the jury may be instructed that, even though it does not find the facts giving rise to the presumption have been proved, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent.



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SECTION 646 Res Ipsa Loquitur

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 646 in the Federal Rules of Evidence.



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SECTION 646 Res Ipsa Loquitur

1-646 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Clark v. Gibbons (1967) 66 Cal. 2d 399, 58 Cal. Rptr. 125, 426 P.2d 525 (when medical personnel, acting in concert, collectively have access to the chief evidence as to the cause of injury but plaintiff does not, an individual doctor, to avoid the inference of negligence as a matter of law under the res ipsa loquitur doctrine, must go beyond showing that it was unlikely or improbable he was negligent and must establish his freedom from negligence by evidence that cannot be rationally disbelieved; falling short of such a showing, it remains for the jury to determine whether the inference arising from the doctrine was rebutted as to any particular doctor).

Seeley v. Combs (1966) 65 Cal. 2d 127, 52 Cal. Rptr. 578, 416 P.2d 810 (the res ipsa loquitur applies to nonjury as well as jury cases).

McKinney v. Nash (1981) 120 Cal. App. 3d 428, 174 Cal. Rptr. 642 (since a res ipsa loquitur instruction permits the jury to infer negligence from the happening of an injury alone, there must be a basis either in common experience or expert testimony that when such an injury occurs, it is more probably than not the result of negligence).

Cline v. Lund (1973) 31 Cal. App. 3d 755, 107 Cal. Rptr. 629 (where defendant, against whom the doctrine of res ipsa loquitur applies, produces evidence that he was not negligent or that, if he was, such negligence was not a proximate cause of the plaintiff's injury, then the plaintiff is entitled to a conditional res ipsa loquitur instruction, and the trial judge must, on request, inform the jury that if it finds that facts giving rise to the doctrine are established it may find for the plaintiff but that, after weighing all of the evidence and drawing such inferences therefrom as it believes to be warranted, unless it believes that it is more probable than not that the injury was caused by a defendant's negligence, it should find for the defendant).

Lewis v. American Hoist & Derrick Co. (1971) 20 Cal. App. 3d 570, 97 Cal. Rptr. 798 (an instruction on res ipsa loquitur is not applicable to a cause of action based upon strict liability).

Albers v. Greyhound Corp. (1970) 4 Cal. App. 3d 463, 84 Cal. Rptr. 846 (in considering the applicability of res ipsa loquitur, it is not for the trial court to ascertain whether a defendant's negligence is the more likely explanation of the

accident; the court merely determines whether the plaintiff has produced sufficient substantial evidence to permit a jury to draw such an inference; and, where reasonable men may differ as to the balance of the probabilities, the trial judge must leave the question to the jury).

Tresham v. Ford Motor Co. (1969) 275 Cal. App. 2d 403, 79 Cal. Rptr. 883 (the doctrine of res ipsa loquitur relates to cases involving negligence and has no application to an alleged breach of warranty).

Fraser v. Sprague (1969) 270 Cal. App. 2d 736, 76 Cal. Rptr. 37 (in medical malpractice cases, permitting an inference of negligence to be drawn solely upon evidence that a particular accident rarely occurs when due care is exercised would place an undue burden on the medical profession and would discourage procedures which may involve inherent risks even when due care is used, but evidence of rarity, together with some other evidence indicating negligence, may warrant a conditional res ipsa loquitur instruction, particularly if the injury resulted from a commonplace procedure rather than from a complex or unusual operation).

Gagosian v. Burdick's Television & Appliances (1967) 254 Cal. App. 2d 316, 62 Cal. Rptr. 70 (the doctrine of res ipsa loquitur applies unconditionally, or as a matter of law, when undisputed evidence establishes that plaintiff's car was stationary when struck from behind by defendant's vehicle).



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SECTION 647 Return of Registered Process Server

1-647 California Evidence Courtroom Manual 647.syn

§ 647.syn Synopsis to Chapter 647: Return of Registered Process Server

Scope Return of Registered Process Server

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SECTION 647 Return of Registered Process Server

1-647 California Evidence Courtroom Manual Scope

Scope Return of Registered Process Server

§ 647 reads as follows:

Rule 647 Return of Registered Process Server

The return of a process server registered pursuant to chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code upon process or notice establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return.

(Stats. 1978, ch. 528, § 1)

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SECTION 647 Return of Registered Process Server

1-647 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 647 is a clear example of a presumption created as a convenience and to speed the trial process. If a party has evidence that service was improper or never made, it is more efficient to simply make that party come forward with such evidence.



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SECTION 647 Return of Registered Process Server

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 647 in the Federal Rules of Evidence.



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SECTION 660 Presumptions Affecting the Burden of Proof

1-660 California Evidence Courtroom Manual 660.syn

§ 660.syn Synopsis to Chapter 660: Presumptions Affecting the Burden of Proof

Scope Presumptions Affecting the Burden of Proof

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SECTION 660 Presumptions Affecting the Burden of Proof

1-660 California Evidence Courtroom Manual Scope

Scope Presumptions Affecting the Burden of Proof

§ 660 reads as follows:

Rule 660 Presumptions Affecting the Burden of Proof

The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 605, are presumptions affecting the burden of proof.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 660 Presumptions Affecting the Burden of Proof

1-660 California Evidence Courtroom Manual 1

1 ANALYSIS

Like Section 630, Section 660 makes clear that the presumptions listed in this division are not an exhaustive list. Presumptions affecting the burden of production can be created by statute or by decisional law. Where the legislature does not state what type of rebuttable presumption is intended, courts must compare the presumption to the criteria of Section 603: has the presumption been created simply to make the presentation of evidence more convenient and efficient? If so, then the court would treat the presumption as one only affecting the burden of production. Or, in addition, is there a social policy to be advanced by the presumption, as set forth in Section 605? If so, then the presumption should be treated as one affecting the burden of proof, here meaning the burden of persuasion.

In contrast to the type of rebuttable presumption based on convenience recognized by Sections 603 and 604, Sections 604 and 605 recognize that presumptions based on important social policies ought not be as easily neutralized as presumptions that are created for reasons only of convenience. The "social policy"--type of rebuttable presumption reflects the views of Professor Edmund Morgan, who argued that when a presumption is created because of strong social policy considerations, its power should not "burst" on the introduction of rebuttal evidence. Rather, he argued that the presumption should shift the burden of persuasion; so, once the proponent of the presumption introduces evidence of the basic fact, the presumption requires the opponent of the presumed fact to prove by a preponderance of the evidence that it does not exist. *See also* Section 115 (defining burden of proof).



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SECTION 660 Presumptions Affecting the Burden of Proof

1-660 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Sections 605 and 606 in the Federal Rules of Evidence. However, Federal Rule of Evidence 301 notes that presumptions can be established by an "Act of Congress." Some of these statutory presumptions do affect the burden of persuasion. See 1 Weinstein 2d §§ 301.01-.30. Moreover, under Federal Rule of Evidence 302, federal courts may be obligated to apply state presumptions that affect the burden of persuasion, where state law provides the rule for decision on the fact concerned. This could occur where the basis of federal jurisdiction is diversity of citizenship or where the federal court is hearing a state claim under the supplemental jurisdiction provisions.



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1-660 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Martinez (2000) 22 Cal. 4th 106, 91 Cal. Rptr. 2d 687, 990 P.2d 563 (provided it satisfies applicable rules of admissibility, evidence other than record of conviction and certified prison records is admissible to establish fact that defendant served prison terms for prior felony convictions; presumption of regular performance of official acts applied to determination of admissibility of computer-generated California Law Enforcement Telecommunications System (CLETS) printout of defendant's criminal history information as official record in connection with habitual offender allegations, where reporting obligations of law enforcement officials in connection with CLETS system were established by statutes of which court could have taken judicial notice and party against whom presumption of regular performance of official duties operates has the burden of proof as to nonexistence of the presumed fact; admission of computer-generated CLETS printout of defendant's criminal history information as official record was not abuse of discretion; admission as official record of printout generated by computer system of Los Angeles County Sheriff's Department concerning defendant's criminal history information was not abuse of discretion).



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SECTION 662 Owner of Legal Title to Property Is Owner of Beneficial Title

1-662 California Evidence Courtroom Manual 662.syn

§ 662.syn Synopsis to Chapter 662: Owner of Legal Title to Property Is Owner of Beneficial Title

Scope Owner of Legal Title to Property Is Owner of Beneficial Title

1 ANALYSIS

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SECTION 662 Owner of Legal Title to Property Is Owner of Beneficial Title

1-662 California Evidence Courtroom Manual Scope

Scope Owner of Legal Title to Property Is Owner of Beneficial Title

§ 662 reads as follows:

Rule 662 Owner of Legal Title to Property Is Owner of Beneficial Title

The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 662 Owner of Legal Title to Property Is Owner of Beneficial Title

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1 ANALYSIS

Section 662 shows the common-law bias toward the holders of property. It creates a strong presumption in favor of the person in possession of legal title to the property. If the opponent of the presumption produces sufficient evidence to rebut the presumption, Section 662 shifts an unusually heavy burden of persuasion to the opponent--he or she must prove by clear and convincing evidence--that the current holder of the legal title is not the owner of the beneficial title.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 662 in the Federal Rules of Evidence.



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3 SIGNIFICANT CASES

In re Marriage of Barneson (1999) 69 Cal. App. 4th 583, 81 Cal. Rptr. 2d 726 (more specific rules governing transmutations of property between spouses control over Section 662's presumption of legal title).

In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 39 Cal. Rptr. 2d 673 (application of Section 662 is improper when it conflicts with the presumption of undue influence. Also, where two presumptions conflict, the more specific one controls. Had the presumption of undue influence been applied, it would have placed the burden on the husband to show that the quitclaim transaction did not violate his fiduciary duties. Instead, the wife was improperly given the initial burden to rebut the presumption of title).

Protestant Episcopal Church v. Barker (1981) 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (presumption of Section 662 applied where a local body affiliated with a national body holds title to property in its own name and later secedes. The national body having presented little evidence to claim that such property was held in trust for it, absent other factors, no claim can be laid to property owned by and held in the name of the local organization).



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SECTION 663 Ceremonial Marriage

1-663 California Evidence Courtroom Manual 663.syn

§ 663.syn Synopsis to Chapter 663: Ceremonial Marriage

Scope Ceremonial Marriage

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SECTION 663 Ceremonial Marriage

1-663 California Evidence Courtroom Manual Scope

Scope Ceremonial Marriage

§ 663 reads as follows:

Rule 663 Ceremonial Marriage

A ceremonial marriage is presumed to be valid.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 663 Ceremonial Marriage

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1 ANALYSIS

Section 663 is a classic example of a presumption that is based on more than efficiency in providing proof. By making this rebuttable presumption one that shifts the burden of persuasion to the opponent of the presumption, the California Legislature intended for there to be a measure of stability in terms of property rights, effect on children, and other societal issues relating to marriage.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 663 in the Federal Rules of Evidence.



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SECTION 663 Ceremonial Marriage

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3 SIGNIFICANT CASES

Estate of Smith (1973) 9 Cal. 3d 74, 106 Cal. Rptr. 774, 507 P.2d 78 (when a person has entered into two successive marriages, a presumption arises in favor of the validity of the second marriage, and the burden is upon the party attacking the validity of the second marriage to prove that the first marriage had not been dissolved by the death of a spouse or by divorce or had not been annulled at the time of the second marriage).



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SECTION 664 Official Duty Regularly Performed

1-664 California Evidence Courtroom Manual 664.syn

§ 664.syn Synopsis to Chapter 664: Official Duty Regularly Performed

Scope Official Duty Regularly Performed

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ARTICLE 4 PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

SECTION 664 Official Duty Regularly Performed

1-664 California Evidence Courtroom Manual Scope

Scope Official Duty Regularly Performed

§ 664 reads as follows:

Rule 664 Official Duty Regularly Performed

It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 664 Official Duty Regularly Performed

1-664 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 664 establishes a presumption that favors the belief in the consistency and trustworthiness of government officials. While the presumption partly rests on elements of convenience, in that it may prevent unnecessary testimony from governmental officials, it also promotes a social policy of warding off unwarranted attacks on governmental transactions.

The second sentence of the presumption is helpful, in that it provides guidance to a court in a situation in which two presumptions might conflict. In the absence of guidance, a court would generally either apply the more specific or narrower of the two presumptions, or simply apply no presumption at all. In Section 664, however, the legislature, foreseeing a conflict, has stated how the matter should be handled. California recognizes a common law presumption that an arrest made without a warrant is unlawful. Thus, if a person arrests another without the color of legality provided by a warrant, the person making the arrest must prove the circumstances that justified the arrest without a warrant. Section 664 makes it clear that its presumption does not apply whenever facts have been established that give rise to the common law presumption regarding the illegality of an arrest made without a warrant. 7 Cal. L. Rev. Comm. Rep. 1 (1965).



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2 COMPARISON TO FEDERAL RULE

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SECTION 664 Official Duty Regularly Performed

1-664 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Application in Civil Cases

Campbell Chain Co. v. Alameda County (1970) 12 Cal. App. 3d 248, 90 Cal. Rptr. 501 (in a proceeding before a county board of equalization to contest property tax assessments, it is presumed that the assessing officers have properly performed the duties entrusted to them and that consequently their assessments are both regular and correctly made; thus the taxpayer must at least make a prima facie showing by introducing some evidence that the assessor's figures are improper and the assessments are not fair and equitable before the assessor is obligated to go forward with any evidence).

City of Industry v. Willey (1970) 11 Cal. App. 3d 658, 89 Cal. Rptr. 922 (in passing on the validity of an ordinance, it will be presumed that it is valid, and he who would claim that it is invalid must assume the burden of showing its invalidity).

Cosgrove v. Sacramento County (1967) 252 Cal. App. 2d 45, 59 Cal. Rptr. 919 (on appeal from a proceeding in mandamus, the presumption that public officials have performed their duty as required by law is applicable).

Examples of Application of Presumption--To Judicial Staff and Juries

People v. Wader (1993) 5 Cal. 4th 610, 20 Cal. Rptr. 2d 788 (in a capital homicide prosecution, the penalty phase verdict of death was not unreliable, even if neither the clerk's transcript nor the reporter's transcript definitely showed that when the jury asked to rehear the testimony of defendant's relatives, the testimony was actually read back to the jury. A proposed settled statement reflected that the trial judge accompanied the court reporter into the jury room and asked the court reporter to read back the requested testimony and then left the room. It was reasonable to assume that the court reporter did reread the testimony. The presumption that an official duty has been regularly performed applies to actions by trial judges and court clerks. There is no reason why it should not apply to court reporters as well).

People v. Mitcham (1992) 1 Cal. 4th 1027, 5 Cal. Rptr. 2d 230, 824 P.2d 1277 (a court clerk is presumed to have

submitted to the jury only the admissible portions of any exhibits they requested).

In re Smiley (1967) 66 Cal. 2d 606, 427 P.2d 179 (in a habeas corpus proceeding brought to set aside petitioner's conviction of a misdemeanor, when the arraignment judge recited the list of legal rights of which he had advised petitioner, and the right to be brought to trial within 30 days was conspicuously absent, the presumption that official duty was performed does not shift to the defendant the burden of proving the negative fact that he was not given an explanation to which he did not know he was entitled, the burden remaining upon the party claiming waiver to prove it, for the court cannot presume on a silent record that essential advice was given).

People v. Sparks (1967) 257 Cal. App. 2d 306, 64 Cal. Rptr. 682 (on review, it will be presumed that the jurors were true to their oaths and followed the various admonitions and instructions of the court).

--To Official Documents

People v. Martinez (2000) 22 Cal. 4th 106, 91 Cal. Rptr. 2d 687, 990 P.2d 563 (provided it satisfies applicable rules of admissibility, evidence other than record of conviction and certified prison records is admissible to establish fact that defendant served prison terms for prior felony convictions; presumption of regular performance of official acts applied to determination of admissibility of computer-generated California Law Enforcement Telecommunications System (CLETS) printout of defendant's criminal history information as official record in connection with habitual offender allegations, where reporting obligations of law enforcement officials in connection with CLETS system were established by statutes of which court could have taken judicial notice and party against whom presumption of regular performance of official duties operates has the burden of proof as to nonexistence of the presumed fact; admission of computer-generated CLETS printout of defendant's criminal history information as official record was not abuse of discretion; admission as official record of printout generated by computer system of Los Angeles County Sheriff's Department concerning defendant's criminal history information was not abuse of discretion).

People v. Tenner (1993) 6 Cal. 4th 559, 24 Cal. Rptr. 2d 840, 862 P.2d 840, cert. denied, (presumption applies to abstract of judgment and state prison commitment form).

People v. Dunlap (1993) 18 Cal. App. 4th 1468, 23 Cal. Rptr. 2d 204 (presumption applies to computer printout of accused's criminal history from the California Law Enforcement Telecommunications System).

--To Police Officers

Morgenstern v. Department of Motor Vehicles (2003) 111 Cal. App. 4th 366, 4 Cal. Rptr. 3d 46 (in a DMV proceeding, the Section 664 presumption that "official duty has been regularly performed" attaches once the DMV presents competent evidence (through presentation of the documents contemplated in the statutory scheme) in support of its prima facie case; here, it was not necessary that officer sign attestation of breath test reliability; the "official duty" is not filling out the form, but rather the officer's performance of his duties to properly conduct the breath test with properly functioning equipment; since officer signed the bottom of the form, certifying the accuracy of all of the facts set forth therein, which necessarily included matters relating to the results of the breath test, the burden shifts to the licensee to rebut the accuracy of those matters).

Manriquez v. Gourley (2003) 105 Cal. App. 4th 1227, 130 Cal. Rptr. 2d 209 (expert testimony failed to rebut Section 664 presumption by proving inadequate foundation for breath test; although expert testified that regulations required the test subject to be in the officer's direct eyesight for the requisite 15-minute period, expert's testimony did not constitute affirmative evidence (or permit an inference) that officer did not in fact continuously observe the subject for 15 minutes because expert did not observe officer and thus no burden shifted to the DMV to establish the reliability of the test results).

Roelfsema v. Department of Motor Vehicles (1995) 41 Cal. App. 4th 871, 48 Cal. Rptr. 2d 817 (in addition to being admissible under a hearsay exception, and in the absence of evidence to the contrary, it is presumed that in reporting firsthand observations, officer has properly performed his official duty).

People v. Maxwell (1978) 78 Cal. App. 3d 124, 144 Cal. Rptr. 95 (in the absence of evidence to the contrary, it is presumed pursuant to Section 664, that police officers act legally in making an arrest. If, however, the question of the legality of an arrest is raised, the defendant makes a prima facie case when he establishes that an arrest was made without a warrant, and the burden then rests on the prosecution to show proper justification).



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SECTION 665 Ordinary Consequences of Voluntary Act

1-665 California Evidence Courtroom Manual 665.syn

§ 665.syn Synopsis to Chapter 665: Ordinary Consequences of Voluntary Act

Scope Ordinary Consequences of Voluntary Act

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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SECTION 665 Ordinary Consequences of Voluntary Act

1-665 California Evidence Courtroom Manual Scope

Scope Ordinary Consequences of Voluntary Act

§ 665 reads as follows:

Rule 665 Ordinary Consequences of Voluntary Act

A person is presumed to intend the ordinary consequences of his voluntary act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 665 Ordinary Consequences of Voluntary Act

1-665 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 665 is an odd duck. It is surely based partly on notions of efficiency of proof, for who is in a better place to explain and to prove or disprove one's intent than the very person whose action is in question. And yet, the Legislature has declared that it is a presumption affecting the burden of persuasion--meaning there is more to this presumption than convenience of proof. The social policy behind this presumption is one of responsibility: a person who undertakes a voluntary action is to be held responsible for the ordinary consequences. Under Section 665, the person will bear the burden of proving that he or she did not intend the ordinary consequences of a voluntary act. The last sentence of Section 665 makes the presumption inapplicable to specific intent crimes, but the United States Supreme Court has held that a burden-shifting presumption like Section 665 is a violation of the due process clause of the U.S. Constitution in all criminal cases. *Sandstrom v. Montana* (1979) 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 .



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2 COMPARISON TO FEDERAL RULE

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SECTION 666 Judicial Action Lawful Exercise of Jurisdiction

1-666 California Evidence Courtroom Manual 666.syn

§ 666.syn Synopsis to Chapter 666: Judicial Action Lawful Exercise of Jurisdiction

Scope Judicial Action Lawful Exercise of Jurisdiction

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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SECTION 666 Judicial Action Lawful Exercise of Jurisdiction

1-666 California Evidence Courtroom Manual Scope

Scope Judicial Action Lawful Exercise of Jurisdiction

§ 666 reads as follows:

Rule 666 Judicial Action Lawful Exercise of Jurisdiction

Any court of this state or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 666 Judicial Action Lawful Exercise of Jurisdiction

1-666 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 666 creates a strong presumption in favor of a court's exercise of jurisdiction. Such a presumption promotes a social policy of respect for and obedience to final judgments.



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2 COMPARISON TO FEDERAL RULE

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1-666 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Hicks v. Hicks (1968) 264 Cal. App. 2d 890, 70 Cal. Rptr. 878 (in absence of proof to the contrary, jurisdiction of authenticated judgment is presumed).



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SECTION 667 Death of Person Not Heard From in Five Years

1-667 California Evidence Courtroom Manual 667.syn

§ 667.syn Synopsis to Chapter 667: Death of Person Not Heard From in Five Years

Scope Death of Person Not Heard From in Five Years

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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SECTION 667 Death of Person Not Heard From in Five Years

1-667 California Evidence Courtroom Manual Scope

Scope Death of Person Not Heard From in Five Years

§ 667 reads as follows:

Rule 667 Death of Person Not Heard From in Five Years

A person not heard from in five years is presumed to be dead.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967; amended Stats. 1983, ch. 201, § 1)

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SECTION 667 Death of Person Not Heard From in Five Years

1-667 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 667 creates a presumption of death that is widely recognized as essential in order to settle insurance matters, estate matters, property issues and a wide range of other financial and legal problems that may result when a person disappears without a trace. This presumption creates some level of finality so that these matters can be settled.



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SECTION 667 Death of Person Not Heard From in Five Years

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 667 in the Federal Rules of Evidence.



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SECTION 667 Death of Person Not Heard From in Five Years

1-667 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Pollack v. Hamm (1970) 3 Cal. 3d 264, 90 Cal. Rptr. 181, 475 P.2d 213 (though the presumption of life continues during the entire statutory period following a person's disappearance, the presumption may be overcome by evidence showing either that within such time the missing person was subjected to some specific peril or that other intervening circumstances or conditions would indicate that the person is dead. The evidence need not be direct evidence of death; it need be only of such character as to make it more probable that the person died at a particular time than that he survived. Thus, application of presumption to situation of superior court judge, who disappeared following a boating accident, was appropriate).

Conservatorship of Geiger (1992) 3 Cal. App. 4th 127, 4 Cal. Rptr. 2d 252 (this presumption is based on public policy and therefore it affects the burden of proof).

Liberty Transport, Inc. v. Harry W. Gorst Co., Inc. (1991) 229 Cal. App. 3d 417, 280 Cal. Rptr. 159, review denied, 1991 Cal. LEXIS 3097 (truck driver who was missing for 15 months when the case was filed was not presumed dead, even though he had been missing for over six years when the case came to trial).



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SECTION 668 Unlawful Intent

1-668 California Evidence Courtroom Manual 668.syn

§ 668.syn Synopsis to Chapter 668: Unlawful Intent

Scope Unlawful Intent

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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SECTION 668 Unlawful Intent

1-668 California Evidence Courtroom Manual Scope

Scope Unlawful Intent

§ 668 reads as follows:

Rule 668 Unlawful Intent

An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 668 Unlawful Intent

1-668 California Evidence Courtroom Manual 1

1 ANALYSIS

Although the last sentence of Section 668 makes the presumption inapplicable to specific intent crimes, the constitutionality of this presumption is questionable in any criminal case. The United States Supreme Court has held that a similar burden-shifting presumption (like the one in Section 665) is a violation of the due process clause of the U.S. Constitution in all criminal cases. *Sandstrom v. Montana* (1979) 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 .



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SECTION 668 Unlawful Intent

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2 COMPARISON TO FEDERAL RULE

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SECTION 669 Failure to Exercise Due Care

1-669 California Evidence Courtroom Manual 669.syn

§ 669.syn Synopsis to Chapter 669: Failure to Exercise Due Care

Scope Failure to Exercise Due Care

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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SECTION 669 Failure to Exercise Due Care

1-669 California Evidence Courtroom Manual Scope

Scope Failure to Exercise Due Care

§ 669 reads as follows:

Rule 669 Failure to Exercise Due Care

(a) The failure of a person to exercise due care is presumed if:

- (1) He violated a statute, ordinance, or regulation of a public entity;
- (2) The violation proximately caused death or injury to person or property;
- (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that:

- (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or
- (2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

(Stats. 1967, ch. 650, § 1)

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SECTION 669 Failure to Exercise Due Care

1-669 California Evidence Courtroom Manual 1

1 ANALYSIS

The presumption created by Section 669 embodies the doctrine of "negligence per se." While it incorporates notions of convenience, Section 669 goes on to shift the burden of persuasion so as to allocate responsibility to the party most likely to be responsible, or at least more blame-worthy, than the person who was injured. Although the presumption can be applied to a wide variety of regulations and statutes, the presumption is directed at assisting those who were intended to be protected by the regulation or statute. It does not apply claim when an individual has violated a duty created by law. Thus, for example, in an action by a contractor against property owners to recover sums due, the property owners cross-complained for costs they incurred to replace a staircase. The Court of Appeals held that the property owners failed to establish their entitlement to judgment on a negligence per se theory. While the property owners were within the class of people the building code was created to protect, the code provisions prescribing the height and width of stairs and the height of the handrail were designed to ensure the safety of persons using a staircase; they were not designed to prevent owners from incurring costs associated with the remediation of building code violations. Further, whether the injury suffered by the property owners was one the code was designed to prevent was a question of law, and thus the trial court erred in instructing the jury on negligence per se. *Morris v. Horton (1994) 22 Cal. App. 4th 968, 27 Cal. Rptr. 2d 585*.



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2 COMPARISON TO FEDERAL RULE

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SECTION 669 Failure to Exercise Due Care

1-669 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Examples of Application of Presumption

Landeros v. Flood (1976) 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (in a malpractice action by a minor who alleged that negligence of defendants, a doctor and a hospital, plaintiff was entitled to an opportunity to prove her further allegations that defendants violated *Penal Code* sections 11160, 11161, 11161.5, by failing to report her injuries, which indicated child abuse, to the authorities, that such violations proximately caused her further injuries, that such injuries resulted from an occurrence which the statutes were designed to prevent and that she was one of the class of persons for whose protection the statutes were adopted).

Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 91 Cal. Rptr. 745, 478 P.2d 465 (in an action to recover for the wrongful death of guests who drowned in motel's swimming pool, though proof of defendant motel owners' numerous violations of statutes and safety regulations governing pools established their negligence as a matter of law, this proof alone did not automatically establish liability; plaintiffs still bore the initial burden of showing that defendants' negligence was a proximate cause of the deaths).

Quiroz v. Seventh Ave. Center (2006) 140 Cal. App. 4th 1256, 45 Cal. Rptr. 3d 222 (The doctrine of negligence per se does not provide a private right of action for violation of a statute; the doctrine is an evidentiary presumption that codifies the rule that a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm that the plaintiff suffered as a result of the violation; Even if the four requirements of § 669(a) are satisfied, this alone does not entitle a plaintiff to a presumption of negligence in the absence of an underlying negligence action).

Klein v. BIA Hotel Corp. (1996) 41 Cal. App. 4th 1133, 49 Cal. Rptr. 2d 60 (this section sets forth the doctrine commonly called negligence per se. It provides that negligence of a person is presumed if he or she violated a statute or regulation of a public entity, if the injury resulted from an occurrence that the regulation was designed to prevent, and if the person injured was within the class for whose protection the regulation was adopted. This presumption may be rebutted by proof that the violator did what might reasonably be expected of a person of ordinary prudence, acting under

similar circumstances, who desired to comply with the law).

Presumption Involves Questions of Fact and Law

Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 23 Cal. Rptr. 2d 377 (all four factors listed in this section must be shown in order to prove a claim of negligence per se. The first two factors are matters for the trier of fact and the second two are determined by the court as a matter of law).

Nowlon v. Koram Ins. Center, Inc. (1991) 1 Cal. App. 4th 1437, 2 Cal. Rptr. 2d 683 (whether injury resulted from occurrence which the statute was designed to prevent and whether plaintiff was a member of the class of persons protected are questions of law, not fact).

Cade v. Mid-City Hospital Corp. (1975) 45 Cal. App. 3d 589, 119 Cal. Rptr. 571 (in a wrongful death action alleging negligence by doctors and a hospital, the trial court did not err in refusing to instruct the jury on negligence per se on the basis of the hospital's failure to comply with a physician's chest X-ray order, thereby allegedly violating Administrative Code section 287(b), requiring that medications and treatments shall be administered as prescribed. The regulation is designed to prevent unauthorized acts, not omissions of duty, and, since the evidence established that the injury to the decedent did not result from unauthorized procedures, the trial court properly determined as a matter of law that the instruction was inapplicable).

Types of Regulations or Statutes Suitable for Presumption

Peterson v. Long Beach (1979) 24 Cal. 3d 238, 155 Cal. Rptr. 360, 594 P.2d 477 (local regulations are not treated differently than statewide or nationwide regulations on matters such as industrial safety and aeronautics, when the local regulations have been duly prescribed and contain words that clearly are obligatory); *but see Minch v. Department of California Highway Patrol* (2006) 140 Cal. App. 4th 895, 907, 44 Cal. Rptr. 3d 846 (stating that *Peterson* holding was superseded by Evid. Code § 669.1, which provides that rule, policy, manual, or guideline of state or local government setting forth employee standards of conduct will not be considered a statute, ordinance, or regulation unless formally adopted in a manner required for statutes, regulations, or ordinances).

Sierra-Bay Fed. Land Bank Assn. v. Superior Court (1991) 227 Cal. App. 3d 318, 277 Cal. Rptr. 753 (a federal statute or regulation may be adopted as a standard of care in a state negligence action under this section).

McDaniel v. Sunset Manor Co. (1990) 220 Cal. App. 3d 1, 269 Cal. Rptr. 196 (under this section, provisions in a manual of acceptable practices and minimum property standards issued by the Department of Housing and Urban Development, and applicable to a federally funded housing project, did not constitute the "regulation of a public entity" whose violation would create a presumption of negligence. The statute by its terms embraces only the "regulation" of a public entity, not its manuals or internal operating procedures).



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ARTICLE 4 PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

SECTION 669.1 Governmental Rule or Guideline for Standards of Conduct for Public Employees

1-669.1 California Evidence Courtroom Manual 669.1.syn

§ 669.1.syn Synopsis to Chapter 669.1: Governmental Rule or Guideline for Standards of Conduct for Public Employees

Scope Governmental Rule or Guideline for Standards of Conduct for Public Employees

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1-669.1 California Evidence Courtroom Manual Scope

Scope Governmental Rule or Guideline for Standards of Conduct for Public Employees

§ 669.1 reads as follows:

669.1 Governmental Rule or Guideline for Standards of Conduct for Public Employees

A rule, policy, manual, or guideline of state or local government setting forth standards of conduct or guidelines for its employees in the conduct of their public employment shall not be considered a statute, ordinance, or regulation of that public entity within the meaning of Section 669, unless the rule, manual, policy, or guideline has been formally adopted as a statute, as an ordinance of a local governmental entity in this state empowered to adopt ordinances, or as a regulation by an agency of the state pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code), or by an agency of the United States government pursuant to the federal Administrative Procedure Act (Chapter 5 (commencing with Section 5001) of Title 5 of the United States Code). This section affects only the presumption set forth in Section 669, and is not otherwise intended to affect the admissibility or inadmissibility of the rule, policy, manual, or guideline under other provisions of law.

(Stats. 1987, ch. 1201, § 13, ch. 1207 § 2)

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1-669.1 California Evidence Courtroom Manual 1

1 ANALYSIS

Unlike the other provisions in this Article, Section 669.1 is not a presumption. It excludes certain types of regulations from the presumption created by Section 669. It is meant to limit the scope of the "negligence per se" doctrine to statutes and regulations properly considered and enacted through the authorized procedures.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 669.1 in the Federal Rules of Evidence.



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1-669.1 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Minch v. Department of California Highway Patrol (2006) 140 Cal. App. 4th 895, 44 Cal. Rptr. 3d 846 (trial court did not err in excluding provisions of the CHP Officer Safety Manual even though they were offered to prove that the officers owed plaintiff a duty in tort; although the manual would be admissible evidence on the question of breach of duty under Section 669 if a duty of care existed, the manual was not formally adopted as a regulation pursuant to Section 669.1 and thus did not have the force of law and could not alone establish a duty of care on the part of CHP officers).

Colvin v. City of Gardena (1992) 11 Cal. App. 4th 1270, 15 Cal. Rptr. 2d 234 (the enactment of Section 669.1, did not supersede prior case law permitting a police department to be considered a public entity empowered to adopt policies or guidelines, including a vehicular pursuit policy by way of a directive issued by a chief of police).



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ARTICLE 4 PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

SECTION 669.5 Effect of Ordinance on Supply of Residential Units

1-669.5 California Evidence Courtroom Manual 669.5.syn

§ 669.5.syn Synopsis to Chapter 669.5: Effect of Ordinance on Supply of Residential Units

Scope Effect of Ordinance on Supply of Residential Units

1 ANALYSIS

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ARTICLE 4 PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

SECTION 669.5 Effect of Ordinance on Supply of Residential Units

1-669.5 California Evidence Courtroom Manual Scope

Scope Effect of Ordinance on Supply of Residential Units

§ 669.5 reads as follows:

669.5 Effect of Ordinance on Supply of Residential Units

(a) Any ordinance enacted by the governing body of a city, county, or city and county which (1) directly limits, by number, the building permits that may be issued for residential construction or the buildable lots which may be developed for residential purposes, or (2) changes the standards of residential development on vacant land so that the governing body's zoning is rendered in violation of *Section 65913.1 of the Government Code* is presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of the city, county, or city and county.

(b) With respect to any action which challenges the validity of an ordinance specified in subdivision (a) the city, county, or city and county enacting the ordinance shall bear the burden of proof that the ordinance is necessary for the protection of the public health, safety, or welfare of the population of the city, county, or city and county.

(c) This section does not apply to state and federal building code requirements or local ordinances which (1) impose a moratorium, to protect the public health and safety, on residential construction for a specified period of time, if, under the terms of the ordinance, the moratorium will cease when the public health or safety is no longer jeopardized by the construction, (2) create agricultural preserves under Chapter 7 (commencing with Section 51200) or Part 1 of Division 1 of Title 5 of the Government Code, or (3) restrict the number of buildable parcels or designate lands within a zone for nonresidential uses in order to protect agricultural uses as defined in subdivision (b) or *Section 51201 of the Government Code* or open-space land as defined in *subdivision (b) of Section 65560 of the Government Code*.

(d) This section shall not apply to a voter approved ordinance adopted by referendum or initiative prior to the effective date of this section which (1) requires the city, county, or city and county to establish a population growth limit which represents its fair share of each year's statewide population growth, or (2) which sets a growth rate of no more than the average population growth rate experienced by the state as a whole. Paragraph (2) of subdivision (a) does not apply to a voter-approved ordinance adopted by referendum or initiative which exempts housing affordable to persons and families of low or moderate income, as defined in *Section 50093 of the Health and Safety Code*, or which otherwise provides low- and moderate-income housing sites equivalent to such an exemption.

(Added by Stats. 1980, ch. 1144, § 2. Amended by Stats. 1988, ch. 541, § 1)

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SECTION 669.5 Effect of Ordinance on Supply of Residential Units

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1 ANALYSIS

Section 669.5 is intended to address the issue of housing shortages in certain parts of California.



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1-669.5 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 669.5 in the Federal Rules of Evidence.



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ARTICLE 4 PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

SECTION 670 Payment by Check

1-670 California Evidence Courtroom Manual 670.syn

§ 670.syn Synopsis to Chapter 670: Payment by Check

Scope Payment by Check

1 ANALYSIS

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ARTICLE 4 PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

SECTION 670 Payment by Check

1-670 California Evidence Courtroom Manual Scope

Scope Payment by Check

§ 670 reads as follows:

Rule 670 Payment by Check

(a) In any dispute concerning payment by means of a check, a copy of the check produced in accordance with *Section 1550 of the Evidence Code*, together with the original bank statement that reflects payment of the check by the bank on which it was drawn or a copy thereof produced in the same manner, creates a presumption that the check has been paid.

(b) As used in this section:

(1) "Bank" means any person engaged in the business of banking and includes, in addition to a commercial bank, a savings and loan association, savings bank, or credit union.

(2) "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank, even though it is described by another term, such as "share draft" or "negotiable order of withdrawal."

(Added by Stats. 1992, ch. 914 (S.B. 833), § 51. Amended by Stats. 2001, ch. 854 (S.B. 205), § 3)

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SECTION 670 Payment by Check

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1 ANALYSIS

Section 670 creates a presumption not only to make proof of payment more convenient but also to promote the ease of commerce through the use of commercial paper, such as ordinary checks.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 670 in the Federal Rules of Evidence.



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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 700 Competency

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§ 700.syn Synopsis to Chapter 700: Competency

Scope Competency

1 ANALYSIS

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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 700 Competency

1-700 California Evidence Courtroom Manual Scope

Scope Competency

§ 700 reads as follows:

Rule 700 Competency

Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1985, ch. 884, § 1)

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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 700 Competency

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1 ANALYSIS

Section 700 declares that all witnesses are competent to testify unless a specific statute renders a potential witness incompetent. The function of Section 700 is to create a broad presumption of competency unless another statute provides the grounds for disqualifying a witness from testifying. For example, Section 703 prohibits a judge from testifying under certain circumstances while Section 704 disqualifies jurors in the situations listed therein.

Section 700 eliminates the old common law grounds for incompetency including: religious belief; conviction of a crime; insanity; infancy; and interest in the litigation.

Section 700 effectively shifts the focus from the witness's competency to the witness's credibility. An alleged infirmity often held to be a threshold question of competency at common law is now frequently considered an issue of credibility for the trier of fact. *See also Evidence Code sections 701, 710* (relating to the competency of child witnesses).



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3 SIGNIFICANT CASES

People v. Lewis (2001) 26 Cal. 4th 334, 110 Cal. Rptr. 2d 272, 28 P.3d 34 (trial court did not err in allowing eyewitness testimony from witness who at times gave inconsistent, incoherent and possibly delusional testimony where witness also testified to many details unlikely to be known by someone not involved with the crime and which were independently corroborated).

People v. Anderson (2001) 25 Cal. 4th 543, 106 Cal. Rptr. 2d 575, 22 P.3d 347 (held trial court did not err in allowing witness who suffered from delusions, i.e. that her imaginary son had been present during the robbery and murder to which she was to testify, to testify during penalty phase of capital murder trial where (1) trial court held a preliminary hearing under Sections 402 and 405, outside the hearing of the jury; and (2) trial court determined that witness could give a coherent account of the murder, which was corroborated by independent evidence, would not likely have been known by someone who was not present, and witness's ability eleven years after the alleged incident, to take investigators to the scene of the crime. Trial court did not err in ruling that the witness could testify and could provide legally sufficient evidence of the uncharged murder for these factors could lead a rational trier of fact to conclude beyond a reasonable doubt that the witness had witnessed a murder. Witness was incompetent to testify only if she lacked the ability to accurately perceive, recollect and recount the events she witnessed--whether she did accurately perceive, recollect and recount the story was a question for the jury. A witness may only be barred from testifying because of lack of personal knowledge only where no reasonable jury could conclude that the witness had such knowledge; if there is evidence from which a rational trier of fact could find that the witness accurately perceived and recollected the events, the witness must be allowed to testify; all other issues pertaining to the accuracy of the witness are issues of credibility to be left to the jury).

In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (recognizing child dependency hearsay exception allowing admission of statements by alleged victim of child sexual abuse in dependency hearings where there is sufficient indicia of reliability, such as the child is available for cross-examination or there is corroborating evidence of sexual abuse and other parties have notice, adopting safeguards of Section 1360; incompetence to testify at trial is not categorical bar to admission of hearsay statements under child dependency exception).

People v. Mincey (1992) 2 Cal. 4th 408, 6 Cal. Rptr. 2d 822, 827 P.2d 388 (party challenging witness's competency bears the burden of proving witness's disqualification).

People v. Jones (1990) 51 Cal. 3d 294, 270 Cal. Rptr. 611, 792 P.2d 643 (child witnesses under the age of 14 are competent in prosecution for child sexual abuse; young children are no longer automatically disqualified to testify).

Mathis v. Morrissey (1992) 11 Cal. App. 4th 332, 13 Cal. Rptr. 2d 819 (cardiologist with same malpractice insurer as defendant doctor not disqualified from testifying; a pecuniary interest, even a substantial one, will not disqualify a person from being a witness).

People v. Hall (1984) 157 Cal. App. 3d 538, 223 Cal. Rptr. 267 (indications of emotional instability of a witness or bias against a party are not incompetency, since whether the witness is truthful or not is a credibility issue to be resolved by the jury).



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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 701 Disqualification of Witness

1-701 California Evidence Courtroom Manual 701.syn

§ 701.syn Synopsis to Chapter 701: Disqualification of Witness

Scope Disqualification of Witness

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CHAPTER 1 COMPETENCY
SECTION 701 Disqualification of Witness

1-701 California Evidence Courtroom Manual Scope

Scope Disqualification of Witness

§ 701 reads as follows:

Rule 701 Disqualification of Witness

(a) A person is disqualified to be a witness if he or she is:

- (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or
- (2) Incapable of understanding the duty of a witness to tell the truth.

(b) In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1985, ch. 884, § 2)

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CHAPTER 1 COMPETENCY
SECTION 701 Disqualification of Witness

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1 ANALYSIS

Under Section 701, the court decides whether a person is competent to be a witness. The party objecting to the competency of a witness must persuade the judge by a preponderance of the evidence that the witness should be disqualified. *See Section 405; People v. Mincey (1992) 2 Cal. 4th 408, 6 Cal. Rptr. 2d 822, 827 P.2d 388*. However, Section 701 requires only that the court determine the prospective witness's capacity to communicate and understanding of the duty to tell the truth. This provision has been particularly relevant in child abuse cases, where the victim, and thus prospective key witness, is often quite young.



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CHAPTER 1 COMPETENCY
SECTION 701 Disqualification of Witness

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2 COMPARISON TO FEDERAL RULE

The principle of Section 701 is reflected in Federal Rule of *Evidence 601*, which eliminates all common-law bases for disqualifying a witness as a matter of law. The federal procedures for determining the competency of a child witness who is alleged to be the victim of abuse or exploitation, or who is a witness to a crime, is set forth in *18 U.S.C.A. § 3509(c)*. This statute provides procedures for hearings and psychological assessments.



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3 ADDITIONAL AUTHORITY

Mitchell L. Beckloff, *In re Basilio T.: In the Best Interest of the Minor?*, 20 W. St. U. L. Rev. 379 (1993)



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CHAPTER 1 COMPETENCY
SECTION 701 Disqualification of Witness

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4 SIGNIFICANT CASES

People v. Lewis (2001) 26 Cal. 4th 334, 110 Cal. Rptr. 2d 272, 28 P.3d 34 (trial court did not err in allowing eyewitness testimony from witness who at times gave inconsistent, incoherent and possibly delusional testimony where witness also testified to many details unlikely to be known by someone not involved with the crime and which were independently corroborated).

People v. Anderson (2001) 25 Cal. 4th 543, 106 Cal. Rptr. 2d 575, 22 P.3d 347 (held trial court did not err in allowing witness who suffered from delusions, i.e. that her imaginary son had been present during the robbery and murder to which she was to testify, to testify during penalty phase of capital murder trial where (1) trial court held a preliminary hearing under Sections 402 and 405, outside the hearing of the jury; and (2) trial court determined that witness could give a coherent account of the murder, which was corroborated by independent evidence, would not likely have been known by someone who was not present, and witness's ability eleven years after the alleged incident, to take investigators to the scene of the crime. Trial court did not err in ruling that the witness could testify and could provide legally sufficient evidence of the uncharged murder for these factors could lead a rational trier of fact to conclude beyond a reasonable doubt that the witness had witnessed a murder. Witness was incompetent to testify only if she lacked the ability to accurately perceive, recollect and recount the events she witnessed--whether she did accurately perceive, recollect and recount the story was a question for the jury. A witness may only be barred from testifying because of lack of personal knowledge only where no reasonable jury could conclude that the witness had such knowledge; if there is evidence from which a rational trier of fact could find that the witness accurately perceived and recollected the events, the witness must be allowed to testify; all other issues pertaining to the accuracy of the witness are issues of credibility to be left to the jury).

People v. Cudjo (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (primary statutory grounds for disqualification of witness are inability to express oneself comprehensibly on subject of testimony and inability to understand obligation to tell the truth).

People v. Mincey (1992) 2 Cal. 4th 408, 6 Cal. Rptr. 2d 822, 827 P.2d 388 (party challenging witness's competency bears the burden of proving witness's disqualification).

In re Clara B. (1993) 20 Cal. App. 4th 988, 25 Cal. Rptr. 2d 56 (*Basilio T.* stands for the proposition that a child's

incompetency based on inability to distinguish between truth and falsehood renders child's hearsay statements in social study report inadmissible).

In re Emilye A. (1992) 9 Cal. App. 4th 1695, 12 Cal. Rptr. 2d 294 (mother's testimony regarding her daughter's accusations against father, when daughter was incompetent witness, admissible as spontaneous statement exception to the hearsay rule).

In re Basilio T. (1992) 4 Cal. App. 4th 155, 5 Cal. Rptr. 2d 450 (four-year-old child disqualified from being a witness since he could not distinguish between the truth and a lie).



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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 702 Personal Knowledge of Witness

1-702 California Evidence Courtroom Manual 702.syn

§ 702.syn Synopsis to Chapter 702: Personal Knowledge of Witness

Scope Personal Knowledge of Witness

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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 702 Personal Knowledge of Witness

1-702 California Evidence Courtroom Manual Scope

Scope Personal Knowledge of Witness

§ 702 reads as follows:

Rule 702 Personal Knowledge of Witness

(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 702 Personal Knowledge of Witness

1-702 California Evidence Courtroom Manual 1

1 ANALYSIS

The preliminary interrogation of every witness must establish that the witness has firsthand or personal knowledge of the facts as to which he or she will testify. This issue is determined under the sufficiency standard of Section 403: the judge must decide whether there is enough evidence that a reasonable juror could find that the witness has personal knowledge; the judge then instructs the jury to disregard the evidence if it is persuaded that the witness does not possess personal knowledge.

Firsthand or personal knowledge is knowledge acquired through one or more of the senses. Under Section 702, the examiner demonstrates the witness's personal knowledge of the facts to which he or she will testify using the witness's own testimony; no extrinsic foundational evidence is required. Consequently, in a preliminary examination of a witness, it is only necessary to establish that he or she was in a physical position to see, hear or otherwise perceive the matters as to which he or she is to provide testimony.

Frequently, it will be established during cross-examination that the witness lacks firsthand knowledge to testify to certain facts presented in the direct examination testimony. Where this occurs, the cross-examining attorney should move to strike the direct examination testimony because of its failure to satisfy Section 702.

Practice Tip

According to the express terms of Section 702, experts qualified under Rule 801 are not subject to the personal knowledge requirement. *See Section 801.* A lay witness testifying in the form of opinion must base his or her opinion on firsthand knowledge. *See Section 800.*



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SECTION 702 Personal Knowledge of Witness

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2 COMPARISON TO FEDERAL RULE

Section 702 is similar in all essential aspects to Federal Rule of *Evidence* 602.



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3 SIGNIFICANT CASES

People v. Lewis (2001) 26 Cal. 4th 334, 110 Cal. Rptr. 2d 272, 28 P.3d 34 (trial court did not err in allowing eyewitness testimony from witness who at times gave inconsistent, incoherent and possibly delusional testimony where witness also testified to many details unlikely to be known by someone not involved with the crime and which were independently corroborated).

People v. Anderson (2001) 25 Cal. 4th 543, 106 Cal. Rptr. 2d 575, 22 P.3d 347 (held trial court did not err in allowing witness who suffered from delusions, i.e. that her imaginary son had been present during the robbery and murder to which she was to testify, to testify during penalty phase of capital murder trial where (1) trial court held a preliminary hearing under Sections 402 and 405, outside the hearing of the jury; and (2) trial court determined that witness could give a coherent account of the murder, which was corroborated by independent evidence, would not likely have been known by someone who was not present, and witness's ability eleven years after the alleged incident, to take investigators to the scene of the crime. Trial court did not err in ruling that the witness could testify and could provide legally sufficient evidence of the uncharged murder for these factors could lead a rational trier of fact to conclude beyond a reasonable doubt that the witness had witnessed a murder. Witness was incompetent to testify only if she lacked the ability to accurately perceive, recollect and recount the events she witnessed--whether she did accurately perceive, recollect and recount the story was a question for the jury. A witness may only be barred from testifying because of lack of personal knowledge only where no reasonable jury could conclude that the witness had such knowledge; if there is evidence from which a rational trier of fact could find that the witness accurately perceived and recollected the events, the witness must be allowed to testify; all other issues pertaining to the accuracy of the witness are issues of credibility to be left to the jury).

Garibay v. Hemmat (2008) 161 Cal. App. 4th 735, 74 Cal. Rptr. 3d 715 (trial court erred in granting summary judgment in medical malpractice case when defendant's expert witness filed a declaration stating that he had no personal knowledge of the breach of standard of care, but based his opinion on his review of medical records which were not filed as part of the motion; Court of Appeal reversed, holding that the expert's opinion was insufficient standing alone; defendant should have attached the medical records, which would have been admissible under the business records exception to the hearsay rule).

Mardirossian & Associates, Inc. v. Ersoff (2007) 153 Cal. App. 4th 257, 62 Cal. Rptr. 3d 665 (in an action to recover

attorneys fees, trial court did not err in admitting testimony of attorneys regarding hours spent on a contingency fee case even though the attorneys did not keep contemporaneous time records and they could not recall an exact number of hours spent on the matter; attorneys' testimony was based on their personal knowledge and was not speculative; also, trial court did not err in admitting expert testimony regarding the reasonableness of the fees and the amount of skill and learning necessary to produce the work expended on the case).

People v. Valencia (2006) 146 Cal. App. 4th 92, 52 Cal. Rptr. 3d 649 (trial court erred in admitting hearsay evidence without a foundation of personal knowledge on the part of the declarant in a case charging continual child abuse; hearsay declarant told the witness that defendant had been touching the victim since she was four years old. Even though witness had personal knowledge that the declarant made this statement, that does not mean that the declarant had personal knowledge of the underlying abuse. The personal knowledge requirement of *Cal. Evid. Code § 702* that is applicable to witnesses was equally applicable to hearsay declarants. In fact, the declarant consistently and repeatedly stated that she did not know that defendant had abused the victim until the day that the girl reported the abuse to the police. Although defense counsel failed to object to this evidence, such failure was prejudicial ineffectiveness of counsel and warranted reversal on this charge).



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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 703 Judge as Witness

1-703 California Evidence Courtroom Manual 703.syn

§ 703.syn Synopsis to Chapter 703: Judge as Witness

Scope Judge as Witness

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 703 Judge as Witness

1-703 California Evidence Courtroom Manual Scope

Scope Judge as Witness

§ 703 reads as follows:

Rule 703 Judge as Witness

(a) Before the judge presiding at the trial of an action may be called to testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, the judge shall declare a mistrial and order the action assigned for trial before another judge.

(c) The calling of the judge presiding at a trial to testify in that trial as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a judge shall be deemed a motion for mistrial.

(d) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 703 Judge as Witness

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1 ANALYSIS

When considering Section 703, the Assembly Committee on Judiciary set forth the following observations which capture the rationale for disqualifying a trial judge from being a witness in the current or subsequent proceeding. The disqualification is

based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party a judge appears in a partisan attitude before the jury. Objections to questions and to his testimony must be ruled on by the witness himself. The extent of cross-examination and the introduction of impeaching and rebuttal evidence may be limited by the fear of appearing to attack the judge personally.

The procedural elements of subdivision (c) are designed to prevent a plea of double jeopardy by a defendant who either calls or objects to the calling of the judge to testify. Under subdivision (c), the defendant will, in effect, have consented to the mistrial and thus waived any objection to a retrial.



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2 COMPARISON TO FEDERAL RULE

Section 703 differs from Federal Rule of *Evidence* 605 in two significant respects. Both the California and federal provisions state that the trial judge presiding at the trial may not testify in that trial as a witness. However, Section 703 requires that if presiding judge is called as a witness, the opposing party must object or that party waives the evidentiary error. Under Federal Rule of *Evidence* 605, however, no objection need be interposed at trial to preserve error for appeal. Moreover, unlike Section 703.5, Federal Rule of *Evidence* 605 does not prevent a judge from testifying at a later trial about matters occurring in the original trial, such as where a trial judge is called as a witness in a hearing on a petition for postconviction relief from a previous judgment.



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DIVISION 6 WITNESSES

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SECTION 703.5 Judges, Arbitrators or Mediators as Witnesses in a Subsequent Civil Proceeding

1-703.5 California Evidence Courtroom Manual 703.5.syn

§ 703.5.syn Synopsis to Chapter 703.5: Judges, Arbitrators or Mediators as Witnesses in a Subsequent Civil Proceeding

Scope Judges, Arbitrators or Mediators as Witnesses in a Subsequent Civil Proceeding

1 ANALYSIS

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SECTION 703.5 Judges, Arbitrators or Mediators as Witnesses in a Subsequent Civil Proceeding

1-703.5 California Evidence Courtroom Manual Scope

Scope Judges, Arbitrators or Mediators as Witnesses in a Subsequent Civil Proceeding

§ 703.5 reads as follows:

703.5 Judges, Arbitrators or Mediators as Witnesses in a Subsequent Civil Proceeding

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of *Section 170.1 of the Code of Civil Procedure*. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with *Section 3160*) of *Part 2 of Division 8 of the Family Code*.

(Added by Stats. 1979, ch. 205, § 1. Amended by Stats 1980, ch. 290, § 1; Stats. 1988, ch. 281, § 1; Stats. 1990, ch. 1491 (A.B. 3765), § 13; Stats. 1993, ch. 114 (A.B. 1757), § 1; Stats. 1993, ch. 1261 (S.B. 401), § 5; Stats. 1994, ch. 1269 (A.B. 2208), § 7)

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DIVISION 6 WITNESSES

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1 ANALYSIS

See Analysis and Comparison to Federal Rule under Section 703.



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CHAPTER 1 COMPETENCY

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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 605 is quite different from Section 703.5; the federal rule does not prohibit a judge or quasi-judicial figure from testifying in a subsequent civil proceeding.



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DIVISION 6 WITNESSES

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3 SIGNIFICANT CASES

Saeta v. Superior Court (2004) 117 Cal. App. 4th 261, 11 Cal. Rptr. 3d 610 (statements made by a member of an employment termination review panel during that panel's hearing are not protected by the privileges of *Evidence Code* sections 703.5 (foreclosing testimony by arbitrators) and 1119 (mediation) and the order compelling him to testify does not violate his right to privacy under the California Constitution; the proceeding, as constituted pursuant to an employment contract, was neither an arbitration nor a mediation).

Eisendrath v. Superior Court (2003) 109 Cal. App. 4th 351, 362, 134 Cal. Rptr. 2d 716 (trial court erred in holding that plaintiff impliedly waived his right to confidentiality; plain language of statutory waiver provisions in *Evidence Code* section 910 *et seq.* shows they do not apply to *Evidence Code* sections 703.5 and 1115 *et seq.*, so trial court should have granted protective order to bar testimony of mediator and discovery of mediation communications concerning a spousal support agreement; conversations between ex-spouses were also protected by the mediation privilege of Section 1119, even if they occurred outside of the mediator's presence as long as they occurred before the end of mediation and "are materially related to the mediation," since Section 1119 protects communications made "pursuant to" a mediation).

Betz v. Pankow (1993) 16 Cal. App. 4th 919, 20 Cal. Rptr. 2d 834 (testimony of arbitrator whose decision is being challenged on grounds of bias is limited to that which addresses charge of bias, partiality or improper conduct; merits of controversy, manner in which evidence was weighed or mental processes of arbitrators in reaching their decision are not subject to judicial review).

Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 265 Cal. Rptr. 868 (while trial court should not have considered portions of arbitrator's declaration purporting to explain reasons for his decision or merits of controversy as he saw them, trial court had power to consider those statements in declaration which went to qualifications of arbitrator to act, namely his bias or lack thereof).



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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 704 Juror as Witness

1-704 California Evidence Courtroom Manual 704.syn

§ 704.syn Synopsis to Chapter 704: Juror as Witness

Scope Juror as Witness

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DIVISION 6 WITNESSES
CHAPTER 1 COMPETENCY
SECTION 704 Juror as Witness

1-704 California Evidence Courtroom Manual Scope

Scope Juror as Witness

§ 704 reads as follows:

Rule 704 Juror as Witness

(a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, the court shall declare a mistrial and order the action assigned for trial before another jury.

(c) The calling of a juror to testify before the jury as a witness shall be deemed a consent to the granting of a motion for a mistrial, and an objection to such calling of a juror shall be deemed a motion for mistrial.

(d) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 6 WITNESSES
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1 ANALYSIS

There are several reasons for the limitations on jurors as witnesses imposed by Section 704. First, counsel may be inhibited in cross-examining a juror, in fear of invoking a disfavorable reaction by the juror. Second, the juror may be unable to weigh objectively the credibility of his own testimony when it is contradicted by an adverse witness. Third, the juror may over-identify with one party and become biased. Fourth, the panel of jurors may more favorably weigh the testimony of a fellow juror.

Hence, Section 704 states that a juror is absolutely disqualified as a witness if the opposing party objects. That objection is held to be consent to a mistrial, for the only option at that point is for the judge to declare a mistrial and have the case assigned to be heard by a different jury. A criminal defendant, by deeming to have consented to the mistrial by objecting to the juror-witness, cannot then assert a claim of double jeopardy.

While Section 704 determines whether a juror may testify at all, Section 1150 limits the content of the juror's testimony where the juror is called as a witness to determine the validity of a verdict. There, the juror is not testifying before his or her fellow jury members, but Section 1150 declares jurors generally incompetent to testify as to any matter purely internal to the jury's deliberations. Section 1150 pertains to a jury's collective discussions and exchanges as well as individual jurors' mental and emotional deliberative processes. Under Section 1150, a juror may testify to whether extraneous information was brought to the jury's attention in an improper manner, or whether any juror's deliberation was improperly affected by an outside influence.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 606(a)* differs from Section 704 by declaring incompetent any witness who is a member of the jury impaneled to hear the case in question, whether the other party objects or not. Federal Rule of *Evidence 606(b)* is the counterpart to Section 1150.



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DIVISION 6 WITNESSES
CHAPTER 2 OATH AND CONFRONTATION
SECTION 710 Oath Required

1-710 California Evidence Courtroom Manual 710.syn

§ 710.syn Synopsis to Chapter 710: Oath Required

Scope Oath Required

1 ANALYSIS

3 SIGNIFICANT CASES



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DIVISION 6 WITNESSES
CHAPTER 2 OATH AND CONFRONTATION
SECTION 710 Oath Required

1-710 California Evidence Courtroom Manual Scope

Scope Oath Required

§ 710 reads as follows:

Rule 710 Oath Required

Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law, except that a child under the age of 10 or a dependent person with a substantial cognitive impairment, in the court's discretion, may be required only to promise to tell the truth.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1988, ch. 486, § 1. Amended by Stats. 2004, ch. 823 (A.B. 20), § 3)

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DIVISION 6 WITNESSES
CHAPTER 2 OATH AND CONFRONTATION
SECTION 710 Oath Required

1-710 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 710 requires that, before testifying, a witness must declare his intention to relate the subject matter of his testimony truthfully. The declaration of intent may be by oath or by affirmation. When the witness is under 10 years old or is a "dependent person with a substantial cognitive impairment," the judge may simply focus on ascertaining that the witness understands the requirement and promises to tell the truth. *See also Section 701* (grounds for disqualifying a witness include the witness's inability to understand the requirement of truthful testimony).

The requirement of an oath may be waived either expressly or by implication, such as when an adverse party goes forward in the matter without inquiry or objection.

See also Section 165 (definition of oath); *Section 751* (oath of interpreter or translator); *Code of Civil Procedure sections 2015.5, 2015.6* (declarations and affirmations); *Code of Civil Procedure section 2094* (form of oath); *Section 177* (definition of dependent person).



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3 SIGNIFICANT CASES

People v. Mincey (1992) 2 Cal. 4th 408, 6 Cal. Rptr. 2d 822, 827 P.2d 388 (party challenging witness's competency bears the burden of proving witness's disqualification).

People v. Jones (1990) 51 Cal. 3d 294, 270 Cal. Rptr. 611, 792 P.2d 643 (child witnesses under the age of 14 are competent in prosecution for child sexual abuse; young children are no longer automatically disqualified to testify).



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DIVISION 6 WITNESSES
CHAPTER 2 OATH AND CONFRONTATION
SECTION 711 Confrontation

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§ 711.syn Synopsis to Chapter 711: Confrontation

Scope Confrontation

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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DIVISION 6 WITNESSES
CHAPTER 2 OATH AND CONFRONTATION
SECTION 711 Confrontation

1-711 California Evidence Courtroom Manual Scope

Scope Confrontation

§ 711 reads as follows:

Rule 711 Confrontation

At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 6 WITNESSES
CHAPTER 2 OATH AND CONFRONTATION
SECTION 711 Confrontation

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1 ANALYSIS

California law has both constitutional and statutory bases for the right to confront and cross-examine witnesses. In criminal cases, the constitutional right is grounded in the *California Constitution, Article I, section 15* and the *Sixth Amendment to the U.S. Constitution*. See *Pointer v. Texas* (1964) 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 ; *People v. Murphy* (1963) 59 Cal. 2d 818, 31 Cal. Rptr. 306, 382 P.2d 346 . In civil cases, the constitutional ground is the *U.S. Constitution's Fifth Amendment* guarantee of due process. See *Goldberg v. Kelly* (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 . Section 711 is one of the statutory bases. See also *Section 1204* (constitutional prohibitions on hearsay); *Penal Code section 686* (confrontation of adverse witnesses in criminal cases).

The United States Supreme Court issued a landmark ruling in *Crawford v. Washington* (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 that has implications for many provisions of the California Evidence Code, including Section 711 (confrontation), Section 1204 (constitutional prohibitions), and all the hearsay exceptions in Division 10, Chapter 2, but especially Section 1231 (prior statements of deceased declarant in gang-related prosecution); Section 1360 (statements by children in child neglect and abuse proceedings); Section 1370 (statements regarding physical abuse); and Section 1380 (statements made by elderly and dependent adults).

In *Crawford*, the Supreme Court held that "testimonial" hearsay statements are no longer admissible against the accused in a criminal prosecution if the declarant does not testify at trial unless (1) the witness is shown to be unavailable and (2) the accused had an earlier opportunity to confront and cross-examine the witness. Unless those two requirements are satisfied, it no longer matters whether the statements are deemed reliable by the trial judge (whether because they fit a firmly rooted hearsay exception or because they bear specific "indicia of reliability"), thus the Court explicitly overruled *Ohio v. Roberts* (1980) 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, 17 Ohio Op. 3d 240 .

The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id. at 1374* . The Court explained that "the principal evil at which the *Confrontation Clause* was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id. at 1363* . It is unclear, however, whether the involvement of law enforcement officials, without more, makes all statements "testimonial" under this standard. The Court made clear that "interrogation" does not have to mean a formal questioning process, but it is unclear exactly what kind of involvement by law enforcement officials is sufficient to invoke the protection *Confrontation Clause*. See *Crawford*, 124 S. Ct. at

1365 n. 4 ("We use the term "interrogation" in its colloquial, rather than any technical legal, sense. [Citation omitted.] Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. [The declarant's] recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition").

However, it remains unclear whether the involvement of law enforcement officials, without more, makes all statements "testimonial" and whether some statements can be "testimonial" even without the direct involvement of law enforcement officials. Some courts have turned for guidance to the *Crawford* Court's citation of a standard offered by one of the *amicus curiae*, defining as "testimonial" those "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *Crawford*, 124 S. Ct. at 1364 (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3). Under this standard, a wider range of statements could be "testimonial," even though they were not made directly to law enforcement personnel. For example, if a parent makes an accusation of child abuse by the noncustodial parent to the child's school officials or pediatrician (who commonly have statutory obligations to report such abuse to law enforcement), such an accusation could be considered "testimonial."

The Supreme Court also left undecided whether the *Confrontation Clause* would ever exclude nontestimonial hearsay (such as a statement admitted under the hearsay exception for business records). It acknowledged that it had once held that the Clause applies to those forms of hearsay as well, but added ominously that "our analysis in this case casts doubt on that holding." *Id.* at 1370 ; see also *id.* at 1374 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether").

Thus, even if a statement can be construed as "nontestimonial," such statements may or may not face a challenge under the federal Constitution and may also face a challenge under the California Constitution. The current federal approach to "nontestimonial" hearsay is set forth in *White v. Illinois* (1992) 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 . There, the United States Supreme Court held that assuming the hearsay statement is shown to be sufficiently reliable (either because it falls within a "firmly rooted hearsay exception" or contains "particularized guarantees of trustworthiness") the prosecution need not show that the declarant is unavailable to testify before introducing the hearsay statement. The viability of cases such as *White*, which arguably deal with "nontestimonial" hearsay, is very much in doubt after *Crawford*, given the Court's dicta discussed above.

In *Davis v. Washington*, 547 U.S. 813 , 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) , the Supreme Court attempted to clarify the application of *Crawford* in two common settings--911 calls and police investigations in the field, as opposed to the station-house interrogation at issue in *Crawford*. The Court held that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency... . They are testimonial when the circumstances indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 126 S. Ct. at 2273-74 .

Despite the Supreme Court's effort to provide some direction in this area, there are many unresolved questions flowing from the *Crawford* decision, not the least of which are what is a "testimonial" statement and what, after *Davis*, is an "on-going emergency?" Other pending, unresolved questions include: (1) are forensic reports (such as autopsy, laboratory reports or the affidavits regarding blood samples in *Cal. Evid. Code* § 712 "testimonial?"; (2) if so, can the state put the burden of compelling the witness's attendance on the defendant, as it does in Section 712?; (3) are statements to private parties or government agents who are not law enforcement officials ever testimonial?; (4) what constitutes "forfeiture" of the *confrontation clause* objection?

The application of the *Sixth Amendment's* right of confrontation to statements made by unavailable hearsay declarants who have never been cross-examined continues to be a hot issue in federal and California courts after the United States

Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) . In *Crawford*, the Supreme Court held that "testimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]," *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) .

In 2007, the U.S. Supreme Court decided *Whorton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007) , withdrawn, *Bockting v. Bayer*, 505 F.3d 973 (9th Cir. 2007) . The central issue in *Whorton* was whether the Court's *Crawford* rule was retroactive to cases already final on direct review. The Court held that *Crawford* announced a new rule; it was flatly inconsistent with the prior governing precedent, *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) overruled in part, *United States v. Diamond*, 65 M.J. 876 (A.C.C.A. 2007) . The Court held that the *Crawford* rule did not fall within the *Teague* exception for watershed rules because: (1) it was not one without which the likelihood of an accurate conviction was seriously diminished; and (2) did not alter the understanding of the bedrock procedural elements essential to the fairness of a proceeding. As the *Crawford* rule was new and did not fall within an exception to the *Teague* rule, it should not have been applied retroactively to collaterally attack a conviction.

However, the other significance of *Whorton* is that it clearly and expressly stated that *Crawford* overruled *Ohio v. Roberts*. *Whorton v. Bockting*, 127 S. Ct. 1173, 1179, 167 L. Ed. 2d 1 (2007), withdrawn, *Bockting v. Bayer*, 505 F.3d 973 (9th Cir. 2007) , cert. denied, 128 S. Ct. 2933 . As noted in earlier editions of the California Evidence Courtroom Manual, the *Crawford* Court was highly critical of *Roberts*, but did not expressly overrule it, leading some state and federal courts to apply the *Ohio v. Roberts* reliability test to nontestimonial statements. After *Whorton*, it is unlikely that this will continue.

In *Giles v. California*, ___ U.S. ___, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) , the United States Supreme Court rejected the California Supreme Court's theory of "forfeiture by wrongdoing," holding that it is not an exception to *Sixth Amendment's* confrontation requirement because it was not established at time of founding of *Bill of Rights* or in American jurisprudence since that time. Although there was a common law rule of forfeiture, the manner in which the common law rule was applied makes plain that uncontroverted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. Because California's rule did not require a showing that defendant intended to prevent a witness from testifying, the case must be reversed and remanded to determine if such intent existed.

In *People v. Geier* (2007) 41 Cal. 4th 555, 61 Cal. Rptr. 3d 580, 161 P.3d 104 , the court determined that the defendant's right to confrontation was not violated by the admission of DNA test results through the testimony of an expert who did not personally perform the tests. The court held that the observations of a nontestifying technician were a contemporaneous recordation of observable events rather than the documentation of past events and thus were not testimonial. In *People v. Cage* (2007) 40 Cal. 4th 965, 56 Cal. Rptr. 3d 789, 155 P.3d 205 , cert. denied, 128 S. Ct. 612, 169 L. Ed. 2d 395 (2007) the court dealt with statements produced during emergency situation. In this case, the court held that a stabbing victim's statement, made in response to questioning by an emergency room physician, was not testimonial where the primary purpose of the physician's question, objectively considered, was to deal with a medical situation that required immediate information. The circumstances under which the doctor questioned the patient had none of the solemnity that inhered in an interview by law enforcement officials. However, the court also concluded that the trial court did err in admitting the victim's statements to a deputy in the hospital emergency room and later, on tape at the sheriff's station, because those statements were made in response to focused police questioning whose primary purpose, objectively considered, was not to deal with an ongoing emergency but to investigate the circumstances of the crime, but the error was harmless because the statements were cumulative of other evidence.



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2 COMPARISON TO FEDERAL RULE

There is no federal rule comparable to Section 711. As noted above, the right to confrontation in federal court is grounded in the *Fifth* and *Sixth Amendments to the U.S. Constitution*.



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3 OTHER SIGNIFICANT CASES

Maryland v. Craig (1990) 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (child permitted to testify from another room where testifying in court would subject child to serious emotional distress; the *Confrontation Clause* has never guaranteed a defendant a face-to-face meeting with the witness).

People v. Lewis (2008) 43 Cal. 4th 415, 75 Cal. Rptr. 3d 588, 181 P.3d 947 (if co-defendants statements can be redacted so that they satisfy *Bruton's* requirement that the statements must not directly or indirectly implicate defendant such that the jury could not reasonably ignore them, then they are not admitted "against" the defendant for *Crawford* purposes).

People v. Mendoza (2007) 42 Cal. 4th 686, 68 Cal. Rptr. 3d 274, 171 P.3d 2 (in capital murder case, trial court did not err in admitting testimony that defendant's stepdaughter had accused defendant of sexually molesting her where the stepdaughter's statements were not offered to prove defendant actually molested her, but rather to prove he was aware of the accusations and to explain his motive for killing her; when offered solely for this non hearsay purpose, the statements did not violate defendant's right to confrontation).

People v. Geier (2007) 41 Cal. 4th 555, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (in capital murder case, defendant's right to confrontation under the *Sixth Amendment* was not violated by the admission of DNA test results through the testimony of an expert who did not personally perform the tests; holding that the observations of a nontestifying technician were a contemporaneous recordation of observable events rather than the documentation of past events and thus were not testimonial. Determining whether a statement was testimonial requires a court to consider the circumstances under which the statement was made, and a crucial point is whether the statement represented the contemporaneous recordation of observable events).

People v. Cage (2007) 40 Cal. 4th 965, 56 Cal. Rptr. 3d 789, 155 P.3d 205, cert. denied, 128 S. Ct. 612, 169 L. Ed. 2d 395 (2007) (in case where defendant was convicted for assaulting her son with a shard of glass, the court held that defendant's right to confront unavailable declarant or victim was not violated by admitting the victim's hearsay statement that his grandmother held him down while his mother cut him, which was made in response to treating physician's single question, "What happened?" The victim's statement was not testimonial where the primary purpose of the physician's question, objectively considered, was to deal with a medical situation that required immediate

information. The circumstances under which the doctor questioned the patient had none of the solemnity that inhered in an interview by law enforcement officials. Trial court did err in admitting the victim's statements to a deputy in the hospital emergency room and later, on tape at the sheriff's station, because those statements were made in response to focused police questioning whose primary purpose, objectively considered, was not to deal with an ongoing emergency but to investigate the circumstances of the crime, but the error was harmless because the statements were cumulative of other evidence).

People v. Jefferson (2008) 158 Cal. App. 4th 830, 70 Cal. Rptr. 3d 451 (suspects incarcerated in bugged cell did not make "testimonial" statements to each other within the meaning of *Crawford*; suspects made no "formal statement to government officers" because they never intended to speak to anyone connected with the government).

People v. Ramirez (2007) 153 Cal. App. 4th 1422, 64 Cal. Rptr. 3d 96 (testimony of state's gang expert that two members of defendant's gang had prior convictions for murder and attempted murder, and that their crimes were committed for the benefit of the gang, did not violate *Confrontation Clause* even though it was based on hearsay statements of other gang members; hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned).

People v. Saracoglu (2007) 152 Cal. App. 4th 1584, 62 Cal. Rptr. 3d 418 (complainant demonstrated sufficient distress to qualify the statements as "excited utterances," an exception to the hearsay rule, even though statements were made over 30 minutes after the incident; disagreeing with both the defendant and the attorney general's office, Court of Appeal held that even though over 30 minutes had passed since the alleged assault, complainant's statements regarding domestic abuse made to police at the station house were nontestimonial because, objectively viewed, the primary purpose of complainant's initial interrogation by police was to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial).

People v. Brenn (2007) 152 Cal. App. 4th 166, 60 Cal. Rptr. 3d 830, review denied (spontaneous statements made by a stabbing victim to a 911 operator and the first police officer on the scene were nontestimonial and thus did not implicate *Confrontation Clause*. The purpose and form of the statements were not the functional equivalents of trial testimony. It did not appear the information was elicited or provided for the primary purpose of making a case against defendant at trial. The officer only had a few moments with the victim before paramedics arrived, and during this brief period of time he was only able to ask the victim a few general questions about what was going on).

People v. Shepherd (2007) 151 Cal. App. 4th 1193, 60 Cal. Rptr. 3d 616 (trial court erred in admitting testimony of probation officer that included alleged out-of-court statements made by a treatment program administrator that defendant violated his probation by consuming alcohol and that defendant failed an alcohol test, where there was no showing of good cause for relying on hearsay in lieu of live testimony).

People v. Gunder (2007) 151 Cal. App. 4th 412, 59 Cal. Rptr. 3d 817, review denied (a witness who appears at trial but who feigns forgetfulness on the stand is not "unavailable" for purposes of *Confrontation Clause* analysis because the witness is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior inconsistent statement's credibility).

People v. Chaney (2007) 148 Cal. App. 4th 772, 56 Cal. Rptr. 3d 128, review denied (*Cal. Evid. Code*, § 353 provides the trial court and any moving party the opportunity to meet and cure any defect to which an objection has been made; thus, by failing to specifically object to the evidence, defendant waived his objection based on the constitutional right of confrontation. Considering the issue nonetheless, the appellate court held that the trial court did not err in allowing the testimony of a police officer that a nontestifying witness told him that defendant would not let the woman open the door and had threatened her with a knife; the trial court correctly found that where the woman hyperventilated and cried hysterically during the interview, the questions the officer asked her were to determine the exact nature of an emergency. As such, those answers were nontestimonial and were not within the scope of the

Confrontation Clause).

In re Miller (2006) 145 Cal. App. 4th 1228, 52 Cal. Rptr. 3d 256 (parole board erred in revoking petitioner's parole based on hearsay statements without determining either the unavailability of the declarant or the reliability of the hearsay evidence. The board also did not determine whether good cause existed to admit the hearsay by weighing factors favoring admitting the hearsay statements against petitioner's right of confrontation).

People v. Fulcher (2006) 136 Cal. App. 4th 41, 38 Cal. Rptr. 3d 702 (although defendants in civil Sexually Violent Predator (SVP) Act proceedings do not have a *Sixth Amendment* right of confrontation, they do have a due process right of confrontation; the two rights are not coextensive, and due process under the SVP Act is not measured by the rights accorded a defendant in criminal proceedings, but by the standard applicable to civil proceedings; experts' testimony concerning defendant's past conduct did not violate his right to confront witnesses because the testimony was introduced, not to establish the truth of the statements that defendant committed misconduct, but for the purpose of explaining the bases of the experts' opinions).

People v. Pirwani (2004) 119 Cal. App. 4th 770, 14 Cal. Rptr. 3d 673 (trial court committed prejudicial error in admitting elderly decedent's hearsay statements in a criminal trial because *Evidence Code* section 1380, which creates a hearsay exception for statements made by elderly or dependent adults to law enforcement officials is unconstitutional on its face as it permits uncross-examined "testimonial" evidence from unavailable declarants in criminal cases).

People v. Sisavath (2004) 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753, *reh'g denied*, 2004 Cal. App. LEXIS 927 (four of defendant's abuse convictions are reversed due to the admission of "testimonial" hearsay statements against a criminal defendant, including statements of victim during interview with a "forensic interview specialist" at a facility specially designed and staffed for interviewing children suspected of being victims of abuse; Court of Appeals did not hold that all statements arising from such interviews are inadmissible, but here interview was held after formal prosecution of defendant had been initiated; such statements violate the *Confrontation Clause of the Sixth Amendment* if the declarant is unavailable to testify at trial and the defendant has no previous opportunity to cross-examine).

People v. Murphy (2003) 107 Cal. App. 4th 1150, 132 Cal. Rptr. 2d 688 (trial court erred in permitting witness to testify using a one-way mirrored glass, to prevent the witness from seeing a defendant, without holding an evidentiary hearing to determine whether, and to what degree, the testifying victim's apparent anxiety was due to the defendant's presence; a court may not dispense with complete face-to-face confrontation merely upon a prosecutor's unsworn representation that defendant's presence was part of a distraught adult witness's problem; error was not harmless beyond a reasonable doubt, especially since the pivotal issue was the alleged victim's credibility).

People v. Williams (2002) 102 Cal. App. 4th 995, 125 Cal. Rptr. 2d 884 (trial court did not violate defendant's rights to confrontation, to be present at trial and to due process by allowing the prosecution to present the testimony of an extremely distraught adult victim by means of videotaped examination in lieu of a live examination during trial where the court held an evidentiary hearing outside the presence of the jury to determine necessity for witness to testify outside the presence of the defendant; defendant listened to the victim's testimony from a wired detention cell and defense counsel was able to go to the detention cell and confer with appellant before ending his cross-examination, and the videotape was thereafter played for the jury with defendant present in the courtroom).

Practice Tip on Analyzing Confrontation Clause Issues After *Crawford* and *Davis*

1. Analyze the hearsay bullet first. Exclude on this narrower ground, if possible

A) Is this an out-of-court statement offered to prove the truth of the matter asserted?

If NO (b/c the statement is being used to prove something other than the truth of its contents--such as verbal acts, effect on the hearer--such as notice, circumstantial evidence of the declarant's state of mind--such as impeachment), then *Crawford's* testimonial analysis does not apply.

If YES, continue

B) Is there a hearsay exception that applies?

If NO--exclude on this narrower statutory ground, if possible, even if you continue to consider the constitutional issue. Think carefully about the reason for the hearsay exceptions--to be thorough. Recall that standard for reversal is abuse of discretion, and that error must be "not harmless."

If YES, continue... .

2. Then do federal *Confrontation Clause* analysis under *Crawford/Davis*:

A) Is the statement "testimonial?"

If NO--NOT TESTIMONIAL STATEMENT--NO CONFRONTATION CLAUSE VIOLATION

If YES--TESTIMONIAL, continue to part B, immediately below.

BUT WHAT IS "TESTIMONIAL?"

CLEARLY "testimonial" according to *Crawford*:

Prior testimony before a grand jury;
Prior testimony at an earlier trial;
Prior testimony at a preliminary hearing.
Crawford, 451 U.S. at 68 .

GENERALLY "testimonial:"

Police "interrogations" (at station house and possibly in the field--). "[The declarant's] recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Crawford*, 124 S. Ct. at 1365 n. 4 (emphasis added).

Most popular definition/approach to "testimonial": The Objective Test: "statements that were made under circumstances which would lead an objective witness reasonably to

believe that the statement would be available for use at a later trial,' " *Crawford*, 124 S. Ct. at 1364 (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3).

MAYBE/MAYBE NOT "testimonial:"

Police "interrogations" in the field
911 calls

See the above standards of "testimonial," but also add:

Davis v. Washington, 126 S. Ct. 2266 (2006)

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."

They are testimonial when the circumstances indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."
Davis, 126 S. Ct. at 2273-74 .

Key facts in determining the "primary purpose" of the statements:

Is the alleged batterer/defendant still present? If so, more likely primary purpose is meeting an "ongoing emergency."

Is the alleged victim speaking in the present tense ("what is happening") or in the past tense ("what happened")? If the questioning and responses are phrased in the present tense, more likely primary purpose is "to meet an ongoing emergency--nontestimonial."

UNCLEAR WHETHER "testimonial:"

For these scenarios, just apply the various definitions of "testimonial" above.

Statements to quasi-governmental agents (including teachers, social workers, medical personnel under a duty to report?)

Statements to bystanders, nongovernmental persons.

Underlying data/documents/information relied upon by experts in forming an opinion.

B) Is the declarant (the party making the out-of-court statement) unavailable and there has never been an opportunity for cross-examination?

C) If NO (EITHER because Declarant is testifying at trial OR because Declarant is unavailable but there was a prior opportunity to cross-examine Declarant), NO CONFRONTATION CLAUSE VIOLATION.

If YES, EXCLUDE the evidence as violating the federal *Confrontation Clause*.



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DIVISION 6 WITNESSES
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SECTION 712 Affidavits Regarding Blood Samples

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§ 712.syn Synopsis to Chapter 712: Affidavits Regarding Blood Samples

Scope Affidavits Regarding Blood Samples

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY



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Scope Affidavits Regarding Blood Samples

§ 712 reads as follows:

Rule 712 Affidavits Regarding Blood Samples

Notwithstanding Sections 711 and 1200, at the trial of a criminal action, evidence of the technique used in taking blood samples may be given by a registered nurse, licensed vocational nurse, or licensed clinical laboratory technologist or clinical laboratory bioanalyst, by means of an affidavit. The affidavit shall be admissible, provided the party offering the affidavit as evidence has served all other parties to the action, or their counsel, with a copy of the affidavit no less than 10 days prior to trial. Nothing in this section shall preclude any party or his counsel from objecting to the introduction of the affidavit at any time, and requiring the attendance of the affiant, or compelling attendance by subpoena.

(Added by Stats. 1978, ch. 93, § 1, eff. April 14, 1978)

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1 ANALYSIS

Section 712 attempts to circumvent the problems of confrontation raised by the use of a common type of forensic evidence--blood samples. The problem with this type of evidence is that it raises the specter of governmental or prosecutorial abuse--procedural concerns about the manufacture or orchestration of evidence produced against a criminal defendant. See Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 Minn. L. Rev. 623 (1992). Despite the availability of Section 712, counsel could still object on constitutional (Fifth and Sixth Amendment) grounds and, where possible, could also subpoena the affiant.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 712 in the Federal Rules of Evidence. Moreover, the hearsay exception for public records and reports, Federal Rule of *Evidence 803(8)*, reflects a concern for the confrontation problems raised by such evidence. Rule 803(8)(B) generally permits the introduction of "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," but expressly excludes "in criminal cases matters observed by police officers and other law enforcement personnel." *See also* Advisory Committee Note to Federal Rule of *Evidence 803(8)(B)*.



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3 ADDITIONAL AUTHORITY

Edward J. Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 *Hastings L.J.* 621 (1979)



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§ 720.syn Synopsis to Chapter 720: Qualification as an Expert Witness

Scope Qualification as an Expert Witness

1 ANALYSIS

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Scope Qualification as an Expert Witness

§ 720 reads as follows:

Rule 720 Qualification as an Expert Witness

(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 720 governs the admissibility of testimony by experts and it performs three distinct functions. First, it expressly authorizes the use of expert testimony. Second, the statute establishes standards to be applied in determining whether expert testimony should be admitted in a particular case. Finally, Section 720 provides criteria to be applied in determining whether an individual qualifies as an expert. Sections 800 to 805 also regulate the admissibility of expert testimony and should be considered along with this provision.

To understand expert testimony, note that there are essentially two types of witnesses at the trial of a lawsuit. First, a lay witness testifies because he or she has firsthand knowledge of relevant facts. Second, an expert may testify, not because he or she has firsthand knowledge of relevant facts, but rather because of special expertise which will assist the trier of fact in interpreting the facts of the case.

Section 720 addresses the qualifications necessary to accord a witness expert status. Under the statute, a witness may qualify as an expert by reason of his or her knowledge, skill, experience, training or education. Note that any of these characteristics may qualify an individual as an expert, although in the usual case, more than one of the factors will be present. *See, e.g., People v. Rodriguez (1969) 274 Cal. App. 2d 770, 79 Cal. Rptr. 240* (in view of agent's testimony that he had served as an agent for state bureau of narcotic enforcement for four and one-half years and had seen balloons containing heroin many times before, a proper foundation was laid for agent's opinion that balloons are normally used by heroin addicts who carry heroin); *People v. Cruz (1968) 260 Cal. App. 2d 55, 66 Cal. Rptr. 772* (trial court, in prosecution for selling heroin, was justified in finding that police officer, who testified as to his opinion whether lack of visible scars on individual's arms would indicate whether he had been using heroin by way of intravenous injection, was an expert by reason of his knowledge, skill, experience, training, and education in field of narcotics).

While the test for the use of expert testimony requires that the trier of fact be aided by the testimony, the standard is a relative one which will depend upon the particular subject, the particular witness, and the facts of the litigation. By necessity, the trial court has a substantial degree of discretion in determining whether to permit expert testimony in a particular case. *People v. Davenport (1995) 11 Cal. 4th 1171, 47 Cal. Rptr. 2d 800, 906 P.2d 1068, cert. denied.* The trial judge may scrutinize the proposed witness's field of expertise. An expert in one area may not be an expert in all related areas.

At times, the issue of whether an individual is an expert is closely related to the issue of the reliability of the basis for the "expert's" opinion. Where there is some question as to the reliability and acceptability of the basis for the individual's particular expertise or basis for the expert's opinion, the issue is determined under California's "*Kelly*" standard. See discussion of this issue under Section 801.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 702 is highly similar to Section 720, except that the federal rule contains no provision for voir dire outside the hearing of the jury. The federal court, however, certainly has that power under Federal Rules of Evidence 104(a), 611(a).

For current trends in the federal law and recent amendments to the Federal Rules of Evidence regarding scientific and technical expert testimony, see Comparison of Federal Rule and Section 801.



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3 SIGNIFICANT CASES

In General

People v. Brown (2001) 96 Cal. App. 4th Supp.1 117 Cal. Rptr. 2d 738 (trial court did not err in admitting expert's testimony on battered women's syndrome; appellate court may find error only if the witness clearly lacks qualification as an expert; expertise "is relative to the subject" and is not subject to rigid classification according to formal education or certification; although expert did not have a clinical psychology license, expert was a licensed marriage and family counselor who had dealt exclusively with domestic violence for the previous 13 years).

People v. Singh (1995) 37 Cal. App. 4th 1343, 44 Cal. Rptr. 2d 644 (a person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which his or her testimony relates. Whether a person qualifies as an expert in a particular case, however, depends on the facts of the case and the witness's qualifications).

Naples Restaurant, Inc. v. Ford (1968) 259 Cal. App. 2d 881, 66 Cal. Rptr. 835 (the essential questions which must be favorably answered to qualify a witness as an expert are two: Does the witness have the background to absorb and evaluate information on the subject? Does he have access to reliable sources of information about the subject? Two aspects of the witness's history are thus involved: the first, a subjective aspect, the capacity of the witness to understand and report; the second, an objective aspect, the witness's access and exposure to relevant data on the subject matter on which his opinion is sought).

Examples of Qualified Experts

People v. Davenport (1995) 11 Cal. 4th 1171, 47 Cal. Rptr. 2d 800, 906 P.2d 1068 (trial court did not abuse its discretion by determining homicide investigator was not qualified to give expert opinion regarding injury to victim in light of witness's lack of medical, serology, or pathology training).

People v. Leahy (1994) 8 Cal. 4th 587, 34 Cal. Rptr. 2d 663, 882 P.2d 321 (police officer without formal training was unqualified to testify as to horizontal gaze nystagmus (HGN) field sobriety test).

People v. Clark (1993) 5 Cal. 4th 950, 22 Cal. Rptr. 2d 689, 857 P.2d 1099, cert. denied, 512 U.S. 1253 (witness was qualified to give expert "blood-spatter" testimony in capital murder prosecution, where witness had attended lectures and training seminars on subject of blood dynamics, read relevant literature, conducted relevant experiments, and visited crime scenes where blood-spatter tests were conducted).

People v. Fierro (1991) 1 Cal. 4th 173, 3 Cal. Rptr. 2d 426, 821 P.2d 1302 (private investigator could not be certified as expert in ballistics and crime scene reconstruction where witness had never photographed crime scene involving gunshot death, and his opinion regarding effects of bullets on victim's body was based on viewing of documentary films of men in combat).

In re Beatrice M. (1994) 29 Cal. App. 4th 1411, 35 Cal. Rptr. 2d 162 (social worker was qualified to testify as expert, on motion to terminate parental rights to dependent, adoptable children, despite her lack of knowledge of legal procedures for terminating guardianship; lack of knowledge of those procedures was unrelated to her expertise as to children's adoptability).

Benson v. Honda Motor Co., Ltd. (1994) 26 Cal. App. 4th 1337, 32 Cal. Rptr. 2d 322 (trial court's decision to permit automobile manufacturer's claims history expert to testify regarding absence of prior similar claims against manufacturer was not abuse of discretion; expert was product analysis engineer who had been employed by manufacturer for approximately 22 years, one of his major duties was to review claims of products liability, and manufacturer kept permanent, computerized system to record such complaints since at least 1970).

People v. Dawkins (1992) 10 Cal. App. 4th 565, 12 Cal. Rptr. 2d 633 (police officers with five years experience may testify as to hearsay. Police officers with under five years of law enforcement training who are certified by the Peace Officer Standards and Training commission may testify as to hearsay).

Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal. App. 4th 234, 7 Cal. Rptr. 2d 101 (work in a particular field is not an absolute prerequisite to qualification as an expert in that field).

Alef v. Alta Bates Hosp. (1992) 5 Cal. App. 4th 208, 6 Cal. Rptr. 2d 900 (party offering expert witness must demonstrate that the expert's knowledge of subject is sufficient, and determinative issue in each case is whether witness has sufficient skill or experience in field so his testimony would be likely to assist jury in search for truth).

People v. Williams (1992) 3 Cal. App. 4th 1326, 5 Cal. Rptr. 2d 130 (police officer with only ten hours of classroom time and one eight-hour laboratory regarding nystagmus (various involuntary muscular movements) was not qualified to testify as an expert on issue of test results showing defendant was drunk).

Qualifying Experts in Medical or Legal Malpractice Cases

Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 61 Cal. Rptr. 2d 326 (in legal malpractice case, defendant attorney was not qualified to give opinion as to whether he had used the degree of skill, prudence and diligence expected of attorneys in the community where his declaration contained no foundation to show that he had the training, skill or experience that would render him qualified).

Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal. App. 4th 234, 7 Cal. Rptr. 2d 101 (witness who possessed Ph.D. in microbiology, had worked for a public health disease center where his duties included investigation of hepatitis epidemics and disease diagnosis based on immune response, and had experience in the commercial blood industry, was qualified to testify as an expert witness as to whether steps taken by blood bank to prevent contamination of blood were adequate, even though witness was not a physician).

Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 286 Cal. Rptr. 243 (legal malpractice is sufficiently similar to medical malpractice such that the qualifications for an expert are the same).

Sigala v. Goldfarb (1990) 222 Cal. App. 3d 1450 (whether testifying expert had substantial recent professional emergency care experience is a factual question to be determined by the trial court in the first instance).

Evans v. Ohanesian (1974) 39 Cal. App. 3d 121, 112 Cal. Rptr. 236 (as consequence of reluctance of physicians to testify against each other, when an expert can be found, it is immaterial whether he is a general practitioner or a specialist, providing he has knowledge of standard of care in any given field).



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1-721 California Evidence Courtroom Manual 721.syn

§ 721.syn Synopsis to Chapter 721: Cross-Examination of Expert Witness

Scope Cross-Examination of Expert Witness

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1-721 California Evidence Courtroom Manual Scope

Scope Cross-Examination of Expert Witness

§ 721 reads as follows:

Rule 721 Cross-Examination of Expert Witness

(a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

(b) If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs:

- (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion.
- (2) The publication has been admitted in evidence.
- (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1997, ch. 892 (S.B. 73), § 11)

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1 ANALYSIS

A witness who testifies as an expert may be cross-examined to the same extent as any other witness. *See* Chapter 5 (commencing with Section 760; Section 780 is a particularly helpful "checklist" of the potential grounds for testing a witness's credibility). Unlike a lay witness, however, an expert witness is also subject to more thorough cross-examination under Section 721. As one court explained:

Once an expert offers his opinion, however, he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, the reasons for his opinion including facts and other matters upon which it is based ... , and which he took into consideration; and he may be 'subjected to the most rigid cross examination' concerning his qualifications, and his opinion and its sources [citation omitted]. [*Hope v. Arrowhead & Puritas Waters, Inc.* (1959) 174 Cal. App. 2d 222, 230, 344 P.2d 428, 433 .]

More specifically, it is necessary to permit cross-examination in regard to a particular publication relied upon by the expert to test whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is important to permit an expert witness to be cross-examined concerning those works referred to or considered by the expert even if they were not specifically relied on in forming the expert's opinion. An expert's reasons for not relying on particular publications that were referred to or considered in forming an opinion may reveal important information bearing upon the credibility of expert's testimony. Finally, in 1997, Section 721 was amended to permit an expert to be cross-examined on a publication that is established as a reliable authority, whether by the expert's own admission, by other expert testimony or by judicial notice. This expansion of the grounds for the cross-examination of expert witnesses is sensible; the expert's failure to consider particular publications that are otherwise considered reliable may be quite relevant to the evaluation of the expert's credibility. Thus, Section 721, as amended, may have produced a different result in *People v. Visciotti* (1992) 2 Cal. 4th 1, 5 Cal. Rptr. 2d 495, 825 P.2d 388 , cert. denied, 506 U.S. 893 . There the court held that a party attacking credibility of expert may bring to jury's attention material that is relevant to issue of which expert was unaware, but that party may not by its questions testify regarding content of that material. Under Section 721 as amended, the cross-examiner would presumably be able to question the expert to some degree regarding the material if it could be established as reliable under Section 721(b)(3). The cross-examiner could read into the record the relevant material bearing on the expert's opinion, but could not introduce the material itself as an

exhibit.

However, Section 721 can extend only so far in permitting cross-examination on publications or treatises not considered by the expert witness and not easily established as reliable. A loose interpretation of Section 721 would permit the cross-examiner to use the rule not for its proper purpose--to test the soundness of the expert's opinion--but to bring before the trier of fact the opinions of absentee authors without the safeguard of cross-examination.

Of course, if a particular publication has already been admitted in evidence, there is no danger that the cross-examiner will use the treatise or publication to bring otherwise inadmissible evidence before the jury. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965). It is important to stress, however, that the function of a publication or treatise used pursuant to this section is to cast doubt on the credibility of the expert's opinion by exposing the expert's misapplication, misinterpretation, omission, or contradiction of reliable publications. The publications, whether in part or in whole, may not be offered as substantive evidence on their own, unless admitted under Section 1341 (hearsay exception for commercial, scientific, and similar publications). *See also Sections 450-460* for grounds and procedures for taking judicial notice such as that permitted by Section 721(b)(3) (reliability of a publication or treatise).



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2 COMPARISON TO FEDERAL RULE

There is no direct counterpart to Section 721 in the federal rules. However, much, if not all, testing of the expert's opinion under Section 721, would also be permissible as relevant evidence of the expert's credibility under Federal Rule of *Evidence* 401. Moreover, Federal Rule of *Evidence* 803(18) creates a hearsay exception that would allow the publications to be used not only for their impeachment value, but also for their substance. Federal Rule of *Evidence* 803(18), however, also contains the prohibition against introducing the actual publications or treatises themselves into evidence.



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People v. Smith (2007) 40 Cal. 4th 483, 54 Cal. Rptr. 3d 245, 150 P.3d 1224, cert. denied, 128 S. Ct. 488, 169 L. Ed. 2d 344 (2007) (trial court did not abuse its discretion in requiring criminal defendant to produce the test data, notes, and materials relied about by an expert witness, where the expert stated during his testimony that he used the tests to refresh his recollection before testifying at the hearing).

People v. Ledesma (2006) 39 Cal. 4th 641, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (holding, as a question of first impression, that the attorney-client privilege continues to apply for purposes of retrial after otherwise privileged matters have been disclosed in connection with habeas corpus proceedings based on ineffective assistance of counsel (relying on *Evidence Code* section 958), but finding that defendant waived the protections of privilege as to his statements to psychotherapist by presenting the testimony of other experts who had reviewed and considered psychotherapist's report and his testimony at the habeas corpus hearing).

People v. Osband (1996) 13 Cal. 4th 622, 55 Cal. Rptr. 2d 26, 919 P.2d 640, cert. denied, 519 U.S. 1061 (cross-examination of psychologist, who testified that defendant would adjust well to life in prison, regarding defendant's prior juvenile record and sexual nature of defendant's juvenile offenses was permissible to discover basis for psychologist's opinion; having examined defendant's juvenile record, psychologist could be cross-examined on it to determine whether he took it into account in forming his opinion).

People v. Clark (1993) 5 Cal. 4th 950, 22 Cal. Rptr. 2d 689, 857 P.2d 1099, cert. denied, 512 U.S. 1253 (prosecution could use scholarly work in cross-examination of expert witness in capital murder prosecution, in light of expert's testimony that he considered or relied upon all his training in arriving at his conclusions, relationship of abolished defenses of diminished capacity and irresistible impulse to expert's opinion that defendant lacked intent to commit crimes due to "rage reaction," and expert's former association with author of work and his familiarity with author's works, including article in question).

McGarity v. Department of Transp. (1992) 8 Cal. App. 4th 677, 10 Cal. Rptr. 2d 344 (purpose of Section 721 prohibiting cross-examination of expert witness regarding scientific or professional text, treatise, or "similar publication" supports broad construction of term "similar publication").



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§ 722.syn Synopsis to Chapter 722: Credibility of Expert Witness

Scope Credibility of Expert Witness

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Scope Credibility of Expert Witness

§ 722 reads as follows:

Rule 722 Credibility of Expert Witness

(a) The fact of the appointment of an expert witness by the court may be revealed to the trier of fact.

(b) The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 722 makes explicit the relevance of exploring two facets of the expert's ethos. First, Section 722(a) expressly permits the jury to be told that the court has appointed this expert. Since jurors tend to hold the judge in the highest esteem of all the parties in the courtroom, that positive impression may carry over to the expert. This factor may become increasingly important if court-appointed experts become more common. Second, Section 722(b) expressly permits the expert to be questioned regarding a clearly relevant source of his or her potential bias--who is paying the witness and how much?



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2 COMPARISON TO FEDERAL RULE

Section 722(a) is quite similar to, although the federal rule appears to require the court's permission for such disclosure while Section 722(a) appears to permit disclosure as of right. There is no counterpart to Section 722(b) in the federal rules, although an expert witness's compensation is relevant to the witness's bias, which is always a permissible ground for impeachment. *See United States v. Abel (1984) 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 .*



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People v. Berryman (1993) 6 Cal. 4th 1048, 25 Cal. Rptr. 2d 867, 864 P.2d 40 , reh'g denied, 7 Cal. 4th 477C (Penal Code section 987.9 requiring that application by indigent defendant for funds to pay experts be kept confidential did not bar prosecutor from cross-examining defendant's expert as to amount of compensation; Section 987.9 does not carve out exception to rule rendering compensation paid to expert a proper subject of inquiry as relevant to credibility); overruled on other grounds in ***People v. Hill*** (1998) 17 Cal. 4th 800, 823, 72 Cal. Rptr. 2d 656, 952 P.2d 673 .



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Scope Limit on Number of Expert Witnesses

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1-723 California Evidence Courtroom Manual Scope

Scope Limit on Number of Expert Witnesses

§ 723 reads as follows:

Rule 723 Limit on Number of Expert Witnesses

The court may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 723 buttresses the court's ordinary discretion under Section 352 to avoid the problem of cumulative or time-consuming witnesses who add little, if any, additional relevant testimony to what has already been presented.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 723 in the federal rules, although Federal Rule of *Evidence 403* authorizes the judge to exclude relevant but cumulative evidence.



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SECTION 730 Appointment of Expert by Court

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1-730 California Evidence Courtroom Manual Scope

Scope Appointment of Expert by Court

§ 730 reads as follows:

Rule 730 Appointment of Expert by Court

When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.

Nothing in this section shall be construed to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act.

(Stats. 1979, ch. 746, § 3, eff. Jan. 1, 1983. Amended by Stats. 1990, ch. 295 (A.B. 3371), § 1)

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1 ANALYSIS

Section 730 empowers the court, on its own motion or the motion of any party, to appoint and select an expert witness to testify in a given lawsuit. The judge's decision to appoint an expert witness should be overturned only upon finding an abuse of discretion. The statute applies in both criminal and civil proceedings. It requires that compensation of appointed experts be reasonable. *See also Section 460* (appointment of expert on matters subject to judicial notice).

Practice Tip

Section 730 does not establish the point before trial or during the trial at which the court may appoint an expert witness. However, because the court must have time to: (1) hear motions against appointing the expert witness; (2) receive consent to appointment by the expert; (3) notify counsel and the expert of his or her duties through writing or the discretionary conference; (4) allow the expert time to make findings of fact; and (5) present the findings to trial counsel within reasonable time to prepare a cross-examination at trial, it would appear the court should determine whether it wishes to appoint an expert witness at the pretrial stage. Liberal discovery should enable the court to determine at an early stage whether it will need to appoint an expert witness.



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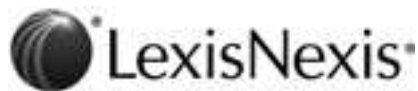
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2 COMPARISON TO FEDERAL RULE

Section 730 is essentially identical to Federal Rule of Evidence 706(a).



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3 SIGNIFICANT CASES

Verdin v. Superior Court (2008) 43 Cal. 4th 1096, 77 Cal. Rptr. 3d 287, 183 P.3d 1250 (when defendant intended to rely on "diminished actuality" defense, trial court's order granting the prosecution access to petitioner for purposes of a mental examination by prosecution's expert was not authorized by *Cal. Evid. Code* § 730, when prosecution did not request the trial court to appoint an expert to conduct a mental examination under Section 730, nor did the trial court actually issue an order appointing an expert under that section).

In re Jennifer J. (1992) 8 Cal. App. 4th 1080, 10 Cal. Rptr. 2d 813 (prior to selection and implementation hearing, father was not entitled to appointment by the court of a new, independent psychiatric expert for purpose of undertaking review of studies and reports on bonding already accomplished by other experts).



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1-731 California Evidence Courtroom Manual Scope

Scope Payment of Court-Appointed Expert

§ 731 reads as follows:

Rule 731 Payment of Court-Appointed Expert

(a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730 shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court.

(b) In any county in which the board of supervisors so provides, the compensation fixed under Section 730 for medical experts in civil actions in such county shall be a charge against and paid out of the treasury of such county on order of the court.

(c) Except as otherwise provided in this section, in all civil actions, the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs.

(Added by Stats. 1979, ch. 746, § 5, eff. Jan. 1, 1983)

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1 ANALYSIS

Section 731 sets forth the sources for the expert's compensation. The state must bear the cost in a criminal trial, while the parties in a civil trial will be assessed proportionately according to the judge's direction.



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2 COMPARISON TO FEDERAL RULE

Section 731 is essentially the same as Federal Rule of Evidence 706(b).



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§ 732.syn Synopsis to Chapter 732: Calling and Examining Court-Appointed Expert

Scope Calling and Examining Court-Appointed Expert

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1-732 California Evidence Courtroom Manual Scope

Scope Calling and Examining Court-Appointed Expert

§ 732 reads as follows:

Rule 732 Calling and Examining Court-Appointed Expert

Any expert appointed by the court under Section 730 may be called and examined by the court or by any party to the action. When such witness is called and examined by the court, the parties have the same right as is expressed in Section 775 to cross-examine the witness and to object to the questions asked and the evidence adduced.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 755 states the general rule that where the trial judge calls a witness to testify, the parties have a right to object to any part of the witness's testimony and to cross-examine the witness. Section 732 makes clear that this general rule applies to expert witnesses as well as lay witnesses.



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2 COMPARISON TO FEDERAL RULE

Section 732 is essentially identical to the last sentence of Federal Rule of Evidence 706(a).



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3 ADDITIONAL AUTHORITY

Note, *The Power of a Trial Judge to Call a Witness--A Tool to Mend Defects*, 21 S.C. L. Rev. 224 (1969)



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DIVISION 6 WITNESSES

CHAPTER 3 EXPERT WITNESSES

ARTICLE 2 APPOINTMENT OF EXPERT WITNESS BY COURT

SECTION 733 Right to Produce Other Expert Evidence

1-733 California Evidence Courtroom Manual 733.syn

§ 733.syn Synopsis to Chapter 733: Right to Produce Other Expert Evidence

Scope Right to Produce Other Expert Evidence

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SECTION 733 Right to Produce Other Expert Evidence

1-733 California Evidence Courtroom Manual Scope

Scope Right to Produce Other Expert Evidence

§ 733 reads as follows:

Rule 733 Right to Produce Other Expert Evidence

Nothing contained in this article shall be deemed or construed to prevent any party to any action from producing other expert evidence on the same fact or matter mentioned in Section 730; but, where other expert witnesses are called by a party to the action, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This section states the somewhat obvious point that even if a court calls an expert witness, nothing prevents a party from calling an expert witness of the party's own choosing. The statute then elaborates that the party is responsible for that expert's fees.



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2 COMPARISON TO FEDERAL RULE

Section 733 is quite similar to Federal Rule of Evidence 706(d), except that the California rule goes on to make clear that where a party calls an expert witness, that party is responsible for paying that expert and, if the party prevails, they will only recover ordinary witness fees when costs are taxed.



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DIVISION 6 WITNESSES

CHAPTER 4 INTERPRETERS AND TRANSLATORS

SECTION 750 Rules Relating to Witnesses Apply to Interpreters and Translators

1-750 California Evidence Courtroom Manual 750.syn

§ 750.syn Synopsis to Chapter 750: Rules Relating to Witnesses Apply to Interpreters and Translators

Scope Rules Relating to Witnesses Apply to Interpreters and Translators

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DIVISION 6 WITNESSES

CHAPTER 4 INTERPRETERS AND TRANSLATORS

SECTION 750 Rules Relating to Witnesses Apply to Interpreters and Translators

1-750 California Evidence Courtroom Manual Scope

Scope Rules Relating to Witnesses Apply to Interpreters and Translators

§ 750 reads as follows:

Rule 750 Rules Relating to Witnesses Apply to Interpreters and Translators

A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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DIVISION 6 WITNESSES

CHAPTER 4 INTERPRETERS AND TRANSLATORS

SECTION 750 Rules Relating to Witnesses Apply to Interpreters and Translators

1-750 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 750 recognizes that the process of translation or interpretation of another's speech is a complex communication process. The translator or interpreter is not simply a mechanical conduit, but is essentially another witness, albeit one limited to restating the true witness's testimony. Because the use of a translator or interpreter adds a layer of potential capacity and sincerity problems, which are present with any witness, this section makes the translator or interpreter subject to all the rules regarding witnesses.



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SECTION 750 Rules Relating to Witnesses Apply to Interpreters and Translators

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2 COMPARISON TO FEDERAL RULE

Section 750 has its rough counterpart in Federal Rule of *Evidence 604*, although the federal rule is more ambiguous in its phrasing, which provides that the "interpreter is subject to the provisions of these rules relating to qualification as an expert." Unlike the California statute, the federal rules make no distinction between translators or interpreters. California makes some effort to distinguish between interpreters, who generally assist deaf or hard-of-hearing individuals and individuals with speech problems, in understanding and making themselves understood as well as those who do not readily speak or understand English. *See Sections 752, 754*. Translators, in contrast, are those who rewrite documents written in a foreign language. *See Section 753*.

In addition, while it is clear that the federal rule requires the interpreter to be qualified to interpret, it is not clear what other provisions relating to witnesses (other than the administration of an oath, which is also required by Federal Rule of *Evidence 604*) apply to interpreters. Reading Federal Rule of *Evidence 604* as consistent with Rule 702, the determination of an interpreter's qualifications is an issue within the discretion of the trial court. Close relatives or friends of the witness are not precluded from serving as interpreters where such individuals qualify as experts.

Interpreters, like all experts, are subject to an attack on credibility. Nevertheless, where the trial judge finds that the interpreter satisfies the requirements of Rule 702 and allows the interpreter to testify, the accuracy of the translation becomes an issue for the trier of fact. In such cases, the credibility of the interpreter and his or her competence to translate, become issues for the jury.



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1-750 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Mora (1984) 153 Cal. App. 3d 18, 199 Cal. Rptr. 904 (as interpreter is subject to rules of law relating to witnesses, any impropriety in interpreter's failure to take oath was waived by defendant's failure to timely object).



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DIVISION 6 WITNESSES
CHAPTER 4 INTERPRETERS AND TRANSLATORS
SECTION 751 Oath Required of Interpreters and Translators

1-751 California Evidence Courtroom Manual 751.syn

§ 751.syn Synopsis to Chapter 751: Oath Required of Interpreters and Translators

Scope Oath Required of Interpreters and Translators

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SECTION 751 Oath Required of Interpreters and Translators

1-751 California Evidence Courtroom Manual Scope

Scope Oath Required of Interpreters and Translators

§ 751 reads as follows:

Rule 751 Oath Required of Interpreters and Translators

(a) An interpreter shall take an oath that he or she will make a true interpretation to the witness in a language that the witness understands and that he or she will make a true interpretation of the witness' answers to questions to counsel, court, or jury, in the English language, with his or her best skill and judgment.

(b) In any proceeding in which a deaf or hard-of-hearing person is testifying under oath, the interpreter certified pursuant to subdivision (f) of Section 754 shall advise the court whenever he or she is unable to comply with his or her oath taken pursuant to subdivision (a).

(c) A translator shall take an oath that he or she will make a true translation in the English language of any writing he or she is to decipher or translate.

(d) An interpreter regularly employed by the court and certified or registered in accordance with Article 4 (commencing with *Section 68560*) of *Chapter 2 of Title 8 of the Government Code*, or a translator regularly employed by the court, may file an oath as prescribed by this section with the clerk of the court. The filed oath shall serve for all subsequent court proceedings until the appointment is revoked by the court.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1984, ch. 30, § 1, eff. March 7, 1984; Stats. 1990, ch. 1450 (S.B. 2046), § 1. Amended by Stats. 1997, ch. 376 (A.B. 1445), § 1)

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1-751 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 751 subjects an interpreter or translator to the obligation of any witnesses to take an oath to render truthful testimony as described in subsections (a) (for interpreters) and (c) (for translators). A 1997 amendment to this section made it easier for qualified translators and interpreters to simply file one oath with the clerk of court for all subsequent cases, which streamlines the process of putting witnesses on the stand and prevents any confusion on the part of the jury if they were to see two individuals take an oath, rather than the main witness.



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CHAPTER 4 INTERPRETERS AND TRANSLATORS

SECTION 751 Oath Required of Interpreters and Translators

1-751 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 751 has a rough counterpart in Federal Rule of *Evidence* 604. See Comparison to Federal Rule in of this manual.



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1-751 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Torres (1985) 164 Cal. App. 3d 266, 210 Cal. Rptr. 375 (requirements of *Evidence Code* sections 750 and 751 for administration of precisely formulated oath to any person who is to act as interpreter are mandatory in a criminal prosecution. Admission of translated transcripts of tape recordings was error where original interpreter was not called to testify under oath as required by these sections; however, the error was harmless since qualified interpreter authenticated the transcripts and testified as to accuracy of the translations and defense counsel failed to challenge the accuracy of the translations).



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DIVISION 6 WITNESSES
CHAPTER 4 INTERPRETERS AND TRANSLATORS
SECTION 752 Interpreters for Witnesses

1-752 California Evidence Courtroom Manual 752.syn

§ 752.syn Synopsis to Chapter 752: Interpreters for Witnesses

Scope Interpreters for Witnesses

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DIVISION 6 WITNESSES
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SECTION 752 Interpreters for Witnesses

1-752 California Evidence Courtroom Manual Scope

Scope Interpreters for Witnesses

§ 752 reads as follows:

Rule 752 Interpreters for Witnesses

(a) When a witness is incapable of understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he or she can understand and who can understand him or her shall be sworn to interpret for him or her.

(b) The record shall identify the interpreter who may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

(Stats. 1965, ch. 299, § 2, effective Jan. 1, 1967. Amended by Stats. 1984, ch. 30, § 2, effective Mar. 7, 1984; Stats. 1984, ch. 768, § 1)

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DIVISION 6 WITNESSES
CHAPTER 4 INTERPRETERS AND TRANSLATORS
SECTION 752 Interpreters for Witnesses

1-752 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 752 makes available the assistance of an interpreter to an individual who has physical impairments, whether in hearing or speech or both, which make it difficult for the individual to understand others or make him or herself understood. Section 752 also authorizes an interpreter for someone who does not speak or understand English well enough to communicate clearly on his or her own. Under Section 752 whether an interpreter should be appointed is largely within the discretion of the trial judge. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965).



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SECTION 752 Interpreters for Witnesses

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2 COMPARISON TO FEDERAL RULE

There is no direct counterpart to Section 752 in the federal rules, although Federal Rule of *Evidence* 604 recognizes the use of interpreters and translators at trial. Federal Rule of *Civil Procedure* 43(f) and *Federal Rule of Criminal Procedure* 28 authorize a trial judge to appoint interpreters and set their compensation. The Court Interpreters Act requires the trial court to appoint an interpreter for a criminal defendant if the court decides that the defendant does not readily speak or understand English. *See* 28 U.S.C. § 1827.



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1-752 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Freeman (1994) 8 Cal. 4th 450, 34 Cal. Rptr. 2d 558, 882 P.2d 249 (trial court should afford to defendant who is handicapped by deafness, blindness, or other affliction such reasonable facilities for confronting and cross-examining witnesses as circumstances will permit).

Gardiana v. Small Claims Court (1976) 59 Cal. App. 3d 412, 130 Cal. Rptr. 675 (court is required to appoint an interpreter in those cases where witness does not understand or speak the English language).



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DIVISION 6 WITNESSES
CHAPTER 4 INTERPRETERS AND TRANSLATORS
SECTION 753 Translators of Writings

1-753 California Evidence Courtroom Manual 753.syn

§ 753.syn Synopsis to Chapter 753: Translators of Writings

Scope Translators of Writings

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CHAPTER 4 INTERPRETERS AND TRANSLATORS
SECTION 753 Translators of Writings

1-753 California Evidence Courtroom Manual Scope

Scope Translators of Writings

§ 753 reads as follows:

Rule 753 Translators of Writings

(a) When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing.

(b) The record shall identify the translator who may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1984, ch. 30, § 3, eff. Mar. 7, 1984)

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1 ANALYSIS

Section 753 authorizes the use of a translator, whose speciality is rewriting a document in a foreign language into English. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965).



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2 COMPARISON TO FEDERAL RULE

See Comparison to Federal Rule in Section 752.



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3 SIGNIFICANT CASES

People v. Torres (1985) 164 Cal. App. 3d 266, 210 Cal. Rptr. 375 (admission of translated transcripts of tape recordings was error where original interpreter was not called to testify under oath as required by Sections 750 and 751; however, the error was harmless since qualified interpreter authenticated the transcripts and testified as to accuracy of the translations and defense counsel failed to challenge the accuracy of the translations).



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DIVISION 6 WITNESSES

CHAPTER 4 INTERPRETERS AND TRANSLATORS

SECTION 754 Interpreters for Deaf or Hearing Impaired Persons

1-754 California Evidence Courtroom Manual 754.syn

§ 754.syn Synopsis to Chapter 754: Interpreters for Deaf or Hearing Impaired Persons

Scope Interpreters for Deaf or Hearing Impaired Persons

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1-754 California Evidence Courtroom Manual Scope

Scope Interpreters for Deaf or Hearing Impaired Persons

§ 754 reads as follows:

Rule 754 Interpreters for Deaf or Hearing Impaired Persons

(a) As used in this section, "individual who is deaf or hearing impaired" means an individual with a hearing loss so great as to prevent his or her understanding language spoken in a normal tone, but does not include an individual who is hearing impaired provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment provided pursuant to *Section 54.8 of the Civil Code*.

(b) In any civil or criminal action, including, but not limited to, any action involving a traffic or other infraction, any small claims court proceeding, any juvenile court proceeding, any family court proceeding or service, or any proceeding to determine the mental competency of a person, in any court-ordered or court-provided alternative dispute resolution, including mediation and arbitration, or any administrative hearing, where a party or witness is an individual who is deaf or hearing impaired and the individual who is deaf or hearing impaired is present and participating, the proceedings shall be interpreted in a language that the individual who is deaf or hearing impaired understands by a qualified interpreter appointed by the court or other appointing authority, or as agreed upon.

(c) For purposes of this section, "appointing authority" means a court, department, board, commission, agency, licensing or legislative body, or other body for proceedings requiring a qualified interpreter.

(d) For the purposes of this section, "interpreter" includes, but is not limited to, an oral interpreter, a sign language interpreter, or a deaf-blind interpreter, depending upon the needs of the individual who is deaf or hearing impaired.

(e) For purposes of this section, "intermediary interpreter" means an individual who is deaf or hearing impaired, or a hearing individual who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language or between American Sign Language and other foreign languages by acting as an intermediary between the individual who is deaf or hearing impaired and the qualified interpreter.

(f) For purposes of this section, "qualified interpreter" means an interpreter who has been certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired.

(g) In the event that the appointed interpreter is not familiar with the use of particular signs by the individual who is deaf or hearing impaired or his or her particular variant of sign language, the court or other appointing authority shall, in consultation with the individual who is deaf or hearing impaired or his or her representative, appoint an intermediary interpreter.

(h) Prior to July 1, 1992, the Judicial Council shall conduct a study to establish the guidelines pursuant to which it shall determine which testing organizations, agencies, or educational institutions will be approved to administer tests for certification of court interpreters for individuals who are deaf or hearing impaired. It is the intent of the Legislature that the study obtain the widest possible input from the public, including, but not limited to, educational institutions, the judiciary, linguists, members of the State Bar, court interpreters, members of professional interpreting organizations, and members of the deaf and hearing-impaired communities. After obtaining public comment and completing its study, the Judicial Council shall publish these guidelines. By January 1, 1997, the Judicial Council shall approve one or more entities to administer testing for court interpreters for individuals who are deaf or hearing impaired. Testing entities may include educational institutions, testing organizations, joint powers agencies, or public agencies.

Commencing July 1, 1997, court interpreters for individuals who are deaf or hearing impaired shall meet the qualifications specified in subdivision (f).

(i) Persons appointed to serve as interpreters under this section shall be paid, in addition to actual travel costs, the prevailing rate paid to persons employed by the court to provide other interpreter services unless such service is considered to be a part of the person's regular duties as an employee of the state, county, or other political subdivision of the state. Payment of the interpreter's fee shall be a charge against the county, or other political subdivision of the state, in which that action is pending. Payment of the interpreter's fee in administrative proceedings shall be a charge against the appointing board or authority.

(j) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of an interpreter shall be made, without any unnecessary delay unless either the individual who is deaf or hearing impaired affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II

of the Americans with Disabilities Act of 1990 (Public Law 101-336)ⁿ¹ and federal regulations adopted thereunder.

(k) No statement, written or oral, made by an individual who the court finds is deaf or hearing impaired in reply to a question of a peace officer, or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding, may be used against that individual who is deaf or hearing impaired unless the question was accurately interpreted and the statement was made knowingly, voluntarily, and intelligently and was accurately interpreted, or the court makes special findings that either the individual could not have used an interpreter or an interpreter was not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder and that the statement was made knowingly, voluntarily, and intelligently.

(l) In obtaining services of an interpreter for purposes of subdivision (j) or (k), priority shall be given to first obtaining a qualified interpreter.

(m) Nothing in subdivision (j) or (k) shall be deemed to supersede the requirement of subdivision (b) for use of a qualified interpreter for individuals who are deaf or hearing impaired participating as parties or witnesses in a trial or hearing.

(n) In any action or proceeding in which an individual who is deaf or hearing impaired is a participant, the appointing authority shall not commence proceedings until the appointed interpreter is in full view of and spatially situated to assure proper communication with the participating individual who is deaf or hearing impaired.

(o) Each superior court shall maintain a current roster of qualified interpreters certified pursuant to subdivision (f).

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1977, ch. 1182, § 1; Stats. 1984, ch. 768, § 2; Stats. 1989, ch. 1002, § 2; Stats. 1990, ch. 1450 (S.B. 2046), § 2; Stats. 1991, ch. 883 (S.B. 585), § 1; Stats. 1992, ch. 118 (S.B. 16), § 1, eff. July 7, 1992; Stats. 1992, ch. 913 (A.B. 1077), § 14; Stats. 1995, ch. 143 (A.B. 1833), § 1, eff. July 18, 1995)

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FOOTNOTES:

(n1)Footnote 1. 42 U.S.C.A. § 12101 et seq.



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CHAPTER 4 INTERPRETERS AND TRANSLATORS

SECTION 754 Interpreters for Deaf or Hearing Impaired Persons

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1 ANALYSIS

Section 754 elaborates on the obligations of the trial court to appoint a translator or interpreter. *See Sections 752, 753.*



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SECTION 754 Interpreters for Deaf or Hearing Impaired Persons

1-754 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 754 in the Federal Rules of Evidence, but other federal rules authorize the trial court to appoint interpreters or translators. *See* Comparison to Federal Rule in Section 752 of this manual.



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1-754 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Freeman (1994) 8 Cal. 4th 450, 34 Cal. Rptr. 2d 558, 882 P.2d 249 (trial court should afford to defendant who is handicapped by deafness, blindness, or other affliction such reasonable facilities for confronting and cross-examining witnesses as circumstances will permit).



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CHAPTER 4 INTERPRETERS AND TRANSLATORS

SECTION 754.5 Privileged Statements of Deaf or Hearing Impaired Persons Using Interpreter

1-754.5 California Evidence Courtroom Manual 754.5.syn

§ 754.5.syn Synopsis to Chapter 754.5: Privileged Statements of Deaf or Hearing Impaired Persons Using Interpreter

Scope Privileged Statements of Deaf or Hearing Impaired Persons Using Interpreter

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SECTION 754.5 Privileged Statements of Deaf or Hearing Impaired Persons Using Interpreter

1-754.5 California Evidence Courtroom Manual Scope

Scope Privileged Statements of Deaf or Hearing Impaired Persons Using Interpreter

§ 754.5 reads as follows:

754.5 Privileged Statements of Deaf or Hearing Impaired Persons Using Interpreter

Whenever an otherwise valid privilege exists between an individual who is deaf or hearing impaired and another person, that privilege is not waived merely because an interpreter was used to facilitate their communication.

(Added by Stats. 1990, ch. 1450 (S.B. 2046), § 3. Amended by Stats. 1992, ch. 913 (A.B. 1077), § 15)

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SECTION 754.5 Privileged Statements of Deaf or Hearing Impaired Persons Using Interpreter

1-754.5 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 754.5 makes clear that the use of an interpreter will not waive a privilege that requires that the communication be made in confidence. This section is really unnecessary in light of substantial case law holding that where a third-party's presence is necessary to facilitate communication between the privileged relationship, there is no waiver of the privilege. *See, e.g., City & County of San Francisco v. Superior Court (1951) 37 Cal. 2d 227, 231 P.2d 26* (client's communications to a third party whose assistance is necessary to allow attorney to adequately represent client are privileged).



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SECTION 754.5 Privileged Statements of Deaf or Hearing Impaired Persons Using Interpreter

1-754.5 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 754.5 in the federal rules. However, federal case law is consistent with Section 754.5. *Cf. United States v. Alvarez (3d Cir. 1975) 519 F.2d 1036, 1046* (where psychiatrist was necessary third party, hired by defendant's attorney, privilege protected).



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DIVISION 6 WITNESSES

CHAPTER 4 INTERPRETERS AND TRANSLATORS

SECTION 755 Interpreters for Hearings or Proceedings Related to Domestic Violence

1-755 California Evidence Courtroom Manual 755.syn

§ 755.syn Synopsis to Chapter 755: Interpreters for Hearings or Proceedings Related to Domestic Violence

Scope Interpreters for Hearings or Proceedings Related to Domestic Violence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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DIVISION 6 WITNESSES

CHAPTER 4 INTERPRETERS AND TRANSLATORS

SECTION 755 Interpreters for Hearings or Proceedings Related to Domestic Violence

1-755 California Evidence Courtroom Manual Scope

Scope Interpreters for Hearings or Proceedings Related to Domestic Violence

§ 755 reads as follows:

Rule 755 Interpreters for Hearings or Proceedings Related to Domestic Violence

(a) In any action or proceeding under Division 10 (commencing with *Section 6200*) of the *Family Code*, and in any action or proceeding under the Uniform Parentage Act (Part 3 (commencing with *Section 7600*) of *Division 12* of the *Family Code*) or for dissolution or nullity of marriage or legal separation of the parties in which a protective order has been granted or is being sought pursuant to *Section 6221* of the *Family Code*, in which a party does not proficiently speak or understand the English language, and that party is present, an interpreter, as provided in this section, shall be present to interpret the proceedings in a language that the party understands, and to assist communication between the party and his or her attorney. Notwithstanding this requirement, a court may issue an ex parte order pursuant to Sections 2045 and 7710 of [sic], and Article 1 (commencing with *Section 6320*) of *Chapter 2* of *Part 4* of *Division 10* of the *Family Code*, without the presence of an interpreter. The interpreter selected shall be certified pursuant to Article 4 (commencing with *Section 68560*) of *Chapter 2* of *Title 8* of the *Government Code*, unless the court in its discretion appoints an interpreter who is not certified.

(b) The fees of interpreters utilized under this section shall be paid as provided in subdivision (b) of *Section 68092* of the *Government Code*. However, the fees of an interpreter shall be waived for a party who needs an interpreter and appears in forma pauperis pursuant to *Section 68511.3* of the *Government Code*. The Judicial Council shall amend subdivision (i) of California Rule of Court 985 and revise its forms accordingly by July 1, 1996.

(c) In any civil action in which an interpreter is required under this section, the court shall not commence proceedings until the appointed interpreter is present and situated near the party and his or her attorney. However, this section shall not prohibit the court from doing any of the following:

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- (1) Issuing an order when the necessity for the order outweighs the necessity for an interpreter.
 - (2) Extending the duration of a previously issued temporary order if an interpreter is not readily available.
 - (3) Issuing a permanent order where a party who requires an interpreter fails to make appropriate arrangements for an interpreter after receiving proper notice of the hearing with information about obtaining an interpreter.
- (d) This section does not prohibit the presence of any other person to assist a party.
- (e) A local public entity may, and the Judicial Council shall, apply to the appropriate state agency that receives federal funds authorized pursuant to the federal Violence Against Women Act (P.L. 103-322) for these federal funds or for funds from sources other than the state to implement this section. A local public entity and the Judicial Council shall comply with the requirements of this section only to the extent that any of these funds are made available.
- (f) The Judicial Council shall draft rules and modify forms necessary to implement this section, including those for the petition for a temporary restraining order and related forms, to inform both parties of their right to an interpreter pursuant to this section.

(Stats. 1995, ch. 888 (S.B. 982), § 1)

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1 ANALYSIS

Section 755 expands on the obligations of the trial court in appointing interpreters in domestic violence cases. *See* Analysis of Section 752.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 755 in the Federal Rules of Evidence. However, other federal statutes would authorize a federal court to appoint an interpreter or translator in these cases. *See* Comparison to Federal Rule in Section 752 of this manual.



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SECTION 755.5 Interpreters for Medical Examinations

1-755.5 California Evidence Courtroom Manual 755.5.syn

§ 755.5.syn Synopsis to Chapter 755.5: Interpreters for Medical Examinations

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1-755.5 California Evidence Courtroom Manual Scope

Scope Interpreters for Medical Examinations

§ 755.5 reads as follows:

755.5 Interpreters for Medical Examinations

(a) During any medical examination, requested by an insurer or by the defendant, of a person who is a party to a civil action and who does not proficiently speak or understand the English language, conducted for the purpose of determining damages in a civil action, an interpreter shall be present to interpret the examination in a language that the person understands. Commencing January 1, 1994, the interpreter shall be certified pursuant to *Section 11513 of the Government Code*.

(b) The fees of interpreters utilized under subdivision (a) shall be paid by the insurer or defendant requesting the medical examination.

(c) The record of, or testimony concerning, any medical examination conducted in violation of subdivision (a) shall be inadmissible in the civil action for which it was conducted or any other civil action.

(d) This section does not prohibit the presence of any other person to assist a party.

(e) In the event that interpreters certified pursuant to *Section 11513 of the Government Code* cannot be present at the medical examination, upon stipulation of the parties the requester specified in subdivision (a) shall have the discretionary authority to provisionally qualify and utilize other interpreters.

(Added by Stats. 1992, ch. 1302 (A.B. 3107), § 5, eff. Sept. 30, 1992. Amended by Stats. 1995, ch. 938, § 8, eff. July 1, 1997)

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1 ANALYSIS

Section 755.5 expands on the obligations of the trial court in appointing interpreters where a medical exam is requested by an insurer or defendant. In these cases, however, the insurer or defendant demanding the medical examination will bear the cost of the interpreter. *See also* Analysis of Section 752.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 755.5 in the Federal Rules of Evidence. However, other federal statutes would authorize a federal court to appoint an interpreter or translator in these cases. *See Comparison to Federal Rule in Section 752 of this manual.*



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SECTION 760 Direct Examination

1-760 California Evidence Courtroom Manual 760.syn

§ 760.syn Synopsis to Chapter 760: Direct Examination

Scope Direct Examination

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SECTION 760 Direct Examination

1-760 California Evidence Courtroom Manual Scope

Scope Direct Examination

§ 760 reads as follows:

Rule 760 Direct Examination

"Direct examination" is the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Direct examination is conducted by the party calling the witness. It leads to the exposition of testimony that will somehow support or explain that party's case. Direct examination is subject to objections as to the form of the questions asked.



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2 COMPARISON TO FEDERAL RULE

There is no direct counterpart to Section 760 in the Federal Rules of Evidence. However, Federal Rule of Evidence 611 allows the court discretion in determining the manner and order of proof.



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1-761 California Evidence Courtroom Manual 761.syn

§ 761.syn Synopsis to Chapter 761: Cross-Examination

Scope Cross-Examination

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1-761 California Evidence Courtroom Manual Scope

Scope Cross-Examination

§ 761 reads as follows:

Rule 761 Cross-Examination

"Cross-examination" is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 761 Cross-Examination

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1 ANALYSIS

Cross-examination is designed to "test" the witness's direct testimony (also called the testimony-in-chief) in terms of the witness's capacity and credibility. A witness can be cross-examined with respect to facts or denials which are necessarily implied from direct testimony as well as facts which he or she expressly states. Cross-examination may extend to the whole transaction which occurred in immediate connection with the part related, shortly before or after, and in which he must have been concerned or may be reasonably supposed to have knowledge. *See People v. Matola* (1968) 259 Cal. App. 2d 686, 66 Cal. Rptr. 610 . *See also Section 773* (on cross-examination).



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2 COMPARISON TO FEDERAL RULE

There is no direct counterpart to Section 761 in the Federal Rules of Evidence. However, Federal Rule of Evidence 611(b) gives the trial judge the authority to control the manner and order of cross-examination.



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3 SIGNIFICANT CASES

People v. Alfaro (1976) 61 Cal. App. 3d 414, 132 Cal. Rptr. 356 (cross-examination is limited to matters within the scope of direct examination; while wide latitude may be permitted, this section and Section 773 still govern scope of cross-examination).



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1-762 California Evidence Courtroom Manual 762.syn

§ 762.syn Synopsis to Chapter 762: Redirect Examination

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1-762 California Evidence Courtroom Manual Scope

Scope Redirect Examination

§ 762 reads as follows:

Rule 762 Redirect Examination

"Redirect examination" is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1-762 California Evidence Courtroom Manual 1

1 ANALYSIS

The definition of "redirect examination" includes not only the examination immediately following cross-examination of the witness but also any subsequent re-examination of the witness by the direct examiner. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965). The principal purposes of redirect are to explain or rebut adverse evidence or inferences developed on cross-examination, and to rehabilitate an impeached witness. *Packard v. Moore* (1937) 9 Cal. 2d 571, 71 P.2d 922 .



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 762 in the Federal Rules of Evidence. However, Federal Rule of Evidence 611 gives the trial judge discretion to control the manner and order of direct, cross-examination and redirect examination.



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1-763 California Evidence Courtroom Manual 763.syn

§ 763.syn Synopsis to Chapter 763: Recross-Examination

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1-763 California Evidence Courtroom Manual Scope

Scope Recross-Examination

§ 763 reads as follows:

Rule 763 Recross-Examination

"Recross-examination" is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

The definition of "recross-examination" embraces not only the examination immediately following the first redirect examination of the witness but also any subsequent re-examination of the witness by a cross-examiner. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965). The purpose of recross is to challenge the effects of redirect by re-establishing the testimony or inferences developed on cross. *Kimic v. San Jose-Los Gatos Interurban Ry. Co.* (1909) 156 Cal. 379, 104 P. 986 .



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 763 in the Federal Rules of Evidence. However, Federal Rule of Evidence 611 gives the trial judge discretion to control the manner and order of direct, cross-examination and redirect examination.



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1-764 California Evidence Courtroom Manual 764.syn

§ 764.syn Synopsis to Chapter 764: Leading Question

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1-764 California Evidence Courtroom Manual Scope

Scope Leading Question

§ 764 reads as follows:

Rule 764 Leading Question

A "leading question" is a question that suggests to the witness the answer that the examining party desires.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 764 Leading Question

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1 ANALYSIS

Leading questions suggest a particular answer by the form or substance of the interrogation.

On direct examination, where the witness usually favors the calling party's case, leading questions are disapproved because the witness may readily accede to the version of the events stated in the examiner's question rather than describing the occurrence as he or she actually remembers it. On cross-examination, where the witness is likely aligned with the opposing party, leading questions are generally permissible because it is assumed that the witness is less susceptible to the question's suggestiveness.

Illustration

The following questions are likely to be held leading, depending upon the factual context in which they are asked:

Isn't it a fact that you were at home on January 19, 1988?

The light was green when you entered the intersection, isn't that true?

Was it 6 o'clock or was it some other time?

After the meeting with Mr. Johnson, did you go home?

(Compare: Where did you go after the meeting with Mr. Johnson?)

Am I correct in stating that you are a close friend of the accused?

Leading questions may be allowed on direct examination but only when necessary to develop testimony or when used to elicit preliminary matters which are usually undisputed. Accordingly, leading questions are frequently permitted when interrogating a young child, or where the witness has temporarily forgotten relatively undisputed facts. Leading questions are often permitted when a party calls a hostile witness, an adverse party or a witness identified with an

adverse party. A hostile witness is one who is so evasive or uncooperative on examination that his testimony is impeded. Usually, counsel asks the trial judge to have the witness declared hostile, thereby permitting counsel to proceed with a leading question form. The term "witness identified with an adverse party" is intended to apply broadly to an identification based upon employment by the party or by virtue of a demonstrated connection to an opposing party.



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2 COMPARISON TO FEDERAL RULE

Section 764 has its counterpart in Federal Rule of Evidence 611(c), which provides the basis for excluding leading questions.



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SECTION 765 Court to Control Mode of Interrogation

1-765 California Evidence Courtroom Manual 765.syn

§ 765.syn Synopsis to Chapter 765: Court to Control Mode of Interrogation

Scope Court to Control Mode of Interrogation

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1-765 California Evidence Courtroom Manual Scope

Scope Court to Control Mode of Interrogation

§ 765 reads as follows:

Rule 765 Court to Control Mode of Interrogation

(a) The court shall exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment.

(b) With a witness under the age of 14 or a dependent person with a substantial cognitive impairment, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to ensure that questions are stated in a form which is appropriate to the age or cognitive level of the witness. The court may, in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1985, ch. 884, § 3; Stats. 1986, ch. 1051, § 1. Amended by Stats. 2004, ch. 823 (A.B. 20), § 4)

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1 ANALYSIS

Section 765 codifies the trial court's discretion to manage the trial proceedings, including the discretion to curtail questioning by the advocates, in order to protect witnesses from unwarranted harassment or humiliation. This provision also provides a basis to exclude certain forms of questions, even though such questions might also be excluded under Section 352.

Practice Tip on Objections as to Form

leading question (see also Sections 764 and 767)

question calls for a narrative response (inviting the witness to ramble and to provide irrelevant or inadmissible evidence, instead of providing specific testimony)

question already asked and answered (repetitive inquiry)

compound question (asking more than one question at a time)

question assumes facts not in evidence (asking witness about issues or facts that have not been proved)

ambiguous or vague question (unclear question)

question calls for a conclusion (inviting witness to draw inferences that only the trier of fact may make)

argumentative question (question makes a statement or assertion rather than a request for information)

question harasses or badgers the witness (question insults or intimidates the witness as opposed to asking for information)



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1-765 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 765(a) is substantially similar to Federal Rule of Evidence 611(a) in providing the judge wide discretion regarding the order and manner of questioning of witnesses. There is no express counterpart to Section 765(b), although a federal judge could take into account the vulnerable quality of the witness in exercising his or her discretion to manage the examination and cross-examination process.



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3 SIGNIFICANT CASES

People v. Alcala (1992) 4 Cal. 4th 742, 15 Cal. Rptr. 2d 432, 842 P.2d 1192 (trial court properly exercised discretion to terminate repetitive line of inquiry regarding witness's inability to identify defendant one week after initial identification).

People v. Cox (1991) 53 Cal. 3d 618, 280 Cal. Rptr. 692, 809 P.2d 351 , *reh'g denied*, 1991 Cal. LEXIS 2899 (trial court has inherent as well as statutory discretion to control proceedings to ensure efficacious administration of justice).

People v. Murphy (2003) 107 Cal. App. 4th 1150, 132 Cal. Rptr. 2d 688 (trial court erred in permitting witness to testify using a one-way mirrored glass, to prevent the witness from seeing a defendant, without holding an evidentiary hearing to determine whether, and to what degree, the testifying victim's apparent anxiety was due to the defendant's presence; a court may not dispense with complete face-to-face confrontation merely upon a prosecutor's unsworn representation that defendant's presence was part of a distraught adult witness's problem; error was not harmless beyond a reasonable doubt, especially since the pivotal issue was the alleged victim's credibility).



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§ 766.syn Synopsis to Chapter 766: Nonresponsive Answers

Scope Nonresponsive Answers

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SECTION 766 Nonresponsive Answers

1-766 California Evidence Courtroom Manual Scope

Scope Nonresponsive Answers

§ 766 reads as follows:

Rule 766 Nonresponsive Answers

A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 766 provides a basis, in addition to the basic relevancy provisions such as Section 352, for excluding testimony that provides irrelevant information because the witness was unwilling or unable to answer the question asked. Of course, testimony that is "stricken" from the record still appears in the trial transcript or record, but the jury will be instructed to disregard the testimony.



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2 COMPARISON TO FEDERAL RULE

Section 766 has no counterpart in the Federal Rules of Evidence, although either Federal Rule of *Evidence 401* or *403* would provide the trial judge with the discretion to exclude nonresponsive testimony.



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SECTION 767 Leading Questions

1-767 California Evidence Courtroom Manual 767.syn

§ 767.syn Synopsis to Chapter 767: Leading Questions

Scope Leading Questions

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ARTICLE 2 EXAMINATION OF WITNESSES
SECTION 767 Leading Questions

1-767 California Evidence Courtroom Manual Scope

Scope Leading Questions

§ 767 reads as follows:

Rule 767 Leading Questions

(a) Except under special circumstances where the interests of justice otherwise require:

- (1) A leading question may not be asked of a witness on direct or redirect examination.
- (2) A leading question may be asked of a witness on cross-examination or recross-examination.

(b) The court may, in the interests of justice permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment in a case involving a prosecution under Section 273a, 273d, 288.5, 368, or any of the acts described in *Section 11165.1 or 11165.2 of the Penal Code*.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1984, ch. 1423, § 1, eff. Sept. 26, 1984. Amended by Stats. 1995, ch. 87 (A.B. 355), § 1. Amended by Stats. 2004, ch. 823 (A.B. 20), § 5)

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SECTION 767 Leading Questions

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1 ANALYSIS

Leading questions suggest a particular answer by the form or substance of the interrogation. *See Section 764* (defining "leading question").

On direct examination, where the witness usually favors the calling party's case, leading questions are disapproved because the witness may readily accede to the version of the events stated in the examiner's question rather than describing the occurrence as he or she actually remembers it. However, under Section 767(a)(1), the court has the discretion to permit leading questions when it serves the interest of justice, such as in stimulating or reviving the witness's recollection. *People v. Williams* (1997) 16 Cal. 4th 635, 66 Cal. Rptr. 2d 573, 941 P.2d 752. Section 767(b) gives the trial judge express authority to allow victims of child abuse who are under the age of ten or dependent persons with substantial cognitive impairment to be examined through leading questions. On cross-examination, where the witness is likely aligned with the opposing party, leading questions are generally permissible because it is assumed that the witness is less susceptible to the question's suggestiveness.

Illustration

The following questions are likely to be held leading, depending upon the factual context in which they are asked:

Isn't it a fact that you were at home on January 19, 1988?

The light was green when you entered the intersection, isn't that true?

Was it 6 o'clock or was it some other time?

After the meeting with Mr. Johnson, did you go home?

(Compare: Where did you go after the meeting with Mr. Johnson?)

Am I correct in stating that you are a close friend of the accused?

Leading questions may be allowed on direct examination but only when necessary to develop testimony or when used to elicit preliminary matters which are usually undisputed. Accordingly, leading questions are frequently permitted when interrogating a young child, or where the witness has temporarily forgotten relatively undisputed facts. Leading questions are often permitted when a party calls a hostile witness, an adverse party or a witness identified with an adverse party. A hostile witness is one who is so evasive or uncooperative on examination that his testimony is impeded. Usually, counsel asks the trial judge to have the witness declared hostile, thereby permitting counsel to proceed with a leading question form. The term "witness identified with an adverse party" is intended to apply broadly to an identification based upon employment by the party or by virtue of a demonstrated connection to an opposing party.



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SECTION 767 Leading Questions

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2 COMPARISON TO FEDERAL RULE

Section 767 is comparable to Federal Rule of Evidence 611(c), which permits the trial court to regulate the use of leading questions, although it contains no special provision for permitting leading questions to be used for young children. Presumably, this issue is handled through the trial court's general discretion under Federal Rule of Evidence 611.



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3 SIGNIFICANT CASES

People v. Williams (1997) 16 Cal. 4th 635, 66 Cal. Rptr. 2d 573, 941 P.2d 752 (under Section 767(a)(1), the court has the discretion to permit leading questions when it serves the interest of justice, such as in stimulating or reviving the witness's recollection).

People v. Visciotti (1992) 2 Cal. 4th 1, 5 Cal. Rptr. 2d 495, 825 P.2d 388 (leading questions are not improper when asked in good faith of presumptive hostile witness on cross-examination).

People v. Spain (1984) 154 Cal. App. 3d 845, 201 Cal. Rptr. 555 (trial court did not abuse its discretion in restricting defendant's use of leading questions in cross-examining defendant's mother, who had been called as witness by prosecution, and to whom prosecution had been permitted to put leading questions as a hostile witness).



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SECTION 768 Writings

1-768 California Evidence Courtroom Manual 768.syn

§ 768.syn Synopsis to Chapter 768: Writings

Scope Writings

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SECTION 768 Writings

1-768 California Evidence Courtroom Manual Scope

Scope Writings

§ 768 reads as follows:

Rule 768 Writings

(a) In examining a witness concerning a writing, it is not necessary to show, read, or disclose to him any part of the writing.

(b) If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 768 Writings

1-768 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 768 permits the examiner to ask the witness about a document without showing it to the witness. The examiner, in such a case, is not asking the witness to testify from the content of the document but is asking the witness to recall the relevant information about the document from the witness's memory. For another technique to jog the witness's memory, see *People v. Williams* (1997) 16 Cal. 4th 635, 66 Cal. Rptr. 2d 573, 941 P.2d 752 (under Section 767(a)(1), the court has the discretion to permit leading questions when it serves the interest of justice, such as in stimulating or reviving the witness's recollection).

Practice Tip

Do not confuse Section 768, which permits the examining attorney to ask a witness about a document, with either Section 771 (use of a document to refresh a witness's memory) or Section 1237 (the hearsay exception for past recollections recorded in a document, used when the document itself is evidence).



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SECTION 768 Writings

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2 COMPARISON TO FEDERAL RULE

There is no express counterpart to Section 768 in the Federal Rules of Evidence. Federal Rule of Evidence 613(a) permits the examiner to withhold the prior statement from the witness, although the examiner must show the statement to opposing counsel on request.



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SECTION 769 Inconsistent Statement or Conduct

1-769 California Evidence Courtroom Manual 769.syn

§ 769.syn Synopsis to Chapter 769: Inconsistent Statement or Conduct

Scope Inconsistent Statement or Conduct

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SECTION 769 Inconsistent Statement or Conduct

1-769 California Evidence Courtroom Manual Scope

Scope Inconsistent Statement or Conduct

§ 769 reads as follows:

Rule 769 Inconsistent Statement or Conduct

In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 769 Inconsistent Statement or Conduct

1-769 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 769 permits the examiner to ask the witness about a prior inconsistent statement without first disclosing or showing the statement. Thus, the statute preserves the examiner's right to surprise the witness with an inconsistent statement, producing maximum impeachment effect. However, see the Analysis of Section 770 in this manual, which requires the examiner who wishes to introduce extrinsic evidence of the inconsistent statement to provide the witness with an opportunity to explain the inconsistent statement, even if the opportunity comes after the witness has been impeached with the inconsistent statement.



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1-769 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 769 is roughly similar to Federal Rule of Evidence 613. Rule 613(a) permits the witness to be questioned regarding the witness's prior statement without disclosing the statement before examining the witness. However, Rule 613(b) requires that, if the examiner seeks to admit extrinsic evidence of the prior inconsistent statement, the witness must be given an opportunity to explain the inconsistency. Of course, the opportunity may be provided after the witness has been confronted with the inconsistency. Section 770 contains the comparable requirements.



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SECTION 770 Extrinsic Evidence of Prior Inconsistent Statement

1-770 California Evidence Courtroom Manual 770.syn

§ 770.syn Synopsis to Chapter 770: Extrinsic Evidence of Prior Inconsistent Statement

Scope Evidence of Prior Inconsistent Statement

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SECTION 770 Extrinsic Evidence of Prior Inconsistent Statement

1-770 California Evidence Courtroom Manual Scope

Scope Evidence of Prior Inconsistent Statement

§ 770 reads as follows:

Rule 770 Extrinsic Evidence of Prior Inconsistent Statement

Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

- (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
- (b) The witness has not been excused from giving further testimony in the action.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 770 Extrinsic Evidence of Prior Inconsistent Statement

1-770 California Evidence Courtroom Manual 1

1 ANALYSIS

Under Sections 769 and 770, a witness may be impeached through the introduction of evidence of a statement made by that witness prior to trial that is inconsistent with the testimony he or she has provided at trial.

Section 770 specifically governs the admissibility of "extrinsic evidence" of a prior inconsistent statement of a witness where such statement is used pursuant to the impeachment device of self-contradiction. Extrinsic evidence is evidence as to the contents of the prior statement which is independently admitted into evidence; in other words, it is evidence other than that obtained from the witness's own testimony. Consequently, extrinsic evidence may assume the form of testimony from another witness, or it may be a document containing the inconsistent statement.

Section 770 requires only that the primary witness be given an opportunity at some point in the trial to explain or deny the inconsistent statement. Section 770 thus dispenses with the common law's requirement that the examiner lay a foundation as a prerequisite to the introduction of extrinsic evidence.

A basic common law doctrine provides that a prior inconsistent statement relating to a "collateral matter" may not be proved by extrinsic evidence. If counsel questions a witness about a prior statement concerning a collateral matter, he or she must accept the witness's answer because extrinsic evidence is not available to prove a prior statement embracing a so-called collateral matter. A collateral matter is a fact which is irrelevant to the substantive issues of the case or which does not demonstrate a motivation of the witness to favor a particular party with his or her testimony. Of course, a trial court has substantial discretion in this area, so the examiner may persuade the court that a matter is not collateral, and worth the time additional inquiry and evidence will take up, even where the matter does not go directly to a substantive issue in the case or the capacity, bias or prejudice of a witness.

Practice Tip

Sections 769 and 770 do not contain a test that determines when a statement is inconsistent; thus, the degree of necessary inconsistency will be governed by prior case law. A general test endorsed by McCormick is: "It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it sought to contradict." 1 McCormick § 34.

To summarize, prior inconsistent statements raise three related issues:

(1) *Foundation*--only where offering extrinsic evidence of the prior inconsistent statement. The witness must have a chance to explain the inconsistency at some point, but not necessarily prior to being confronted with it. *See also Section 1202* (foundational requirements for the admission of a hearsay declarant's inconsistent statement; inconsistent statement is admissible although hearsay declarant has no chance to explain inconsistency).

(2) *Collateral matter problem*--only where offering extrinsic evidence of the prior inconsistent statement. The extrinsic evidence must go to a substantive issue in the case as well as impeach the witness or the examiner must be able to justify the use of time and effort in considering such evidence, such as where the evidence goes to the capacity or credibility of a key witness in the case. The resolution of the collateral matter problem is ultimately a question of relevancy under Sections 351, 352.

(3) *Hearsay*--Section 1235 makes the prior inconsistent statement admissible as substantive evidence in addition to its impeachment value.



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SECTION 770 Extrinsic Evidence of Prior Inconsistent Statement

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2 COMPARISON TO FEDERAL RULE

Section 770 is substantially similar to Federal Rule of Evidence 613(b), which requires that, if the examiner seeks to admit extrinsic evidence of the prior inconsistent statement, the witness must be given an opportunity to explain the inconsistency. Of course, the opportunity may be provided after the witness has been confronted with the inconsistency.

The major difference in the treatment of prior inconsistent statements in California and federal courts is that in California the prior inconsistent statement may be used for both substantive and impeachment purposes. In federal court, the statement may only be used for impeachment purposes (and the jury will be so instructed upon request) unless the declarant is testifying at trial and the prior statement was made under oath at a deposition, trial or other proceeding, such that the statement is exempted from the hearsay rule under Federal Rule of *Evidence* 801(d)(1)(A).



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1-770 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Michigan v. Harvey (1990) 494 U.S. 344, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (statements taken in violation of defendant's *Sixth Amendment* right to counsel were admissible to impeach the defendant's testimony).

James v. Illinois (1990) 493 U.S. 307, 110 S. Ct. 648, 107 L. Ed. 2d 676 (the impeachment exception to the exclusionary rule may not be extended beyond the defendant's own testimony to include other defense witnesses).

People v. Johnson (1992) 3 Cal. 4th 1183, 14 Cal. Rptr. 2d 702, 842 P.2d 1 (testimony of a witness that he or she does not remember an event is generally not inconsistent with prior statement describing the event but where there is a reasonable basis for concluding that the witness's claim of lack of memory is evasive and untrue, admission of the prior statement is proper).

People v. May (1988) 44 Cal. 3d 309, 243 Cal. Rptr. 369, 748 P.2d 307 (statements obtained in violation of *Miranda* warning can be used to impeach the accused as long as the confession was not coerced or involuntary).

Jimena v. Alesso (1995) 36 Cal. App. 4th 1028, 43 Cal. Rptr. 2d 18 (prior inconsistent statements made by accident reconstruction expert in arbitration proceeding arising out of automobile accident could not be used to impeach expert in subsequent civil trial).

People v. Garcia (1990) 224 Cal. App. 3d 297, 273 Cal. Rptr. 666 (trial court properly refused to allow defense counsel to introduce prior inconsistent statement made by prosecution witness; foundational question as to whether witness told anyone that unless defendant gave witness certain amount of money, she would get defendant into trouble failed to specify people involved in conversation and its time and place and thus witness did not have realistic opportunity to explain or deny statements).



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DIVISION 6 WITNESSES
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SECTION 771 Production of Writing Used to Refresh Memory

1-771 California Evidence Courtroom Manual 771.syn

§ 771.syn Synopsis to Chapter 771: Production of Writing Used to Refresh Memory

Scope Production of Writing Used to Refresh Memory

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SECTION 771 Production of Writing Used to Refresh Memory

1-771 California Evidence Courtroom Manual Scope

Scope Production of Writing Used to Refresh Memory

§ 771 reads as follows:

Rule 771 Production of Writing Used to Refresh Memory

(a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness.

(c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing:

(1) Is not in the possession or control of the witness or the party who produced his testimony concerning the matter; and

(2) Was not reasonably procurable by such party through the use of the court's process or other available means.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 771 Production of Writing Used to Refresh Memory

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1 ANALYSIS

Under Section 771, the recollection of a witness may be refreshed through the use of a document. The writing is used to revive the memory of the witness, and it must provide sufficient stimulus that the witness has a present, independent recollection of the matter. In order to apply Section 771 properly, it is imperative to recognize that the writing is not the evidence. It is the refreshed recollection in the form of testimony that is the evidence. Thus, the writing need not be admissible in evidence. There is no necessity of compliance with the best evidence rule, the authentication rule or the hearsay rule. Frequently, a document used to refresh recollection is marked for the purposes of identification for the trial record, even though it is not being offered as evidence.

Utilizing the technique of present recollection refreshed, the witness at trial must be incapable of recalling all of the pertinent facts as to which he or she has first-hand knowledge and as to which he or she has been called to testify. The witness is then handed the writing by trial counsel. The proponent of the witness then asks the witness to read the writing silently in order to refresh his or her recollection. The witness is then asked if his or her recollection is refreshed, and if he or she then has a present recollection, the witness provides testimony from revived memory.

When a document is used prior to or at trial to refresh a witness's memory, this section provides that the adverse party is entitled, as of right, to inspect the writing, to cross-examine the witness concerning the document and to introduce those portions of the writing pertinent to the trial testimony.

Where a claim is made that the writing used to refresh recollection contains matters which are unrelated to the litigation and which have not affected the witness's testimony, the court has the duty to inspect the writing *in camera* to excise any unrelated or irrelevant portions. The remainder is delivered to the adverse party. Where a party fails to produce documents in compliance with the trial court's order, the court may make any further order necessitated by the ends of justice, including in criminal cases, ordering a mistrial where the prosecution fails to comply.

Practice Tip

The technique of refreshing a witness's recollection must be distinguished from simply asking a witness about a document, which is permitted under Section 768, and the hearsay exception, "past recollection recorded," contained in Section 1237. Under the technique of refreshing recollection the witness reviews

the writing to revive his or her memory of the material event and then proceeds to testify on the basis of present, personal knowledge. As with a question asked pursuant to Section 768, the writing itself is not offered as evidence. A document shown to a witness under Section 771 merely serves as a memory jogging device, and compliance with the hearsay rule, the authentication rule or the so-called best evidence rule is not required. In contrast, under the "past recollection recorded" exception to the general proscription against hearsay, the document itself is offered as the evidence. Section 1237 may operate to admit written hearsay in certain instances where the witness's present recollection remains absent or incomplete and cannot be refreshed by the writing.

Under Section 1237(a), the witness's trial testimony establishes the foundational fact that recollection was complete at the time of writing and that the facts were accurately recorded in the document. Obviously, where a writing is offered into evidence, it must comply with all the rules regarding the admissibility of documentary evidence, one of which is the hearsay rule. Where a writing is offered, one of the hearsay exceptions available to admit the out-of-court statement is Section 1237. Of course, other hearsay exceptions might be available as well.

For another technique to jog the witness's memory, see *People v. Williams* (1997) 16 Cal. 4th 635, 66 Cal. Rptr. 2d 573, 941 P.2d 752 (under Section 767(a)(1), the court has the discretion to permit leading questions when it serves the interest of justice, such as in stimulating or reviving the witness's recollection).



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2 COMPARISON TO FEDERAL RULE

The key difference between Section 771 and Federal Rule of Evidence 612 is whether the adverse party has a right to inspect the writing used to refresh the witness's recollection. Under both the California and the federal approaches, when a document is used at trial in an effort to refresh the recollection of a witness, the document must be produced for adverse counsel upon request. The rules differ, however, where the document is used prior to testifying in order to refresh the witness's recollection. Under Federal Rule of Evidence 612, the trial judge may, but is not required to, order the production of the writing if the interests of justice so require. Section 771 requires production as of right, whether the writing is used before trial or at trial. Moreover, in contrast to the federal rule, the California statute explains what must happen if the writing is not produced to the adverse party--the witness's testimony is stricken unless the failure to produce the writing is excused pursuant to Section 771(c).

Finally, Federal Rule of Evidence 612 is expressly limited by *Section 3500 of Title 18 of the United States Code*, the so-called Jencks Act, now incorporated into *Rule 26.2 of the Federal Rules of Criminal Procedure*. Accordingly, the discretion of the trial judge to order production of a writing used prior to trial to refresh a witness's recollection may not exceed the authority of the court to order production under this Act.



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1-771 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Smith (2007) 40 Cal. 4th 483, 54 Cal. Rptr. 3d 245, 150 P.3d 1224, cert. denied, 128 S. Ct. 488, 169 L. Ed. 2d 344 (2007) (trial court did not abuse its discretion in requiring criminal defendant to produce the test data, notes, and materials relied upon by an expert witness, where the expert stated during his testimony that he used the tests to refresh his recollection before testifying at the hearing).

International Ins. Co. v. Montrose Chemical Corp. (1991) 231 Cal. App. 3d 1367, 282 Cal. Rptr. 783 (litigant had right to production of documents of opposing party used to refresh memory of nonparty deponent with respect to any matter about which deponent testified, without further foundation that the documents actually refreshed his memory).

People v. Lee (1990) 219 Cal. App. 3d 829, 268 Cal. Rptr. 595 (in absence of testimony of witness that he could not remember whether he was on duty on date of alleged drug sale, testimony concerning contents of ship's log, which allegedly would show that witness was on duty at time of sale, was not admissible on ground that witness had used the log to refresh his memory).



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DIVISION 6 WITNESSES
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SECTION 772 Order of Examination

1-772 California Evidence Courtroom Manual 772.syn

§ 772.syn Synopsis to Chapter 772: Order of Examination

Scope Order of Examination

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SECTION 772 Order of Examination

1-772 California Evidence Courtroom Manual Scope

Scope Order of Examination

§ 772 reads as follows:

Rule 772 Order of Examination

(a) The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination.

(b) Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.

(c) Subject to subdivision (d), a party may, in the discretion of the court, interrupt his cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness upon a matter not within the scope of a previous examination of the witness.

(d) If the witness is the defendant in a criminal action, the witness may not, without his consent, be examined under direct examination by another party.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 772 Order of Examination

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1 ANALYSIS

Section 772 sets forth the basic order of trial, giving the trial court judge some direction to alter the order. Section 772(d) limits the ability of others to question a criminal defendant without his or her consent.



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2 COMPARISON TO FEDERAL RULE

There is no express counterpart to Section 772 in the Federal Rules of Evidence. Federal Rule of Evidence 611 gives the judge the discretion to direct the order and manner of questioning, but does not set forth the order of trial. Nonetheless, federal courts follow the same order set forth in Section 772.



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3 SIGNIFICANT CASES

People v. McDermand (1984) 162 Cal. App. 3d 770, 211 Cal. Rptr. 773 (under this section providing only that each phase of witness's testimony shall be completed before the next phase commences, all phases of examination of witness need not be concluded without interruption).



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1-773 California Evidence Courtroom Manual 773.syn

§ 773.syn Synopsis to Chapter 773: Cross-Examination

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1-773 California Evidence Courtroom Manual Scope

Scope Cross-Examination

§ 773 reads as follows:

Rule 773 Cross-Examination

(a) A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.

(b) The cross-examination of a witness by any party whose interest is not adverse to the party calling him is subject to the same rules that are applicable to the direct examination.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 773 is one of several provisions that deal with the order of trial. *See also Section 761* (defining cross-examination); Sections 760-765 (general provisions on order of trial).



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2 COMPARISON TO FEDERAL RULE

Federal Rule of Evidence 611(b) is the rough equivalent to Section 773(b), in providing the trial court the discretion to control the content of cross-examination.



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People v. Barnett (1998) 17 Cal. 4th 1044, 954 P.2d 384, 74 Cal. Rptr. 2d 121 , cert. denied, 549 U.S. 835 (defendant could not raise objection for first time on appeal that prosecutor improperly exceeded scope of direct testimony during cross-examination of defendant's mother).

People v. Fauber (1992) 2 Cal. 4th 792, 9 Cal. Rptr. 2d 24, 831 P.2d 249 (cross-examination of defendant in criminal case may not exceed scope of direct examination since to permit prosecutor to exceed scope of direct examination would force defendant to become prosecution's witness).

People v. Cooper (1991) 53 Cal. 3d 771, 281 Cal. Rptr. 90, 809 P.2d 865 (although defendant cannot be compelled to be a witness against himself, if he takes the stand and makes a general denial of the crime with which he is charged, permissible scope of cross-examination is very wide; when defendant voluntarily testifies, district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them; the trial judge has broad discretion to control the ultimate scope of cross-examination).



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§ 774.syn Synopsis to Chapter 774: Re-Examination

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1-774 California Evidence Courtroom Manual Scope

Scope Re-Examination

§ 774 reads as follows:

Rule 774 Re-Examination

A witness once examined cannot be reexamined as to the same matter without leave of the court, but he may be reexamined as to any new matter upon which he has been examined by another party to the action. Leave may be granted or withheld in the court's discretion.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 774 is one of several provisions that deal with the order of trial. *See Sections 760-765* (general provisions on order of trial).



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2 COMPARISON TO FEDERAL RULE

There is no express counterpart to Section 774 in the Federal Rules of Evidence. However, Federal Rule of Evidence 611 provides the trial court the discretion to control the order of examination.



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Scope Court May Call Witnesses

§ 775 reads as follows:

Rule 775 Court May Call Witnesses

The court, on its own motion or on the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 775 applies in civil and criminal cases and permits the trial judge to call and interrogate witnesses. Where the trial judge elects to call a witness, all parties are allowed to cross-examine that witness. The power of the trial court to interrogate witnesses is, of course, subject to the restriction that the trial judge must maintain his or her status as an impartial arbiter. The section also permits trial counsel to make objections to either the court's calling of its own witness or the court's questioning of any witness. *See also Section 765* (discussing court's general control over the manner of interrogation).



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2 COMPARISON TO FEDERAL RULE

Section 775 is similar to Federal Rule of Evidence 614 in permitting trial judges to call and question witnesses. The rules differ, however, in the handling of objections from the advocates. Federal Rule of Evidence 614(c) provides that an objection is timely if it is made at the earliest opportunity outside of the hearing of the jury. Section 775 contains no such language, suggesting that objections must be made in the usual manner--at the first available opportunity.



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People v. Hawkins (1995) 10 Cal. 4th 920, 42 Cal. Rptr. 2d 636, 897 P.2d 574 (trial court has power, discretion and affirmative duty to participate in examination of witnesses whenever court believes participation may fairly aid in eliciting truth, in preventing misunderstanding, in clarifying testimony or covering omissions, in allowing witness his right of explanation, and in eliciting facts material to just determination of cause).

People v. Cummings (1993) 4 Cal. 4th 1233, 18 Cal. Rptr. 2d 796, 850 P.2d 1, cert. denied, 549 U.S. 835 (court may elect to call witnesses, preserving right of parties to object and cross-examine in order to ensure that truth is exposed, over the objection and against the will of parties in furtherance of justice, although power to do so must be exercised impartially).

People v. Camacho (1993) 19 Cal. App. 4th 1737, 24 Cal. Rptr. 2d 286 (trial court did not err by questioning defendant after direct examination and cross-examination had been completed; trial court did not interrupt direct examination, allowed all counsel to conclude their examination, and then asked only nonargumentative questions of defendant).



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1-776 California Evidence Courtroom Manual 776.syn

§ 776.syn Synopsis to Chapter 776: Examination of Adverse Party or Person Identified with Adverse Party

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1-776 California Evidence Courtroom Manual Scope

Scope Examination of Adverse Party or Person Identified with Adverse Party

§ 776 reads as follows:

Rule 776 Examination of Adverse Party or Person Identified with Adverse Party

(a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but, subject to subdivision (e), the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

(d) For the purpose of this section, a person is identified with a party if he is:

- (1) A person for whose immediate benefit the action is prosecuted or defended by the party.
 - (2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.
 - (3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.
 - (4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.
- (e)** Paragraph (2) of subdivision (b) does not require counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified to examine the witness as if under redirect examination if the party who called the witness for examination under this section:
- (1) Is also a person identified with the same party with whom the witness is identified.
 - (2) Is the personal representative, heir, successor, or assignee of a person identified with the same party with whom the witness is identified.

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1 ANALYSIS

Section 776 recognizes the reality that not only the adverse party may be hostile to the party examining the witness, but also any witness who "identifies" with the adverse witness. Thus, the section opens up opportunities to treat such witnesses in a manner that is more likely to produce relevant testimony--primarily through the use of leading questions. *See also Sections 761, 764, and 774* (regarding cross-examination and leading questions).



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 776 in the Federal Rules of Evidence, although Federal Rule of Evidence 611(c) authorizes the use of leading questions on direct examination where the witness is "identified with an adverse party."



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Ashcraft v. King (1991) 228 Cal. App. 3d 604, 278 Cal. Rptr. 900 (when the plaintiff obtains testimony of an adverse witness under this section, those portions of the testimony favorable to the plaintiff must be taken as true, while unfavorable portions must be disregarded, so that grant of defendant's motion for nonsuit as to plaintiff's cause of action was prejudicial error).

Applegate v. Ota (1983) 146 Cal. App. 3d 702, 194 Cal. Rptr. 331 (court may attach more importance to expressions of a hostile witness which favor the side he opposes than to the main portion of his testimony).



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SECTION 777 Exclusion of Witness

1-777 California Evidence Courtroom Manual 777.syn

§ 777.syn Synopsis to Chapter 777: Exclusion of Witness

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1-777 California Evidence Courtroom Manual Scope

Scope Exclusion of Witness

§ 777 reads as follows:

Rule 777 Exclusion of Witness

(a) Subject to subdivisions (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.

(b) A party to the action cannot be excluded under this section.

(c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Although civil and criminal trials are generally open to all members of the public, including potential witnesses in the action, Section 777 authorizes a trial court to exclude all or certain witnesses from the proceedings. The trial court has the discretion to grant this request. The section, however, also recognizes the right of the parties to be present, and notes that where a party is a corporate entity or other legal entity, the party may be represented in court by an officer or employee designated by the entity's counsel; that individual is exempt from any order barring witnesses from attending trial proceedings. A witness's violation of an order excluding witnesses from the courtroom does not render the witness incompetent nor furnish any other grounds for refusing to permit him or her to testify, but it will permit contempt proceedings against the witness. *See People v. Duane (1942) 21 Cal. 2d 71, 130 P.2d 123.*



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2 COMPARISON TO FEDERAL RULE

Section 777 is substantially similar to Federal Rule of Evidence 615. However, the federal approach requires the judge to ban witnesses on the request of a party, while the California section simply gives the trial judge the discretion to bar witnesses from attending trial. The federal rule also permits the trial judge to bar witnesses on its own motion.



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People v. Adams (1993) 19 Cal. App. 4th 412, 23 Cal. Rptr. 2d 512 (if witness violates exclusion order by attending trial, violation does not mean that defendant has been denied fair trial, does not render witness incompetent to testify, and does not furnish grounds to refuse permission to testify, at least where party who seeks to offer testimony is not at fault in causing witness's violation).



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SECTION 778 Recall of Witness

1-778 California Evidence Courtroom Manual 778.syn

§ 778.syn Synopsis to Chapter 778: Recall of Witness

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1-778 California Evidence Courtroom Manual Scope

Scope Recall of Witness

§ 778 reads as follows:

Rule 778 Recall of Witness

After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 778 has significance in the context of impeachment through the use of extrinsic evidence of a prior inconsistent statement. Section 770(b) prohibits a witness from being impeached with extrinsic evidence of a prior inconsistent statement if the witness has been discharged and is not subject to recall, as the witness would no longer have an opportunity to deny or explain the inconsistency.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 778 in the Federal Rules of Evidence. Presumably, this is a matter within the discretion of the trial court to direct the order and manner of questioning of witnesses pursuant to Federal Rule of Evidence 611.



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People v. Thomas (1992) 2 Cal. 4th 489, 7 Cal. Rptr. 2d 199, 828 P.2d 101 (trial court has the discretion to deny recall of any witness where it determines that recall is inappropriate).



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§ 780.syn Synopsis to Chapter 780: Proof of Truthfulness

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1-780 California Evidence Courtroom Manual Scope

Scope Proof of Truthfulness

§ 780 reads as follows:

Rule 780 Proof of Truthfulness

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness 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:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- (i) The existence or nonexistence of any fact testified to by him.
- (j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 780 adds nothing substantive to the California Evidence Code, but it is a wonderful checklist for an advocate to consider in deciding how to impeach a witness. The list, however, is not an exhaustive catalogue of grounds for impeachment. Any evidence may be used to impeach or bolster a witness's credibility if the evidence will establish a fact that has a tendency and reason to disprove or to prove truthfulness of a witness's testimony. *People v. Jones* (1984) 155 Cal. App. 3d 153, 202 Cal. Rptr. 162. Thus, the fundamental principle for impeaching or rehabilitating a witness is relevance: is the evidence relevant to a determination of the witness's capacity or credibility? *See Sections 351, 352* (on basic concepts of relevance).

Whenever impeaching a witness, one must also bear in mind the common law "Collateral matter rule," which limits the examiner's ability to impeach a witness with evidence (such as a document or another witness) other than the witness's own answers to the examiner's questions. A collateral matter is a fact which is irrelevant to the substantive issues of the case or which does not demonstrate a motivation of the witness to favor a particular party with his or her testimony. *People v. Rodriguez* (1999) 20 Cal. 4th 1, 82 Cal. Rptr. 2d 413, 971 P.2d 618 (trial court did not abuse its discretion in excluding extrinsic evidence where evidence had only marginal relevance to impeach the direct testimony regarding witness's capacity to make identification).

Of course, a trial court has substantial discretion in this area, *see id.*, so the examiner may persuade the court that a matter is not collateral, and worth the time additional inquiry and evidence will take up, even where the matter does not go directly to a substantive issue in the case or the capacity, bias or prejudice of a witness. *See also* 7 Cal. L. Rev. Comm. Rep. 1 (1965) (Section 780, along with Sections 351 and 352, eliminate the inflexible rule excluding evidence on a collateral matter, and institute a rule of discretion). If the extrinsic evidence goes to a substantive issue in the case in addition to impeaching the witness, a trial court will generally find that the evidence does not pertain to a collateral matter. However, where the only purpose of the extrinsic evidence is to impeach a witness, the court will balance whether the probative value of the evidence is substantially outweighed by its dangers, particularly the danger of a waste of time or sideshow on the issue of credibility.

An additional factor to consider in criminal cases is the effect of Proposition 8, the "Right to Truth-in-Evidence" part of the "Victims' Bill of Rights" initiative passed in 1982, which gave both parties in criminal proceedings a constitutional right under the California Constitution not to have relevant evidence excluded. Proposition 8 has called into question

several of the limitations on impeachment, which are discussed where relevant. Even if Proposition 8 did have the effect of repealing particular sections in criminal cases, the trial court retains the discretion to exclude evidence under Section 352, where the probative value of the evidence is substantially outweighed by its dangers. *See People v. Harris (1989) 47 Cal. 3d 1047, 255 Cal. Rptr. 352, 767 P.2d 619* (statutory limitations on admission of evidence relevant to witness's credibility are no longer applicable in criminal cases, except to extent that exclusion is ordered pursuant to Evidence Code providing for such exclusion at discretion of trial court, following enactment of "Right to Truth-in-Evidence" provision of Proposition 8). Impeachment evidence is not subject to reciprocal discovery obligations (*Penal Code sections 1054 et seq.*) adopted under Proposition 115; denial of discovery of such evidence does not violate the defendant's right to due process. *People v. Tillis (1998) 18 Cal. 4th 284, 75 Cal. Rptr. 2d 447, 956 P.2d 409*.

Practice Tip

The very best checklist for a litigator to consider in planning a strategy for impeaching a witness are the grounds of impeachment listed in Section 780. Even if the grounds for impeaching a witness are obvious to you, it is well worthwhile to consider this list to see if you have overlooked any basis you might use to impeach.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 780 in the Federal Rules of Evidence. Nonetheless, the law of evidence recognized several specific techniques that might be used to diminish the credibility of witnesses. These techniques included prior inconsistent statement impeachment (self-contradiction); contradiction; prior acts and convictions; character impeachment (propensity for lack of veracity); exposure of perceptual incapacity; exposure of mental incapacity; and the introduction of evidence to expose bias, prejudice, interest or motive to misrepresent. The Federal Rules of Evidence do not treat impeachment with a comprehensive constellation of rules, and much of the law governing impeachment in federal courts is in the nature of federal common law. Rules governing certain aspects of impeachment include: Rules 608 and 609 pertaining to the character, prior acts and convictions of witnesses; Rule 610 pertaining to impeachment evidence relating to religious belief; and Rule 613 pertaining to limited aspects of prior inconsistent statement impeachment (also known as "self-contradiction"). Consequently, many impeachment principles, such as those governing the exposure of witnesses' bias or interest, are left uncodedified.

Of the impeachment techniques not expressly codified, bias and interest impeachment will be employed most frequently. When a party attempts to demonstrate a witness is biased or interested, it is relying on a theory of relevancy premised on a theory that certain types of relationships may affect the witness's testimony, and consequently, the accuracy of the truthfinding process. The exposure of potential bias or interest has always been considered highly relevant, and courts have been reluctant to hamper counsel's use of this impeachment technique. Bias or interest may be proven by conduct or words of a witness. Additionally, almost all types of relationships will facially establish some potential bias or interest.

The United States Supreme Court has held that common law grounds for impeaching a witness are still in existence, even after the passage of the Federal Rules of Evidence. See *United States v. Abel* (1984) 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (witnesses may be impeached on grounds of bias, even though there is no specific Federal Rule of Evidence concerning bias; evidence of the bias of witness would always be relevant under Federal Rules of Evidence 401, 402).



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SECTION 780 Proof of Truthfulness

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3 ADDITIONAL AUTHORITY

James McElhaney, *An Impeachment Checklist: Attacking the Witness' Credibility*, 78 A.B.A. J. 62(2) (Jan. 1992)

Hank M. Goldberg, *Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*, 24 Loy. L.A. L. Rev. 621 (1991)



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4 SIGNIFICANT CASES

Bias of Witness

People v. Freeman (1994) 8 Cal. 4th 450, 34 Cal. Rptr. 2d 558, 882 P.2d 249 (evidence that defendant and witness who provided alibi testimony had been partners in crime 20 years earlier was admissible, over other crimes objection, on question of credibility).

People v. Price (1991) 1 Cal. 4th 324, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (trial courts retain wide latitude to impose reasonable limits on defense inquiry into potential bias of prosecution witness).

People v. Mickle (1991) 54 Cal. 3d 140, 284 Cal. Rptr. 511, 814 P.2d 290 (evidence concerning whether psychiatric experts opposed death penalty was admissible during penalty phase of capital murder trial as bearing on their credibility as witnesses).

Piscitelli v. The Salesian Society (2008) 166 Cal. App. 4th 1, 82 Cal. Rptr. 3d 139 (ordinarily, a witness's felony conviction that is remote in time might have little or no bearing on the truthfulness of a witness who has since lived a commendable life, thereby moving the needle closer toward exclusion of the evidence under Section 352, but this is not the case when the witness's prior conviction is being used to show the witness's bias in favor of a similar defendant and against a plaintiff--when the intervening years may have done nothing to reduce the witness's potential bias; if it is relevant to the issue of bias, a witness may be impeached by evidence of a prior conviction even if the underlying crime does not directly relate to the character traits of honesty and truthfulness).

People v. Lopez (2005) 129 Cal. App. 4th 1508, 29 Cal. Rptr. 3d 586 (after enactment of Proposition 8, a witness can be impeached in a criminal case by prior misdemeanor conduct that involves moral turpitude, meaning a willingness to lie; crime of battery, however, is not one of moral turpitude, nor is it admissible as evidence of bias of arresting police officers; evidence of arrest for battery was not admissible due to the danger that it would be employed exactly as the prosecutor employed it--not simply to show that the witnesses might be biased against the police, but that each of them has an untrustworthy and criminal character).

People v. Bojorquez (2002) 104 Cal. App. 4th 335, 128 Cal. Rptr. 2d 411 (in robbery and related prosecution, police officer's testimony that defendant and witness belonged to the same gang was admissible for impeachment, but the trial court abused its discretion in further admitting wide-ranging testimony about gangs' criminal tendencies, and such error was prejudicial, requiring reversal).

People v. Tauber (1996) 49 Cal. App. 4th 518, 56 Cal. Rptr. 2d 656 (pretrial silence of a defense witness possessing exculpatory information may be used to impeach witness).

Collateral Matters/Use of Extrinsic Evidence to Impeach

People v. Rodriguez (1999) 20 Cal. 4th 1, 82 Cal. Rptr. 2d 413, 971 P.2d 618 (trial court did not abuse its discretion in excluding extrinsic evidence where evidence had only marginal relevance to impeach the direct testimony regarding witness's capacity to make identification).

Fear of Witness

People v. Gray (2005) 37 Cal. 4th 168, 33 Cal. Rptr. 3d 451, cert. denied, 549 U.S. 827 (evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible; the trial court has discretion on whether to permit an explanation of the basis for the witness's fear).

People v. Olguin (1994) 31 Cal. App. 4th 1355, 37 Cal. Rptr. 2d 596 (just as the fact that witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility, the fact that witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility and for this purpose, it matters not the source of the threat).

People v. Gutierrez (1994) 23 Cal. App. 4th 1576, 28 Cal. Rptr. 2d 897 (trial court did not abuse its discretion by admitting testimony tending to show that three state witnesses in murder case had been threatened; jury was entitled to learn of possible reasons for witnesses' radically different versions of what they saw, one given near time of event, and the other given at time of trial in order to accurately assess their credibility at trial).

Incentives for Testimony

People v. Fauber (1992) 2 Cal. 4th 792, 9 Cal. Rptr. 2d 24, 831 P.2d 249 (terms of a plea agreement may be relevant to impeach witness).

People v. Roberts (1992) 2 Cal. 4th 271, 6 Cal. Rptr. 2d 276, 826 P.2d 274, modified, 2 Cal. 4th 758c (trial court should not have refused defendant's demand for admonition that witness had received additional benefits besides those admitted by witness where court excluded evidence, as confidential official information, that tattoo specialist had charged state \$100 to remove tattoo from government witness).

People v. Price (1991) 1 Cal. 4th 324, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (defendant is entitled to explore nature of any promises prosecution has made or inducements it has offered to its witnesses).

Calvert v. State Bar of California (1991) 54 Cal. 3d 765, 1 Cal. Rptr. 2d 684, 819 P.2d 424 (disciplinary hearing referee erred in refusing to allow accused attorney to impeach complainant by attempting to show that complainant had a financial incentive in seeing that attorney was disciplined as a means of strengthening her malpractice case).

People v. Mickle (1991) 54 Cal. 3d 140, 284 Cal. Rptr. 511, 814 P.2d 290 (evidence that informant had written letters to judges in three separate criminal cases pending against him offering to inform on various persons in exchange for leniency was relevant in murder prosecution in which informant testified that he expected no benefit from his

testimony and was testifying for purely unselfish reasons).

Mental State or Condition of Witness

People v. Marshall (1996) 13 Cal. 4th 799, 55 Cal. Rptr. 2d 347, 919 P.2d 1280 (use of psychiatric testimony to impeach a witness is disfavored).

People v. Pokovich (2006) 39 Cal. 4th 1240, 48 Cal. Rptr. 3d 158, 141 P.3d 267 (*Fifth Amendment* prohibited impeaching testifying defendant with statements made to mental health professionals during court-ordered examination to determine defendant's competency to stand trial).

People v. Chatman (2006) 38 Cal. 4th 344, 42 Cal. Rptr. 3d 621, 133 P.3d 534 (trial court did not err in refusing to permit expert testimony to impeach prosecution evidence; even though witness voluntarily cooperated with psychological testing and expert examination, there is a general judicial policy against admission of psychiatric evidence to impeach a witness and the concerns behind the policy were magnified where there was no notice to prosecution or court, no opportunity for the witness to obtain legal advice, and defense investigators told witness she "had to" submit to testing).

People v. Lepe (1997) 57 Cal. App. 4th 977, 67 Cal. Rptr. 2d 525 (evidence regarding unavailable witness's admission of former gang membership was relevant to his background and motivation for his refusal to testify, but trial court did not abuse its discretion in excluding such evidence under Section 352).

People v. Franklin (1994) 25 Cal. App. 4th 328, 30 Cal. Rptr. 2d 376 (evidence that alleged victim had once falsely accused her mother of sexual misconduct was relevant to victim's credibility, in prosecution for continuous sexual abuse of a child under the age of 14 with substantial sexual contact; evidence had tendency to prove or disprove truthfulness of victim's testimony).

People v. Herring (1993) 20 Cal. App. 4th 1066, 25 Cal. Rptr. 2d 213 (psychologist's testimony regarding rape victim's mental retardation was admissible in prosecution's case in chief, since victim's ability to perceive and recollect were at issue, prosecutor had to prove lack of consent, and psychologist testified that victim's borderline retardation did not make her any more or less truthful).



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SECTION 782 Procedure for Admissibility of Evidence of Sexual Conduct of Complaining Witness

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§ 782.syn Synopsis to Chapter 782: Procedure for Admissibility of Evidence of Sexual Conduct of Complaining Witness

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Scope Procedure for Admissibility of Evidence of Sexual Conduct of Complaining Witness

§ 782 reads as follows:

Rule 782 Procedure for Admissibility of Evidence of Sexual Conduct of Complaining Witness

(a) In any of the circumstances described in subdivision (c), if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court.

(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(5) An affidavit resealed by the court pursuant to paragraph (2) shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding.

(b) As used in this section, "complaining witness" means:

(1) The alleged victim of the crime charged, the prosecution of which is subject to this section, pursuant to paragraph (1) of subdivision (c).

(2) An alleged victim offering testimony pursuant to paragraph (2) or (3) of subdivision (c).

(c) The procedure provided by subdivision (a) shall apply in any of the following circumstances:

(1) In a prosecution under *Section 261, 262, 264.1, 286, 288, 288a, 288.5, or 289 of the Penal Code*, or for assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in any of those sections, except if the crime is alleged to have occurred in a local detention facility, as defined in *Section 6031.4 of the Penal Code*, or in the state prison, as defined in *Section 4504*.

(2) When an alleged victim testifies pursuant to subdivision (b) of *Section 1101* as a victim of a crime listed in *Section 243.4, 261, 261.5, 269, 285, 286, 288, 288a, 288.5, 289, 314, or 647.6 of the Penal Code*, except if the crime is alleged to have occurred in a local detention facility, as defined in *Section 6031.4 of the Penal Code*, or in the state prison, as defined in *Section 4504 of the Penal Code*.

(3) When an alleged victim of a sexual offense testifies pursuant to *Section 1108*, except if the crime is alleged to have occurred in a local detention facility, as defined in *Section 6031.4 of the Penal Code*, or in the state prison, as defined in *Section 4504 of the Penal Code*.

Legislative History

(Added by Stats. 1974, ch. 569, § 1. Amended by Stats. 1981, ch. 726, § 1; Stats. 1987, ch. 177, § 1; Stats. 1989, ch. 1402, § 2; Stats. 1996, ch. 1075, § 6 (S.B. 1444); Stats. 2004, ch. 61, (A.B. 2829) § 1; Stats. 2006, ch. 225, (A.B. 1996) § 1; Stats 2007, ch. 130 (A.B.299) § 83).

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1 ANALYSIS

Section 782 sets forth the procedural safeguards for the admission of evidence regarding sexual conduct of the complaining witness, where the evidence is offered on that witness's credibility under Section 780. Section 782 has been used sparingly, but most frequently where victim's prior sexual history has been one of prostitution. *People v. Chandler (1997) 56 Cal. App. 4th 703, 65 Cal. Rptr. 2d 687*. As one can imagine, the use of such evidence is highly controversial in that while defendants have a right to impeach witnesses, even prostitutes have the right not to be raped. Section 783 deals with evidence of prior sexual conduct of a plaintiff in civil cases. The 2004 amendment, which requires defendant's offer of proof to be sealed, provides greater protection for the complainant. *See also Section 1103* (rule regarding general admissibility of complaining witness's sexual conduct).



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2 COMPARISON TO FEDERAL RULE

Section 782 procedures are comparable to those in Federal Rule of *Evidence* 412(c). The essence of both provisions is that the offering party must make a case for the relevancy of the evidence and the opposing party must have a chance to contest the admissibility well before the evidence can be offered. The judge thus has the opportunity to take greater care and thought on this evidentiary issue than he or she might on others. The federal rule does not require the offer of proof to be filed under seal.



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People v. Chandler (1997) 56 Cal. App. 4th 703, 65 Cal. Rptr. 2d 687 (trial court properly excluded some evidence of witness's sexual conduct under this section in that witness's willingness to exchange sex for drugs during long-term sexual relationship had little or no relevance to her willingness to do so out of that relationship; trial court committed harmless error in excluding evidence of witness's sexual conduct because trial court disbelieved testimony relating to prior conduct; trial court must apply guidelines under Section 352 and credibility of witnesses is not a factor to be balanced).

People v. Franklin (1994) 25 Cal. App. 4th 328, 30 Cal. Rptr. 2d 376 ("sexual conduct" encompasses any behavior that reflects actor's or speaker's willingness to engage in sexual activity, for purpose of evidence code sections governing admission of alleged victim's "sexual conduct" in prosecution of sex offenses; term should not be construed narrowly).

People v. Culton (1992) 11 Cal. App. 4th 363, 14 Cal. Rptr. 2d 189 (Proposition 8, or the "Victims' Bill of Rights" (Cal. Const. art. I, § 8(b)) expressly states that it does not affect this section).

People v. Daggett (1990) 225 Cal. App. 3d 751, 275 Cal. Rptr. 287 (in prosecution for child molestation, defendant was entitled to hearing on issue of whether complaining witness had been victim of sexual abuse in similar manner by others prior to allegations against defendant, for knowledge of such acts is unexpected in a child who has not been subjected to them, and therefore such evidence is relevant to the credibility of the complaining witness).

People v. Harlan (1990) 222 Cal. App. 3d 439, 271 Cal. Rptr. 653 (victim's conduct need not be "blameworthy" to fall within protection of this section; cross-examination that asked victim's mother, "Did he play with himself a lot?," which was asked to show state of the victim's knowledge about what he felt and thought with regard to his "privates," fell within proscription against evidence of the victim's sexual conduct).



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SECTION 783 Admissibility of Evidence of Plaintiff's Sexual Conduct in Civil Cases

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§ 783.syn Synopsis to Chapter 783: Admissibility of Evidence of Plaintiff's Sexual Conduct in Civil Cases

Scope Admissibility of Evidence of Plaintiff's Sexual Conduct in Civil Cases

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Scope Admissibility of Evidence of Plaintiff's Sexual Conduct in Civil Cases

§ 783 reads as follows:

Rule 783 Admissibility of Evidence of Plaintiff's Sexual Conduct in Civil Cases

In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780, the following procedures shall be followed:

- (a) A written motion shall be made by the defendant to the court and the plaintiff's attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented.
- (b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.
- (c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant.
- (d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(Added by Stats. 1985, ch. 1328, § 3)

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1 ANALYSIS

Section 783 deals with evidence of prior sexual conduct of a plaintiff in civil cases. Section 782 is the provision controlling the use of sexual conduct evidence in criminal cases.



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2 COMPARISON TO FEDERAL RULE

Section 783 is essentially similar to Federal Rule of *Evidence* 412, which permits the use of evidence of the complainant's prior sexual conduct or sexual predisposition if the judge determines, pursuant to procedures similar to those in Section 783, that the "probative value of the evidence substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Federal Rule of *Evidence* 412(b)(2). The federal rule contains an additional restriction absent from the California section: reputation evidence may be used only if the complainant has placed his or her reputation in controversy.



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3 SIGNIFICANT CASES

People v. Espinoza (2002) 95 Cal. App. 4th 1287, 116 Cal. Rptr. 2d 700 (trial court did not abuse its discretion in excluding, under Section 352, proposed testimony by defense psychiatric expert that victim suffered from emotional problems, caused by sexual abuse by an unknown assailant, that affected her ability to perceive and her credibility; lack of probative value of proffered evidence is supported by decision of California Legislature in 1980 to eliminate the trial court's discretion to order a psychiatric examination of complainant in sex crimes case on the issue of credibility; minimal probative value would be substantially outweighed by substantial consumption of time it would take to present testimony).

In re Venus B. (1990) 222 Cal. App. 3d 931, 272 Cal. Rptr. 115 (legislature's policy pronouncement made in enacting this section is equally applicable to juvenile dependency cases where sexual assault has been alleged).



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ARTICLE 2 ATTACKING OR SUPPORTING CREDIBILITY

SECTION 785 Parties May Attack or Support Credibility

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§ 785.syn Synopsis to Chapter 785: Parties May Attack or Support Credibility

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SECTION 785 Parties May Attack or Support Credibility

1-785 California Evidence Courtroom Manual Scope

Scope Parties May Attack or Support Credibility

§ 785 reads as follows:

Rule 785 Parties May Attack or Support Credibility

The credibility of a witness may be attacked or supported by any party, including the party calling him.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 785 Parties May Attack or Support Credibility

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1 ANALYSIS

Section 785 provides that the credibility of a witness may be attacked by any party, including the party who called the witness. Section 785 departs from the common law rule, sometimes known as the "voucher rule," which prevented a party from impeaching its own witness. The common law rule imposed a hardship on a party when, by necessity, the party had to call a hostile witness.

Potential abuse in the literal application of Section 785 is subject to control by the trial judge where, for example, a witness is called for the purpose of introducing otherwise inadmissible evidence for the purpose of impeachment. Federal Rule of *Evidence* 403 may be applied in such situations to prevent admissibility.



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2 COMPARISON TO FEDERAL RULE

Section 785 is substantially similar to Federal Rule of *Evidence* 607.



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People v. Newton (1970) 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (party's right to impeach his own witness is not available where witness has not testified against impeaching party at all; in such cases there is nothing to counteract and the prior statement emerges as substantive evidence of the facts asserted within it, thus becoming subject to hearsay rule).



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SECTION 786 Character Evidence Generally

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§ 786.syn Synopsis to Chapter 786: Character Evidence Generally

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SECTION 786 Character Evidence Generally

1-786 California Evidence Courtroom Manual Scope

Scope Character Evidence Generally

§ 786 reads as follows:

Rule 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.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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*1-786 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 786 authorizes the credibility or veracity of a witness who has testified to be supported or attacked by calling a character witness who is competent to testify to the reputation of the primary witness for truthfulness or untruthfulness. However, note that a witness's character for truthfulness cannot be established unless the witness's truthfulness has been attacked first. Section 790. The format is as follows: The primary witness steps down from testifying. The proponent of the primary witness completes his or her case and rests. Then, the opponent of the primary witness, at a point later in the trial when the opponent has an opportunity to call witnesses, calls a character witness. This character witness then testifies in regard to an opinion of or the reputation of the primary witness sought to be impeached.

The character witness must be a member of an appropriate community where the reputation of the person characterized is known. The character witness testifies to an opinion or to the reputation of the primary witness in regard to the character trait of veracity or truth-telling. The character witness may also be asked to state his or her personal opinion as to the veracity of the primary witness sought to be impeached and must show a basis for familiarity with the primary witness's character for veracity. In civil cases, however, the character witness is not permitted to testify to specific instances of truthful or untruthful conduct of the primary witness on direct examination, although specific acts of conduct of the primary witness may be elicited on cross-examination of the character witness in order to test the basis for his or her reputation or opinion testimony. *People v. Jones (1964) 225 Cal. App. 2d 598, 37 Cal. Rptr. 454*. In criminal cases, however, under Proposition 8--the "Right to Truth-in-Evidence" initiative--the limitations on a character witness's testimony no longer exist, unless a trial judge exercises discretion under Section 352 to impose restrictions. Thus, a character witness may be permitted to testify on direct examination as to specific instances of the primary witness's honesty or dishonesty.

Illustration

Counsel:

Mr. Johnson, an individual by the name of Jacob Rolfman testified during the plaintiff's case-in-chief. Are you acquainted with Mr. Rolfman?

Witness:

Yes, I am.

Counsel:

Please state the basis of your acquaintance with Mr. Rolfman.

Witness:

I have known Mr. Rolfman for 10 years. He is a neighbor of mine and lives two houses from me up the street.

Counsel:

Do you know him personally? That is, have you socialized with him or had business dealings with him?

Witness:

I know him casually. He is not a close friend, but I am acquainted with him. I have not had opportunity to have any business dealings with him or to socialize with him.

Counsel:

Nevertheless, are you aware of Mr. Rolfman's reputation for truthfulness in your community?

Witness:

Well, I know what everybody generally thinks about him, if that is what you mean.

Counsel:

Yes. Please state what you understand to be the reputation of Mr. Rolfman for truth telling.

Witness:

Well, he generally has the reputation of being a liar. People in our community just do not think he is the sort of person who tells the truth.

Counsel:

Have you heard of any instances of conduct which would justify this reputation?

Opposing Counsel:

Objection. The response would be hearsay and it would violate Section 787. (*Editor's note:* This is only clearly true in civil cases; in criminal cases the judge would have the discretion to sustain the objection under Section 352. See Analysis of Proposition 8, the Right to Truth-in-Evidence initiative, above.)

Judge:

Sustained.

Counsel:

Have you ever observed Mr. Rolfman engaging in deceitful or untruthful conduct?

Opposing Counsel:

Objection. The question calls for specific instances of conduct which are prohibited by Section 787 on direct examination of the character witness.

Judge:

Sustained. (*Editor's note:* Again, this is only clearly correct in civil cases; in criminal cases, the judge would have the discretion to sustain the objection.)

See also Section 1100 (establishing how character may be proved: reputation or opinion testimony and specific instances, where permitted).



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2 COMPARISON TO FEDERAL RULE

When considered along with Section 790, Section 786 is comparable to Federal Rule of Evidence 608(a).



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3 SIGNIFICANT CASES

People v. Barnett (1998) 17 Cal. 4th 1044, 954 P.2d 384, 74 Cal. Rptr. 2d 121, cert. denied, 549 U.S. 835 (during penalty phase of capital murder trial, defendant's mother was permitted to testify as to specific acts of goodness by defendant and prosecutor was allowed to ask mother on cross-examination whether she had heard of specific bad acts by defendant as long as prosecutor had good faith basis for asking questions).

People v. Wheeler (1992) 4 Cal. 4th 284, 14 Cal. Rptr. 2d 418, 841 P.2d 938 (questioning regarding specific acts is permitted to impeach the character witness).

People v. Harris (1989) 47 Cal. 3d 1047, 255 Cal. Rptr. 352, 767 P.2d 619 (statutory limitations on admission of evidence relevant to witness's honesty or veracity are no longer applicable in criminal cases, except to extent that exclusion is ordered pursuant to Evidence Code providing for such exclusion at discretion of trial court, following enactment of "Right to Truth-in-Evidence" provision of Proposition 8).

People v. Stern (2003) 111 Cal. App. 4th 283, 3 Cal. Rptr. 3d 479 (where defendant was charged with attempted murder and criminal threats, Cal. Const. art. I, § 28(d), the "Truth-in-Evidence" provision, overrides Evidence Code sections 786, 787 and allows the admission of relevant uncharged conduct, subject to the discretion of the trial judge; here, the accuracy of alleged victim's in-court recitation of defendant's words was an important issue; defendant allegedly made threat involving the use of a knife on victim and his parents; thus, defendant's claim, in the midst of the threatening telephone call to victim, that he had stabbed somebody "just a couple of nights earlier" tended to demonstrate that defendant was in fact involved in a stabbing around the time of the threatening telephone call, thereby lending credence to victim's testimony concerning the threats; because the sole issue is one of witness credibility, Section 1101, uncharged conduct used to prove conduct, is inapposite).

People v. Rivera (2003) 107 Cal. App. 4th 1374, 133 Cal. Rptr. 2d 176 (trial court did not err in permitting defendant to be impeached with a prior misdemeanor offense of possession of a deadly weapon with the intent to commit an assault; the combination of elements in the offense of possession of a deadly weapon with the intent to commit an assault generates a synergy that represents a degree of public harm significantly greater than simple assault or simple drug possession; the act of carrying a deadly weapon while intending to assault another is a clear example of conduct

indicating "general readiness to do evil," a crime of moral turpitude that may be used to impeach a witness in a criminal proceeding).

People v. Willoughby (1985) 164 Cal. App. 3d 1054, 210 Cal. Rptr. 880 (evidence of uncharged sexual offense would not have been admissible to impeach defendant's implied assertion that he could not have sexually molested a young girl because of his religious beliefs or to rebut other evidence of his good character, since evidence of uncharged offense was evidence of a specific act, and Section 786 provides that evidence of character traits other than honesty or veracity is inadmissible to attack or support credibility of witness).



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SECTION 787 Specific Instances of Conduct

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§ 787.syn Synopsis to Chapter 787: Specific Instances of Conduct

Scope Specific Instances of Conduct

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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1-787 California Evidence Courtroom Manual Scope

Scope Specific Instances of Conduct

§ 787 reads as follows:

Rule 787 Specific Instances of Conduct

Subject to Section 788, 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 a witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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 SECTION 787 Specific Instances of Conduct

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1 ANALYSIS

Section 787 bans specific instances of a person's conduct which do not amount to a felony conviction to show his or her character in civil cases. In criminal cases, however, Section 787 is no longer applicable, except to extent that exclusion is ordered pursuant to Section 352, which allows such exclusion at discretion of trial court, following enactment of "Right to Truth-in-Evidence" provision of Proposition 8. *People v. Harris (1989) 47 Cal. 3d 1047, 255 Cal. Rptr. 352, 767 P.2d 619*. See Sections 780 and 788 for more commentary on Proposition 8.

Section 787's ban on evidence of specific acts to prove character should be distinguished from three other uses of evidence of specific instance of conduct. First, recall that a character witness may be asked about specific instances of conduct of the primary witness in order to test the character witness's opinion or knowledge regarding the reputation of the primary witness. See Section 786, *People v. Jones (1964) 225 Cal. App. 2d 598, 37 Cal. Rptr. 454*. Second, where the evidence of specific conduct is not being used to prove character (for truthfulness, untruthfulness--or any other character trait) but instead is being used to prove another issue in the case, the trial judge may admit the evidence along with a limiting instruction. See, e.g., *People v. Knox (1979) 95 Cal. App. 3d 420, 157 Cal. Rptr. 238* (although evidence of specific instance of a witness's past conduct is inadmissible to attack his credibility when its only relevancy is to establish a trait of his character, where a specific instance of conduct is relevant to prove a witness's bias or improper motive, apart from any relevancy it has to prove a character trait, it is admissible). Finally, where the evidence of specific conduct is used to impeach the witness not on the basis of his or her character trait for truthfulness, but rather to contradict the actual testimony of the witness. See, e.g., Section 780(i); *Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 178 Cal. Rptr. 167* (in malpractice action against physician, evidence of physician's prior arrest and conviction for misdemeanor offense for using silicone without approved application was admissible to impeach physician's denial of knowledge that silicone was dangerous where conviction occurred before treating patient and was relevant to prove physician's knowledge of falsity of statement made to patient that silicone was inert and harmless, and where court gave limiting instructions to jury).



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2 COMPARISON TO FEDERAL RULE

Section 787 differs significantly from Federal Rule of Evidence 608(b), at least in civil cases. As noted above, in criminal cases, a trial judge has discretion to permit this questioning after Proposition 8. Under Federal Rule of Evidence 608(b), a witness may be impeached on cross-examination by interrogation as to specific prior instances of conduct which are probative of untruthfulness. Cross-examination through this technique is limited by two factors. First, only prior acts involving an element of dishonesty or deceit are appropriate for interrogation. Second, the trial judge must exercise discretion before permitting cross-examination as to the prior acts. It should be noted that specific acts of untruthful behavior may only be inquired into on cross-examination, and they may not be established by extrinsic evidence. Consequently, if the witness on cross-examination denies the prior untruthful act, the cross-examiner is said to be "stuck with the answer." He may not seek to prove the occurrence of the untruthful act through extrinsic evidence after the witness has left the stand. Trial counsel seeking to impeach a witness through this technique, however, is permitted to press hard for an admission of the prior act providing he is proceeding in good faith in inquiring as to the prior untruthful conduct. It is possible that a California trial judge, confronted with Proposition 8, might impose such restrictions if he or she permits some questioning regarding specific instances.



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3 ADDITIONAL AUTHORITY

Hank M. Goldberg, *Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*,
24 Loy. L.A. L. Rev. 621 (1991)



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4 SIGNIFICANT CASES

People v. Wheeler (1992) 4 Cal. 4th 284, 14 Cal. Rptr. 2d 418, 841 P.2d 938 (questioning regarding specific acts is permitted to impeach character witness).

People v. Visciotti (1992) 2 Cal. 4th 1, 5 Cal. Rptr. 2d 495, 825 P.2d 388 (when defendant admitted during direct examination that he had previously been convicted for assault with deadly weapon, and claimed that he was forced to plead guilty to that offense even though he acted in self-defense, People could properly impeach defendant by bringing out all circumstances of prior incident).

People v. Stern (2003) 111 Cal. App. 4th 283, 3 Cal. Rptr. 3d 479 (where defendant was charged with attempted murder and criminal threats, Cal. Const. art. I, § 28(d), the "Truth-in-Evidence" provision, overrides Evidence Code sections 786, 787 and allows the admission of relevant uncharged conduct, subject to the discretion of the trial judge; here, the accuracy of alleged victim's in-court recitation of defendant's words was an important issue; defendant allegedly made threat involving the use of a knife on victim and his parents; thus, defendant's claim, in the midst of the threatening telephone call to victim, that he had stabbed somebody "just a couple of nights earlier" tended to demonstrate that defendant was in fact involved in a stabbing around the time of the threatening telephone call, thereby lending credence to victim's testimony concerning the threats; because the sole issue is one of witness credibility, Section 1101, uncharged conduct used to prove conduct, is inapposite).

People v. Rivera (2003) 107 Cal. App. 4th 1374, 133 Cal. Rptr. 2d 176 (trial court did not err in permitting defendant to be impeached with a prior misdemeanor offense of possession of a deadly weapon with the intent to commit an assault; the combination of elements in the offense of possession of a deadly weapon with the intent to commit an assault generates a synergy that represents a degree of public harm significantly greater than simple assault or simple drug possession; the act of carrying a deadly weapon while intending to assault another is a clear example of conduct indicating "general readiness to do evil," a crime of moral turpitude that may be used to impeach a witness in a criminal proceeding).

People v. Feaster (2002) 102 Cal. App. 4th 1084, 125 Cal. Rptr. 2d 896 (misdemeanor negligent discharge of a firearm constitutes a crime of moral turpitude for impeachment purposes, but the trial court did not abuse its discretion

in excluding a prosecution witness's prior conviction for this offense under *Evidence Code section 352*).

People v. Halsey (1993) 21 Cal. App. 4th 325, 26 Cal. Rptr. 2d 701 (specific acts of witness's conduct are inadmissible to attack or support his credibility).



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SECTION 788 Prior Felony Conviction

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§ 788.syn Synopsis to Chapter 788: Prior Felony Conviction

Scope Prior Felony Conviction

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2 COMPARISON TO FEDERAL RULE

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1-788 California Evidence Courtroom Manual Scope

Scope Prior Felony Conviction

§ 788 reads as follows:

Rule 788 Prior Felony Conviction

For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

- (a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.
- (b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with *Section 4852.01*) of Title 6 of Part 3 of the Penal Code.
- (c) The accusatory pleading against the witness has been dismissed under the provisions of *Penal Code Section 1203.4*, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.
- (d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 788 Prior Felony Conviction

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1 ANALYSIS

Section 788 governs the impeachment of a witness by evidence of his or her prior felony criminal convictions. Section 788 is limited to the use of felony convictions. The felony may be proved by examination of witness or certified copy of judgment that witness has been convicted of felony. The conviction may not be used for impeachment where the witness has previously received full and unconditional pardon based on certificate of rehabilitation. Conviction must be felony in jurisdiction in which conviction was obtained if it is to be used for impeachment. A plea of guilty to a felony is a conviction for purposes of Section 788.

Criminal cases require consideration of Proposition 8, the "Right to Truth-in-Evidence" initiative, which amended the California Constitution to state that "[a]ny felony conviction of any person ... shall subsequently be used without limitation for purposes of impeachment ... in any criminal proceeding." *cal. const. art. I, § 28(f)*. However, the California Supreme Court held that the due process clause limits the felony convictions that can be used for impeachment to those involving "moral turpitude," meaning a "readiness to do evil." *People v. Castro (1985) 38 Cal. 3d 301, 211 Cal. Rptr. 719, 696 P.2d 111*. The *Castro* court reasoned that only these convictions are "relevant" in that "a witness's moral depravity of any kind has some 'tendency in reason' ... to shake one's confidence in his honesty." *Id.* at 314, 211 Cal. Rptr. at 726, 696 P.2d at 119.

To determine whether a conviction involves "moral turpitude," the court does not look at the facts of the actual crime, but instead applies the "least adjudicated elements test." Under this test, moral turpitude only has to be reasonably inferable from the statutory elements of the crime--without regard to facts of particular violation. Thus, the prior conviction can be found to have involved moral turpitude, even if there is a conceivable set of facts under which the offense could have been committed free of moral turpitude. *People v. White (1992) 4 Cal. App. 4th 1299, 6 Cal. Rptr. 2d 259, review denied*.

The following crimes have been held to involve moral turpitude: arson, assault with a deadly weapon, auto theft, battery of a police officer, burglary, commission of lewd and lascivious acts on children, discharging a firearm at an inhabited dwelling, driving under the influence, driving with intent to avoid police with willful or wanton disregard for safety, escape without force, forgery, indecent exposure, pimping and pandering, possession of drugs with intent to sell, receiving stolen goods and voluntary manslaughter. The court may consider the state of mind required under the statutory definition of the crime; the mens rea requirement of "malice" is sufficient to constitute moral turpitude. *See*

People v. Campbell (1994) 23 Cal. App. 4th 1488, 28 Cal. Rptr. 2d 716 (holding that offense of felony vandalism is a crime of moral turpitude). The following crimes have been held not to be crimes of moral turpitude: simple assault, simple battery, felony child endangerment, involuntary manslaughter and simple possession of drugs.

Despite the language of Proposition 8, mandating admissibility of felony convictions "without limitation," the California Supreme Court also held in *Castro* that another part of Proposition 8, Section 28(d), reaffirms the judge's discretion to exclude relevant evidence when its probative value is substantially outweighed by its dangers, pursuant to *Evidence Code* section 352. *People v. Castro* (1985) 38 Cal. 3d 301, 211 Cal. Rptr. 719, 696 P.2d 111. Thus, the Court held that trial courts could be guided, but not bound, by balancing the factors it discussed in *People v. Beagle* (1972) 6 Cal. 3d 441, 99 Cal. Rptr. 313, 492 P.2d 1. Those factors include: the conviction's bearing on honesty and integrity, the temporal remoteness of the conviction and whether the witness has led a blameless life since the conviction, and the similarity between the conduct on which the prior conviction rested and the conduct for which the accused is on trial when the accused is the witness whose impeachment is sought. Where the trial court has denied a defendant's *Castro* motion to exclude evidence of a prior conviction, and has not testified, the trial court's ruling is not reviewable on appeal. *People v. Collins* (1986) 42 Cal. 3d 378, 722 P.2d 173.

Note that, in civil cases, Section 788 clearly excludes misdemeanor convictions when used for impeachment purposes; such convictions would also be inadmissible under Section 787 as prior bad acts. In criminal cases, however, such convictions may be admissible under Proposition 8, the "Right to Truth-in-Evidence" initiative, *Cal. Const. art. I, § 28(d)*, where such convictions are probative of a witness's lack of truthfulness, subject only to the trial court's discretion to exclude them under Section 352. *People v. Wheeler* (1992) 4 Cal. 4th 284, 14 Cal. Rptr. 2d 418, 841 P.2d 938.

When the cross-examination seeks to obtain an admission from the witness sought to be impeached that he has suffered a conviction, specific information about the conviction should be elicited. The date and place of the conviction should be established. Similarly, the witness may be asked about any sentence that was imposed. Generally, in order to minimize the prejudicial effect, impeachment may not inquire into exact details concerning the conviction. Moreover, the trial judge has the discretion to withhold from the jury the nature of a conviction offered to impeach the accused if the conviction is similar or identical to the charge filed against the accused; the judge may instruct the jurors only that the accused was convicted of a crime involving moral turpitude. See *People v. Ballard* (1993) 13 Cal. App. 4th 687, 16 Cal. Rptr. 2d 624. Whenever a prior conviction is utilized for the purposes of impeaching the credibility of a witness, the proponent of the witness impeached should request a limiting instruction to minimize the prejudicial impact of the conviction and to insure that the jury will use the conviction only for the purposes of evaluating the credibility of the witness.

As a rehabilitative device, nothing in the statute prohibits an "explanation" by the witness of extenuating circumstances of the conviction. Some courts permit "brief protestations" of innocence or testimony of extenuating circumstances to explain away the implication of a conviction. No collateral evidence of such extenuating circumstances, however, should be permitted in rehabilitation efforts.

See also Section 452.5 (judicial notice of criminal conviction records); *Penal Code* sections 4800 et seq. (regarding effect of reprieves, pardons and commutations).



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2 COMPARISON TO FEDERAL RULE

Section 788 differs substantially from Federal Rule of Evidence 609, which also permits impeachment by convictions. First, Section 788 is limited to the use of felony convictions or, in criminal cases, convictions where the underlying crime involves "moral turpitude," meaning a "readiness to do evil." *People v. Castro* (1985) 38 Cal. 3d 301, 211 Cal. Rptr. 719, 696 P.2d 111. Under Rule 609(a), convictions may be introduced pertaining to (1) crimes punishable by death or imprisonment of more than one year, for all witnesses in civil proceedings subject to Rule 403, or for all witnesses other than the accused in criminal proceedings subject to Rule 403, or for the accused in criminal cases where the court in its special discretion allows the impeachment (subsection (a)(1)); or (2) crimes involving dishonesty or false statement regardless of the applicable sentence in all proceedings in regard to all witnesses (subsection (a)(2)). Consequently, in regard to convictions of the accused, under Rule 609(a)(1) the court employs a special balancing test in which the prosecution must show that the "probative value of [the conviction] outweighs the prejudicial effect to the accused."

Federal Rule of Evidence 609 contains other limitations to admissibility that differ to some degree or are absent from those in Section 788. Under Rule 609(b), if more than ten years has elapsed since the date of conviction or the termination of confinement, whichever is later, the conviction is not admissible unless the court finds that the probative value of such evidence substantially outweighs its prejudicial effect. Rule 609(c) provides that evidence of a conviction is not admissible for the purpose of impeachment where a pardon, annulment, certificate of rehabilitation or other equivalent procedure is based upon either a finding of innocence, or a required showing of rehabilitation where the witness has not been subsequently convicted of a felony.

Finally, Rule 609(d) establishes the general principle that evidence of the juvenile adjudication of a witness is not admissible for the purpose of impeaching his testimony. Evidence of such a juvenile adjudication is admissible only when the judge determines in a criminal proceeding that admission of the evidence is necessary for a fair determination of the defendant's guilt or innocence. This exception to the general rule prohibiting impeachment by juvenile adjudications is inapplicable in civil proceedings or where the witness to be impeached is the criminal defendant.

Rule 609(e) provides that the pendency of an appeal from a conviction does not render evidence of the conviction inadmissible. The Rule provides, however, that where a witness is questioned about a prior conviction which has since been appealed, the fact that the appeal is pending is admissible. Consequently, the matter of appeal is left to the trier of

fact in evaluating the weight of the conviction in regard to credibility.



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3 ADDITIONAL AUTHORITY

Hank M. Goldberg, *Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases*,
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4 SIGNIFICANT CASES

People v. Turner (1994) 8 Cal. 4th 137, 32 Cal. Rptr. 2d 762, 878 P.2d 521 (defendant's convictions in 1974 and 1976 were not too remote to be used for impeachment in 1987 trial where defendant had spent much of the time in the interval in jail).

People v. Clair (1992) 2 Cal. 4th 629, 7 Cal. Rptr. 2d 564, 828 P.2d 705 (felony conviction involving moral turpitude may be excluded under Section 352 where conviction is remote and the witness has led a blameless life for the past 22 years).

People v. Visciotti (1992) 2 Cal. 4th 1, 5 Cal. Rptr. 2d 495, 825 P.2d 388 (judge may permit witness to be rehabilitated by evidence disputing effect of conviction on witness's lack of credibility).

Piscitelli v. The Salesian Society (2008) 166 Cal. App. 4th 1, 82 Cal. Rptr. 3d 139 (ordinarily, a witness's felony conviction that is remote in time might have little or no bearing on the truthfulness of a witness who has since lived a commendable life, thereby moving the needle closer toward exclusion of the evidence under Section 352, but this is not the case when the witness's prior conviction is being used to show the witness's bias in favor of a similar defendant and against a plaintiff--when the intervening years may have done nothing to reduce the witness's potential bias; if it is relevant to the issue of bias, a witness may be impeached by evidence of a prior conviction even if the underlying crime does not directly relate to the character traits of honesty and truthfulness).

People v. Fritz (2007) 153 Cal. App. 4th 949, 62 Cal. Rptr. 3d 885 (trial court committed reversible error by admitting defendant's lie about his criminal record as evidence of "consciousness of guilt"; the lie was unrelated to any material facts of the crime at issue and was highly prejudicial; in addition, since defendant did not testify or otherwise place his credibility at issue, and did not introduce the statement he made after his arrest denying that he had previously shoplifted, evidence of his prior shoplifting charges is not admissible to impeach his statement).

People v. Chavez (2000) 84 Cal. App. 4th 25, 100 Cal. Rptr. 2d 680 (defendant's prior conviction for misdemeanor sexual battery amounted to conviction of crime involving moral turpitude and probative value was not substantially outweighed by danger of unfair prejudice).

People v. Jacobs (2000) 78 Cal. App. 4th 1444, 93 Cal. Rptr. 2d 783 (it is permissible to use a felony conviction to impeach an exculpatory hearsay statement of a nontestifying defendant where defendant put the hearsay statement into evidence).

People v. Williams (1999) 72 Cal. App. 4th 1460, 86 Cal. Rptr. 2d 62 (felony conviction under *Penal Code* section 69 for resisting an executive officer by means of force or violence constitutes crime of moral turpitude and may be used for impeachment).

People v. Vera (1999) 69 Cal. App. 4th 1100, 82 Cal. Rptr. 2d 128 (a conviction under provision of Health and Safety Code making it a crime to open or maintain "any place for the purpose of unlawfully selling, giving away, or using" controlled substances or narcotics is a crime of moral turpitude for purposes of impeachment).

People v. Shea (1995) 39 Cal. App. 4th 1257, 46 Cal. Rptr. 2d 388 (scope of inquiry when criminal defendant is impeached with evidence of prior felony conviction does not extend to facts of underlying offense; however, if in admitting prior felony conviction defendant first seeks to mislead jury or minimize facts of earlier conviction, he may properly be questioned further).

People v. Field (1995) 31 Cal. App. 4th 1778, 37 Cal. Rptr. 2d 803 (expungement limitation on admissibility of prior felony convictions for impeachment purposes has not been abrogated by "Truth-in-Evidence" amendment to the California Constitution, as fact of expungement prevented prior conviction from being relevant evidence on issue of credibility).

People v. Santos (1994) 30 Cal. App. 4th 169, 35 Cal. Rptr. 2d 719 (inquiry into the circumstances and underlying facts of a felony is prohibited when evidence is offered for impeachment purposes only, and thus, rap sheets themselves are not discoverable).

People v. Forster (1994) 29 Cal. App. 4th 1746, 35 Cal. Rptr. 2d 705 (felony driving under the influence with three or more DUI convictions within seven years of instant offense is "crime involving moral turpitude").

Robbins v. Wong (1994) 27 Cal. App. 4th 261, 32 Cal. Rptr. 2d 337 (Proposition 8 provisions regarding impeachment with felony convictions do not apply to civil cases, although criminal cases may be considered by trial judge for guidance in balancing probative value and dangers of such evidence).

People v. Campbell (1994) 23 Cal. App. 4th 1488, 28 Cal. Rptr. 2d 716 (felony battery does not require mens rea of malice, but, rather, requires same intent as simple battery, that is, merely intent to commit unwanted touching, an intent which need not show readiness to do evil).

People v. Halsey (1993) 21 Cal. App. 4th 325, 26 Cal. Rptr. 2d 701 (for purposes of section of Evidence Code making felony convictions admissible to attack credibility of witness, "prior felony conviction" means any conviction suffered before trial, regardless of the offense date).

People v. White (1992) 4 Cal. App. 4th 1299, 6 Cal. Rptr. 2d 259 (crime of discharging firearm at inhabited dwelling house is crime of moral turpitude).



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Scope Religious Belief

1 ANALYSIS

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DIVISION 6 WITNESSES
CHAPTER 6 CREDIBILITY OF WITNESSES
ARTICLE 2 ATTACKING OR SUPPORTING CREDIBILITY
SECTION 789 Religious Belief

1-789 California Evidence Courtroom Manual Scope

Scope Religious Belief

§ 789 reads as follows:

Rule 789 Religious Belief

Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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1-789 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 789 generally prohibits the introduction of evidence or interrogation of witnesses as to religious beliefs or opinions for the purpose of impeaching or bolstering a witness's credibility. The principles of inadmissibility contained in this section rest primarily upon grounds of unfair prejudice and minimal probative value.

Section 789 does not preclude the admission of evidence of religious beliefs where the evidence is relevant in a manner other than to show that the witness's trustworthiness is enhanced or diminished by virtue of the belief. Consequently, Section 789 does not prevent evidence tending to demonstrate bias or interest on the part of a witness, such as where the witness is affiliated with a church that is a party to the action. Nor is the evidence inadmissible if it tends to prove any issue other than the credibility of a witness based on religious beliefs. *See, e.g., People v. Cooks (1983) 141 Cal. App. 3d 224, 190 Cal. Rptr. 211* (prosecutor's cross-examination about contents of defendant's binder containing Muslim educational material did not violate defendant's *First Amendment* rights or this section since evidence was also relevant to corroborate accomplice informant's testimony about meetings where such defendant read from binder and discussed killing of white people).



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2 COMPARISON TO FEDERAL RULE

Section 789 is substantially similar to Federal Rule of Evidence 610.



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3 SIGNIFICANT CASES

People v. Morris (1991) 53 Cal. 3d 152, 279 Cal. Rptr. 720, 807 P.2d 949 (prosecution committed harmless error, in capital murder case, by attempting to impeach one of defendant's witnesses on the ground that she was a former devil worshiper since devil worship was not shown to have any bearing on witness's credibility or issues of case).

People v. Bautista (2008) 163 Cal. App. 4th 762, 77 Cal. Rptr. 3d 824 Cal. Rptr. 3d (trial court did not err in admitting testimony regarding the church's beliefs and defendant's role in the church; evidence did not violate Section 789 because it was not admitted for the purpose of attacking defendant's credibility or that of any witness on the basis of his or her religious beliefs but rather because the religious background provided a context for defendant's actions and the girls' delayed reporting of the incidents; thus, the evidence was relevant to determining whether defendant committed the alleged crimes, not to attack the credibility of a witness).

Drake v. Dean (1993) 15 Cal. App. 4th 915, 19 Cal. Rptr. 2d 325 (cross-examination based on bias from witness's status as fellow Jehovah's Witness was proper).



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SECTION 790 Good Character of Witness

1-790 California Evidence Courtroom Manual 790.syn

§ 790.syn Synopsis to Chapter 790: Good Character of Witness

Scope Good Character of Witness

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1-790 California Evidence Courtroom Manual Scope

Scope Good Character of Witness

§ 790 reads as follows:

Rule 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.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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SECTION 790 Good Character of Witness

*1-790 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 790 provides that reputation and opinion evidence (*see Section 1100*) tending to establish the truthful propensity of any witness may be admitted only after the principal witness's character has in fact been attacked by opinion or reputation evidence or by other impeachment evidence which represents an attack on character. The underlying theory provides that all witnesses under oath are presumed to be telling the truth and that the issue of a witness's truthfulness or credibility is collateral to the principal issues in the case. While every witness's credibility is an issue for the trier of fact, this does not, in the absence of an attack on character, authorize a party to bolster any witness through use of a character witness. The condition precedent for the use of a rehabilitation character witness is an attack on the character of the primary witness, and mere impeachment not involving the character of the primary witness is insufficient to authorize the calling of a positive character witness.

A witness merely discredited by evidence of bias not involving corruption has not been subjected to character impeachment. Also, where a prior inconsistent statement of a witness is introduced, where a witness is simply shown to be confused, or where a witness merely provides conflicting testimony, the witness's credibility may not be bolstered through a character witness attesting to the primary witness's good character for veracity. By comparison, however, where impeachment is effected by a negative character witness pursuant to Section 786, by interrogation as to prior acts probative of untruthful character (if permitted in a criminal case under Proposition 8) or by evidence of a criminal conviction under Section 788, the *character* of the primary witness is, in fact, attacked and, therefore, may be rehabilitated with a positive character witness. Beyond these presumptive attacks on character expressly addressed by the Code, the careful discretion of the trial judge must be exercised on a case-by-case basis to determine whether the form of impeachment employed effectively operates as an attack on character.

Section 790 is also subject to Proposition 8 in criminal cases. *See* discussion in *Sections 780, 786*. The "Right to Truth-in-Evidence" initiative presumably prevents the trial court from excluding evidence of the witness's good character even though the witness's character for truthfulness has not been attacked, unless the trial court uses its discretion to exclude such evidence under Section 352.

See also Section 786 (character evidence generally); *Section 1100* (establishing how character may be proved: reputation or opinion testimony and specific instances, where permitted).



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2 COMPARISON TO FEDERAL RULE

Section 790 is substantially identical to Federal Rule of Evidence 608(a)(2).



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3 SIGNIFICANT CASES

People v. Taylor (1986) 180 Cal. App. 3d 622, 225 Cal. Rptr. 733 (pursuant to Proposition 8, evidence of defendant's reputation for truth and veracity is admissible in criminal trial for purpose of proving truthfulness of his testimony, notwithstanding that prosecution did not first introduce evidence impeaching defendant's character for truth and veracity as required by the language of Section 790).



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SECTION 791 Prior Consistent Statement of Witness

1-791 California Evidence Courtroom Manual 791.syn

§ 791.syn Synopsis to Chapter 791: Prior Consistent Statement of Witness

Scope Prior Consistent Statement of Witness

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1-791 California Evidence Courtroom Manual Scope

Scope Prior Consistent Statement of Witness

§ 791 reads as follows:

Rule 791 Prior Consistent Statement of Witness

Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

- (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
- (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 791 Prior Consistent Statement of Witness

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1 ANALYSIS

Section 791 allows a party to rehabilitate a witness who has been impeached by offering a statement made by the witness before any alleged inconsistent statement or that is consistent with the witness's trial testimony and was made before a motive to be untruthful arose. In criminal cases, where Proposition 8, the "Right to Truth-in-Evidence" initiative applies, a party may not be limited by the requirement that the consistent statement was made before the inconsistent statement or before the motive to lie arose. Moreover, a party may not need to wait to use the witness's consistent statement until the witness has been impeached. Of course, the trial court may still exclude the prior consistent statement where its probative value is substantially outweighed by its dangers. *See also* Analysis of Section 780 in this manual; Section 1236 (hearsay exception for prior consistent statements).



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2 COMPARISON TO FEDERAL RULE

Section 791 is substantially similar to Federal Rule of Evidence 608(a)(2), especially in light of the United States Supreme Court's interpretation in *Tome v. United States* (1995) 513 U.S. 150, 115 S. Ct. 696, 130 L. Ed. 2d 574 , which holds that the common law "pre-motive" requirement, codified in Section 791(b), is implied in Federal Rule of Evidence 801(d)(1)(B).



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3 SIGNIFICANT CASES

People v. Bolin (1998) 18 Cal. 4th 297, 75 Cal. Rptr. 2d 412, 956 P.2d 374 (trial court properly admitted witness's prior consistent statement as witness was first impeached by defense counsel and statement was made before motive to fabricate arose).

People v. Noguera (1992) 4 Cal. 4th 599, 15 Cal. Rptr. 2d 400, 842 P.2d 1160 (witness's prior consistent statement to police officer was made before alleged motive to fabricate arising from events which were basis of defendant's cross-examination; thus, statement was admissible, even if witness had motive to minimize potential penal liability as soon as officer told him that he was liable as coconspirator).

People v. Johnson (1992) 3 Cal. 4th 1183, 14 Cal. Rptr. 2d 702, 842 P.2d 1 (where defense counsel made no express or implied charge that victim's trial testimony was recently fabricated or influenced by bias or improper motive, preliminary hearing testimony was not admissible as evidence of a prior consistent statement).

People v. DeSantis (1992) 2 Cal. 4th 1198, 9 Cal. Rptr. 2d 628, 831 P.2d 1210 (admission of accomplice's prior consistent statement did not deny defendant due process where statement fell within scope of statute governing prior consistent statements and statute's constitutionality was unchallenged).

People v. Hayes (1990) 52 Cal. 3d 577, 276 Cal. Rptr. 874, 802 P.2d 376 (admission of witness's prior consistent statement under this section did not violate defendant's right of confrontation under *Sixth Amendment*; when witness's testimony may have been influenced by multiple biases or motives to fabricate, prior consistent statement is admissible if made before existence of any one or more of the alleged biases or motives to fabricate, and not only if made before existence of all such biases and motives).

People v. Williams (2002) 102 Cal. App. 4th 995, 125 Cal. Rptr. 2d 884 (videotaped interviews the police conducted with the victim and her son were admissible as prior consistent statements where defense counsel implied during cross-examination that both witnesses had fabricated portions of their trial testimony; "pre-motive" requirement, that the statement must have been made before an improper motive is alleged to have arisen, did not apply because defense counsel made charge of recent fabrication "by negative evidence"--suggesting that the witnesses did not talk about the

matter before when it would have been natural to do so; the videotape rebuts this charge, showing that the witnesses did talk about the matter).



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DIVISION 6 WITNESSES

CHAPTER 7 HYPNOSIS OF WITNESSES

SECTION 795 Admissibility of Testimony of Hypnosis Subject

1-795 California Evidence Courtroom Manual 795.syn

§ 795.syn Synopsis to Chapter 795: Admissibility of Testimony of Hypnosis Subject

Scope Admissibility of Testimony of Hypnosis Subject

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CHAPTER 7 HYPNOSIS OF WITNESSES

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1-795 California Evidence Courtroom Manual Scope

Scope Admissibility of Testimony of Hypnosis Subject

§ 795 reads as follows:

Rule 795 Admissibility of Testimony of Hypnosis Subject

(a) The testimony of a witness is not inadmissible in a criminal proceeding by reason of the fact that the witness has previously undergone hypnosis for the purpose of recalling events which are the subject of the witness' testimony, if all of the following conditions are met:

- (1) The testimony is limited to those matters which the witness recalled and related prior to the hypnosis.
- (2) The substance of the prehypnotic memory was preserved in written, audiotape, or videotape form prior to the hypnosis.
- (3) The hypnosis was conducted in accordance with all of the following procedures:
 - (A) A written record was made prior to hypnosis documenting the subject's description of the event, and information which was provided to the hypnotist concerning the subject matter of the hypnosis.
 - (B) The subject gave informed consent to the hypnosis.
 - (C) The hypnosis session, including the pre- and post-hypnosis interviews, was videotape recorded for subsequent review.

(D) The hypnosis was performed by a licensed medical doctor, psychologist, licensed clinical social worker, or a licensed marriage and family therapist experienced in the use of hypnosis and independent of and not in the presence of law enforcement, the prosecution, or the defense.

(4) Prior to admission of the testimony, the court holds a hearing pursuant to *Section 402 of the Evidence Code* at which the proponent of the evidence proves by clear and convincing evidence that the hypnosis did not so affect the witness as to render the witness' prehypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness' prehypnosis recollection. At the hearing, each side shall have the right to present expert testimony and to cross-examine witnesses.

(b) Nothing in this section shall be construed to limit the ability of a party to attack the credibility of a witness who has undergone hypnosis, or to limit other legal grounds to admit or exclude the testimony of that witness.

(Added by Stats. 1984, ch. 479, § 1. Amended by Stats. 1987, ch. 285, § 1.; Stats. 1996, ch. 67 (A.B. 2296), § 1; Stats. 2002, ch. 1013 (S.B. 2026), § 77)

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CHAPTER 7 HYPNOSIS OF WITNESSES

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1 ANALYSIS

Section 795 was enacted in response to *People v. Shirley* (1982) 31 Cal. 3d 18, 181 Cal. Rptr. 243, 723 P.2d 1354 and the passage of Proposition 8, the "Right to Truth-in-Evidence" initiative. The California Supreme Court held in *Shirley* that testimony of a witness who has been hypnotized to restore the witness's memory of the events at issue is inadmissible as to all matters relating to those events from the time of the hypnosis forward, excepting criminal defendants where such a rule would violate the fundamental right of the accused to testify in his own behalf. After the passage of Proposition 8, however, there was concern that the initiative would result in the introduction of all hypnotically refreshed testimony. Thus, Section 795 was designed to permit a previously hypnotized witness to testify if specific safeguards are followed. Section 795, however, does not limit the introduction of a criminal defendant's testimony even if it has been hypnotically refreshed without the safeguards listed in Section 795. *People v. Aguilar* (1990) 218 Cal. App. 3d 1556, 267 Cal. Rptr. 879 .

Although Section 795 applies only to criminal proceedings, *Shirley* does not distinguish between criminal and civil proceedings and thus arguably controls in civil cases. *See also Section 351.1* (exclusion of evidence regarding polygraph tests).



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 795 in the Federal Rules of Evidence. In *Rock v. Arkansas (1987) 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37*, the United States Supreme Court held that the trial judge's exclusion of the accused's hypnotically refreshed testimony violated her constitutional right to testify; however, the state may exclude the defendant's hypnotically refreshed testimony where it can show that such testimony is unreliable. On the issue of reliability of evidence, in *United States v. Scheffer (1998) 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413*, the United States Supreme Court held that Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings, does not abridge the constitutional right under the *Sixth Amendment* of accused members of the military to present a defense. The Court held that Rule 707 serves several legitimate interests, including ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation on collateral issues. The Court thus held that the rule was neither arbitrary nor disproportionate in achieving its purpose.



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1-795 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Miller (1990) 50 Cal. 3d 954, 269 Cal. Rptr. 492, 790 P.2d 1289 (posthypnotic testimony of witness identifying defendant as the man last seen with murder victim was inadmissible as hypnosis is not a recognized reliable area of science under the *Kelly/Frye* rule).

Ramona v. Superior Court (1997) 57 Cal. App. 4th 107, 66 Cal. Rptr. 2d 766 (assuming, without deciding, that Section 795 is applicable in civil cases, plaintiff failed to meet the statute's safeguards; her pre--sodium amytal memories were not preserved in written, audiotape, or videotape form and the interview conducted under the influence of sodium amytal was not videotaped).

Schall v. Lockheed Missiles & Space Co. (1995) 37 Cal. App. 4th 1485, 44 Cal. Rptr. 2d 191 (Section 795, which applies only to criminal proceedings, was intended to clarify whether and under what circumstances witness may testify after having been hypnotized for trial).



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DIVISION 7 OPINION TESTIMONY AND SCIENTIFIC EVIDENCE
CHAPTER 1 EXPERT AND OTHER OPINION TESTIMONY
ARTICLE 1 EXPERT AND OTHER OPINION TESTIMONY GENERALLY
SECTION 800 Opinion Testimony by Lay Witness

1-800 California Evidence Courtroom Manual 800.syn

§ 800.syn Synopsis to Chapter 800: Opinion Testimony by Lay Witness

Scope Opinion Testimony by Lay Witness

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SECTION 800 Opinion Testimony by Lay Witness

1-800 California Evidence Courtroom Manual Scope

Scope Opinion Testimony by Lay Witness

§ 800 reads as follows:

Rule 800 Opinion Testimony by Lay Witness

If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

- (a) Rationally based on the perception of the witness; and
- (b) Helpful to a clear understanding of his testimony.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 800 Opinion Testimony by Lay Witness

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1 ANALYSIS

Section 800 governs the admissibility of opinion testimony from a lay witness. Before an opinion from a lay witness is permitted, two circumstances must exist. First, consistent with Section 800, the opinion must be rationally based upon first-hand perceptions by the witness; second, the opinion must facilitate an understanding of the witness's testimony.

Some things simply cannot easily be expressed in terms other than an opinion. Obvious examples would be testimony about color, speed of a vehicle, and the like. Opinion testimony is permitted in more complex circumstances where the opinion will facilitate a more complete understanding of the witness's testimony. Such circumstances might include the identity of a person, elements of a person's health, age, or appearance. Another area in which a lay witness is permitted to give opinion testimony under controlled circumstances relates to sanity. *See Section 870.* In any case, a foundation is necessary to establish that the witness has had sufficient perceptions to form an opinion based upon those perceptions of the witness. The degree to which a witness may give an opinion, of course, is predicated in part upon whether and the extent to which the witness has sufficient life experiences that would permit making a judgment as to the matter involved.

Lay opinions are not "helpful" under this section whenever the jury can readily draw the necessary inferences and conclusions without the aid of the opinion. Likewise, such opinions are not helpful when they are confusing or excessively time consuming. Accordingly, Section 800 vests considerable discretion in the trial court and mandates care in determining whether the jury will be aided by lay opinion testimony in reaching a just result. Furthermore, in a proper case, lay opinion testimony otherwise admissible may be excluded by the trial court if the probative value of the testimony is sufficiently outweighed by the considerations set forth in Section 352.

Practice Tip

Any question that asks a lay witness to speculate as to certain facts will likely be "not helpful" under Section 800. Consequently, a question such as, "What would have happened if your son had survived the accident?" is likely to be subject to objection based upon its speculative nature.



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SECTION 800 Opinion Testimony by Lay Witness

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2 COMPARISON TO FEDERAL RULE

Federal Rule of Evidence 701 was amended effective December 1, 2000. It now differs somewhat from Section 800. *Federal Rule of Evidence 701* imposes an express requirement that the lay opinion not be based on scientific, technical, or other specialized knowledge of the type referred to in the expert opinion rule, *Federal Rule of Evidence 702*. It is doubtful that this amendment will make much difference, in that most courts would find that an opinion based on such special knowledge or training is not a lay opinion.



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3 SIGNIFICANT CASES

In General

People v. Farnam (2002) 28 Cal. 4th 107, 121 Cal. Rptr. 2d 106, 47 P.3d 988 (testimony regarding computerized database for matching fingerprints did not have to satisfy standards for admitting new scientific evidence as expert's opinion was not based on computerized system but on long-established techniques; jury could make its own comparisons since computerized system did not alter evidence; correctional officer's testimony that defendant stood "in a posture like he was going to start fighting" was not improper lay testimony under Section 800).

People v. McAlpin (1991) 53 Cal. 3d 1289, 283 Cal. Rptr. 382, 812 P.2d 563 (the purpose of *Evidence Code* section 800(b), limiting lay opinion testimony to an opinion that is helpful to a clear understanding of the witness's testimony, is to determine when a lay witness may supplement or illustrate his factual testimony by drawing therefrom his own conclusion or inference, i.e., his opinion. The opinion need only be "helpful," rather than necessary).

Mardirossian & Associates, Inc. v. Ersoff (2007) 153 Cal. App. 4th 257, 62 Cal. Rptr. 3d 665 (in an action to recover attorneys fees, trial court did not err in admitting testimony of attorneys regarding hours spent on a contingency fee case even though the attorneys did not keep contemporaneous time records and they could not recall an exact number of hours spent on the matter; attorneys' testimony was based on their personal knowledge and was not speculative; also, trial court did not err in admitting expert testimony regarding the reasonableness of the fees and the amount of skill and learning necessary to produce the work expended on the case).

People v. Hurlic (1971) 14 Cal. App. 3d 122, 92 Cal. Rptr. 55 (the opinion rule requires that witnesses express themselves at the lowest possible level of abstraction, and "concluding" should be left to the jury; however, when the details observed, even though recalled, are "too complex or too subtle" for concrete description by the witness, he may state his general impression).

Examples of Lay Opinion--Opinion on Mental Issues Other Than Sanity

People v. DeSantis (1992) 2 Cal. 4th 1198, 9 Cal. Rptr. 2d 628, 831 P.2d 1210 (in a capital prosecution, trial court

erred in excluding statement by witness that he had trouble remembering "because of his brain cells." Assuming the testimony related to the witness's present cognitive difficulties, it was admissible opinion evidence under this section, for there is no logical reason why qualified lay witnesses cannot give an opinion as to mental condition less than sanity).

--Opinions on Identity or Perception

People v. Lucero (1998) 64 Cal. App. 4th 1107, 75 Cal. Rptr. 2d 806 (trial court erred in admitting police officer's lay opinion testimony that soles of shoes defendant was wearing at the time of his arrest matched the print obtained at crime scene, but error was harmless where there was sufficient additional evidence connecting defendant to robbery).

People v. Ingle (1986) 178 Cal. App. 3d 505, 223 Cal. Rptr. 723 (witness with personal knowledge of defendant's appearance at time of robbery allowed to identify defendant from surveillance videotape when such identification was helpful to the trier of fact to determine the critical issue of identity).

People v. Mixon (1982) 129 Cal. App. 3d 118, 180 Cal. Rptr. 772 (officer allowed to make identification opinion of surveillance photograph when probative value outweighed prejudicial potential).

People v. Harris (1969) 270 Cal. App. 2d 863, 76 Cal. Rptr. 130 (trial court erred in excluding lay testimony that it looked as if defendant was trying to break up the fight in which the victim was stabbed and that it did not look as if defendant participated in the assault, where the fight was the kind of occurrence that is recognized as requiring a description by opinion, in that, under the circumstances shown, the precise sequence of blows and other details would have been difficult to see).

--Opinions on Value

Pond v. Insurance Co. of N. America (1984) 151 Cal. App. 3d 280, 198 Cal. Rptr. 517 (claims adjuster's opinion of plaintiff's amount of insurance coverage inadmissible lay opinion).

Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (an owner of property is allowed to estimate its worth whether or not he has special knowledge of such values).

--Physical Effects of Intoxication and Drug Use

People v. Williams (1992) 3 Cal. App. 4th 1326, 5 Cal. Rptr. 2d 130 (nonexpert witness opinion as to the intoxication of another based on commonly recognized signs of drunkenness such as slurred speech, smell of alcohol, and unsteadiness permitted).

People v. Partin (1967) 254 Cal. App. 2d 89, 62 Cal. Rptr. 59 (in a prosecution for selling marijuana, reactions and acquired knowledge from the use of a drug such as marijuana qualify a witness to testify that what he later used was the forbidden drug, particularly when no objection was made to the witness's statement of opinion).



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DIVISION 7 OPINION TESTIMONY AND SCIENTIFIC EVIDENCE
CHAPTER 1 EXPERT AND OTHER OPINION TESTIMONY
ARTICLE 1 EXPERT AND OTHER OPINION TESTIMONY GENERALLY
SECTION 801 Opinion Testimony by Expert Witness

1-801 California Evidence Courtroom Manual 801.syn

§ 801.syn Synopsis to Chapter 801: Opinion Testimony by Expert Witness

Scope Opinion Testimony by Expert Witness

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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1-801 California Evidence Courtroom Manual Scope

Scope Opinion Testimony by Expert Witness

§ 801 reads as follows:

Rule 801 Opinion Testimony by Expert Witness

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

- (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
- (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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1 ANALYSIS

Section 801 concerns one of the most controversial topics in evidence law today--expert testimony. To understand expert testimony, one must see that there are essentially two types of witnesses at the trial of a lawsuit--lay witnesses and expert witnesses. The lay witness testifies because he or she has firsthand knowledge of relevant facts. An expert may testify, not because he or she has firsthand knowledge of relevant facts, but rather because of special expertise which will assist the trier of fact in interpreting the facts of the case. While the test for the use of expert testimony requires that the trier of fact be aided by the testimony, the standard is a relative one which will depend upon the particular subject, the particular witness, and the facts of the litigation.

Section 801 performs three distinct functions. First, it expressly authorizes the use of expert testimony. Second, it establishes standards to be applied in determining whether expert testimony should be admitted in a particular case. Finally, it governs the form of expert testimony.

Section 801(b) identifies permissible sources of facts or data upon which the expert may base his or her opinion or inference. The expert may predicate his or her opinion on first-hand knowledge, or in the alternative, the expert may draw upon facts or data made known to the expert at or before the hearing. Additionally, Section 801(b) provides that if the facts or data are of the type reasonably relied upon by experts in the field, they are a permissible source of information even if they would not be admissible in evidence.

Where an expert has personal knowledge of the facts or data underlying his or her opinion, this basis is a permissible predicate for his or her testimony. For example, an attending physician who treated an injured plaintiff would have first-hand knowledge of the facts which could permissibly support expert opinion testimony as to the permanence of plaintiff's disability. In this case, the expert is aware of the supporting data by reason of his or her first-hand experience.

The expert may also rely on other sources in lieu of having personal knowledge of the underlying facts. For example, the expert may base his or her opinion on reports prepared by others. If such material is inadmissible, it nevertheless is an appropriate basis for expert testimony provided it is the type of information relied upon by experts in the field.

A closely related and controversial issue is whether a trial judge should impose stricter standards on expert opinion that rests on scientific, technical or novel methodologies. This issue is discussed below, in comparing the California and

federal approaches to expert testimony.

See also Sections 720 (qualification of expert witnesses), *721* (cross-examination of witnesses), *722* (credibility of expert witnesses) and *723* (limit on number of expert witnesses).



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2 COMPARISON TO FEDERAL RULE

Section 801(a) is somewhat similar to the first part of *Federal Rule of Evidence 702*, which requires that the expert testify on a matter that is beyond the common experience of the jury. Thus, the expert's function under both rules is to "assist the trier of fact." However, Federal Rule of Evidence 702 was amended, effective December 1, 2000, to codify the U.S. Supreme Court's recent cases on scientific and technical expert witness testimony, which are discussed below. Section 801(b) is the counterpart of *Federal Rule of Evidence 703*, which defines the proper bases for the expert's opinion. Federal Rule of Evidence 703 was also amended in 2000 in such a way as to set it apart from Section 801(b). Federal Rule of Evidence 703 now states that facts or data that help to form an expert's opinion but that are inadmissible may not be disclosed to the jury unless the court determines the probative value substantially outweighs the prejudicial effect.

Despite the similarity in language, California and federal courts differ in their approach to determining the admissibility of expert testimony when it rests on scientific, technical or novel methodologies. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, the U.S. Supreme Court held that under the Federal Rules of Evidence, the so-called *Frye* test (*Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 54 App. D.C. 46 does not apply to determine whether expert testimony may be offered on a particular subject. The *Frye* test, or the "general acceptance test," provides that an expert opinion based on a scientific technique is admissible only where the technique is generally accepted as reliable in the relevant scientific community. The Court held that the express language of the pertinent federal rules places appropriate limits on the admissibility of purportedly scientific evidence by requiring the trial judge to ensure that an expert's testimony rests on a reliable foundation.

The Court in *Daubert* held that the reliability standard is principally established by Federal Rule of Evidence 702's requirement that an expert's testimony pertain to scientific knowledge, since the adjective "scientific" implies a grounding in certain methods and procedures. The Court further held that the word "knowledge" in Rule 702 suggests a body of known facts or of ideas inferred from such facts or accepted as true on solid grounds. The Rule's requirement that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" pertains primarily to relevance by requiring a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

The *Daubert* Court set out a non-exhaustive list of inquiries that courts may find helpful in determining whether to admit novel scientific evidence and which have now been codified in Federal Rule of Evidence 702: (1) Can the theory

or technique in question be tested and, if so, has it been tested? (2) Has the theory or technique been published and subjected to peer review? (3) What is the known or potential rate of error when using the theory or technique? (4) Do standards exist which can serve as controls on a technique's operation and, if so, were such standards employed in the matter in dispute? and (5) Has the theory or technique been generally accepted? By mentioning the "general acceptance" standard, the Court appears to leave room for courts to consider the *Frye* standard as part of their analysis. However, the Court modified the traditional *Frye* standard by adding that "[a] reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." The Court stressed that by listing the foregoing factors, it did not seek to set forth a "definitive checklist or test," but rather envisioned a flexible evaluation of the admissibility of expert testimony concerning novel scientific evidence. The Court emphasized that the focus of the inquiry centers on the scientific validity of the "principles and methodology" underlying the expert's conclusions, not the conclusions themselves. As the *Daubert* Court explained, the Rules of Evidence are "designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." The Supreme Court recently affirmed that the ultimate test of admissibility is reliability, no matter what the subject of the expert's opinion; reliability must be evaluated within the context of the particular situation. *Kumho Tire Company, Ltd. v. Carmichael* (1999) 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 . The trial court has substantial discretion in evaluating the reliability of the expert's methodologies and conclusions; the trial court's decision will only be reversed for an abuse of discretion. *General Electric Co. v. Joiner* (1997) 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 .

The California courts have also stressed that the trial court must examine the reliability of scientific or novel methodologies, but have focused on whether the methodology is sufficiently reliable to have gained general acceptance in the field to which it belongs. Thus, the California approach has been labeled the "*Kelly/Frye*" test, after the California Supreme Court case and federal case establishing the standards. *People v. Kelly* (1976) 17 Cal. 3d 24, 130 Cal. Rptr. 144, 549 P.2d 1240 ; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 54 App. D.C. 46 . The California Supreme Court has specifically declined to follow the *Daubert* decision, preferring to adhere to the "*Kelly/Frye*," or more simply "the *Kelly*" test, for novel scientific or technical expert testimony. *People v. Leahy* (1994) 8 Cal. 4th 587, 34 Cal. Rptr. 2d 663, 882 P.2d 321 .



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3 SIGNIFICANT CASES

Application of *Kelly/Frye* Test

People v. Wilkinson (2004) 33 Cal. 4th 821, 16 Cal. Rptr. 3d 420, 94 P.3d 551, cert. denied, 543 U.S. 1064 (holding that trial court did not err in denying defendant a *Kelly/Frye* hearing regarding the admissibility of polygraph evidence when polygraph evidence is categorically inadmissible under Section 351.1).

People v. Soto (1999) 21 Cal. 4th 512, 88 Cal. Rptr. 2d 34, 981 P.2d 958 (the unmodified product rule, as applied in DNA forensic analysis, is generally accepted in the relevant scientific community of population geneticists and that statistical calculations made utilizing that rule meet the judicial standard for admissibility of scientific evidence; this conclusion is supported most notably by a 1996 report by the National Research Council, which explicitly approved use of the unmodified product rule in calculating match frequencies and the clear weight of nationwide judicial authority).

People v. Smithey (1999) 20 Cal. 4th 936, 86 Cal. Rptr. 2d 243, 978 P.2d 1171, reh'g denied, 21 Cal. 4th 845a (prosecution's rebuttal expert testimony that psychiatric testing and evaluations are unreliable did not require *Kelly* hearing on reliability of psychological testing; prosecution's rebuttal expert attacked the credibility but did not dispute admissibility of defense expert testimony).

People v. Venegas (1998) 18 Cal. 4th 47, 74 Cal. Rptr. 2d 262, 954 P.2d 525 (FBI's failure to use correct scientific procedures in processing and matching of DNA fragments justify reversal of conviction, but restriction fragment length polymorphism (RFLP) analysis along with "modified ceiling principle" satisfies *Kelly/Frye* test of general acceptance).

People v. Clark (1993) 5 Cal. 4th 950, 22 Cal. Rptr. 2d 689, 857 P.2d 1099, cert. denied, 512 U.S. 1253 ("blood-spatter" evidence does not raise *Kelly/Frye* problem as methods employed are neither new nor carry misleading aura of scientific infallibility).

People v. Fierro (1991) 1 Cal. 4th 173, 3 Cal. Rptr. 2d 426, 821 P.2d 1302 (for new scientific techniques to be properly admitted, proponent must establish their general acceptance in the relevant scientific community; such proof was established under the *Kelly/Frye* rule for electrophoretic testing of dried blood stains).

Geffcken v. D'Andrea (2006) 137 Cal. App. 4th 1298, 41 Cal. Rptr. 3d 80 (trial court did not abuse its discretion in excluding evidence where proponent failed to show that the "Immunosciences mycotoxin antibody test" and "IBT blood serology test" have gained general acceptance in the relevant scientific community; trial court did not abuse its discretion in excluding expert testimony where expert's pervasive chain of custody errors and deficiencies invalidate the integrity of sampling results).

Roberti v. Andy's Termite & Pest Control, Inc. (2003) 113 Cal. App. 4th 893, 6 Cal. Rptr. 3d 827 (*Kelly* test does not apply to medical opinion regarding cause of autism; *Kelly* is not applicable even though the proffered evidence presents a new theory of medical causation because *Kelly* analysis is limited to situations where a novel scientific theory or method that creates a misleading aura of certainty by purporting to relay to the trier of fact a definitive truth derived from an unproven scientific technique or procedure).

People v. Mitchell (2003) 110 Cal. App. 4th 772, 2 Cal. Rptr. 3d 49 (trial court erred in denying defendant's request that novel device used in canine scent identification lineup be subject to a *Kelly* hearing; the technique of establishing a person's identity in a canine scent lineup, using a scent transfer unit, has not been subject to judicial scrutiny in this state; it is a novel device used in furtherance of a new technique).

People v. Nolan (2002) 95 Cal. App. 4th 1210, 116 Cal. Rptr. 2d 331 (the *Kelly/Frye* test, which holds that evidence of a new scientific technique is not admissible unless it has gained general acceptance in the scientific community, does not bar admission into evidence of an ADX Abbott bench urinalysis test; ADX Abbott test results have been accepted into the scientific community for testing urine for drug usage; a *Kelly/Frye* hearing is not necessary for new devices, but only for new methodology; this machine process is not new and can be used in a probation violation hearing).

People v. Robbie (2001) 92 Cal. App. 4th 1075, 112 Cal. Rptr. 2d 479 (trial court erred in allowing prosecution expert witness to testify regarding rapist profile characteristics).

People v. Reeves (2001) 91 Cal. App. 4th 14, 109 Cal. Rptr. 2d 728 (unmodified product rule, as used with polymerase chain reaction (PCR) testing to calculate statistical significance of DNA matches is generally accepted in the scientific community and was admissible).

People v. Bui (2001) 86 Cal. App. 4th 1187, 103 Cal. Rptr. 2d 908 (expert testimony that use of methamphetamine in greater than therapeutic dosage would impair a person's ability to drive was admissible; epidemiological studies on which expert relied were generally accepted method of research in the scientific community).

Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (appeal of consolidated civil actions against O. J. Simpson for wrongful deaths of Nicole Brown Simpson and Ronald Goldman; trial court did not err in excluding proposed expert testimony about validation studies allegedly showing a chronic contamination problem in DNA testing by the police department's laboratory because the study was not based on alleged contamination in blood tests in the case at hand but on unrelated sampling procedures).

People v. Brown (2001) 91 Cal. App. 4th 623, 110 Cal. Rptr. 2d 750 (correct and accepted scientific technique was followed in DNA testing; in determining whether a database sample is appropriate for comparison of DNA testing, evidence that a disproportionate number of individuals came from same geographic area is insufficient to disqualify the sample absent a sub-population in that geographic area; laboratory's African-American database was not too small).

Wilson v. Phillips (1999) 73 Cal. App. 4th 250, 86 Cal. Rptr. 2d 204 (expert testimony on phenomenon of repressed memory was not based on a new scientific technique and thus was not subject to *Kelly* test).

People v. Allen (1999) 72 Cal. App. 4th 1093, 85 Cal. Rptr. 2d 655 (employee of laboratory that performed DNA

testing by short tandem repeats (STR) method on semen stain was competent to testify as to general acceptance of test in the scientific community; moreover, cases from other jurisdictions supported conclusion that STR is generally accepted in its field).

People v. Ward (1999) 71 Cal. App. 4th 368, 83 Cal. Rptr. 2d 828 (expert psychiatric or psychological testimony in a proceeding under *Welfare and Institutions Code* section 6600 (Sexually Violent Predator Act) is "expert medical opinion"; it is not "scientific evidence" subject to *Kelly* test for admissibility).

Ramona v. Superior Court (1997) 57 Cal. App. 4th 107, 66 Cal. Rptr. 2d 766 (expert testimony may be admissible to explain psychological factors altering capacity of eyewitnesses without regard to *Kelly* test as there is no experimental or novel device involved in such testimony; however, testimony of alleged victim as to repressed memories recovered during interview conducted under influence of sodium amytal was inadmissible under *Kelly*).

People v. Bury (1996) 41 Cal. App. 4th 1194, 49 Cal. Rptr. 2d 107 (the preliminary alcohol screening (PAS) device is not a novel scientific technique and thus need not satisfy the *Kelly/Frye* test).

People v. Amundson (1995) 34 Cal. App. 4th 1151, 41 Cal. Rptr. 2d 127 (testimony about polymerase chain reaction (PCR) technique for testing DNA is admissible).

Harris Transp. Co. v. Air Resources Bd. (1995) 32 Cal. App. 4th 1472, 38 Cal. Rptr. 2d 431 (the *Kelly* standard is applicable to administrative proceedings).

People v. Cegers (1992) 7 Cal. App. 4th 988, 9 Cal. Rptr. 2d 297 (*Kelly/Frye* has been held inapplicable to medical opinions based on actual examination of the subject).

People v. Axell (1991) 235 Cal. App. 3d 836, 1 Cal. Rptr. 2d 411 (DNA typing evidence meets legal requirements for admissibility of novel scientific evidence under *Kelly/Frye* test).

People v. Pitts (1990) 223 Cal. App. 3d 606, 273 Cal. Rptr. 757 (expression of expert medical opinion as to cause of wound or injury fell outside realm subject to *Kelly/Frye* rule; expert medical witness is qualified to give opinion on cause of particular injury based on his deduction from appearance of injury itself).

People v. Yorba (1989) 209 Cal. App. 3d 1017, 257 Cal. Rptr. 641 (bloodstain analysis based on agglutination inhibition testing is accepted by scientific community as valid and reliable scientific technique as determined by prior precedent established by published appellate decision; defendant did not produce evidence showing change in scientific community's opinion of test).

Expert Testimony Not Admissible Regarding Issues of Law

Asplund v. Selected Investments in Financial Equities, Inc. (2000) 86 Cal. App. 4th 26, 103 Cal. Rptr. 2d 34 (expert opinion on broker-dealer's duty was inadmissible since duty is a question of law for the court to determine).

Howard Jarvis Taxpayers Assn. v. City of Riverside (1999) 73 Cal. App. 4th 679, 86 Cal. Rptr. 2d 592 (declarations regarding opinion on whether assessment was or was not exempt under Proposition 218 were inadmissible as issue is pure question of law).

Williams v. Coombs (1986) 179 Cal. App. 3d 626, 224 Cal. Rptr. 865, *overruled in part*, 47 Cal. 3d 863 (expert opinion not allowed on issue of legal question of probable cause).

Downer v. Bramet (1984) 152 Cal. App. 3d 837, 199 Cal. Rptr. 830 (improper to allow testimony on whether a

transfer of property was legally a gift-transfer).

In General

People v. Lindberg (2008) 45 Cal. 4th 1, 82 Cal. Rptr. 3d 323, 190 P.3d 664 (although expert testimony is generally inadmissible on topics "so common" that jurors of ordinary knowledge and education could reach a conclusion as intelligently as the expert, an expert may testify on a subject about which jurors are not completely ignorant; thus, trial court did not abuse its discretion in admitting expert testimony regarding white supremacist beliefs and tenets from which they could determine, based on the material seized from defendant's bedroom, that defendant subscribed to white supremacist beliefs and tenets; this evidence could assist the jury in determining defendant's motive for killing the victim, specifically, whether the prosecution proved the hate-murder special circumstance).

People v. Prince (2007) 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, cert. denied, 128 S. Ct. 887 (trial court did not err in capital murder case in allowing expert testimony by FBI agent that several murders were committed by the same person; such "linkage" testimony goes beyond the common experience of the jury, which can be enlightened by the experience and perspective of the expert; there is no need to subject "linkage" testimony to testing and peer-review standards because it is based on the substantial experience of the expert. Such "linkage" testimony differs from "profiling" evidence, because the former does not refer to the defendant--it simply draws out the connections between criminal incidents. In contrast, "profiling" testimony attempts to link an accused to a series of crimes through their common attributes).

People v. Wilson (2006) 38 Cal. 4th 1237, 45 Cal. Rptr. 3d 73, 136 P.3d 864 (expert testimony on profiling frequencies for three most common population groups in country of DNA evidence found on murder victim's clothing was admissible where ethnicity of perpetrator was unknown and expert did not assume the perpetrator was the same race as defendant or victim; the evidence is relevant for the jury to know that most persons of at least major portions of the general population could not have left the evidence).

People v. Guerra (2006) 37 Cal. 4th 1067, 40 Cal. Rptr. 3d 118, 129 P.3d 321, cert. denied, 549 U.S. 1182 (trial court erred in refusing to admit testimony by defendant's expert that defendant had passive personality and was incapable of committing a violent act under normal circumstances; trial court erroneously stated the evidence would be admissible only if he was "100 percent certain" that defendant would not commit a violent act under any circumstances, but error was harmless).

People v. Brown (2004) 33 Cal. 4th 892, 16 Cal. Rptr. 3d 447, 94 P.3d 574 (defendant's conviction for domestic violence was affirmed on grounds that expert testimony that victims often later deny or minimize an assailant's conduct was admissible under *Evidence Code* section 801 because it would assist the trier of fact in evaluating credibility of the victim. The Court thus declined to rule on defendant's argument that this expert testimony did not fall within the scope of *Evidence Code* section 1107, which authorizes expert testimony on "battered women's syndrome." The defense had argued the prosecution had failed to show that the victim here was a battered woman because it offered no proof that defendant had abused her on more than one occasion. Thus, the Court did not resolve a conflict within the courts of appeal: *People v. Gomez* (1999) 72 Cal. App. 4th 405, 85 Cal. Rptr. 2d 101 (holding that such expert testimony is inadmissible) and *People v. Williams* (2000) 78 Cal. App. 4th 1118, 93 Cal. Rptr. 2d 356 (holding that expert testimony is admissible even if there was no evidence of abuse on a prior occasion)).

People v. Boyette (2002) 29 Cal. 4th 381, 127 Cal. Rptr. 2d 544, 58 P.3d 391 (prosecutor erred in penalty phase by asking defense mental health expert series of hypothetical questions regarding future dangerousness of defendant, where defendant has not presented evidence that he lacked future dangerousness; error was not prejudicial where expert disputed prosecutor's line of testimony).

People v. Williams (2002) 28 Cal. 4th 408, 121 Cal. Rptr. 2d 854, 49 P.3d 203 (in an appeal from a driving under the

influence conviction, absence of substantial compliance with applicable regulations in a preliminary alcohol screening (PAS) test does not justify blanket exclusion of PAS results, but goes merely to the weight of the evidence where other foundational elements are present).

People v. Farnam (2002) 28 Cal. 4th 107, 121 Cal. Rptr. 2d 106, 47 P.3d 988 (testimony regarding computerized database for matching fingerprints did not have to satisfy standards for admitting new scientific evidence as expert's opinion was not based on computerized system but on long-established techniques; jury could make its own comparisons since computerized system did not alter evidence; correctional officer's testimony that defendant stood "in a posture like he was going to start fighting" was not improper lay testimony under Section 800).

Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 91 Cal. Rptr. 2d 293, 989 P.2d 270 (Code of Civil Procedure section 2034 does not require an expert witness declaration in order for a treating physician to offer expert opinion testimony on causation and other matters, but the treating physician must still be designated as a testifying expert).

People v. Soto (1999) 21 Cal. 4th 512, 88 Cal. Rptr. 2d 34, 981 P.2d 958 (the unmodified product rule, as applied in DNA forensic analysis, is generally accepted in the relevant scientific community of population geneticists and that statistical calculations made utilizing that rule meet the judicial standard for admissibility of scientific evidence; this conclusion is supported most notably by a 1996 report by the National Research Council, which explicitly approved use of the unmodified product rule in calculating match frequencies and the clear weight of nationwide judicial authority).

Bonds v. Roy (1999) 20 Cal. 4th 140, 83 Cal. Rptr. 2d 289, 973 P.2d 66 (a trial court may preclude an expert witness from testifying at trial about a subject matter that was not previously described in the expert witness declaration).

People v. Venegas (1998) 18 Cal. 4th 47, 74 Cal. Rptr. 2d 262, 954 P.2d 525 (FBI's failure to use correct scientific procedures in processing and matching of DNA fragments justifies reversal of conviction, but restriction fragment length polymorphism (RFLP) analysis along with "modified ceiling principle" satisfies *Kelly/Frye* test of general acceptance).

People v. Sims (1993) 5 Cal. 4th 405, 20 Cal. Rptr. 2d 537, 853 P.2d 992 (counsel may ask an expert witness a hypothetical question framed upon any theory that can be deduced from the evidence, and the questioner may assume any facts within the limits of the evidence and omit any facts deemed not material, such that examining attorney was allowed to ask expert about possible cause of death scenario).

People v. Samuel (1981) 29 Cal. 3d 489, 174 Cal. Rptr. 684, 629 P.2d 485 (it is within the exclusive province of the trier of fact to determine the credibility of experts and the weight to be given to their testimony. Where the expert testimony is unanimous, although this unanimity is persuasive, the jury may nonetheless reject their opinions. Nevertheless, a jury cannot reasonably reject persuasive and virtually uncontradicted evidence showing a defendant's lack of competency to stand trial).

People v. Bassett (1968) 69 Cal. 2d 122, 70 Cal. Rptr. 193, 443 P.2d 777 (expert testimony is an expert's argument to the court and is valuable only in regard to the proof of the facts and to the validity of the reasons advanced for the expert's conclusion; thus, when the foundation of an expert's testimony is determined to be inadequate as a matter of law, an appellate court is not bound by an apparent conflict in the evidence created by his bare conclusions).

People v. Chapple (2006) 138 Cal. App. 4th 540, 41 Cal. Rptr. 3d 680 (the crime charged, felon in possession of prohibited "body armor," consists of elements incapable of determination by the trier of fact without the assistance of an expert; lay opinion testimony may rest only on common experience, which is inadequate to support the opinion required here--whether or not the vest seized in this case met certification standards for prohibited "body armor;" these concepts go beyond common experience and thus, was a proper subject for expert testimony, but not for a lay opinion).

Nardizzi v. Harbor Chrysler Plymouth Sales, Inc. (2006) 136 Cal. App. 4th 1409, 39 Cal. Rptr. 3d 530 (affirming summary judgment where plaintiff failed to provide adequate evidence of causation; expert's declaration that the accident must have been caused by defendant's failure to properly close the "bleeder" screws after servicing, which allowed the brake fluid to leak out and ultimately led to the total brake failure on plaintiff's car failed to address the fact that the only individual who physically inspected the vehicle shortly after the accident testified that the bleeder screws were properly closed and that there were no signs of leaking from those screws).

Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363, 37 Cal. Rptr. 3d 9 (testimony of tire expert, in support of vehicle owner's action against tire manufacturer alleging defective design and negligence, was not admissible, inasmuch as vehicle owner failed to show substantial similarity between the tire failures relied on by expert witness and her own tire failure; although expert testified that he had worked on about 300 tire failure cases, he based his similar accident testimony on only 10 of those cases, he failed to provide police reports from the other accidents or any other information to show that the circumstances of the 10 tire failures were similar to the circumstances of the instant case, he conceded that only three of the ten cases involved the same model tire as that used by vehicle owner, and he conceded that none of the 10 tires were nearly as worn as vehicle owner's tire; expert improperly relied on amateur photographs taken by the insurance adjuster and plaintiff's boyfriend instead of personally examining plaintiff's tire; thus expert's opinions and conclusions amounted to mere speculation).

Sinaiko v. Superior Court (2004) 19 Cal. Rptr. 3d 371 (Medical Board of California revoked license of physician for employing alternative therapies for children suffering from attention deficit and hyperactivity disorder and adults suffering from an assortment of hard-to-diagnose symptoms. Physician petitioned for writ of mandate; appellate court held that the wholesale disqualification of physician's experts rendered the administrative proceedings unfair as a matter of law, requiring remand to the Board to decide the case on the basis of all of the evidence).

Collins v. State (2004) 121 Cal. App. 4th 1112, 18 Cal. Rptr. 3d 112 (court of appeals reversed disqualification of plaintiff's expert witness, for dual representation because (1) plaintiff's law firm had no notice of the expert's dual status until plaintiff's lawyer disclosed his expert and defendant's counsel raised the conflict, (2) plaintiff's law firm ceased all direct contact with the expert after his dual role was revealed, and (3) no confidential information was transmitted between plaintiff's law firm and defendant's expert).

Petrou v. South Coast Emergency Group (2004) 119 Cal. App. 4th 1090, 15 Cal. Rptr. 3d 64 (trial court erred in precluding testimony from plaintiff's expert in a medical malpractice action; Court of Appeals held that proper interpretation of *Health and Safety Code* section 1799.110 is that the five-year "substantial professional experience" period to qualify as an expert witness is to be measured from the date of the alleged malpractice, reasoning that the relevant standard of care in medical malpractice cases was the one existing at time the alleged malpractice occurred, and therefore it was logical that statute demanded expert witnesses with substantial professional experience at time of treatment in question).

Jennings v. Palomar Pomerado Health Systems, Inc. (2003) 114 Cal. App. 4th 1108, 8 Cal. Rptr. 3d 363 (trial court did not err in striking plaintiff's expert witness testimony in medical malpractice action; even though expert was qualified and the subject of testimony was beyond the common experience of the jury so that expert testimony was necessary, the expert merely provided a conclusory opinion that something did occur; plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury).

People v. Killebrew (2002) 103 Cal. App. 4th 644, 126 Cal. Rptr. 2d 876 (In prosecution for conspiracy to possess a handgun by an active member of a criminal street gang, trial court erred in admitting testimony of police gang expert that all of the occupants of three cars traveling in gang territory together were gang members who would have known of and mutually possessed any gun that was located in any of the three cars; expert improperly opined on the subjective intent and knowledge of each of the gang members; moreover, in describing why he believed each person involved in

conspiracy was a gang member, expert improperly recited numerous allegations, varying from convictions, to arrests without convictions, to pure speculation; it is well-settled that an expert may not testify to incompetent hearsay under the guise of stating reasons for an opinion).

West v. Sundown Little League of Stockton (2002) 96 Cal. App. 4th 351, 116 Cal. Rptr. 2d 849 (plaintiff's expert's declaration did not raise triable issue of fact; the motion of the sun and its effects on a baseball field and players is a subject of common sense, not a subject for expert opinion).

People v. Clauser/Wells Partnership (2002) 95 Cal. App. 4th 1066, 116 Cal. Rptr. 2d 240 (trial court erred in excluding the testimony of expert in eminent domain case against automobile salvage business; expert's conversations with unidentified distributors and dealers in unidentified industries provided sufficient foundation for expert's opinion that wholesale cost of used automobile parts was retail price less a 50 percent markup; expert may rely on hearsay in forming opinion if it is of a type reasonably relied upon by experts in that field).

Mizel v. City of Santa Monica (2001) 93 Cal. App. 4th 1059, 113 Cal. Rptr. 2d 649 (opinion testimony by a non-designated expert witness is not admissible to rebut the opinion of another expert and may not be admitted under the guise of impeachment; such a non-designated expert may testify as to the facts underlying the opinion of another expert, but trial courts are to strictly construe the term "foundational fact" to prevent a party from simply offering a contrary opinion by a non-designated expert).

People v. Acevedo (2001) 93 Cal. App. 4th 757, 113 Cal. Rptr. 2d 437 (in prosecution for driving with a blood alcohol level above legal limits, defendant should have been allowed to cross-examine State's expert witness on whether the partition ratio, used to convert a urine-alcohol measurement into a blood-alcohol equivalent, could vary from time to time and from individual to individual, and (2) the error in excluding the cross-examination was not harmless).

Jones v. Moore (2000) 80 Cal. App. 4th 557, 95 Cal. Rptr. 2d 216 (affirming trial court decision to exclude plaintiff's expert testimony where expert witness attempted to testify outside the scope of the opinions expressed in his deposition; at deposition the expert stated that he had provided all the opinions he was going to provide unless he contacted opposing counsel; appellate court held it would be unfair and prejudicial to allow the expert to give additional opinions at trial with no warning to the defense).

People v. Romero (1999) 69 Cal. App. 4th 846, 81 Cal. Rptr. 2d 823 (trial court properly excluded testimony of proposed expert witness regarding the sociology of poverty, honor, paternalism and self-defense in Hispanic culture; such testimony was irrelevant to whether the defendant actually believed he was in imminent danger of death or great bodily injury and whether such a belief was objectively reasonable).

Melaleuca, Inc. v. Clark (1998) 66 Cal. App. 4th 1344, 78 Cal. Rptr. 2d 627 (plaintiff or defendant may use expert testimony to prove falsity or truth of alleged defamatory statements but such testimony is subject to the *Kelly* general acceptance test where it is based on a new or novel scientific technique).

Kelley v. Trunk (1998) 66 Cal. App. 4th 519, 78 Cal. Rptr. 2d 122 (affidavit of defendant's medical expert was defective in that it did not disclose basis for expert's opinion; without disclosing basis of opinion, proponent cannot satisfy foundational showing that opinion rests on matters of a type experts reasonably rely upon).

Western Digital Corp. v. Superior Court (1998) 60 Cal. App. 4th 1471, 71 Cal. Rptr. 2d 179 (insufficient evidence to disqualify, on grounds of conflict of interest, defendant's lawyer and expert witness who had access to confidential information regarding plaintiff because plaintiff provided information to non-retained members of the expert's consulting firm).

Loth v. Truck-A-Way Corp. (1998) 60 Cal. App. 4th 757, 70 Cal. Rptr. 2d 571 (expert testimony on "hedonic"

damages is not admissible).

People v. Herring (1993) 20 Cal. App. 4th 1066, 25 Cal. Rptr. 2d 213 (1993) (a jury need not be wholly ignorant of the subject matter of expert testimony; such testimony should be excluded "only when it would add nothing at all to the jury's common fund of information").

People v. Bowker (1988) 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (the "reliable matter" on which *Evidence Code* section 801, requires an expert's opinion to be based varies with each particular subject. The word "matter" is used to encompass facts, data, and such things as a witness's knowledge, experience, and other tangibles on which an opinion may be based).

Proper Basis of Opinion

People v. Arias (1996) 13 Cal. 4th 92, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (an expert may rely on hearsay in forming his or her opinion).

Garibay v. Hemmat (2008) 161 Cal. App. 4th 735, 74 Cal. Rptr. 3d 715 (trial court erred in granting summary judgment in medical malpractice case when defendant's expert witness filed a declaration stating that he had no personal knowledge of the breach of standard of care, but based his opinion on his review of medical records which were not filed as part of the motion; Court of Appeal reversed, holding that the expert's opinion was insufficient standing alone; defendant should have attached the medical records, which would have been admissible under the business records exception to the hearsay rule).

Redevelopment Agency of San Diego v. Mesdaq (2007) 154 Cal. App. 4th 1111, 65 Cal. Rptr. 3d 372 (trial court abused its discretion in admitting expert testimony in eminent domain action; "goodwill" had to be determined by a method that looked to the revenue of the actual business operation, not a hypothetical best use of the property).

People v. Fulcher (2006) 136 Cal. App. 4th 41, 38 Cal. Rptr. 3d 702 (although defendants in civil Sexually Violent Predator (SVP) Act proceedings do not have a *Sixth Amendment* right of confrontation, they do have a due process right of confrontation; the two rights are not coextensive, and due process under the SVP Act is not measured by the rights accorded a defendant in criminal proceedings, but by the standard applicable to civil proceedings; experts' testimony concerning defendant's past conduct did not violate his right to confront witnesses because the testimony was introduced, not to establish the truth of the statements that defendant committed misconduct, but for the purpose of explaining the bases of the experts' opinions).

People v. Vy (2004) 122 Cal. App. 4th 1209, 19 Cal. Rptr. 3d 402 (because the culture and habits of gangs are matters which are "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," testimony from a gang expert, subject to the limitations applicable to expert testimony generally, is proper under Section 801(a); such an expert may give opinion testimony that is based upon hearsay, including conversations with gang members as well as with the defendant).

Rupf v. Yan (2000) 85 Cal. App. 4th 411, 102 Cal. Rptr. 2d 157 (opinion of sheriff's deputy that detainee was a danger to himself and others was properly admitted even if based in part on upon hearsay as it was based on information routinely relied upon by officers making these sorts of decisions).

People v. Manriquez (1999) 72 Cal. App. 4th 1486, 86 Cal. Rptr. 2d 69 (expert properly based opinion that defendant belonged to gang based on defendant's participation in drive-by shooting).

Kelley v. Trunk (1998) 66 Cal. App. 4th 519, 78 Cal. Rptr. 2d 122 (affidavit of defendant's medical expert was defective in that it did not disclose basis for expert's opinion; without disclosing basis of opinion, proponent cannot

satisfy foundational showing that opinion rests on matters of a type experts reasonably rely upon).

City of San Diego v. Sobke (1998) 65 Cal. App. 4th 379, 76 Cal. Rptr. 2d 9 (expert testimony on existence and loss of goodwill in condemnation proceeding must be based on matter of a type reasonably relied upon by experts in the subject to which the testimony relates).

People v. Valdez (1997) 58 Cal. App. 4th 494, 68 Cal. Rptr. 2d 135 (police officer could testify as an expert on gangs even if opinions embraced ultimate issue of defendant's involvement with gang and could testify to hearsay as a type of evidence reasonably relied upon by such experts; arguably dicta in that court held that defendant waived objection to opinion testimony by failure to raise it at trial).

People v. Gamez (1991) 235 Cal. App. 3d 957, 286 Cal. Rptr. 894 (police officer permitted to testify that defendant was a member of a particular street gang, and that his motive in committing criminal activity was to further the gang's activities; opinion was based upon personal observations and experience, the observations of other officers in the department, police reports, and conversations with other gang members); *disapproved in part on other grounds in People v. Gardeley* (1996) 14 Cal. 4th 605, 624 n. 10, 59 Cal. Rptr. 2d 356, 927 P.2d 713 .

Buckwalter v. Airline Training Center (1982) 134 Cal. App. 3d 547, 184 Cal. Rptr. 659 (plaintiff's expert entitled to rely on training records of pilot, which revealed pilot's past confusion during landing approach, as a basis for opinion that pilot and observer pilot became confused as they began landing).

Board of Trustees v. Porini (1968) 263 Cal. App. 2d 784, 70 Cal. Rptr. 73 (whether hearsay evidence is properly used by a psychiatrist under *Evidence Code* section 801, subdivision (b), as the partial basis of his expert testimony and the admissibility of a psychiatrist's opinion notwithstanding improper use of hearsay, are questions for the trial court to determine in the exercise of a sound discretion and in the light of the evidence offered).

Scope of Expert's Testimony

People v. Gardeley (1996) 14 Cal. 4th 605, 59 Cal. Rptr. 2d 356, 927 P.2d 713 (gang expert testimony provided by a detective was properly admitted to prove that defendants were members of a certain criminal street gang).

People v. Humphrey (1996) 13 Cal. 4th 1073, 56 Cal. Rptr. 2d 142, 921 P.2d 1 (expert testimony regarding battered women's syndrome (generally admissible under *Evidence Code* section 1107) is properly admitted because it may help the jury understand the circumstances in which the defendant found herself at the time of the killing and is relevant to the reasonableness and the subjective existence of the defendant's belief in the need to defend).

People v. Champion (1995) 9 Cal. 4th 879, 39 Cal. Rptr. 2d 547, 891 P.2d 93 (trial court did not err in permitting expert witness to explain the meaning of a number of the words used by defendants in a tape-recorded conversation, since the testimony was not beyond the scope of the witness's expertise; since the witness had spent a number of years investigating and associating with juvenile gangs, the trial court could reasonably have concluded that he was sufficiently familiar with gang terminology to accurately interpret the words used by defendants).

Mizel v. City of Santa Monica (2001) 93 Cal. App. 4th 1059, 113 Cal. Rptr. 2d 649 (opinion testimony by a non-designated expert witness is not admissible to rebut the opinion of another expert and may not be admitted under the guise of impeachment; such a non-designated expert may testify as to the facts underlying the opinion of another expert, but trial courts are to strictly construe the term "foundational fact" to prevent a party from simply offering a contrary opinion by a non-designated expert).

Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal. App. 4th 234, 7 Cal. Rptr. 2d 101 (expert testimony required on issue of feasibility of routine anti-HBC testing and the relationship between hospital and blood bank as issue was

beyond the competence of persons of common experience, training, and education).



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1-802 California Evidence Courtroom Manual 802.syn

§ 802.syn Synopsis to Chapter 802: Statement of Basis of Opinion

Scope Statement of Basis of Opinion

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1-802 California Evidence Courtroom Manual Scope

Scope Statement of Basis of Opinion

§ 802 reads as follows:

Rule 802 Statement of Basis of Opinion

A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 802 Statement of Basis of Opinion

*1-802 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 802 sets forth the procedure governing the disclosure of the facts or data used by a witness in formulating his or her opinion. Under this section, the witness need not first disclose the underlying basis for his or her opinion unless the court in its discretion requires such a sequence. Consequently, Section 802 is designed to provide flexibility in the presentation of expert testimony. Moreover, Section 802 implicitly rejects the necessity of a hypothetical question.

The rationale behind Section 802 is threefold: (1) requiring an expert to lay a factual foundation prior to rendering his or her opinion is inefficient; (2) competent counsel will be able to expose any flaws in the expert's reasoning or methods upon cross-examination; and (3) the trial process has faith in the commonsense and critical abilities of the trier of fact. In the end, of course, the trier of fact must decide what weight to give to the expert's testimony, using the facts elicited by counsel at trial.

Section 802 grants the trial court the right to order the preliminary disclosure of facts underlying the expert witness's opinion. Common situations where the trial court may require such preliminary disclosure are instances where the facts or data underlying the expert's opinion are needed before deciding whether, and to what extent, an expert should be allowed to testify under Section 802. However, an order of advance disclosure is not limited to such situations, but rather is at the trial court's discretion.

Section 802 dispenses with any remnant of the common law requirement that expert witnesses render their opinions in response to hypothetical questions. Under Section 802 counsel may still ask hypothetical questions, but the law no longer requires the use of this technique.

Practice Tip

Liberating attorneys from the mandatory use of the hypothetical question marks a significant advancement in modern trial practice. Nevertheless, attorneys comfortable with the use of hypothetical questions will undoubtedly continue to use them whenever a tactical advantage may be attained. An attorney may, for example, wish to enlighten the jury as to the relative absence of controverted facts in a case by asking the expert to assume as a hypothesis the facts advanced by the opposing party. Likewise, the significance of a controverted fact may be emphasized by the use of comparative hypothetical

questions proposed to the expert. When an attorney asks a hypothetical question likely to be confusing to the jury, a court has the power to exclude such a question pursuant to Section 352.



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2 COMPARISON TO FEDERAL RULE

Section 802 is the counterpart of recently amended *Federal Rule of Evidence 703* and *Federal Rule of Evidence 705*. However, the federal rules differ significantly from the California approach. Federal Rule of *Evidence 703* now states that although an expert may base an opinion on otherwise inadmissible evidence, that evidence may not be disclosed to the jury by the proponent of the opinion unless the court determines that the probative value of the evidence substantially outweighs the prejudice.



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People v. Nicolaus (1991) 54 Cal. 3d 551, 286 Cal. Rptr. 628, 817 P.2d 893 (*Evidence Code* section 802 provides that an expert may state on direct examination the reasons for his opinion and the matter upon which it is based. Section 802 does not require the trial court to admit documentary or other evidence of matters relied upon by an expert).

People v. Coleman (1985) 38 Cal. 3d 69, 211 Cal. Rptr. 102, 695 P.2d 189 (trial court abused its discretion where it permitted extensive questioning of expert psychiatric witnesses and permitted letters constituting inadmissible hearsay to be read into the record, despite jury instruction stating that such letters were only to be used for the purpose of explaining and challenging the basis for the experts' opinions).

Kelley v. Trunk (1998) 66 Cal. App. 4th 519, 78 Cal. Rptr. 2d 122 (affidavit of defendant's medical expert was defective in that it did not disclose basis for expert's opinion; without disclosing basis of opinion, proponent cannot satisfy foundational showing that opinion rests on matters of a type experts reasonably rely upon).

People v. Campos (1995) 32 Cal. App. 4th 304, 38 Cal. Rptr. 2d 113 (while a doctor can testify as to the basis for his or her opinion, this rule is not intended to be a channel by which a testifying doctor can place the opinion of innumerable out-of-court doctors before the jury).

People v. Miller (1994) 25 Cal. App. 4th 913, 31 Cal. Rptr. 2d 423 (in a proceeding in which defendant was found to be a mentally disordered offender (MDO), a doctor who testified as to defendant's MDO status properly referred to the probation report in concluding that defendant's commitment offense involved "force or violence," and that reference did not violate the hearsay rule).

People v. Piper (1980) 103 Cal. App. 3d 102, 162 Cal. Rptr. 833 (a physician witness may testify as to the content of an opinion of an out-of-court physician on which the testifying physician based his diagnosis and treatment of a patient. Such testimony is admissible not as independent proof of the facts stated, but as part of the information on which the doctor based the diagnosis and treatment).



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1-803 California Evidence Courtroom Manual 803.syn

§ 803.syn Synopsis to Chapter 803: Opinion Based on Improper Matter

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1-803 California Evidence Courtroom Manual Scope

Scope Opinion Based on Improper Matter

§ 803 reads as follows:

Rule 803 Opinion Based on Improper Matter

The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 803 essentially clarifies the trial judge's discretion to permit the expert to render an opinion based only on the kind of information reasonably relied upon by experts in that field and which will not violate other evidentiary policies. The statute permits the expert to reformulate his or her opinion, where necessary, so it does not depend on the impermissible evidence.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 803 in the Federal Rules of Evidence. However, under Federal Rule of *Evidence* 703, a trial court could simply refuse to permit the expert to testify on certain issues, or to testify at all, if the expert's opinion is not based on material reasonably relied upon by other experts or is not based on reliable scientific, technical or other theories.



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Westrec Marina Management v. Jardine Ins. Brokers (2000) 85 Cal. App. 4th 1042, 102 Cal. Rptr. 2d 673 (trial court did not abuse its discretion in excluding expert opinion that was not based on evidence of reasonable reliability; expert did no survey to establish basis for his opinion that 2000 boats would have been insured during relevant time period).

City of San Diego v. Sobke (1998) 65 Cal. App. 4th 379, 76 Cal. Rptr. 2d 9 (trial court did not err when it excluded expert's testimony regarding loss of goodwill, as testimony was based on matter insufficient to form a proper basis for the opinion) (*Editor's note:* Although appellate court relied on general rules regarding experts (Sections 801, 803), court should have relied on Section 814 regarding evidence in eminent domain proceedings).

County Sanitation Dist. v. Watson Land Co. (1993) 17 Cal. App. 4th 1268, 22 Cal. Rptr. 2d 117 (exclusion of expert opinion based in whole or in significant part on material that is not a proper basis for such testimony).

Korsak v. Atlas Hotels, Inc. (1992) 2 Cal. App. 4th 1516, 3 Cal. Rptr. 2d 833 (the correct test for the use of extrajudicial material or statements forming a partial basis for an opinion of an expert is whether the material is reasonably reliable information; if such hearsay is not reliable, the opinion should be excluded).

Hyatt v. Sierra Boat Co. (1978) 79 Cal. App. 3d 325, 145 Cal. Rptr. 47 (an expert opinion must not be based on speculative or conjectural data, and an expert's assumption of facts contrary to the proof destroys his opinion. It is impossible for an expert basing his testimony solely upon other evidence introduced in the case to thus lift himself by his own bootstraps).



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1-804 California Evidence Courtroom Manual 804.syn

§ 804.syn Synopsis to Chapter 804: Opinion Based on Opinion or Statement of Another

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1-804 California Evidence Courtroom Manual Scope

Scope Opinion Based on Opinion or Statement of Another

§ 804 reads as follows:

Rule 804 Opinion Based on Opinion or Statement of Another

(a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.

(c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

The purpose of Section 804 is to protect a party who is confronted with an expert witness who relies on the opinion or statement of some other person. As noted in Section 802, the expert may be permitted to reveal the basis for the opinion. Section 804 then allows a party to extend his cross-examination into the underlying bases of the opinion testimony introduced against him by calling the authors of opinions and statements relied on by adverse witnesses and examining them as if under cross-examination concerning the subject matter of their opinions and statements. *See* 7 Cal. L. Rev. Comm. 1 (1965).



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 804 in the Federal Rules of Evidence, although newly amended *Federal Rule of Evidence 703* would prevent an expert from disclosing otherwise inadmissible facts or data that form the basis of the opinion on direct examination unless the court exercises its discretion to permit it.



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Korsak v. Atlas Hotels, Inc. (1992) 2 Cal. App. 4th 1516, 3 Cal. Rptr. 2d 833 (the correct test for the use of extrajudicial material or statements forming a partial basis for an opinion of an expert is whether the material is reasonably reliable information; if such hearsay is not reliable, the opinion should be excluded).



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§ 805.syn Synopsis to Chapter 805: Opinion on Ultimate Issue

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SECTION 805 Opinion on Ultimate Issue

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Scope Opinion on Ultimate Issue

§ 805 reads as follows:

Rule 805 Opinion on Ultimate Issue

Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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2 ANALYSIS

Section 805 provides that testimony in the form of an opinion is not subject to exclusion because it addresses the ultimate issue in the case. This provision applies both to expert and lay testimony.

Section 805 provides that "ultimate issue" testimony "otherwise admissible" is not subject to exclusion, and consequently, the testimony at issue must minimally satisfy the requirements of all Rules of Evidence. For example, Section 800 governs opinions offered by a lay witness. The ultimate issue testimony of a lay person must be rationally based on facts perceived by the witness in order to be admissible. Moreover, under Section 800 the opinion or inference is not admissible if it does not assist the trier of fact in the determination of a factual issue. When the jury can easily draw the inference from a simple recitation of facts by the witness, the witness's opinion on the ultimate issue might be subject to exclusion under Section 800 even though Section 805 would not afford a basis for exclusion.

Under Section 801 the expert's special body of knowledge must assist the trier of fact in determining a fact in issue or in understanding the evidence. It is the inability of the unaided jury to reach the ultimate opinion that renders the expert opinion vital. For this reason, an ultimate issue opinion from a properly qualified expert should not be excluded except in the extreme case where the expert opinion is inherently misleading or unfairly prejudicial.

See also S.D. Cal. CrimLR 12.2.1, Insanity Defense and Mental Condition Experts.



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3 COMPARISON TO FEDERAL RULE

Section 805 is substantially identical to *Federal Rule of Evidence 704(a)*. Subsection (b) of *Federal Rule of Evidence 704* was added by amendment as part of the Insanity Defense Reform Act of 1984; the legislative history shows that the scope of subsection (b) reaches not only the insanity defense but also all such "ultimate" issues, *e.g.*, premeditation in a homicide case, or lack of predisposition in entrapment. The rule as amended does not totally bar expert testimony on the criminal defendant's mental state, but instead, merely prohibits an expert from expressing his or her views on the ultimate issue which the trier of fact is to determine. For example, an expert may testify as to the diagnosis of the accused's mental condition, and describe the general characteristics that accompany that mental condition, but may not state an opinion on whether the defendant was capable of forming a particular mental state or not.

California adopted a provision substantially similar to *Federal Rule of Evidence 704(b)*, *Penal Code section 29*, to prevent experts from usurping the role of the jury in evaluating criminal mental states. In applying Rule 704(b), or *Penal Code section 29*, the trial court must determine not only whether the expert's testimony constitutes fact or opinion but also, if it is found to be opinion, whether it embraces an ultimate issue. Testimony by psychiatric experts must be "limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been." H. Rep. No. 98-1030, 98th Cong., 2d Sess. 224, 232.



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People v. Smithey (1999) 20 Cal. 4th 936 , reh'g denied, 21 Cal. 4th 845a (prosecutor engaged in improper conduct in seeking to elicit inadmissible opinion from defense expert regarding the defendant's capacity to form the intent required for the crime; prosecutor's conduct was not prejudicial as it was isolated instance of improper questioning in lengthy trial).

People v. Mickle (1991) 54 Cal. 3d 140, 284 Cal. Rptr. 511, 814 P.2d 290 , cert. denied, 503 U.S. 988 (questions seeking a partisan expert's general views on capital punishment are permissible, but questions posed to experts as to why they favor or oppose the death penalty in that particular case are disapproved because they do not "assist" the jury in determining the appropriate punishment).

People v. Adan (2000) 77 Cal. App. 4th 390 (in prosecution for workers' compensation fraud, medical expert's testimony that defendant was a malingerer did not violate *Penal Code* section 29, prohibiting expert from testifying whether a defendant has the required mental state to commit the crime charged).

People v. Valdez (1997) 58 Cal. App. 4th 494 (court states that police officer could testify as an expert on gangs even if opinions embraced ultimate issue of defendant's involvement with gang and could testify to hearsay as a type of evidence reasonably relied upon by such experts; arguably dicta in that court held that defendant waived objection to opinion testimony by failure to raise it at trial).

People v. Nunn (1996) 50 Cal. App. 4th 1357 (expert could testify that criminal defendant had a certain mental condition that caused him to react in a certain way to stress and that this condition could cause defendant to act impulsively, but expert could not opine on whether this actually occurred in the particular case).

People v. Rangel (1992) 11 Cal. App. 4th 291 (expert could not testify to effect of defendant's intoxication on his ability to form criminal intent).

People v. Doss (1992) 4 Cal. App. 4th 1585 (an expert opinion is not inadmissible merely because it is in the form of opinion as to the ultimate issue).

Carlton v. Department of Motor Vehicles (1988) 203 Cal. App. 3d 1428 (this section does not, however, authorize an expert to testify to legal conclusions in the guise of an expert opinion; expert opinion concerning who was most responsible for a car accident was a legal conclusion and beyond the scope of a proper expert opinion).

People v. Whitler (1985) 171 Cal. App. 3d 337 (this section is not controlling over *Penal Code* section 29, which prohibits an expert witness from testifying whether a defendant did or did not have the requisite mental state at the time of the offense and which calls for the trier of fact to decide this question. As the more specific provision, Section 29 must prevail).



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Scope Application

§ 810 reads as follows:

810 Application

(a) Except where another rule is provided by statute, this article provides special rules of evidence applicable to any action in which the value of property is to be ascertained.

(b) This article does not govern ad valorem property tax assessment or equalization proceedings.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967; Amended by Stats. 1978, ch. 294, § 3; Stats. 1980, ch. 381, § 1)

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1 ANALYSIS

Sections 810 to 824 deal with the specific problem of opinion testimony regarding the value of property in eminent domain proceedings. These statutes set forth with great specificity: when lay individuals may testify, when owners of the property may testify, when expert witnesses may testify and on what the opinions of value may be based.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Sections 810 to 824 in the Federal Rules of Evidence. These issues would be handled by the general rules regarding lay and expert opinion, as well as *Federal Rule of Evidence 403*, which provides a basis for excluding the evidence when the probative value of the opinion is substantially outweighed by problems of cumulative evidence, confusion and so on.



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City of Stockton v. Albert Brocchini Farms, Inc. (2001) 92 Cal. App. 4th 193, 111 Cal. Rptr. 2d 662 (trial court did not abuse its discretion in excluding the proposed opinion of defendant's valuation expert who employed an unsanctioned methodology for evaluating discounted cash value of the income from a hypothetical landfill; income to be derived from placing landfill on a property is not akin to income from mineral or other natural resources on a property).

In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 145 Cal. Rptr. 205 (evidence of comparable sales is not admissible in condemnation proceedings as independent substantive proof of the value of the property in issue (*Evidence Code* sections 810, 813, 816), but only as a factor to be used in weighing the opinion testimony of value expressed by the witnesses).



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Scope Value of Property

§ 811 reads as follows:

Rule 811 Value of Property

As used in this article, "value of property" means market value of any of the following:

- (a) Real property or any interest therein.
- (b) Real property or any interest therein and tangible personal property valued as a unit.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967; Amended by Stats. 1975, ch. 1240, § 15, eff. July 1, 1976; Stats. 1978, ch. 294, § 4; Stats. 1980, ch. 381, § 2)

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Aetna Life & Cas. Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 865, 216 Cal. Rptr. 831 (although the legislative committee comment to *Evidence Code* section 811 states that subdivision (b) includes personal property only when valued together with real property, and that actions involving personal property alone are governed by general law, the comment makes it clear that the general rules of evidence are to be applied only when an action for loss of personal property is brought separately from any action for real property damage. In the present case, although the personal property was evaluated separately from the land and fixtures, plaintiffs sued to recover for both species of property loss in the same inverse condemnation action).



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§ 812.syn Synopsis to Chapter 812: Concept of "Market Value" Not Affected

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Scope Concept of "Market Value" Not Affected

§ 812 reads as follows:

Rule 812 Concept of "Market Value" Not Affected

This article is not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting the meaning of "market value," whether denominated "fair market value" or otherwise.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967; Amended by Stats. 1975, ch. 1240, § 16, eff. July 1, 1976; Stats. 1978, ch. 294, § 5)

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3 SIGNIFICANT CASES

County Sanitation Dist. v. Watson Land Co. (1993) 17 Cal. App. 4th 1268, 22 Cal. Rptr. 2d 117 (existing case law on the proper method of establishing the fair market value of an easement is not affected by this provision).



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Scope Opinion Testimony

§ 813 reads as follows:

Rule 813 Opinion Testimony

(a) The value of property may be shown only by the opinions of any of the following:

- (1) Witnesses qualified to express such opinions.
- (2) The owner or the spouse of the owner of the property or property interest being valued.
- (3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest.

(b) Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony given under subdivision (a); and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal.

(c) For the purposes of subdivision (a), "owner of the property or property interest being valued" includes, but is not limited to, the following persons:

(1) A person entitled to possession of the property.

(2) Either party in an action or proceeding to determine the ownership of the property between the parties if the court determines that it would not be in the interest of efficient administration of justice to determine the issue of ownership prior to the admission of the opinion of the party.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967. Amended by Stats. 1978, ch. 294, § 6; Stats. 1980, ch. 381, § 3)



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Escondido Union School Dist. v. Casa Suenos de Oro, Inc. (2005) 129 Cal. App. 4th 944 29 Cal. Rptr. 3d 89 (trial court did not err in admitting opinion of property owner's expert on valuation in condemnation proceeding, even though expert used a definition of market value based on federal mortgage lender's form; expert was subject to cross-examination on his appraisal methodology, including the language on the form and whether its definition of fair market value differed from the statutory definition).

Redevelopment Agency of San Diego v. Attisha (2005) 128 Cal. App. 4th 357, 27 Cal. Rptr. 3d 126 , as mod. on denial of reh'g, review denied (trial court erred in eminent domain case, by improperly excluding lessee's goodwill valuation testimony on grounds that he assumed lease would be renewed and that he used comparable sales outside the metropolitan area; both of those grounds were legitimate bases for expert's opinion).

In re Marriage of Stoll (1998) 63 Cal. App. 4th 837, 74 Cal. Rptr. 2d 506 (spouse using statute permitting spouse to be reimbursed for contributions to acquisition of property to the extent spouse traces the contributions to a separate property source is qualified as owner pursuant to *Evidence Code section 813(a)(2)* to render valuation opinion without rigid requirement of authenticated written documentation establishing an exact value for real property later transmuted into community property, when there is no dispute about the source of the real property).

County of Madera v. Forrester (1981) 115 Cal. App. 3d 57, 170 Cal. Rptr. 896 (that an owner's testimony on value must meet the same criteria of admissibility as an expert's does not mean that the owner is an expert).

South Bay Irrig. Dist. v. California-American Water Co. (1976) 61 Cal. App. 3d 944, 133 Cal. Rptr. 166 (in eminent domain action, the trier of fact--to the extent supported by the evidence--determines the price the seller and buyer would agree upon in the open market, subject only to the limitations imposed by *Evidence Code section 813*. Thus, the trier of fact, premised on its evaluation of evidence in the case, determines the price upon which the assumed knowledgeable buyer and seller would agree, and draws its conclusions of value by a process of balancing and reconciling the varying opinions on the subject).

State ex rel. State Public Works Board v. Wherity (1969) 275 Cal. App. 2d 241, 79 Cal. Rptr. 591 (*Evidence Code*

section 813 is not intended to be an exclusionary section, but rather, the limitations set forth are to prevent evidence, otherwise admissible, from being used to support a verdict outside the range of opinion testimony, and the section expressly contemplates the admission of any relevant evidence for the limited purpose of enabling the trier of fact to understand and weigh the valuation witnesses' opinions).



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Scope Basis for Opinion

§ 814 reads as follows:

Rule 814 Basis for Opinion

The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for an opinion.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967; Amended by Stats. 1975, ch. 1240, § 17, eff. July 1, 1976; Stats. 1980, ch. 381, § 4)

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City of San Diego v. Sobke (1998) 65 Cal. App. 4th 379, 76 Cal. Rptr. 2d 9 (trial court did not err when it exclude expert's testimony regarding loss of goodwill, as testimony was based on matter insufficient to form a proper basis for the opinion) (*Editor's note:* Although appellate court relied on general rules regarding experts (Sections 801, 803), court should have relied on this section).

Los Angeles County Flood Control Dist. v. Mindlin (1980) 106 Cal. App. 3d 698, 165 Cal. Rptr. 233 (witness qualified to express opinion on market value not necessarily qualified to express opinion on other matters relating to the property).

Los Angeles v. Lowensohn (1976) 54 Cal. App. 3d 625, 127 Cal. Rptr. 417 (even though an expert witness in a valuation trial can base his opinion on hearsay, as provided for by *Evidence Code section 814*, where the appraiser's testimony revealed insufficient knowledge of the source of the plan for proposed industrial use of land, the trial court could properly exclude such evidence as not being of the type that would "reasonably" be relied on in forming an opinion as to property values, as required by *Evidence Code section 814*).

State ex rel. Public Works Bd. v. Stevenson (1970) 5 Cal. App. 3d 60, 84 Cal. Rptr. 742 (the appraisal trinity, codified by the Evidence Code, is a system of valuation used by appraisers which considers any or all of three factors: (a) the current cost of reproducing the property less depreciation; (b) the market data of recent sales of comparable properties in the same market; and (c) the net earning power or income produced by the property).



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Scope Sales of Subject Property

§ 815 reads as follows:

Rule 815 Sales of Subject Property

When relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the sale or contract to sell and purchase includes only the property or property interest being taken or a part thereof, such sale or contract to sell and purchase may not be taken into account if it occurs after the filing of the lis pendens.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967. Amended by Stats. 1978 ch. 294, § 7)

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3 SIGNIFICANT CASES

Los Angeles v. Retlaw Enterprises, Inc. (1976) 16 Cal. 3d 473, 128 Cal. Rptr. 436, 546 P.2d 1380 (in eminent domain proceedings, evidence of a sale of the property being condemned is admissible in the discretion of the trial court under *Evidence Code* section 815, when it illuminates the value of the subject property at the date of valuation, even though the sale may have been at a "project enhanced" price).

City & County of San Francisco v. Golden Gate Heights Investments (1993) 14 Cal. App. 4th 1203, 18 Cal. Rptr. 2d 467 (in an action to condemn a vacant, steep hillside to preserve it as city open space, the trial court properly admitted evidence of the owner's purchase price of the subject property some years earlier, despite contentions that the price was depressed by 20 years of "condemnation blight").

San Diego Gas & Electric Co. v. 3250 Corp. (1988) 205 Cal. App. 3d 1075, 252 Cal. Rptr. 853 (the proscription of *Evidence Code* section 815 against consideration of sales after the filing of the lis pendens in eminent domain proceedings is designed to prevent the possibility of influencing the valuation by means of collusive sales manipulating the valuation upward at the expense of the condemning entity).



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1-816 California Evidence Courtroom Manual 816.syn

§ 816.syn Synopsis to Chapter 816: Comparable Sales

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1-816 California Evidence Courtroom Manual Scope

Scope Comparable Sales

§ 816 reads as follows:

Rule 816 Comparable Sales

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may be fairly considered as shedding light on the value of the property being valued.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967)

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County of San Luis Obispo v. Bailey (1971) 4 Cal. 3d 518, 93 Cal. Rptr. 859, 483 P.2d 27 (upon the trial judge's prima facie determination that a particular sale is sufficiently "comparable" for introduction in evidence pursuant to this section, the degree of "comparability" is for the trier of fact).

Redevelopment Agency of San Diego v. Attisha (2005) 128 Cal. App. 4th 357 27 Cal. Rptr. 3d 126, as mod. on denial of reh'g, review denied (trial court erred in eminent domain case, by improperly excluding lessee's goodwill valuation testimony on grounds that he assumed lease would be renewed and that he used comparable sales outside the metropolitan area; both of those grounds were legitimate bases for expert's opinion).

In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 145 Cal. Rptr. 205 (evidence of comparable sales is not admissible in condemnation proceedings as independent substantive proof of the value of the property at issue, but only as a factor to be used in weighing the opinion testimony of value expressed by the witnesses).

City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 82 Cal. Rptr. 1 (the general qualifications governing the use of evidence of comparable sales in condemnation proceedings are that the sales of the other tracts must have been sufficiently near in time, and the other land must be located sufficiently near the land to be valued, and must be sufficiently alike in respect to character, situation, usability, and improvements, to make it clear that the two tracts are comparable in value and that the price realized for one tract has probative force in determining the value of the condemned tract; the trial judge must be granted a wide discretion in applying such a vague standard).



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1-817 California Evidence Courtroom Manual Scope

Scope Leases of Subject Property

§ 817 reads as follows:

Rule 817 Leases of Subject Property

(a) Subject to subdivision (b), when relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the lease includes only the property or property interest being taken or a part thereof, such lease may not be taken into account in the determination of the value of property if it is entered into after the filing of the lis pendens.

(b) A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property only for the purpose of arriving at an opinion as to the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967. Amended by Stats. 1978, ch. 294, § 8)

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§ 818.syn Synopsis to Chapter 818: Comparable Leases

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1-818 California Evidence Courtroom Manual Scope

Scope Comparable Leases

§ 818 reads as follows:

Rule 818 Comparable Leases

For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967)

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City of Ontario v. Kelber (1972) 24 Cal. App. 3d 959, 101 Cal. Rptr. 428 (for a lease of property to be considered comparable for purposes of forming an opinion, it must meet the criteria specifically set forth in *Evidence Code* section 816, relating to sales or contracts for sale and purchase of comparable property, of nearness in time to the date of valuation, nearness of location to the property being valued, and sufficiency of similarity in respect to character, size, situation, usability, and improvements, to make it clear that the properties are comparable in value and that the price realized for the other property may fairly be considered as shedding light on the value of the property being valued).



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§ 819.syn Synopsis to Chapter 819: Capitalization of Income

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1-819 California Evidence Courtroom Manual Scope

Scope Capitalization of Income

§ 819 reads as follows:

Rule 819 Capitalization of Income

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon).

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967)

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3 SIGNIFICANT CASES

South Bay Irrig. Dist. v. California-American Water Co. (1976) 61 Cal. App. 3d 944, 133 Cal. Rptr. 166 (the capitalization of income, other than rentals, as a basis or approach in determining market value of a waterworks system conducted as a public utility, was not proscribed by *Evidence Code section 819*, providing that a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to land and improvements, as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon, where the property being taken was a business enterprise as a whole, including all of its assets, tangible, and intangible, while the statute is limited in application to the determination of "just compensation" for taking land and improvements thereon, rather than for taking a business).

Redevelopment Agency of San Francisco v. Del-Camp Invest., Inc. (1974) 38 Cal. App. 3d 836, 113 Cal. Rptr. 762 (defendant in a condemnation action by a city redevelopment agency could not successfully contend that the agency's appraisers' appraisals should be disregarded because they made no effort to appraise the property by use of the reproduction cost method, where the appraisers for both parties employed as a basis for their opinions "the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon," as permitted by *Evidence Code section 819*, and, though defendant's appraisers also used the reproduction cost method, they conceded that such approach was not satisfactory because of the age of the structure and changing building requirements).



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SECTION 820 Reproduction Cost

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§ 820.syn Synopsis to Chapter 820: Reproduction Cost

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SECTION 820 Reproduction Cost

1-820 California Evidence Courtroom Manual Scope

Scope Reproduction Cost

§ 820 reads as follows:

Rule 820 Reproduction Cost

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

(Added by Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967)

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Redevelopment Agency of Long Beach v. First Christian Church (1983) 140 Cal. App. 3d 690, 189 Cal. Rptr. 749 (depreciation and obsolescence should not be used as a backdoor method of nullifying the reproduction and replacement approach to valuation of a special use building).

Redevelopment Agency of San Francisco v. Del-Camp Invest., Inc. (1974) 38 Cal. App. 3d 836, 113 Cal. Rptr. 762 (defendant in a condemnation action by a city redevelopment agency could not successfully contend that the agency's appraisers' appraisals should be disregarded because they made no effort to appraise the property by use of the reproduction cost method, where the appraisers for both parties employed as a basis for their opinions "the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon," as permitted by *Evidence Code* section 819, and, though defendant's appraisers also used the reproduction cost method, they conceded that such approach was not satisfactory because of the age of the structure and changing building requirements).



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§ 821.syn Synopsis to Chapter 821: Conditions in General Vicinity of Subject Property

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SECTION 821 Conditions in General Vicinity of Subject Property

1-821 California Evidence Courtroom Manual Scope

Scope Conditions in General Vicinity of Subject Property

§ 821 reads as follows:

Rule 821 Conditions in General Vicinity of Subject Property

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties.

(Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967)

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SECTION 822 Inadmissible Evidence

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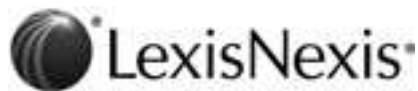
§ 822.syn Synopsis to Chapter 822: Inadmissible Evidence

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1-822 California Evidence Courtroom Manual Scope

Scope Inadmissible Evidence

§ 822 reads as follows:

Rule 822 Inadmissible Evidence

(a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property:

- (1) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain. The price or other terms and circumstances shall not be excluded pursuant to this paragraph if the proceeding relates to the valuation of all or part of a water system as defined in *Section 240 of the Public Utilities Code*.
- (2) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which the property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.
- (3) The value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.
- (4) An opinion as to the value of any property or property interest other than that being valued.

(5) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(6) The capitalized value of the income or rental from any property or property interest other than that being valued.

(b) In an action other than an eminent domain or inverse condemnation proceeding, the matters listed in subdivision (a) are not admissible as evidence, and may not be taken into account as a basis for an opinion as to the value of property, except to the extent permitted under the rules of law otherwise applicable.

(Added by Stats. 1965, ch. 1151, § 4, eff. Jan. 1, 1967. Amended by Stats. 1978, ch. 294, § 9; Stats. 1980, ch. 381, § 5. Amended by Stats. 1986, ch. 1238, § 2; Stats. 1987, ch. 1278, § 1; Amended by Stats. 2000, ch. 948, § 1)

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City & County of San Francisco v. Golden Gate Heights Investments (1993) 14 Cal. App. 4th 1203, 18 Cal. Rptr. 2d 467 (Evidence Code section 822(a), as amended in 1988, permits evidence of the prices paid by the city for adjacent parcels that were acquired for use as open space, even if those sales were consummated under threat of eminent domain condemnation where the acquisition was for the same public use for which the property could have been taken by eminent domain).

People ex rel. Department of Water Resources v. Andresen (1987) 193 Cal. App. 3d 1144, 238 Cal. Rptr. 826 (the purpose of Section 822 is to prevent introduction into evidence of particular acquisitions of similar properties to the condemnor itself. The parties are to focus instead on the market value of the property at the time of condemnation).



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§ 823.syn Synopsis to Chapter 823: Property With No Relevant Market

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Scope Property With No Relevant Market

§ 823 reads as follows:

Rule 823 Property With No Relevant Market

Notwithstanding any other provision of this article, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable.

(Stats. 1980, ch. 381, § 6. Amended by Stats. 1992, ch. 7, § 4)

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ARTICLE 2 EVIDENCE OF MARKET VALUE OF PROPERTY

SECTION 823 Property With No Relevant Market

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2 COMPARISON TO FEDERAL RULE

See Comparison to Federal Rule in Section 810.



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DIVISION 7 OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

CHAPTER 1 EXPERT AND OTHER OPINION TESTIMONY

ARTICLE 2 EVIDENCE OF MARKET VALUE OF PROPERTY

SECTION 824 Method for Determining Value of Nonprofit or Special Use Property

1-824 California Evidence Courtroom Manual 824.syn

§ 824.syn Synopsis to Chapter 824: Method for Determining Value of Nonprofit or Special Use Property

Scope Method for Determining Value of Nonprofit or Special Use Property

1 ANALYSIS

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1-824 California Evidence Courtroom Manual Scope

Scope Method for Determining Value of Nonprofit or Special Use Property

§ 824 reads as follows:

Rule 824 Method for Determining Value of Nonprofit or Special Use Property

(a) Notwithstanding any other provision of this article, a just and equitable method of determining the value of nonprofit, special use property, as defined by *Section 1235.155 of the Code of Civil Procedure*, for which there is no relevant, comparable market, is the cost of purchasing land and the reasonable cost of making it suitable for the conduct of the same nonprofit, special use, together with the cost of constructing similar improvements. The method for determining compensation for improvements shall be as set forth in subdivision (b).

(b) Notwithstanding any other provision of this article, a witness providing opinion testimony on the value of nonprofit, special use property, as defined by *Section 1235.155 of the Code of Civil Procedure*, for which there is no relevant, comparable market, shall base his or her opinion on the value of reproducing the improvements without taking into consideration any depreciation or obsolescence of the improvements.

(c) This section does not apply to actions or proceedings commenced by a public entity or public utility to acquire real property or any interest in real property for the use of water, sewer, electricity, telephone, natural gas, or flood control facilities or rights-of-way where those acquisitions neither require removal or destruction of existing improvements, nor render the property unfit for the owner's present or proposed use.

(Added by Stats. 1992, ch. 7, § 5)

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1 ANALYSIS

See Analysis of Section 810.



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See Comparison to Federal Rule in Section 810.



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ARTICLE 3 OPINION TESTIMONY ON PARTICULAR SUBJECTS
SECTION 870 Opinion as to Sanity

1-870 California Evidence Courtroom Manual 870.syn

§ 870.syn Synopsis to Chapter 870: Opinion as to Sanity

Scope Opinion as to Sanity

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SECTION 870 Opinion as to Sanity

1-870 California Evidence Courtroom Manual Scope

Scope Opinion as to Sanity

§ 870 reads as follows:

Rule 870 Opinion as to Sanity

A witness may state his opinion as to the sanity of a person when:

- (a) The witness is an intimate acquaintance of the person whose sanity is in question;
- (b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or
- (c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.

(Stats. 1965, ch. 299, § 2, effective Jan. 1, 1967)

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1 ANALYSIS

Section 870 must be read along with Section 800 (lay opinion testimony) and Section 801 (expert opinion testimony). Under Section 800, a lay person with personal knowledge can testify to another individual's rational or irrational appearance or conduct, even though the witness is not qualified under Section 870 to express an opinion on the person's sanity. Section 870 in essence expands the opportunities for lay opinion of an individual's sanity, where there is a great need for such testimony--such as where a testator or transferor's capacity to make a will or other property transfer is in question. *See* 7 Cal. L. Rev. Comm. 1 (1965). Thus, an "intimate acquaintance" may be called on for an opinion of an individual's sanity. *See Atkins Corp. v. Tourny* (1936) 6 Cal. 2d 206, 57 P.2d 480 (there is no definite rule as to what constitutes an intimate acquaintance; it is left to the discretion of the court).



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2 COMPARISON TO FEDERAL RULE

There is no comparable Federal Rule of Evidence, although a lay witness with personal knowledge and whose testimony would aid the trier of fact might be able to testify in the form of an opinion under *Federal Rule of Evidence 701*; a person qualified as an expert might be able to testify pursuant to *Federal Rule of Evidence 702*. In both cases, the court will not be concerned that the testimony may touch on an ultimate issue in the case; *see* Federal Rule of Evidence 704. However, where the case is a criminal case, Federal Rule of Evidence 704(b) prohibits opinion testimony on whether the defendant had the requisite mental state to commit a crime. California law is similar under *Penal Code section 29*.



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DIVISION 8 PRIVILEGES
CHAPTER 1 DEFINITIONS
Untitled

1-1 California Evidence Courtroom Manual 1.syn

§ 1.syn Synopsis to Chapter 1:

AN INTRODUCTION TO PRIVILEGES

2 GENERAL NOTE ON THE FEDERAL LAW OF PRIVILEGE

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DIVISION 8 PRIVILEGES
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AN INTRODUCTION TO PRIVILEGES

The rationale for many types of evidence rules is to improve the truth-finding function of trials. Privileges do not serve the truth-finding function. Indeed, the law of privilege sometimes makes the most relevant, reliable and revealing evidence inadmissible. Because the law of privilege blocks the straight road to the determination of truth, privileges can only be justified on the grounds of significant public policy concerns that exist independently of the usual evidentiary concerns with the accuracy and reliability of evidence.

A privilege may involve a refusal to testify, a refusal to disclose a matter during the discovery stage of litigation, a refusal to produce real proof, or the right to prevent other persons from doing any of these things. A privilege permits a person to resist any judicial or governmental process aimed at eliciting protected information. As such, it is the only right that relieves an individual from the duty of revealing facts in response to governmental or judicial process and from the corollary risk of contempt for failure to respond.

Rules of privilege should be distinguished from two other doctrines. The first of these are the rules governing competency. (*Evidence Code sections 700 to 704; Federal Rule of Evidence 601*). While both privilege and competency involve limitations on who may testify and the subject matter of testimony, these distinct concepts approach the subject from entirely different policies. Competency, on one hand, generally concerns the reliability of witnesses. Privilege, on the other hand, precludes the introduction of possibly reliable testimony due to extrinsic policy considerations directed toward protecting certain confidential relationships. Privilege should also be distinguished from other types of statutory or constitutional limitations on the admissibility of evidence due to privacy concerns. Examples include the California Constitution's right to privacy and the work product doctrine, set forth in *Code of Civil Procedure section 2018.030* and Federal Rule of *Civil Procedure 26(b)(3)*. The work product doctrine may operate to shield from discovery the attorney's work product generated in anticipation of litigation. As such, its design is to preserve the adversary nature of our judicial system, and this policy is distinguishable from that supporting the protection of confidential relationships.



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2 GENERAL NOTE ON THE FEDERAL LAW OF PRIVILEGE

Federal Rule of Evidence 501 reserves the matter of privileges to the common law and statutes for determination, interpretation and development. Federal Rule of *Evidence 501* in essence provides that privileges are to be governed either by common law principles as interpreted by the federal courts, or in those civil actions in which state law supplies the rule of decision as to an element of a claim or defense, by principles of state law.

In adopting Federal Rule of *Evidence 501*, Congress rejected the Supreme Court's proposed Article V, which contained 13 rules relating to privilege. The proposed rules set forth nine substantive areas of privileged communications as well as four procedural provisions. Congress chose, however, to reject this attempt at specification, which attempt also included several modifications of common law privileges. It instead promulgated a single rule which left the law of privilege in *status quo*.

The two separate sentences of Rule 501 clearly establish that applicable privilege law will vary in federal courts depending upon the surrounding circumstances and the type of action or proceeding. This result reflects the position taken in the House Report that "federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason." H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8-9 (1973).

By giving deference to state-created privileges, the second sentence of Rule 501 serves the purpose of insuring that all aspects of substantive state law will apply in a claim or defense based on or having a background relation to state law.

In civil cases, principles of federal common law will be applied in federal question litigation and in diversity actions where an element of a claim is not based on state law. In a civil action where state law supplies the rule of decision, the state-created privilege law must be applied.

Rule 501 leaves unanswered the question of which of several states' laws to apply, once it has been determined that a state's law concerning a privilege should govern. In resolving this issue, the federal courts have largely continued to apply the rule established by the Supreme Court in *Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941) 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477. Consequently, a claim of privilege that is made at trial is governed by the state law of the forum in which the federal court sits.



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Swidler & Berlin v. United States (1998) 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (attorney-client privilege protects attorney's notes taken during confidential discussion between attorney and client, even though client has subsequently died).

Jaffee v. Redmond (1996) 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (under Rule 510, federal law recognizes a privilege protecting confidential communications between patient and psychotherapist, including communications between a patient and social worker in the course of psychotherapy; failure to recognize this privilege may chill the "frank and complete disclosure of facts, emotions, memories and fears" which are necessary for effective treatment).

University of Pennsylvania v. E.E.O.C. (1990) 493 U.S. 182, 110 S. Ct. 577, 107 L. Ed. 2d 571 (the Supreme Court declined to recognize a privilege against disclosure of peer review information).

United States v. Zolin (1989) 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (addressing in camera review of allegedly privileged communications to determine applicability of the crime-fraud exception to the attorney-client privilege).

Trammel v. United States (1980) 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 (spousal privilege to exclude adverse spousal testimony is held solely by the witness spouse; the party spouse cannot object if the witness spouse freely elects to testify).

Whalen v. Roe (1977) 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (patient's right to privacy in receiving medical treatment is additional protection for physician-patient relationship besides the physician-patient privilege).

Fisher v. United States (1976) 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (it is universally accepted that the attorney-client privilege may be raised by the attorney).

Branzburg v. Hayes (1972) 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (*First Amendment* does not create journalist privilege).

United States v. Murphy (9th Cir. 1995) 65 F.3d 758 (defendant was charged with violating environmental laws and

his estranged wife testified against him at trial; trial court did not err in admitting the testimony because, although the parties were technically married, the court found that the marriage was irreconcilable where the parties had been separated for seven years and had filed for divorce).

United States v. Hamilton (7th Cir. 1994) 19 F.3d 350 (testimony from defendant's wife was not rendered inadmissible by defendant's assertion of the spousal privilege where defendant failed to prove the validity of the marriage at trial).

In re Bieter Co. (8th Cir. 1994) 16 F.3d 929 (court found that an individual was an independent consultant of a client's attorney, and that communications between the consultant and the client's attorney were protected by the attorney-client privilege).

Vingelli v. United States (2d Cir. 1993) 992 F.2d 449 (in drug investigation, where grand jury wanted to know how one of the convicted conspirators had paid fees to an attorney, questions concerning client and fee information to another attorney who had forwarded the legal fees did not violate the attorney-client privilege).

United States v. Hall (4th Cir. 1993) 989 F.2d 711 (cross-examination of defendant using a statement given by defendant's wife, but not offered at trial because of the marital privilege was reversible error).

United States v. Porter (6th Cir. 1993) 986 F.2d 1014 (privilege against adverse spousal testimony did not prevent defendant's ex-wife from testifying against him since the couple was divorced at the time of trial and because the wife did not elect to exercise the privilege).

Clarke v. American Commerce National Bank (9th Cir. 1992) 974 F.2d 127 (attorney's billing statements did not constitute privileged communications).

Chase Manhattan Bank, N.A. v. Turner & Newall, PLC (2d Cir. 1992) 964 F.2d 159 (a magistrate's decision to issue an "attorney's-eyes-only" order directing the defense to release documents to plaintiff's counsel constituted error, as it undermined the purpose of the attorney-client privilege).

Westinghouse Electric Corp. v. The Republic of the Philippines (3d Cir. 1991) 951 F.2d 1414 (court rejected the concept of selective waiver of attorney-client privilege by voluntary disclosure to government agencies).

United States v. Jackson (8th Cir. 1991) 939 F.2d 625 (spouse waived the adverse testimony privilege by stating her willingness to testify).

United States v. Wood (1st Cir. 1991) 924 F.2d 399 (in husband's trial, wife could waive privilege to testify against husband, but could not waive privilege regarding letter from husband to wife).

Noggle v. Marshall (6th Cir. 1983) 706 F.2d 1408 (while the rule that psychiatric experts retained by the defense are shielded by the attorney-client privilege has been adopted in federal criminal proceedings and in the majority of states, the rule is not mandated by the U.S. Constitution; therefore there is no entitlement to habeas corpus relief on the grounds that the privilege was violated in an Ohio criminal case when the prosecution called as its witness a defense-retained psychiatrist).

General Motors v. Director of NIOSH (S.D. Ohio 1978) 459 F. Supp. 235 (a physician may not disclose a patient's medical records without the patient's consent. The one exception that is permitted is the disclosure of an occupational disease).

Practice Tip on Privileges

The five key issues surrounding privilege are:

(1) *Is there an applicable legally recognizable privilege?*

In California, or in federal courts that must apply California law, only those privileges created by statute or the California Constitution's right to privacy may give rise to a claim of privilege.

(2) *Has the claim of privilege been asserted properly?*

In general, only the holder of the privilege may assert a privilege in order to suppress relevant evidence. The holders of the testimonial privileges are both the husband and wife in the marital privilege, the client in the attorney-client privilege, the patient in the physician-patient privilege, and the parishioner in the clergyman-parishioner privilege. However, some non-holders are obligated by statute to assert the privilege in the absence of direction from the actual holder. *See, e.g., Evidence Code sections 954(c), 955* (circumstances under which attorney must assert attorney-client privilege on behalf of client); *Boling v. Superior Court* (1980) 105 Cal. App. 3d 430, 164 Cal. Rptr. 432 (when no party present can show that she is "holder of a privilege," trial court must bar the records unless party seeking production can prove they fall under an exception).

(3) *Has the existence of the privilege been established properly?*

The party claiming the privilege has the burden of proving its existence. Several privileges apply only to communications made for a certain purpose, such as legal advice (attorney-client privilege) or medical treatment (doctor-patient privilege). If the communication is not made for the valid purpose, it is not privileged. Because a communication may be made for multiple purposes, the courts apply "the dominant purpose test," which examines the dominant purpose of the communication in light of the requirements of the specific privilege, to determine whether the privilege will attach. *See People v. Badgett* (1995) 10 Cal. 4th 330, 41 Cal. Rptr. 2d 635, 895 P.2d 877 (claimant of marital privilege for confidential communications has burden of proving, by preponderance of evidence, facts necessary to sustain claim); *People v. Cabral* (1993) 12 Cal. App. 4th 820, 15 Cal. Rptr. 2d 866. For those privileges requiring confidentiality, the holder of the privilege is aided by a presumption of confidentiality. *Evidence Code section 917*. This presumption is rebuttable, but production of evidence showing that the communication was not made in confidence shifts the burden of persuasion to the party seeking to defeat the privilege. In other words, because of Section 917, the party opposing the claim of privilege must disprove confidentiality. *See People v. Carter* (1973) 34 Cal. App. 3d 748, 110 Cal. Rptr. 324 (communication between husband and wife is presumed to be confidential and burden is on opponent of privilege to prove otherwise).

(4) *Has the privilege been waived?*

In general, only the holder of a privilege may waive the right to the protection of the privilege. The reasoning employed here rests on the notion that if the holder of the privilege is careless about confidentiality of the privileged communication or puts the content of the privileged communication into issue, why should the truth-finding process be hindered unnecessarily? *See Evidence Code section 912* (discussing waiver in detail).

(5) *Does an exception to the privilege apply?*

Most privileges arise due to a need to protect confidentiality in certain special relationships. Where this

need for confidentiality does not exist, exceptions to the privilege are recognized. For example, if an attorney sues his or her client for the payment of fees, or a patient sues his or her physician for alleged malpractice, the privilege ceases to function. The exceptions for each privileged relationship can be found in the article of the Evidence Code creating that privilege. In contrast to the doctrine of waiver, the holder of the privilege may care very much about the confidentiality of the communication; however, either the policy behind the privilege does not apply for some clear reason or the policies behind the various exceptions are deemed by law to be more important than the need to protect privacy.



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§ 900.syn Synopsis to Chapter 900: Application of Definitions

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1-900 California Evidence Courtroom Manual Scope

Scope Application of Definitions

§ 900 reads as follows:

Rule 900 Application of Definitions

Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division. They do not govern the construction of any other division.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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2 ANALYSIS

The law of privileges raises special policy considerations, which justifies being especially careful with defining crucial terms. Thus, Section 900 makes the definitions contained in this division controlling for this division, unless otherwise stated or required. If these definitions do not apply, for reasons of context or otherwise, the definitions of *Section 100 et seq.* would apply by default.



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3 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 900 in the Federal Rules of Evidence. *See* General Note on the Federal Law of Privilege preceding this section.



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4 ADDITIONAL AUTHORITY

Weissenberger's Federal Evidence §§ 501.1-.8



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§ 901.syn Synopsis to Chapter 901: Proceeding

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1-901 California Evidence Courtroom Manual Scope

Scope Proceeding

§ 901 reads as follows:

Rule 901 Proceeding

"Proceeding" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 901 defines the term "proceeding" broadly, thus capturing virtually any situation in which governmental power may operate to compel an individual to give testimony. The exclusion of "privileged" evidence is distinguishable from the use of "confidential" information. Many disciplines require their professionals to keep the information learned from a client confidential as a matter of professional ethics. However, such information can be compelled through subpoena, for example, if the information is not also privileged. In other words, confidentiality is a broader concept than privilege; some confidences are also privileged, but some may not be privileged and can be disclosed if required by law.



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2 COMPARISON TO FEDERAL RULE

Section 901 has its rough counterpart in *Federal Rules of Evidence 1101* and *104*, which relate to procedural aspects of the application of privilege laws. Federal Rule of *Evidence 1101* sets forth the broad applicability of privilege law and it provides in subsection (c) that: "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." Reading Federal Rule of *Evidence 1101* in its entirety, it is clear that privilege rules apply even to proceedings not conducted under the Federal Rules of Evidence. Federal Rule of Evidence 104 notes that even judges are bound by the law of privilege in ruling on the admissibility of evidence. See General Note on the Federal Law of Privilege, preceding Section 900.



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3 ADDITIONAL AUTHORITY

Weissenberger's Federal Evidence §§ 501.1-.8



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4 SIGNIFICANT CASES

People v. Torres (1971) 19 Cal. App. 3d 724, 97 Cal. Rptr. 139 (in determining the adequacy of a *Miranda* warning, the word "proceedings" must be interpreted in context and given its ordinary meaning rather than the technical definition found in *Evidence Code* section 901).



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§ 902.syn Synopsis to Chapter 902: Civil Proceeding

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1-902 California Evidence Courtroom Manual Scope

Scope Civil Proceeding

§ 902 reads as follows:

Rule 902 Civil Proceeding

"Civil proceeding" means any proceeding except a criminal proceeding.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 902 attempts to clarify the broad scope of civil proceedings; the privilege rules apply to any nonjudicial forum in which there is power to compel testimony.



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2 COMPARISON TO FEDERAL RULE

There is no direct counterpart to Section 902, but see Comparison to Federal Rule in Section 901 of this manual for scope of application of federal privilege law. *See also* General Note on the Federal Law of Privilege, preceding Section 900.



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1-903 California Evidence Courtroom Manual Scope

Scope Criminal Proceeding

§ 903 reads as follows:

Rule 903 Criminal Proceeding

"Criminal proceeding" means:

(a) A criminal action; and

(b) A proceeding pursuant to Article 3 (commencing with *Section 3060*) of *Chapter 7 of Division 4 of Title 1 of the Government Code* to determine whether a public officer should be removed from office for willful or corrupt misconduct in office.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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CHAPTER 1 DEFINITIONS
SECTION 903 Criminal Proceeding

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1 ANALYSIS

Section 903 serves to clarify that, as used in Division 8, regarding privileges, the phrase "criminal proceedings" includes not only traditional criminal actions, but also those proceedings which can have the punitive result of removing a public officer under *Government Code sections 3060-3073*.



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2 COMPARISON TO FEDERAL RULE

There is no direct counterpart to Section 903, but see Comparison to Federal Rule in Section 901 of this manual for a description of the scope of federal privilege law. *See also* General Note on the Federal Law of Privilege, preceding Section 900.



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3 ADDITIONAL AUTHORITY

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§ 905.syn Synopsis to Chapter 905: Presiding Officer

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Scope Presiding Officer

§ 905 reads as follows:

Rule 905 Presiding Officer

"Presiding officer" means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

The phrase "presiding officer" was used in Section 905 to clarify that not only judges but also those exercising other types of legal authority may be authorized to rule on privilege claims. Thus, presiding officers may include arbitrators, hearing officers, referees, and any other person authorized to make rulings on claims of privilege. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965).



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 905 in the Federal Rules of Evidence. However, the broad application of federal privilege law set forth in *Federal Rule of Evidence 1101(c)* ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings") suggests that persons with proper authority, other than judges, are able to make rulings on claims of privilege. *See also* General Note on the Federal Law of Privilege, preceding Section 900.



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SECTION 910 Applicability of Division

1-910 California Evidence Courtroom Manual 910.syn

§ 910.syn Synopsis to Chapter 910: Applicability of Division

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Scope Applicability of Division

§ 910 reads as follows:

Rule 910 Applicability of Division

Except as otherwise provided by statute, the provisions of this division apply in all proceedings. The provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 910 serves to clarify the special status of the rules regarding privilege. Privilege rules apply to all types of proceedings, even when other rules do not apply, unless a statute expressly states otherwise. This broad application is necessary to protect the privileged relationship; otherwise, any agency or official empowered to issue subpoenas could probe into communications that the legislature stated should be protected from public scrutiny.



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2 COMPARISON TO FEDERAL RULE

Section 910 has its rough counterpart in *Federal Rules of Evidence 1101* and *104*, which relate to procedural aspects of the application of privilege laws. Federal Rule of *Evidence 1101* sets forth the broad applicability of privilege law and it provides in subsection (c) that "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." Reading Federal Rule of *Evidence 1101* in its entirety, it is clear that privilege rules apply even to proceedings not conducted under the Federal Rules of Evidence.

Federal Rule of Evidence 104(a) states that whether a privilege applies in a given situation is a preliminary question to be determined by the court. In making this determination, the court remains bound by rules with respect to privilege even though it is not bound at this stage by other evidentiary rules, *e.g.*, rules on admissibility. In this regard, Federal Rule 104 serves to emphasize the rules' overriding concern with maintaining the protection of privileged communication.

In operation, Federal Rule of Evidence 104(a) generally requires the judge to make preliminary determinations on the existence of the privilege without invading the area of privileged communication. In deciding, for example, whether a privilege exists, the court will usually consider whether the necessary facts supportive of a privilege exist (*e.g.*, whether a statutorily or judicially recognized confidential relationship has been shown, whether the relevant communication was made in confidence, etc.) without exposing the substance of the allegedly privileged subject matter.

Current Trends and New Developments

The Supreme Court has ruled that *Federal Rule of Evidence 104(a)* does not categorically prohibit in camera review of materials for which a privilege has been claimed. For example, materials claimed to be privileged as attorney-client communications may be examined in camera to determine if they fall within the crime fraud exception to the asserted privilege once the opponent of the privilege makes a threshold showing that such review is appropriate. See *United States v. Zolin* (1989) 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469. See also General Note on the Federal Law of Privilege, preceding Section 900.



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§ 911.syn Synopsis to Chapter 911: Recognition of Privileges

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1- 911 California Evidence Courtroom Manual Scope

Scope Recognition of Privileges

§ 911 reads as follows:

Rule 911 Recognition of Privileges

Except as otherwise provided by statute:

- (a) No person has a privilege to refuse to be a witness.
- (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.
- (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Except for privileges grounded in the United States or California constitutions, the legislature is the sole source of privilege law pursuant to Section 911. Although courts may interpret statutes regarding privilege, only the legislature can create privileges.



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2 COMPARISON TO FEDERAL RULE

California and federal law differ significantly here. While California gives the power to create new privileges only to the legislature, Federal Rule 501 provides that, where federal law provides the rule of decision in the case, privileges are to be governed by common law principles as interpreted by the federal courts. In those civil actions in which state law supplies the rule of decision as to an element of a claim or defense, the federal court applies the law regarding privilege of the state in which the court sits. Thus, at least in cases applying only federal law, federal courts have considerable power to create and interpret privileges. See General Note on the Federal Law of Privilege, preceding Section 900.



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Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625 (this Section cannot bar privileges based on constitutional provisions, but does prevent judicial creation of new common-law privileges).

Union Bank of California v. Superior Court (2005) 130 Cal. App. 4th 378, 29 Cal. Rptr. 3d 894 (in action by investors alleging fraud, trial court erred in ordering bank to produce its internal forms used in preparing confidential suspicious activity reports (SAR) required by federal law; privilege created by federal law for SAR is applicable in California without necessity of reliance on California's official information privilege; the privilege protects from discovery not just the SAR and its contents, but also information that would disclose preparation of a SAR).

Cloud v. Superior Court (1996) 50 Cal. App. 4th 1552, 58 Cal. Rptr. 2d 365 (although a "self-critical analysis" privilege might exist in federal court and in other jurisdictions, privileges in California are created only by the state legislature and not by the courts. Because the California Legislature has not created this privilege, company could not refuse to produce documents relating to company's affirmative action plans).

Garstang v. Superior Court (1995) 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84 (privileges are exclusive, and courts are not free to create new privileges as a matter of judicial policy).



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SECTION 912 Waiver of Privilege

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Scope Waiver of Privilege

§ 912 reads as follows:

Rule 912 Waiver of Privilege

(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954

(lawyer-client privilege), 994 (physician- patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, is not a waiver of the privilege.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1980, ch. 917, § 1; Stats. 2002, ch. 72 (S.B. 2061), § 1. Amended by Stats. 2004, ch. 405 (S.B. 1796), § 1)

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1 ANALYSIS

The protection of an evidentiary privilege may be lost either through a waiver of the privilege or through the application of an exception to the privilege. The distinction between a waiver and an exception is as follows:

Waiver--the statements or conduct of the holder of the privilege (or the holder's consent to the statements or conduct of another) suggest that the holder considers confidentiality unimportant.

Exception--the holder may carefully guard the confidentiality of the communication and desire nondisclosure, but is not entitled to assert the privilege because the legislature has determined that under the circumstances making an exception applicable, the policy considerations favor disclosure of the relevant evidence and outweigh any interest in preserving the confidence.

Section 912 generally defines the circumstances under which a communication, which is otherwise privileged, may lose its protected status through waiver. Exceptions to California privileges can be found in each article establishing a particular privilege.

Only a holder of a privilege may waive the privilege, although a court may find that the holder authorized, either expressly or impliedly, someone else to waive the privilege. There are essentially three ways to waive a privilege. First, the holder may disclose, or consent to the disclosure of, a "significant" part of the communication outside the privileged relationship. Failure to claim the privilege at the earliest opportunity is considered "consent" to disclosure. Section 912(a); *see Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal. App. 4th 263, 69 Cal. Rptr. 2d 112 (party who fails to object specifically on grounds of attorney-client privilege in its initial response to request for documents waives the privilege); *but see Korea Data Systems Co. v. Superior Court* (1997) 51 Cal. App. 4th 1513, 59 Cal. Rptr. 2d 925 (express but non-specific objection on the basis of privilege was sufficient to preserve attorney-client privilege and work product protection). The holder's disclosure may constitute a waiver even if it is accidental. *But see O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal. App. 4th 563, 69 Cal. Rptr. 2d 389 (refusing to find waiver by inadvertent disclosure of list of employees scheduled for termination that was prepared for employer's legal counsel for purpose of getting legal advice on terminating employees). California rejects the eavesdropper doctrine, which permits disclosure by individuals who have deliberately overheard confidential communications. *See Menendez v. Superior Court* (1992) 3 Cal. 4th 435, 11 Cal. Rptr. 2d 92, 834 P.2d 786 .

Second, waiver may be found when a party puts the privileged communication "at issue" in a case or otherwise affirmatively relies on a privileged communication such that the application of the privilege would unfairly deny the opposing party access to essential information. See *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal. App. 4th 110, 68 Cal. Rptr. 2d 844 (privilege waived where employer raised defense of reasonableness of attorney investigation of employee claim because this puts the adequacy of the investigation itself in issue); *Rockwell Internat. Corp. v. Superior Court* (1994) 26 Cal. App. 4th 1255, 32 Cal. Rptr. 2d 153 (discussing the "in issue" doctrine). While placing a privileged communication in issue in a dispute is one route to losing the privilege, there are also specific exceptions that may apply. The lawyer-client privilege, spousal privileges, physician-patient privilege and psychotherapist-patient privilege have exceptions when a holder of the privilege litigates against the other member of the privileged relationship. *Evidence Code* sections 958, 972, 984, 1001, 1020. In addition, the physician-patient and psychotherapist-patient privileges have exceptions where the patient places his or her relevant physical or mental state in issue in a lawsuit. *Evidence Code* sections 996 (patient-litigant exception to physician-patient privilege), 998 (no physician-patient privilege in criminal cases); 1016 (patient-litigant exception to psychotherapist-patient privilege).

Third, a party may waive the privilege by using those documents to prepare an expert or other witness to testify or by using the documents to refresh the recollection of the witness. Although there is authority holding that use of privileged information to refresh a witness's recollection under *Evidence Code* section 771 does not waive the privilege as to that information, the issue is unclear. See *Sullivan v. Superior Court* (1972) 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (use of transcription of party's meeting with her attorney to refresh party's recollection before her deposition was not waiver); *Kerns Constr. Co. v. Superior Court* (1968) 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (use of privileged material to refresh a witness's recollection during testimony waives the privilege). The better approach is to avoid using privileged information in preparing or refreshing a witness's recollection.

See *Section 917* for information on the presumed confidentiality of electronic communications.



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2 COMPARISON TO FEDERAL RULE

Federal law is more settled than is California law, holding that use of privileged information or document to prepare a witness or to refresh a witness's recollection waives the privilege as to that information or document. *Marshall v. United States Postal Serv. (D.D.C. 1980) 88 F.R.D. 348, 350-51* ; *Bailey v. Meister Brau Inc. (N.D. Ill. 1972) 57 F.R.D. 11, 13* . In other respects, federal law tends to be consistent with California law regarding waiver of privileges. See General Note on the Federal Law of Privilege, preceding Section 900.



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3 ADDITIONAL AUTHORITY

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4 SIGNIFICANT CASES

Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 80 Cal. Rptr. 3d 83, 187 P.3d 934 (evidence of alleged oral settlement agreement in mediation arising from a malpractice-based action was inadmissible on additional breach of contract claim; the Legislature did not intend for implied waiver to apply to mediation; thus, when there was no written evidence of the oral agreement existed, there was no written agreement signed by both parties, and the parties executed no express waivers of mediation confidentiality, evidence of the oral agreement was inadmissible).

Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092 (in products liability suit, plaintiffs' attorney inadvertently obtained notes of one of the defense attorneys and used them during a deposition to impeach a defense expert. The trial court entered an order granting a defense motion to disqualify plaintiffs' legal team and experts and the Court of Appeal affirmed. Held: When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified).

Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (trustee did not, by producing some documents in response to document request, waive attorney-client privilege as to communications not yet disclosed where trustee had made honest mistake of law and where the law was unsettled and debatable).

Samuels v. Mix (1999) 22 Cal. 4th 1, 91 Cal. Rptr. 2d 273, 989 P.2d 701 (attorney-client privilege does not protect independent facts related to a communication, such as that a communication took place, the time, the date and the participants in the communication; client waives the privilege by exposing any significant part of the confidential communication).

Menendez v. Superior Court (1992) 3 Cal. 4th 435, 11 Cal. Rptr. 2d 92, 834 P.2d 786 (psychotherapist-patient privilege was not negated with regard to psychotherapist's communications with patients when eavesdropper overheard some of the communications).

People v. Wharton (1991) 53 Cal. 3d 522, 280 Cal. Rptr. 631, 809 P.2d 290 (defendant whose psychotherapist took witness stand placed his mental state in issue, thus waiving psychotherapist-patient privilege, despite defendant's contention that waiver was coerced by trial court's pretrial ruling that exception to privilege applied).

People v. Haskett (1990) 52 Cal. 3d 210, 276 Cal. Rptr. 80, 801 P.2d 323 (waiver in first criminal trial effective as waiver in second trial as well).

Southern Cal. Gas Co. v. Public Utilities Comm'n (1990) 50 Cal. 3d 31, 265 Cal. Rptr. 801, 784 P.2d 1373 (client's disclosure that he was relying on counsel's advice on particular action did not waive attorney-client privilege; in addition, client did not waive privilege when it revealed facts that attorney conversations had occurred and conclusions reached in those conversations since client did not reveal specific contents of its communications with counsel).

People v. Borunda (1974) 11 Cal. 3d 523, 113 Cal. Rptr. 825, 522 P.2d 1 (mere inadvertent mention of informant's name by police officer during preliminary examination was not in itself sufficient to cause waiver of privilege against nondisclosure of agent's identity).

People v. Urbano (2005) 128 Cal. App. 4th 396, 26 Cal. Rptr. 3d 871, review denied (trial court did not err in ruling that attorney-client privilege was inapplicable to comment defendant made to attorney while sitting next to his attorney in the jury box when court was not in session, where lawyers were engaged in conversation throughout the courtroom and comment was so loud that witness openly present in the last row of seats in the courtroom overheard defendant's comment and saw his gesture).

Laguna Beach County Water Dist. v. Superior Court (2004) 124 Cal. App. 4th 1453, 22 Cal. Rptr. 3d 387 (lawyer's letters to auditors for petitioner Laguna Beach County Water District containing work product did not contravene the purpose of the work product doctrine, and thus there was no waiver, and defendant is not required to produce the letters. In California, however, "the protection afforded by the attorney work product doctrine is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity. Disclosure operates as a waiver only when otherwise protected information is divulged to a third party who has no interest in maintaining the confidentiality ... of a significant part of the work product.).

Eddy v. Fields (2004) 121 Cal. App. 4th 1543, 18 Cal. Rptr. 3d 487 (attorney waived work product privilege as to documents prepared in representing trustees of inter vivos trust by submitting documents to other counsel of same trustees who was not attorney's co-counsel; although disclosure of work product to an attorney who represents a mutual client or a client with common interests does not necessarily operate as a waiver of the work product privilege as to third parties, here the attorney claiming work product protection and separate counsel for the trustees were not acting pursuant to a common interest).

McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (held that when corporation shared audit committee report and interview memoranda, which had been prepared by attorneys retained by corporation to perform internal review of alleged securities fraud, corporation waived the attorney-client privilege and work product protection; disclosure of the documents to the SEC and U.S. Attorney's Office was not reasonably necessary to accomplish the purpose for which the law firm was consulted, which was to investigate the alleged fraud and determine who was responsible; although parties aligned on the same side in an investigation or litigation may, in some circumstances, share privileged documents without waiving the attorney-client privilege there is no real alignment of interests between the government and persons or entities under investigation for securities law violations; we still find the situation here is not qualitatively different than a defendant sharing privileged material with one plaintiff, but not another and no one suggests that a defendant facing multiple plaintiffs should be able to disclose privileged materials to one plaintiff without waiving the attorney-client privilege as to the other plaintiffs. Also held that waiver of work product protection, though not expressly defined by statute, is generally found under the same set of

circumstances as waiver of the attorney-client privilege--by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection).

Shooker v. Superior Court (2003) 111 Cal. App. 4th 923, 4 Cal. Rptr. 3d 334 (holding that the designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege as long as the designation is withdrawn before the party discloses a significant part of a privileged communication, or before it is known with reasonable certainty that the party will actually testify as an expert; here, party who designated himself as an expert appeared for his deposition but recognized the privilege issue before he did anything more than identify his charts and the previously disclosed documents he had brought with him, and no confidential information was disclosed, let alone a significant part of a confidential communication, so that privilege was secure).

State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799 (when a lawyer receives materials that appear to be subject to the attorney-client privilege and inadvertently disclosed, the lawyer should refrain from examining the materials any more than necessary and must notify the party entitled to the privilege of this fact).

Kaiser Foundation Hosp. v. Superior Court (1998) 66 Cal. App. 4th 1217, 78 Cal. Rptr. 2d 543 (where employer investigates employee claim using nonattorney human resource specialist, produced vast majority of its investigation related documents subject to a written stipulation that such production did not constitute a waiver of the attorney-client privilege and did not disclose a substantial part of any communication to nonessential third parties, employer did not waive its attorney-client privilege or work product protection as to specific communications between its employees and its legal counsel).

O'Mary v. Mitsubishi Electronics America, Inc. (1997) 59 Cal. App. 4th 563, 69 Cal. Rptr. 2d 389 (refusing to find waiver by inadvertent disclosure of list of employees scheduled for termination that was prepared for employer's legal counsel for purpose of getting legal advice on terminating employees).

Scottsdale Ins. Co. v. Superior Court (1997) 59 Cal. App. 4th 263, 69 Cal. Rptr. 2d 112 (party who fails to object specifically on grounds of attorney-client privilege in its initial response to request for documents waives the privilege).

Wellpoint Health Networks, Inc. v. Superior Court (1997) 59 Cal. App. 4th 110, 68 Cal. Rptr. 2d 844 (privilege waived where employer raised defense of reasonableness of attorney investigation of employee claim because this puts the adequacy of the investigation itself in issue).

Korea Data Systems, Co. v. Superior Court (1997) 51 Cal. App. 4th 1513, 59 Cal. Rptr. 2d 925 (express but non-specific objection on the basis of privilege was sufficient to preserve attorney-client privilege and work product protection. The holder's disclosure may constitute a waiver even if it is accidental).

Rockwell Internat. Corp. v. Superior Court (1994) 26 Cal. App. 4th 1255, 32 Cal. Rptr. 2d 153 (" 'in issue doctrine' creates implied waiver only when client tenders issue involving substance or content of protected communication, not where privileged communication simply represents one of several forms of indirect evidence in particular case").

Woods v. Superior Court (1994) 25 Cal. App. 4th 178, 30 Cal. Rptr. 2d 182 (while communications with an expert retained to assist in preparation of defense may initially be protected by attorney-client privilege, privilege is waived where expert is identified, substantial portions of his otherwise privileged evaluation is disclosed in his report, and the report is released; moreover, electing to present expert as a witness destroys work-product privilege).

People v. Superior Court (1991) 231 Cal. App. 3d 584, 282 Cal. Rptr. 418 (therefore court must determine the scope of waiver--whether privilege was waived for only as to that specific doctor or to all material sought from that doctor depends on the type of information disclosed).

Raytheon Co. v. Superior Court (1989) 208 Cal. App. 3d 683, 256 Cal. Rptr. 425 (where disclosure to codefendants of information covered by attorney-client privilege was reasonably necessary to accomplish purpose for which defendants' attorneys were consulted, there is no waiver).

Blue Cross of N. Cal. v. Superior Court (1976) 61 Cal. App. 3d 798, 132 Cal. Rptr. 635 (no waiver of physician-patient privilege occurs if disclosure is reasonably necessary to accomplish medical consultation's purpose; "purpose" refers to diagnosis, treatment, or both).



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1-913 California Evidence Courtroom Manual 913.syn

§ 913.syn Synopsis to Chapter 913: Comment on, and Inferences from, Exercise of Privilege

Scope Comment on, and Inferences from, Exercise of Privilege

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Scope Comment on, and Inferences from, Exercise of Privilege

§ 913 reads as follows:

Rule 913 Comment on, and Inferences from, Exercise of Privilege

(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 913 codifies a well-established constitutional principle holding that comment by state agents on a defendant's failure to testify in a criminal case violates the *self-incrimination clause* of the *Fifth Amendment of the U.S. Constitution*. *Griffin v. California* (1965) 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 . In addition, the trial court must take care not to allow the jury to draw inferences from the defendant's failure to testify in criminal cases, including instructing the jury where appropriate. However, this protection does not apply in civil proceedings. Moreover, this protection is limited to only the defendant's decision not to testify--it does not prevent the prosecution from commenting on the defendant's failure to call other witnesses. *See People v. Gray* (1979) 91 Cal. App. 3d 545, 154 Cal. Rptr. 555 . *See also Section 930* (recognizing criminal defendant's constitutional privilege not to be called as a witness and not to testify); *Section 940* (recognizing the constitutional privilege against self-incrimination).



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2 COMPARISON TO FEDERAL RULE

Federal law is essentially consistent with Section 913. See General Note on the Federal Law of Privilege, preceding Section 900.



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3 ADDITIONAL AUTHORITY

Weissenberger's Federal Evidence §§ 501.1-.8



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People v. Padilla (1995) 11 Cal. 4th 891, 47 Cal. Rptr. 2d 426, 906 P.2d 388 (it is improper for the prosecution to comment on the failure of the defendant to testify in his own behalf, and also with respect to any witness's exercise of a privilege not to testify).

People v. Johnson (1992) 3 Cal. 4th 1183, 14 Cal. Rptr. 2d 702, 842 P.2d 1 (by failing to object, defendant waived claim of misconduct in prosecutor's closing argument which allegedly drew the attention to the fact that defendant had not testified at trial).

People v. Mitcham (1992) 1 Cal. 4th 1027, 5 Cal. Rptr. 2d 230, 824 P.2d 1277 (defendant could not object for first time on appeal to prosecutor's remarks during closing argument on ground that they amounted to comments on defendant's failure to testify, where defendant's counsel did not object at trial; timely objection and admonition would have cured any harm caused by remarks).



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1-914 California Evidence Courtroom Manual 914.syn

§ 914.syn Synopsis to Chapter 914: Sanctions for Failure to Obey Order Regarding Privileged Information

Scope Sanctions for Failure to Obey Order Regarding Privileged Information

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1-914 California Evidence Courtroom Manual Scope

Scope Sanctions for Failure to Obey Order Regarding Privileged Information

§ 914 reads as follows:

Rule 914 Sanctions for Failure to Obey Order Regarding Privileged Information

(a) The presiding officer shall determine a claim of privilege in any proceeding in the same manner as a court determines such a claim under Article 2 (commencing with § 400) of Chapter 4 of Division 3.

(b) No person may be held in contempt for failure to disclose information claimed to be privileged unless he has failed to comply with an order of a court that he disclose such information. This subdivision does not apply to any governmental agency that has constitutional contempt power, nor does it apply to hearings and investigations of the Industrial Accident Commission, nor does it impliedly repeal Chapter 4 (commencing with *Section 9400*) of *Part 1 of Division 2 of Title 2 of the Government Code*. If no other statutory procedure is applicable, the procedure prescribed by *Section 1991 of the Code of Civil Procedure* shall be followed in seeking an order of a court that the person disclose the information claimed to be privileged.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 914 requires in general that before a person may be held in contempt for failure to disclose privileged information, the person must be subject to a court order. Section 914 excepts those circumstances in which governmental bodies or agencies exercise valid contempt powers. Essentially, Section 914 guarantees that a person will have due process before being sanctioned for failure to disclose privileged information.



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2 COMPARISON TO FEDERAL RULE

Federal law is essentially consistent with Section 914. See General Note on the Federal Law of Privilege, preceding Section 900.



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3 ADDITIONAL AUTHORITY

Weissenberger's Federal Evidence §§ 501.1-.8



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1-915 California Evidence Courtroom Manual 915.syn

§ 915.syn Synopsis to Chapter 915: Matters to be Considered in Ruling on Privilege Claim

Scope Matters to be Considered in Ruling on Privilege Claim

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Scope Matters to be Considered in Ruling on Privilege Claim

§ 915 reads as follows:

Rule 915 Matters to be Considered in Ruling on Privilege Claim

(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under subdivision (a) of *Section 2018.030 of the Code of Civil Procedure* in order to rule on the claim of privilege; provided, however, that in any hearing conducted pursuant to subdivision (c) of *Section 1524 of the Penal Code* in which a claim of privilege is made and the court determines that there is no other feasible means to rule on the validity of the claim other than to require disclosure, the court shall proceed in accordance with subdivision (b).

(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under subdivision (b) of *Section 2018.030 of the Code of Civil Procedure* (attorney work product) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1979, ch. 1034, p. 3572, § 1; Stats. 2001, ch. 812 (A.B. 223), § 13. Amended Stats. 2004, ch. 182 (A.B. 3081), § 29)

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1 ANALYSIS

Section 915 demonstrates the scope and power of privileges. If information is privileged, it is very difficult to pierce that protection. When read together with the presumption of confidentiality provided by Section 917, Section 915 imposes a huge burden on the party seeking disclosure of allegedly privileged information.



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2 COMPARISON TO FEDERAL RULE

Federal law differs significantly from Section 915. The United States Supreme Court has held that where a party can make a threshold showing of the applicability of the crime-fraud exception to the attorney-client privilege, the trial court may conduct an *in camera* review of allegedly privileged communications to determine applicability of the crime-fraud exception. *United States v. Zolin* (1989) 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 . The Court rejected the approach of Section 915(a) as imposing too great a burden on the truth-seeking function of the trial.



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Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (while Section 915 prevents a court from ordering disclosure of material claimed to be privileged in order to rule on the claim of privilege, Section 915 does not apply to the work product doctrine, which is codified in the *Code of Civil Procedure* section 2018; thus *in camera* inspection is an appropriate way of determining whether documents are entitled to protection as work product).

People v. Hobbs (1994) 7 Cal. 4th 948, 30 Cal. Rptr. 2d 651, 873 P.2d 1246 (where, due to sealing of any portion or all of search warrant affidavit, defendant cannot reasonably be expected to make preliminary showing required to challenge warrant or search, certain *in camera* review and discovery procedures should be followed in order to strike fair balance between People's right to assert informant's privilege and defendant's discovery rights, and court set forth those procedures).

People v. Price (1991) 1 Cal. 4th 324, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (defendant was not entitled to disclosure of documents that trial court found to be privileged, although defendant wished documents so that appellate counsel could decide whether trial court's rulings were properly made).

Geilim v. Superior Court (1991) 234 Cal. App. 3d 166, 285 Cal. Rptr. 602 (if only means to assess validity of claim of privilege requires examination of purported privileged documents, trial court must examine them *in camera* with only the person from whom disclosure is sought or the person authorized to claim the privilege or both, and any other person authorized by the holder to be present).



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§ 916.syn Synopsis to Chapter 916: Duty to Exclude Privileged Information

Scope Duty to Exclude Privileged Information

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1-916 California Evidence Courtroom Manual Scope

Scope Duty to Exclude Privileged Information

§ 916 reads as follows:

Rule 916 Duty to Exclude Privileged Information

(a) The presiding officer, on his own motion or on the motion of any party, shall exclude information that is subject to a claim of privilege under this division if: (1) The person from whom the information is sought is not a person authorized to claim the privilege; and (2) There is no party to the proceeding who is a person authorized to claim the privilege.

(b) The presiding officer may not exclude information under this section if: (1) He is otherwise instructed by a person authorized to permit disclosure; or (2) The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 916 is another instance of the special position of privileges in evidence law. Ordinarily, the failure of any party to make an evidentiary objection would result in the admissibility of the evidence. Section 916, however, requires the presiding officer to exclude the information where there is no party to the proceeding authorized to claim the privilege. Section 916 thus preserves the privilege for the benefit of the holder of the privilege, who might otherwise lose the protection of the privilege through waiver.



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2 COMPARISON TO FEDERAL RULE

There is no comparable federal law.



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1-917 California Evidence Courtroom Manual Scope

Scope Presumption of Confidentiality

§ 917 reads as follows:

Rule 917 Presumption of Confidentiality

(a) If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, or domestic violence counselor--victim relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

(b) A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.

(c) For purposes of this section, "electronic" has the same meaning provided in *Section 1633.2 of the Civil Code*.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 2002, ch. 72 (S.B. 2061), §§ 2-3. Amended by Stats. 2003, ch. 468 (S.B. 851), § 2; Stats. 2004, ch. 183 (A.B. 3082), § 93, Stats. 2006, ch. 689 (S.B. 1743) § 2)

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1 ANALYSIS

Section 917 creates a type of rebuttable presumption that shifts the burden of persuasion to the party seeking to defeat the privilege--in other words, the party opposing the claim of privilege must disprove confidentiality. *See also Evidence Code section 115* (defining "burden of proof"), Sections 605-606 (the nature and effect of presumptions affecting the burden of proof); Section 660 (general provision regarding presumption affecting the burden of proof). Note that the party seeking discovery of the information will have to persuade the presiding officer that the privilege is inapplicable without using the privileged information itself. *See Section 915*.

In 2002, Sections 912, 917 and 952 were rewritten to reflect the recommendation of the California Law Revision Commission that these sections make clear that all communications within privileged relationships (including the more recent privileges of sexual assault counselor-victim and domestic violence counselor-victim) should be presumed confidential and such confidentiality is not waived simply by using one of the increasingly common modes of electronic communication. Section 952, the lawyer-client privilege, had been amended in 1994 to reflect this reality, but the Law Revision Commission wanted to stress that the same principles apply to all types of confidential communication privileges. Thus, the language relating to electronic communications was removed from Section 952 and Section 917 was substantially rewritten to reflect this change. The California language is based on the New York state counterpart: *N.Y. C.P.L.R. 4548* (Consol. 2001) ("No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication." The Commission chose the broad definition of "electronic" contained in the Uniform Electronic Transactions Act § 2 comment (1999) (enacted as *Civil Code section 1633.2*): including any "intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form." *See generally Electronic Communications and Evidentiary Privileges*, 31 Cal. L. Rev. Comm. Rep. 245 (2001) (containing full report). The Commission wanted to keep the language broad and generic to "provide flexibility to accommodate new technologies." *Id.* at 251.

Practice Tip

If you are the party opposing a claim of privilege, how would you obtain evidence to overcome and disprove the presumption of confidentiality? Suppose you are deposing a party and her attorney objects, claiming privilege, and instructs the witness not to answer. You are then entitled to ask the following questions:

(1) *Why* did you consult your attorney about your neck pain? The attorney-client privilege, like some other privileges, only protects confidential communications that are made for a particular purpose--obtaining or giving legal advice. The courts apply a dominant purpose test. If the dominant purpose of this communication was to obtain treatment referrals, the communication arguably is not privileged. However, the opposition is likely to claim that the dominant purpose of the conversation was to help the attorney evaluate the client's claim for damages.

(2) *When* did you talk to your attorney about your neck pain?

For each individual instance of communication ask:

(3) *Where* did you and your attorney discuss your neck pain? Most of the privileges discussed in the following sections apply to *confidential communications*. Elevators, corridors and restaurants are common places where individuals defeat their claim that the communication was made in confidence. Individuals, even experienced attorneys, are sometimes surprisingly indiscreet when it comes to maintaining confidentiality.

(4) *How long* did you talk to your attorney about your neck pain?

(5) *Who else* was present when you talked to your attorney about your neck pain? Determine that individual's function at the meeting. If the third party was not necessary to further the communication, the presence of that individual prevents the communication from being considered confidential.



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2 COMPARISON TO FEDERAL RULE

Federal law recognizes a similar presumption of confidentiality of communications within privileged relationships. See *United States v. Cheshire* (M.D. La. 1989) 707 F. Supp. 235 , *aff'd without op.*, 983 F.2d 1063 (communications between attorney and client presumed confidential); *United States v. Neal* (D. Colo. 1982) 532 F. Supp. 942 , *aff'd*, 743 F.2d 1441 , *cert. denied*, 470 U.S. 1086 (communications between spouses presumed confidential).



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3 SIGNIFICANT CASES

People v. Urbano (2005) 128 Cal. App. 4th 396, 26 Cal. Rptr. 3d 871, review denied (trial court did not err in ruling that attorney-client privilege was inapplicable to comment defendant made to attorney while sitting next to his attorney in the jury box when court was not in session, where lawyers were engaged in conversation throughout the courtroom and comment was so loud that witness openly present in the last row of seats in the courtroom overheard defendant's comment and saw his gesture).

Gordon v. Superior Court (1997) 55 Cal. App. 4th 1546, 65 Cal. Rptr. 2d 53 (communications made within the attorney-client relationship are presumed confidential; the party seeking discovery of those communications has the burden of disproving that they were made in confidence).



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1-918 California Evidence Courtroom Manual 918.syn

§ 918.syn Synopsis to Chapter 918: Error in Overruling Claim of Privilege

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1-918 California Evidence Courtroom Manual Scope

Scope Error in Overruling Claim of Privilege

§ 918 reads as follows:

Rule 918 Error in Overruling Claim of Privilege

A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Section 970 or 971.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 918 sets forth the common sense that a party can only claim error on appeal on the basis of privilege if he or she is a holder of the privilege. Presumably, only a holder of a privilege is aggrieved by the erroneous disclosure of privileged information.



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2 COMPARISON TO FEDERAL RULE

Federal law is consistent with Section 918. *See* General Note on the Federal Law of Privilege, preceding Section 900.



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3 ADDITIONAL AUTHORITY

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DIVISION 8 PRIVILEGES

CHAPTER 3 GENERAL PROVISIONS RELATING TO PRIVILEGES

SECTION 918 Error in Overruling Claim of Privilege

1-918 California Evidence Courtroom Manual 4

4 SIGNIFICANT CASES

People v. Corona (1989) 211 Cal. App. 3d 529, 259 Cal. Rptr. 524 (even if testimony of former Mexican consul regarding conversation with criminal defendant was privileged, defendant could not assert trial court's failure to exclude such privileged testimony as error on appeal, as defendant did not demonstrate that he, rather than Mexican government, was holder of privilege).



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DIVISION 8 PRIVILEGES
CHAPTER 3 GENERAL PROVISIONS RELATING TO PRIVILEGES
SECTION 919 Where Disclosure Erroneously Compelled

1-919 California Evidence Courtroom Manual 919.syn

§ 919.syn Synopsis to Chapter 919: Where Disclosure Erroneously Compelled

Scope Where Disclosure Erroneously Compelled

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY



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1-919 California Evidence Courtroom Manual Scope

Scope Where Disclosure Erroneously Compelled

§ 919 reads as follows:

Rule 919 Where Disclosure Erroneously Compelled

(a) Evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if:

- (1) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or
- (2) The presiding officer did not exclude the privileged information as required by Section 916.

(b) If a person authorized to claim the privilege claimed it, whether in the same or a prior proceeding, but nevertheless disclosure erroneously was required by the presiding officer to be made, neither the failure to refuse to disclose nor the failure to seek review of the order of the presiding officer requiring disclosure indicates consent to the disclosure or constitutes a waiver and, under these circumstances, the disclosure is one made under coercion.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1974, ch. 277, § 1)

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SECTION 919 Where Disclosure Erroneously Compelled

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1 ANALYSIS

Section 919 attempts to soften the blows resulting from an erroneous decision to require disclosure of privileged information. Although the courts cannot fully redress the damage to the privacy of the privileged relationship as a result of the forced disclosure, they can refuse to permit that information to be used in later proceedings in the same action or in a different action. Essentially, Section 919 operates to clarify that erroneous forced disclosure of privileged information does not constitute a waiver of the privilege, whether that erroneous decision is appealed or not. Although Section 912 states that coerced disclosure does not constitute waiver, Section 919 makes clear that the information cannot be used as evidence in any proceeding.



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2 COMPARISON TO FEDERAL RULE

Federal law is consistent with Section 919. *See* General Note on the Federal Law of Privilege, preceding Section 900.



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3 ADDITIONAL AUTHORITY

Weissenberger's Federal Evidence §§ 501.1-.8



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CHAPTER 3 GENERAL PROVISIONS RELATING TO PRIVILEGES
SECTION 920 Implied Repeal of Other Statutes Related to Privileges

1-920 California Evidence Courtroom Manual 920.syn

§ 920.syn Synopsis to Chapter 920: Implied Repeal of Other Statutes Related to Privileges

Scope Implied Repeal of Other Statutes Related to Privileges

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1-920 California Evidence Courtroom Manual Scope

Scope Implied Repeal of Other Statutes Related to Privileges

§ 920 reads as follows:

Rule 920 Implied Repeal of Other Statutes Related to Privileges

Nothing in this division shall be construed to repeal by implication any other statute relating to privileges.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 920 clarifies that other provisions relating to privileges (such as *Penal Code* sections 266h and 266i which make the marital communications privilege inapplicable to prosecutions for pimping and pandering) are not repealed by the enactment of this division regarding privileges.



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2 COMPARISON TO FEDERAL RULE

There is no corresponding federal law, since no rules relating to privilege were adopted as part of the Federal Rules of Evidence. *See* General Note on the Federal Law of Privilege, preceding Section 900.



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SECTION 930 Privilege Not to be Called as a Witness and Not to Testify

1-930 California Evidence Courtroom Manual 930.syn

§ 930.syn Synopsis to Chapter 930: Privilege Not to be Called as a Witness and Not to Testify

Scope Privilege Not to be Called as a Witness and Not to Testify

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1-930 California Evidence Courtroom Manual Scope

Scope Privilege Not to be Called as a Witness and Not to Testify

§ 930 reads as follows:

Rule 930 Privilege Not to be Called as a Witness and Not to Testify

To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 930 Privilege Not to be Called as a Witness and Not to Testify

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1 ANALYSIS

Section 930 codifies an individual's right not to be called as a witness and not to testify. This right is grounded in the *Fifth Amendment to the United States Constitution* and also in *Article I, Section 15 of the California Constitution*. *Malloy v. Hogan* (1964) 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (governments, state and federal, are compelled to establish guilt by evidence independently and freely secured and may not by coercion prove charge against accused out of his own mouth); *People v. May* (1988) 44 Cal. 3d 309, 243 Cal. Rptr. 369, 748 P.2d 307. However, the California Supreme Court has held that Proposition 8 abolished the ability of California courts to create more restrictive rules than those established under federal constitutional law. *Id.* Thus, for all practical purposes, the privilege of a criminal defendant not to testify in California courts is determined by federal law. *See also Section 913* (prohibiting comment regarding the defendant's decision not to testify); *Section 940* (recognizing the constitutional privilege against self-incrimination).

Like other privileges, the privilege of a criminal defendant not to testify may be waived if the defendant voluntarily takes the stand and testifies. *People v. Stone* (1965) 239 Cal. App. 2d 14, 48 Cal. Rptr. 469. Unlike the attorney-client privilege, however, the privilege not to testify does not extend to corporations; a corporation may be forced to disclose corporate records which incriminate the corporation. *George Campbell Painting Corp. v. Reid* (1968) 392 U.S. 286, 88 S. Ct. 1978, 20 L. Ed. 2d 1094.



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2 COMPARISON TO FEDERAL RULE

Federal law is not only consistent with Section 930, but also determines the meaning and scope of Section 930, following the enactment of Proposition 8 and the California Supreme Court's decision in *People v. May (1988)* 44 Cal. 3d 309, 243 Cal. Rptr. 369, 748 P.2d 307, holding that California courts may not interpret the California Constitution to provide more protection to a criminal defendant than the United States Constitution.



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3 SIGNIFICANT CASES

People v. Padilla (1995) 11 Cal. 4th 891, 47 Cal. Rptr. 2d 426, 906 P.2d 388 (it is improper for the prosecution to comment on the failure of the defendant to testify in his own behalf, and also with respect to any witness's exercise of a privilege not to testify).

People v. Johnson (1992) 3 Cal. 4th 1183, 14 Cal. Rptr. 2d 702, 842 P.2d 1 (by failing to object, defendant waived claim of misconduct in prosecutor's closing argument which allegedly drew the attention to the fact that defendant had not testified at trial).

People v. Mitcham (1992) 1 Cal. 4th 1027, 5 Cal. Rptr. 2d 230, 824 P.2d 1277 (defendant could not object for first time on appeal to prosecutor's remarks during closing argument on ground that they amounted to comments on defendant's failure to testify, where defendant's counsel did not object at trial).

People v. Merfeld (1997) 57 Cal. App. 4th 1440, 67 Cal. Rptr. 2d 759 (hearing on petition to extend commitment of allegedly mentally disordered offender is not punitive; thus, committee is not entitled to a criminal defendant's right to refuse to testify).



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SECTION 940 Privilege Against Self-Incrimination

1-940 California Evidence Courtroom Manual 940.syn

§ 940.syn Synopsis to Chapter 940: Privilege Against Self-Incrimination

Scope Privilege Against Self-Incrimination

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES

4 RECENT SIGNIFICANT CASES REGARDING WORK PRODUCT DOCTRINE



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SECTION 940 Privilege Against Self-Incrimination

1-940 California Evidence Courtroom Manual Scope

Scope Privilege Against Self-Incrimination

§ 940 reads as follows:

Rule 940 Privilege Against Self-Incrimination

To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 940 Privilege Against Self-Incrimination

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1 ANALYSIS

Section 940 recognizes the existence of the federal and California constitutional privilege against self-incrimination. *See Wilson v. Superior Court (1976) 63 Cal. App. 3d 825, 134 Cal. Rptr. 130* (privilege against self-incrimination is neither created nor defined by statute and is dependent for its elaboration upon judicial decision). Evidence obtained in violation of an individual's privilege against self-incrimination is excluded under Section 940. *People v. Rivera (1985) 41 Cal. 3d 388, 221 Cal. Rptr. 562, 710 P.2d 362*. The admission of physical evidence, such as the results of a blood alcohol test or other physical evidence of intoxication does not violate the privilege against self-incrimination, nor does a refusal to submit to a blood alcohol test. *People v. Municipal Court (1982) 137 Cal. App. 3d 114, 186 Cal. Rptr. 716*. *See also Section 913* (prohibiting comment regarding the defendant's decision not to testify); *Section 930* (recognizing a criminal defendant's constitutional privilege not to be called as a witness and not to testify).



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2 COMPARISON TO FEDERAL RULE

California and federal law are essentially the same regarding the privilege against self-incrimination.



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3 SIGNIFICANT CASES

People v. Pokovich (2006) 39 Cal. 4th 1240, 48 Cal. Rptr. 3d 158, 141 P.3d 267 (Fifth Amendment prohibited impeaching testifying defendant with statements made to mental health professionals during court-ordered examination to determine defendant's competency to stand trial).

People v. Seijas (2005) 36 Cal. 4th 291, 30 Cal. Rptr. 3d 493, 114 P.3d 742 (the test for the applicability of the privilege is whether a statement could incriminate a witness, even if the prosecution says that it would not prosecute the witness; the use of incriminating statements must be forbidden, as by a grant of immunity, and not merely unlikely, before the court may force a witness to make the statements at issue; trial court did not err in allowing witness to assert the privilege where it did "not clearly appear that the testimony could not possibly tend to incriminate").

People v. Macias (1997) 16 Cal. 4th 739, 66 Cal. Rptr. 2d 659, 941 P.2d 838 (minor suspect's statements made to probation officers in connection with juvenile fitness hearings are not legislatively compelled; absent some showing of involuntariness, such statements may be used to impeach minor's testimony at subsequent trials).

In re Marriage of Sachs (2002) 95 Cal. App. 4th 1144, 116 Cal. Rptr. 2d 273 (privilege against self-incrimination did not protect former husband from producing his income tax returns and being questioned about them by his former wife in judgment debtor examination, subject to statutory requirement of confidentiality; trial court did not err in finding that proposed testimony could not incriminate witness).

Fuller v. Superior Court (2001) 87 Cal. App. 4th 299, 104 Cal. Rptr. 2d 525 (where privilege against self-incrimination is asserted in civil discovery during the pendency of a related criminal investigation, the trial court should balance both the interests behind the privilege and the need for discovery, using all procedural safeguards at its disposal).

People v. Berry (1991) 230 Cal. App. 3d 1449, 281 Cal. Rptr. 543 (privilege against self-incrimination is available to persons appearing before civil or administrative tribunals if statement could tend to incriminate them in any criminal activity and which could subject them to criminal prosecution; trial judge has duty to assist witness in preserving this privilege by either informing that witness of his or her constitutional rights or by appointment of counsel for that

purpose).

In criminal cases, *Penal Code section 1054.6* expressly limits the definition of "work product" in criminal cases to "core" or "opinion" work product (i.e., any writing reflecting an attorney's impressions, conclusions, opinions, or legal research or theories); the qualified protection of certain materials under *Code of Civil Procedure section 2018(b)*, applicable in civil cases, is not available in criminal cases. *Izazaga v Superior Court (1991) 54 Cal. 3d 356, 285 Cal. Rptr. 231, 815 P.2d 304*. The federal work product doctrine in criminal cases is *Federal Rule of Criminal Procedure 16(b)(2)*, which limits disclosure regardless of a showing of good cause.

Similar to federal law, California courts find waiver of the work product protection that may have attached to expert reports if the expert is designated as a witness for trial. Work product protection may also be waived if it is not asserted at the earliest possible point or if the material is disclosed by the attorney, who holds the protection, to those who have no need to see it. Unlike federal law, California limits the applicability of traditional exceptions to the attorney-client privilege to work product protection. California abrogates work product protection where the attorney has been accused of breach of duty to the client and in disciplinary actions brought against an attorney by the State Bar if the client consents to the disclosure. *Code of Civil Procedure section 2018*.



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**4 RECENT SIGNIFICANT CASES REGARDING
WORK PRODUCT DOCTRINE**

Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (California Supreme Court had no authority to create a "fiduciary" exception to attorney-client privilege for communications between trustee and trustee's attorney; the attorney for trustee of trust does not always also represent the beneficiaries of trust, so beneficiaries had no right to examine communications between trustee and attorney; work product of trustee's counsel also was not discoverable).

Laguna Beach County Water Dist. v. Superior Court (2004) 124 Cal. App. 4th 1453, 22 Cal. Rptr. 3d 387 (lawyer's letters to auditors for petitioner Laguna Beach County Water District containing work product did not contravene the purpose of the work product doctrine, and thus there was no waiver, and defendant is not required to produce the letters. In California, however, "the protection afforded by the attorney work product doctrine is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity. Disclosure operates as a waiver only when otherwise protected information is divulged to a third party who has no interest in maintaining the confidentiality ... of a significant part of the work product.).

Eddy v. Fields (2004) 121 Cal. App. 4th 1543, 18 Cal. Rptr. 3d 487 (attorney waived work product privilege as to documents prepared in representing trustees of inter vivos trust by submitting documents to other counsel of same trustees who was not attorney's co-counsel; although disclosure of work product to an attorney who represents a mutual client or a client with common interests does not necessarily operate as a waiver of the work product privilege as to third parties, here the attorney claiming work product protection and separate counsel for the trustees were not acting pursuant to a common interest).

Magill v. Superior Court (2000) 86 Cal. App. 4th 61, 103 Cal. Rptr. 2d 355 (videotape and unredacted photos of client's vehicle contained in files in private investigator's residence were not protected by attorney-client privilege because they contained nothing which could reasonably be interpreted as a confidential communication between client and attorney; the videotape and photos are protected by the conditional or qualified work product rule, subject to discovery on a showing of good cause--that the need for disclosure outweighs the purposes of the work product rule).

Dowden v. Superior Court (1999) 73 Cal. App. 4th 126, 86 Cal. Rptr. 2d 180 (attorney work product protection may be asserted by *in propria persona* litigants).

People v. Superior Court (1995) 37 Cal. App. 4th 1757, 44 Cal. Rptr. 2d 734 (all attorney work product is not disclosable by adoption of Right to Truth in Evidence proposition; federal rule that crime-fraud exception applies to attorney work product does not apply in state cases because of differences between federal and state codes).

Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 166 Cal. Rptr. 274 (the attorney work-product privilege may be claimed by the client although the privilege belongs to the attorney. Since the privilege belongs to the attorney, the attorney may waive it, even over his client's objection, but in the absence of the attorney, the client has standing to claim the privilege on his behalf).



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SECTION 950 Lawyer

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§ 950.syn Synopsis to Chapter 950: Lawyer

Scope Lawyer

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1-950 California Evidence Courtroom Manual Scope

Scope Lawyer

§ 950 reads as follows:

Rule 950 Lawyer

As used in this article, "lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Since the rationale for the attorney-client privilege is to encourage full disclosure, the client's reasonable belief that the person the client is consulting is an attorney is sufficient to justify application of the privilege even if this belief turns out to be mistaken. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965). In addition, this section should be read in conjunction with Section 954, which extends the attorney-client relationship to agents of attorneys and the corporate entities that lawyers may adopt.



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2 COMPARISON TO FEDERAL RULE

Federal case law is consistent with Section 950.



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3 ADDITIONAL AUTHORITY

Edna Selan Epstein & Michael M. Martin, *The Attorney-Client Privilege and the Work Product Doctrine* 35 (2d ed. 1989)



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4 SIGNIFICANT CASES

HLC Properties, Ltd. v. Superior Court (2005) 35 Cal. 4th 54, 60, 24 Cal. Rptr. 3d 199, 105 P.3d 560 (the California Supreme Court reaffirmed California's unique approach in *HLC Properties, Ltd.*; when personal representative of decedent is discharged in probate proceeding, the attorney-client privilege ceases to exist and no longer protects once privileged communications; trial court rulings on privilege are reviewed under the substantial evidence standard--unless a claimed privilege appears as a matter of law from the undisputed facts, an appellate court may not overturn the trial court's decision regarding privilege).

Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (California Supreme Court had no authority to create a "fiduciary" exception to attorney-client privilege for communications between trustee and trustee's attorney; the attorney for trustee of trust does not always also represent the beneficiaries of trust, so beneficiaries had no right to examine communications between trustee and attorney; work product of trustee's counsel also was not discoverable).

Samuels v. Mix (1999) 22 Cal. 4th 1, 91 Cal. Rptr. 2d 273, 989 P.2d 701 (attorney-client privilege does not protect independent facts related to a communication, such as that a communication took place, the time, the date and the participants in the communication; client waives the privilege by exposing any significant part of the confidential communication).

Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (unless otherwise provided by the trust instrument, successor trustee assumes the power to assert the attorney-client privilege as to confidential communications between an attorney and a predecessor trustee on the subject of trust administration).

People v. Gionis (1995) 9 Cal. 4th 1196, 40 Cal. Rptr. 2d 456, 892 P.2d 1199 (no reasonable expectation of representation by attorney can arise after attorney explicitly refuses to undertake representation, and evidence of express refusal of representation may give rise to reasonable inference that, in continuing to speak to attorney, speaker is not thereafter consulting attorney for advice in his or her professional capacity).

Magill v. Superior Court (2000) 86 Cal. App. 4th 61, 103 Cal. Rptr. 2d 355 (videotape and unredacted photos of

client's vehicle contained in files in private investigator's residence were not protected by attorney-client privilege because they contained nothing which could reasonably be interpreted as a confidential communication between client and attorney; the videotape and photos are protected by the conditional or qualified work product rule, subject to discovery on a showing of good cause--that the need for disclosure outweighs the purposes of the work product rule).

Hooser v. Superior Court (2000) 84 Cal. App. 4th 997, 101 Cal. Rptr. 2d 341 (although attorney-client privilege was inapplicable, clients' right of privacy barred former client from discovery of identities of attorney's other clients and financial statements relating to clients' funds in attorney's client trust accounts; former client's failure to show compelling need for the information).

Smith v. Laguna Sur Villas Community Assn. (2000) 79 Cal. App. 4th 639, 94 Cal. Rptr. 2d 321 (condominium association, rather than individual unit owners, holds the attorney-client privilege).

People v. Klvana (1992) 11 Cal. App. 4th 1679, 15 Cal. Rptr. 2d 512 (defendant could not invoke attorney-client privilege to prevent admission of statements made to person no longer licensed to practice law, where person had informed defendant that he lacked license prior to start of conversation).



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SECTION 951 Client

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§ 951.syn Synopsis to Chapter 951: Client

Scope Client

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SECTION 951 Client

1-951 California Evidence Courtroom Manual Scope

Scope Client

§ 951 reads as follows:

Rule 951 Client

As used in this article, "client" means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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CHAPTER 4 PARTICULAR PRIVILEGES
ARTICLE 3 LAWYER-CLIENT PRIVILEGE
SECTION 951 Client

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1 ANALYSIS

A client, for purposes of the attorney-client privilege and the work product rule (*Code of Civil Procedure section 2018*), is someone who consults a lawyer in his or capacity as a lawyer. Thus, if a person seeks purely business or personal advice, that person is not considered an attorney's client for purposes of the privilege or work product protection. A client need not be an individual; a client can be a corporate entity, a public entity, a partnership, whether for profit or nonprofit.



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2 COMPARISON TO FEDERAL RULE

Federal case law is consistent with Section 951.



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3 ADDITIONAL AUTHORITY

Edna Selan Epstein & Michael M. Martin, *The Attorney-Client Privilege and the Work Product Doctrine* 33-40 (2d ed. 1989)



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4 SIGNIFICANT CASES

Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (California Supreme Court had no authority to create a "fiduciary" exception to attorney-client privilege for communications between trustee and trustee's attorney; the attorney for trustee of trust does not always also represent the beneficiaries of trust, so beneficiaries had no right to examine communications between trustee and attorney; work product of trustee's counsel also was not discoverable).

Samuels v. Mix (1999) 22 Cal. 4th 1, 91 Cal. Rptr. 2d 273, 989 P.2d 701 (attorney-client privilege does not protect independent facts related to a communication, such as that a communication took place, the time, the date and the participants in the communication; client waives the privilege by exposing any significant part of the confidential communication).

Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (unless otherwise provided by the trust instrument, successor trustee assumes the power to assert the attorney-client privilege as to confidential communications between an attorney and a predecessor trustee on the subject of trust administration).

People v. Gionis (1995) 9 Cal. 4th 1196, 40 Cal. Rptr. 2d 456, 892 P.2d 1199 (fact that attorney agreed to represent defendant on one-time emergency basis during custody dispute did not undermine conclusion that earlier communications between defendant and attorney, after attorney had refused to represent defendant in divorce proceedings, were unprivileged).

Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330, 853 P.2d 496 (attorney-client privilege applies to public entities as clients).

Magill v. Superior Court (2000) 86 Cal. App. 4th 61, 103 Cal. Rptr. 2d 355 (videotape and unredacted photos of client's vehicle contained in files in private investigator's residence were not protected by attorney-client privilege because they contained nothing which could reasonably be interpreted as a confidential communication between client and attorney; the videotape and photos are protected by the conditional or qualified work product rule, subject to discovery on a showing of good cause--that the need for disclosure outweighs the purposes of the work product rule).

Hooser v. Superior Court (2000) 84 Cal. App. 4th 997, 101 Cal. Rptr. 2d 341 (although attorney-client privilege was inapplicable, clients' right of privacy barred former client from discovery of identities of attorney's other clients and financial statements relating to clients' funds in attorney's client trust accounts; former client's failure to show compelling need for the information).

Smith v. Laguna Sur Villas Community Assn. (2000) 79 Cal. App. 4th 639, 94 Cal. Rptr. 2d 321 (condominium association, rather than individual unit owners, holds the attorney-client privilege).

Dickerson v. Superior Court (1982) 135 Cal. App. 3d 93, 185 Cal. Rptr. 97 (corporations are given same attorney-client privilege as natural persons).



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SECTION 952 Confidential Communication Between Client and Lawyer

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§ 952.syn Synopsis to Chapter 952: Confidential Communication Between Client and Lawyer

Scope Confidential Communication Between Client and Lawyer

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY

4 SIGNIFICANT CASES



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Scope Confidential Communication Between Client and Lawyer

§ 952 reads as follows:

Rule 952 Confidential Communication Between Client and Lawyer

As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1967, ch. 650, § 3; Stats. 1994, ch. 186, § 1; Stats. 1994, ch. 587, § 9; Stats. 2002, ch. 72 (S.B. 2061), § 3)

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1 ANALYSIS

The term "communication" is not limited to written or oral messages; nonverbal action, such as a nod of the head, may be a communication for purposes of the attorney-client privilege if it was intended as a communication. *Grand Lake Drive In, Inc. v. Superior Court* (1960) 179 Cal. App. 2d 122, 3 Cal. Rptr. 621. The communications covered by the privilege go both ways: from client to attorney and from attorney to client. *People v. Tucker* (1964) 61 Cal. 2d 828, 40 Cal. Rptr. 609, 395 P.2d 449.

One of the most common misconceptions about the privilege is that any document sent in confidence to a lawyer or any facts a lawyer learns about the client's matters are privileged. A client may not take advantage of the privilege simply by funneling nonprivileged documents or communications through the lawyer. *San Francisco Unified Sch. Dist. v. Superior Court* (1961) 55 Cal. 2d 451, 11 Cal. Rptr. 373, 359 P.2d 925. The attorney-client privilege only protects disclosure of communications; it does not protect disclosure of underlying facts upon which communications are based if those facts can be obtained from an unprivileged source, nor does the privilege extend to independent witnesses or their discovery. *Aerojet-General Corp. v. Transport Indem. Ins.* (1993) 18 Cal. App. 4th 996, 22 Cal. Rptr. 2d 862.

The other central issue about confidential communications is whether the presence of a third party destroys their confidentiality. The answer depends on whether the third party's presence or expertise was necessary to further the interest of the client. For example, if an attorney retains a doctor to examine the client in order to evaluate the cause of an injury that is the subject of potential litigation, the communications between doctor, attorney and client on that subject are covered by the attorney-client privilege. *Andrade v. Superior Court* (1996) 46 Cal. App. 4th 1609, 54 Cal. Rptr. 2d 504. To ensure that communications involving third parties remain confidential, many lawyers will retain the expert on behalf of the client so as to make the relationships clear.

See Section 917 for information regarding the presumed confidentiality of electronic communications between lawyer and client.



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2 COMPARISON TO FEDERAL RULE

Federal case law is generally consistent with Section 952.

Current Trends and New Developments

In *Swidler & Berlin v. United States* (1998) 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379, in which attorney-client privilege protects an attorney's notes taken during a confidential discussion between an attorney and client even though the client has subsequently died, the U.S. Supreme Court rejected the California approach of recognizing the existence of the attorney-client privilege only as long as the deceased client's estate remains open.



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3 ADDITIONAL AUTHORITY

Edna Selan Epstein & Michael M. Martin, *The Attorney-Client Privilege and the Work Product Doctrine* 14-20 (2d ed. 1989)



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4 SIGNIFICANT CASES

Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092 (in products liability suit, plaintiffs' attorney inadvertently obtained notes of one of the defense attorneys and used them during a deposition to impeach a defense expert. The trial court entered an order granting a defense motion to disqualify plaintiffs' legal team and experts and the Court of Appeal affirmed. Held: When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified).

Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (California Supreme Court had no authority to create a "fiduciary" exception to attorney-client privilege for communications between trustee and trustee's attorney; the attorney for trustee of trust does not always also represent the beneficiaries of trust, so beneficiaries had no right to examine communications between trustee and attorney; work product of trustee's counsel also was not discoverable).

Samuels v. Mix (1999) 22 Cal. 4th 1, 91 Cal. Rptr. 2d 273, 989 P.2d 701 (attorney-client privilege does not protect independent facts related to a communication, such as that a communication took place, the time, the date and the participants in the communication; client waives the privilege by exposing any significant part of the confidential communication).

Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (unless otherwise provided by the trust instrument, successor trustee assumes the power to assert the attorney-client privilege as to confidential communications between an attorney and a predecessor trustee on the subject of trust administration).

Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330, 853 P.2d 496 (privilege applies to confidential communications within scope of attorney-client relationship even if communication does not relate to

pending litigation as long as legal opinions were formed and advice was given by attorney in course of attorney-client relationship).

People v. Mickey (1991) 54 Cal. 3d 612, 286 Cal. Rptr. 801, 818 P.2d 84 (no privilege for matters which client realizes that third parties, other than the lawyer, will read in a letter).

People v. Milner (1988) 45 Cal. 3d 227, 246 Cal. Rptr. 713, 753 P.2d 669 (attorney-client privilege and work-product doctrine did not apply to matters relied on or considered in formation of defense expert's opinion and did not apply to transcripts of defendant's interviews with experts; once defendant called expert to stand, expert lost status as consulting agent of attorney).

Zurich American Ins. Co. v. Superior Court (2007) 155 Cal. App. 4th 1485, 66 Cal. Rptr. 3d 833 (trial court erred in ordering production of confidential internal documents containing statements of employees discussing legal advice and strategy; even though employees were not in the corporation's "control group" and corporate attorney was not involved in the employees' discussions; where the statements were made to further the interest of the client or when reasonably necessary to facilitate the purpose of the legal consultation, the communications of the employees are within the attorney-client privilege; it would be neither practical nor efficient to require every corporate employee charged with implementing legal advice given by corporate counsel to meet directly with counsel or to see verbatim excerpts of the legal advice given).

Roush v. Seagate Technology, LLC (2007) 150 Cal. App. 4th 210, 58 Cal. Rptr. 3d 275 (when two or more clients jointly hold the attorney-client privilege, the privilege cannot be waived without the consent of the other client or clients. However, retention of the same attorney by a former employee and another employee to sue the same employer does not make the employees "joint clients" for purposes of the attorney-client privilege. Each client employed the attorney's services for distinct separate claims which did not share a common interest; therefore, the sharing of one employee's confidential information with the other was not necessary to advance the position of each employee's case).

McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229, 9 Cal. Rptr. 3d 812 (held that when corporation shared audit committee report and interview memoranda, which had been prepared by attorneys retained by corporation to perform internal review of alleged securities fraud, corporation waived the attorney-client privilege and work product protection; disclosure of the documents to the SEC and U.S. Attorney's Office was not reasonably necessary to accomplish the purpose for which the law firm was consulted, which was to investigate the alleged fraud and determine who was responsible; although parties aligned on the same side in an investigation or litigation may, in some circumstances, share privileged documents without waiving the attorney-client privilege there is no real alignment of interests between the government and persons or entities under investigation for securities law violations; we still find the situation here is not qualitatively different than a defendant sharing privileged material with one plaintiff, but not another and no one suggests that a defendant facing multiple plaintiffs should be able to disclose privileged materials to one plaintiff without waiving the attorney-client privilege as to the other plaintiffs. Also held that waiver of work product protection, though not expressly defined by statute, is generally found under the same set of circumstances as waiver of the attorney-client privilege--by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection).

Scripps Health v. Superior Court (2003) 109 Cal. App. 4th 529, 135 Cal. Rptr. 2d 126 (holding that dominant purpose of hospital occurrence reports was for transmittal to hospital attorney in course of professional attorney-client relationship under circumstances in which hospital expected confidentiality, and thus, such reports were protected from disclosure under attorney-client privilege in wrongful death action; although hospital admitted that reports served a dual purpose, i.e., attorney review in anticipation of possible litigation and quality assurance/peer review, actual physical reports were not reviewed or submitted to any peer review or quality assurance committee, but were kept confidential, with access provided only to risk managers, in-house or outside counsel and third-party litigation claim administrators, and such confidentiality was necessary to preserve attorney-client privilege).

Magill v. Superior Court (2000) 86 Cal. App. 4th 61, 103 Cal. Rptr. 2d 355 (videotape and unredacted photos of client's vehicle contained in files in private investigator's residence were not protected by attorney-client privilege because they contained nothing which could reasonably be interpreted as a confidential communication between client and attorney; the videotape and photos are protected by the conditional or qualified work product rule, subject to discovery on a showing of good cause--that the need for disclosure outweighs the purposes of the work product rule).

Hooser v. Superior Court (2000) 84 Cal. App. 4th 997, 101 Cal. Rptr. 2d 341 (although attorney-client privilege was inapplicable, clients' right of privacy barred former client from discovery of identities of attorney's other clients and financial statements relating to clients' funds in attorney's client trust accounts; former client's failure to show compelling need for the information).

Smith v. Laguna Sur Villas Community Assn. (2000) 79 Cal. App. 4th 639, 94 Cal. Rptr. 2d 321 (condominium association, rather than individual unit owners, holds the attorney-client privilege).

State Farm Fire & Cas. Co. v. Superior Court (1997) 54 Cal. App. 4th 625, 62 Cal. Rptr. 2d 834 (attorney-client privilege does not extend to the facts that may be discussed within a privileged communication).

Fletcher v. Alameda County Superior Court (1996) 44 Cal. App. 4th 773, 52 Cal. Rptr. 2d 65 (attorney's letter to trust beneficiaries not privileged; settlor of trust was attorney's client, not the beneficiaries).



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§ 953.syn Synopsis to Chapter 953: Holder of the Privilege

Scope Holder of the Privilege

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY

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Scope Holder of the Privilege

§ 953 reads as follows:

Rule 953 Holder of the Privilege

As used in this article, "holder of the privilege" means:

- (a) The client when he has no guardian or conservator.
- (b) A guardian or conservator of the client when the client has a guardian or conservator.
- (c) The personal representative of the client if the client is dead.
- (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 953 makes the client the sole holder of the privilege. However, the statute also makes clear that the privilege extends to the representative of the client, where the client is unable to assert the privilege, whether because of incapacity or death, or, in the case of a corporate entity, dissolution.



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2 COMPARISON TO FEDERAL RULE

Federal case law is consistent with Section 953.

Current Trends and New Developments

In *Swidler & Berlin v. United States* (1998) 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379, in which attorney-client privilege protects an attorney's notes taken during a confidential discussion between an attorney and client even though the client has subsequently died, the U.S. Supreme Court rejected the California approach of recognizing the existence of the attorney-client privilege only as long as the deceased client's estate remains open.



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3 ADDITIONAL AUTHORITY

Roger C. Park et al., Evidence Law § 8.08 at 396 (1998)

Edna Selan Epstein & Michael M. Martin, The Attorney-Client Privilege and the Work Product Doctrine (2d ed. 1989)



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4 SIGNIFICANT CASES

Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (California Supreme Court had no authority to create a "fiduciary" exception to attorney-client privilege for communications between trustee and trustee's attorney; the attorney for trustee of trust does not always also represent the beneficiaries of trust, so beneficiaries had no right to examine communications between trustee and attorney; work product of trustee's counsel also was not discoverable).

Samuels v. Mix (1999) 22 Cal. 4th 1, 91 Cal. Rptr. 2d 273, 989 P.2d 701 (attorney-client privilege does not protect independent facts related to a communication, such as that a communication took place, the time, the date and the participants in the communication; client waives the privilege by exposing any significant part of the confidential communication).

Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279 (unless otherwise provided by the trust instrument, successor trustee assumes the power to assert the attorney-client privilege as to confidential communications between an attorney and a predecessor trustee on the subject of trust administration).

Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 12 Cal. Rptr. 3d 656 (trial court erred in granting motion to compel attorney for corporation that merged with another corporation to answer deposition questions that would violate the attorney-client privilege; successor corporation holds the attorney-client privilege of merged corporation so that attorney for merged corporation has a duty to assert the privilege; officers and managers of merged corporation have no authority or ability to impliedly waive privilege by asserting advice of counsel because on upon merger, that authority transfers to the successor officers and managers).

Magill v. Superior Court (2000) 86 Cal. App. 4th 61, 103 Cal. Rptr. 2d 355 (videotape and unredacted photos of client's vehicle contained in files in private investigator's residence were not protected by attorney-client privilege because they contained nothing which could reasonably be interpreted as a confidential communication between client and attorney; the videotape and photos are protected by the conditional or qualified work product rule, subject to discovery on a showing of good cause--that the need for disclosure outweighs the purposes of the work product rule).

Hooser v. Superior Court (2000) 84 Cal. App. 4th 997, 101 Cal. Rptr. 2d 341 (although attorney-client privilege was inapplicable, clients' right of privacy barred former client from discovery of identities of attorney's other clients and financial statements relating to clients' funds in attorney's client trust accounts; former client's failure to show compelling need for the information).

Smith v. Laguna Sur Villas Community Assn. (2000) 79 Cal. App. 4th 639, 94 Cal. Rptr. 2d 321 (condominium association, rather than individual unit owners, holds the attorney-client privilege).

National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 75 Cal. Rptr. 2d 893 (California does not recognize right of plaintiff-shareholder football team to obtain attorney-client privileged documents from corporation).



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§ 954.syn Synopsis to Chapter 954: Lawyer-Client Privilege

Scope Lawyer-Client Privilege

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SECTION 954 Lawyer-Client Privilege

1-954 California Evidence Courtroom Manual Scope

Scope Lawyer-Client Privilege

§ 954 reads as follows:

Rule 954 Lawyer-Client Privilege

Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with *Section 6160*) of *Chapter 4 of Division 3 of the Business and Professions Code* and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1968, ch. 1375, § 2; Stats. 1994, ch. 1010, § 104)

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1 ANALYSIS

Section 954 is the basic statement of California's attorney-client privilege, although it must be read along with Section 912 (waiver) and the provisions of Article 3 preceding and following Section 954.

One of the most difficult questions arising under this section is who "communicates" as the client for purposes of the privilege when the client is not a natural person, such as a corporation. The California Supreme Court addressed this question in *Chadbourn v. Superior Court* (1964) 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700. Assuming that all of the usual requirements of the privilege apply, such as confidentiality and that the communication is made for the purpose of seeking legal advice, the Court stated several principles to be used in determining whether a corporate agent "speaks" for the client for purposes of the privilege: (1) the statement of an individual employee, who is or is likely to be a co-defendant of the corporation, and who communicates with the attorney who will represent the corporation or the individual or both of them is privileged; (2) the statements of an individual who is sufficiently involved in the corporate management that he or she would normally communicate with the attorney are privileged; (3) the statements of an employee who is solely a witness to an event, in contrast to experiencing the event as part of his or her employment, are not privileged; (4) the statements of an employee who experiences an event may be privileged if the employer requires in the ordinary course of business that the employee make a confidential report to the corporate attorney for the purpose of seeking legal advice for the corporation; and (5) the employer's indemnity insurer and its agents are considered agents of the corporation for purposes of preserving the privilege, although this finding is subject to a case-by-case determination.

Although the *Chadbourn* principles require thoughtful application on an individual case basis, the central theme appears to be that, for the privilege to apply to the statements of an agent of the corporation, the agent must be an appropriate "spokesperson" for the corporation based on his or her duties and functions within the company and must communicate with the corporate attorney in confidence for the dominant purpose of obtaining legal advice for the corporation.

Practice Tip

Distinguishing Among Attorney-Client Privilege, Attorney Work-Product Doctrine and Attorney's Ethical Obligation to Protect Client Confidences

The facts giving rise to the attorney-client privilege often also raise related issues of work product protection and confidential communications of clients. It is important to understand the nature of these concepts and their differences to protect not only the client's interests, but also the attorney's professional obligations.

Distinguishing Between Attorney-Client Privilege and Work Product Rule

If the *attorney-client privilege* applies to a confidential communication, neither the attorney nor the client can be lawfully compelled to disclose it, unless the privilege has been waived or an exception applies. The *work product rule* serves to protect material that may or may not also be protected by the attorney-client privilege. This can be a crucial distinction. One famous example occurred in *United States v. Stewart* (S.D.N.Y. 2003) 287 F. Supp. 2d 461. The trial court held that "Living" celebrity Martha Stewart, who was charged with securities fraud, waived her attorney-client privilege regarding an e-mail she had sent to her attorney, giving details regarding the sale of stock which was central to fraud charge, by later sending her daughter a copy of the e-mail. The court refused to order disclosure of the e-mail, however, because it was protected work product, which Stewart did not waive by sending it to a close family member. Since the government made no showing of substantial need of the fact-based work product, the e-mail remained protected.

Two major distinctions between the attorney-client privilege and the work product doctrine are the rationale for these rules and the related issue of whose interests the rules protect. The attorney-client privilege exists largely to protect the interests of the client; the client is the holder of the privilege. The most common rationale of this privilege is that it is necessary to instill confidence in the client so that he or she can tell the attorney everything about the legal problem--the good, the bad and the ugly--without fear that the attorney will be forced to disclose the information. Only in this way can the client be sure of the best representation possible.

In contrast, the work product doctrine exists to protect the attorney's interest; the attorney is essentially the holder of the protection, although the client may assert the work product rule on behalf of the attorney, just as the attorney may assert the client's privilege on behalf of the client. The rationale for the work product doctrine, whether federal or state, is neatly summed up by *Code of Civil Procedure section 2018.010*, which states that work product shall be protected to "(1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts." For purposes of the California work product rule, the term "client" is defined by *Evidence Code section 951*, which also applies to the attorney-client privilege. *Code of Civil Procedure section 2018.030*.

Both federal and California law differentiate between two types of "work product" in civil cases. Some types of work product receive only qualified protection from disclosure in contrast to the absolute protection provided by attorney-client privilege. In civil cases, the federal work product doctrine is defined by Federal Rule of *Civil Procedure 26(b)(3)*, which states:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under [the federal rules] and prepared in anticipation of litigation or trial by or for another party or by or for that party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

See also *Hickman v. Taylor* (1947) 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (setting forth the policy justifications for the federal work product rule). Although the terms of the federal rules regarding work product (see discussion of *Federal Rule of Criminal Procedure* 16(b)(2) below) appear to limit their application to pretrial discovery of tangible documents and things, federal courts relying on *Hickman* have extended work product protection to the trial setting and to oral statements. See *United States v. Nobles* (1975) 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 .

In California, the work product doctrine is codified in *Code of Civil Procedure* section 2018.030 and, in criminal cases, *Penal Code* section 1054.6. The California statute also provides a type of limited protection for some types of work product: "[T]he work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." *Code of Civil Procedure* section 2018.030. The California statutes do not define "work product"; the determination is made by courts on a case-by-case basis. In general, however, courts have followed a definition of "work product" similar to that used in federal courts: material compiled by the attorney in preparation of his or her case. See *In re Jeanette H.* (1990) 225 Cal. App. 3d 25, 275 Cal. Rptr. 9 .

Depending on the context, work product protection may be broader or narrower than the attorney-client privilege. For example, "work product" could include statements of third-party witnesses, which would be outside the scope of the attorney-client privilege. However, the "preparation" or "anticipation of litigation" definition of work product narrows its scope; the attorney-client privilege covers confidential communications regarding legal issues unrelated to litigation, such as estate planning.

California law is similar to federal law in that the work-product doctrine applies to oral statements and applies at trial as well as pretrial discovery proceedings. *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal. App. 3d 264, 218 Cal. Rptr. 205 (oral statements as well as written documents covered by work product doctrine); *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (work product doctrine applies at trial as well as in pretrial discovery).

When, however, the work product contains "the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation," the federal rule dictates that "the court shall protect against disclosure" of such material. Federal Rule of *Civil Procedure* 26(b)(3). In general, this statement is read as giving absolute protection to the material, similar to treating the material as privileged, although there is some authority that disclosure can be obtained with a stringent showing of need and inability to obtain the information from other sources. See *Upjohn Co. v. United States* (1981) 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (dicta); *Xerox v. International Business Mach. Corp.* (S.D.N.Y. 1974) 64 F.R.D. 367 (disclosure permitted where high level of need and inability to separate opinion work product from mere fact work product). California law is similar, but more clearly provides absolute protection for this type of work product: "Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." *Code of Civil Procedure* section 2018.030.

Distinguishing Attorney-Client Privilege and Attorney's Ethical Obligation to Protect Client Confidences

The attorney-client privilege should also be distinguished from the attorney's professional obligation to keep client confidences or secrets. The central distinction is that if the information is confidential, but not privileged, the attorney or client may be compelled to disclose the information.

An attorney has a basic professional obligation to keep client matters learned in the course of representing a client confidential, regardless of whether they are privileged or protected by the work product rule. The scope of the client confidence rule is much broader than either the privilege or the work product rule. A client's business matters may not be covered by either the privilege or the work product rule, but if the attorney learned of those matters in the course of representing the client, the matters would be treated as a client confidence or secret. The most prudent approach is to follow a broad view of the client confidence rule. Such a broad perspective is provided by the ABA Model Rules of Professional Conduct 1.6(1983): subject to certain exceptions, such as when necessary to prevent wrongful conduct or to defend against accusations of wrongdoing, "a lawyer shall not reveal information relating to the representation of a client." *See also Business and Professions Code section 6068* (duty to client of confidentiality); Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. Davis L. Rev. 367 (1995).



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2 COMPARISON TO FEDERAL RULE

Federal case law is consistent with Section 954. See *Upjohn Co. v. United States* (1981) 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (stating factors trial courts should consider in determining whether statements of corporate agents are privileged).



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3 SIGNIFICANT CASES

Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092 (in products liability suit, plaintiffs' attorney inadvertently obtained notes of one of the defense attorneys and used them during a deposition to impeach a defense expert. The trial court entered an order granting a defense motion to disqualify plaintiffs' legal team and experts and the Court of Appeal affirmed. Held: When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified).

HLC Properties, Ltd. v. Superior Court (2005) 35 Cal. 4th 54, 60, 24 Cal. Rptr. 3d 199, 105 P.3d 560 (when personal representative of decedent is discharged in probate proceeding, the attorney-client privilege ceases to exist and no longer protects once privileged communications; trial court rulings on privilege are reviewed under the substantial evidence standard--unless a claimed privilege appears as a matter of law from the undisputed facts, an appellate court may not overturn the trial court's decision regarding privilege).

People v. Michaels (2002) 28 Cal. 4th 486, 122 Cal. Rptr. 2d 285, 49 P.3d 1032 (because Section 965.5, which creates an exception to the attorney-client privilege for threats of death or serious bodily injury, was not yet in effect, trial court erred in ruling that the privilege did not apply to defendant's note to attorney threatening witness; crime-fraud exception was also inapplicable; erroneous ruling on privilege was harmless error).

Musser v. Provencher (2002) 28 Cal. 4th 274, 121 Cal. Rptr. 2d 373, 48 P.3d 408 (attorney's claim for indemnity or contribution from concurrent counsel or co-counsel for legal malpractice damages would not violate public policy regarding conflicts of interest and the confidentiality of attorney-client communications where client, in her settlement with attorney, expressly waived the privilege with respect to co-counsel's representation of her).

People v. Superior Court (2001) 25 Cal. 4th 703, 107 Cal. Rptr. 2d 323, 23 P.3d 563 (attorneys being investigated

for insurance fraud were entitled to a judicial hearing on the applicability of attorney-client privilege and work product rule to computers, documents and client files seized by the government; trial court possessed the inherent authority in criminal cases to appoint a special master to assist in examining allegedly protected documents, but trial court lacked the authority to impose half of the costs of a special master on the government).

***Wells Fargo Bank v. Superior Court* (2000) 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591** (California Supreme Court had no authority to create a "fiduciary" exception to attorney-client privilege for communications between trustee and trustee's attorney; the attorney for trustee of trust does not always also represent the beneficiaries of trust, so beneficiaries had no right to examine communications between trustee and attorney; work product of trustee's counsel also was not discoverable).

***Samuels v. Mix* (1999) 22 Cal. 4th 1, 91 Cal. Rptr. 2d 273, 989 P.2d 701** (attorney-client privilege does not protect independent facts related to a communication, such as that a communication took place, the time, the date and the participants in the communication; client waives the privilege by exposing any significant part of the confidential communication).

***Moeller v. Superior Court* (1997) 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279** (unless otherwise provided by the trust instrument, successor trustee assumes the power to assert the attorney-client privilege as to confidential communications between an attorney and a predecessor trustee on the subject of trust administration).

***Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal. App. 4th 1485, 66 Cal. Rptr. 3d 833** (trial court erred in ordering production of confidential internal documents containing statements of employees discussing legal advice and strategy; even though employees were not in the corporation's "control group" and corporate attorney was not involved in the employees' discussions; where the statements were made to further the interest of the client or when reasonably necessary to facilitate the purpose of the legal consultation, the communications of the employees are within the attorney-client privilege; it would be neither practical nor efficient to require every corporate employee charged with implementing legal advice given by corporate counsel to meet directly with counsel or to see verbatim excerpts of the legal advice given).

***Roush v. Seagate Technology, LLC* (2007) 150 Cal. App. 4th 210, 58 Cal. Rptr. 3d 275** (when two or more clients jointly hold the attorney-client privilege, the privilege cannot be waived without the consent of the other client or clients. However, retention of the same attorney by a former employee and another employee to sue the same employer does not make the employees "joint clients" for purposes of the attorney-client privilege. Each client employed the attorney's services for distinct separate claims which did not share a common interest; therefore, the sharing of employee's confidential information with the other was not necessary to advance the position of each employee's case).

***Tien v. Superior Court* (2006) 139 Cal. App. 4th 528, 43 Cal. Rptr. 3d 121** (trial court erred in allowing discovery of names, addresses, and telephone numbers of all putative class members in wage and hour violation class action who contacted employees' counsel; names of class members who contacted the employees' counsel did not constitute the work product of counsel because counsel was merely the passive recipient of telephone calls; the trial court's discovery order did not violate the attorney-client privilege because no personal, confidential information was sought; however, discovery would violate the privacy rights under *Cal. Const., art. I, § 1*, of class members whose identities were disclosed; they had a significant interest in maintaining their privacy, and the employer had no compelling need to learn their identities).

***People v. Navarro* (2006) 138 Cal. App. 4th 146, 41 Cal. Rptr. 3d 164** (affirming denial of motions to disclose the identity of an informant, quash a search warrant, and suppress evidence; the government did not procure a breach of the attorney-client privilege when lawyer became confidential informant against defendant; in camera hearing on motion to quash is proper when defendant believes informant was his lawyer and police procured breach of privilege).

People v. Dang (2001) 93 Cal. App. 4th 1293, 113 Cal. Rptr. 2d 763 (exception to attorney-client privilege, provided by Section 956.5, applied to allow defendant's former attorney to testify about defendant's death threats against witnesses).

State Compensation Ins. Fund v. Superior Court (2001) 91 Cal. App. 4th 1080, 111 Cal. Rptr. 2d 284 (state workers' compensation fund may assert attorney-client privilege even if the insured employer in the underlying case does not object to disclosing the information; where there is a colorable claim of attorney-client privilege regarding seized documents, court must conduct in camera review of documents to determine validity of the claim of privilege prior to disclosure).

STI Outdoor v. Superior Court (2001) 91 Cal. App. 4th 334, 109 Cal. Rptr. 2d 865 (attorney-client privilege applies outside of litigation context; disclosure of legal memo prepared by county counsel and transmittal letter discussing memo was reasonably necessary to further interests of county metropolitan transportation authority and successful bidder in finalizing negotiations for licensing agreements and thus did not waive attorney-client privilege or make documents subject to disclosure under the Public Records Act).

Solin v. O'Melveny & Myers (2001) 89 Cal. App. 4th 451, 107 Cal. Rptr. 2d 456 (where a lawyer's lawsuit cannot be resolved without breaching client confidences and attorney-client privilege as to his non-party clients, lawsuit must be dismissed).

Magill v. Superior Court (2000) 86 Cal. App. 4th 61, 103 Cal. Rptr. 2d 355 (videotape and unredacted photos of client's vehicle contained in files in private investigator's residence were not protected by attorney-client privilege because they contained nothing which could reasonably be interpreted as a confidential communication between client and attorney; the videotape and photos are protected by the conditional or qualified work product rule, subject to discovery on a showing of good cause--that the need for disclosure outweighs the purposes of the work product rule).

Hooser v. Superior Court (2000) 84 Cal. App. 4th 997, 101 Cal. Rptr. 2d 341 (although attorney-client privilege was inapplicable, clients' right of privacy barred former client from discovery of identities of attorney's other clients and financial statements relating to clients' funds in attorney's client trust accounts; former client's failure to show compelling need for the information).

Smith v. Laguna Sur Villas Community Assn. (2000) 79 Cal. App. 4th 639, 94 Cal. Rptr. 2d 321 (condominium association, rather than individual unit owners, holds the attorney-client privilege).

State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799 (when a lawyer receives materials that appear to be subject to the attorney-client privilege and inadvertently disclosed, the lawyer should refrain from examining the materials any more than necessary and must notify the party entitled to the privilege of this fact).

First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co. (N.D. Cal. 1995) 163 F.R.D. 574 (under California law, statutory attorney-client privilege extends to communications between insured and its insurance carrier if carrier has accepted responsibility both for defense and indemnification without a reservation of rights, and has hired one lawyer who simultaneously represents both the insured and the carrier).



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§ 955.syn Synopsis to Chapter 955: When Lawyer Required to Claim Privilege

Scope When Lawyer Required to Claim Privilege

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1-955 California Evidence Courtroom Manual Scope

Scope When Lawyer Required to Claim Privilege

§ 955 reads as follows:

Rule 955 When Lawyer Required to Claim Privilege

The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

The purpose of Section 955 is to ensure that the attorney assists in preserving the privilege for the client, the holder of the privilege. Without a provision such as Section 955, the privilege might be waived by the failure of the client's representative to raise an objection at the earliest possible point. Other privileges have similar provisions enabling another member of the privileged relationship to assert the privilege on behalf of the holder: For the physician-patient privilege, see *Evidence Code section 995*; for the psychotherapist-patient privilege, see *Evidence Code section 1015*. Under case law, even the judge has an obligation to assert the privilege, in order to preserve it, where it is unclear what the holder of the privilege would want to do. See *Stearns v. Los Angeles City Sch. Dist. (1966) 244 Cal. App. 2d 696, 53 Cal. Rptr. 482* (if attorney fails to assert privilege when he should, judge may exclude information that is subject to claim of privilege on judge's own motion).



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2 COMPARISON TO FEDERAL RULE

Federal case law is consistent with Section 955. *United States v. Loftin* (S.D.N.Y. 1981) 518 F. Supp. 839 , *aff'd without op.*, 819 F.2d 1130 .



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3 SIGNIFICANT CASES

People v. Superior Court (1995) 37 Cal. App. 4th 1757, 44 Cal. Rptr. 2d 734 (fact that attorney is suspected of criminal activity does not lessen client's interest in confidentiality nor obviate client's privilege, and suspect attorney is entitled to assert privilege on behalf of client and have claim adjudicated by court).



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§ 956.syn Synopsis to Chapter 956: Exception: Crime or Fraud

Scope Exception: Crime or Fraud

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Scope Exception: Crime or Fraud

§ 956 reads as follows:

Rule 956 Exception: Crime or Fraud

There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 956 Exception: Crime or Fraud

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1 ANALYSIS

Section 956 creates an exception to the attorney-client privilege which can be tied directly to its rationale. The attorney-client privilege exists to allow the client to freely communicate with his or her attorney so that the attorney will be able to do the best job possible in representing the client. However, that rationale does not extend to allowing the attorney to assist the client in fraudulent or criminal behavior--thus, the privilege does not apply where such a showing can be made. Moreover, the focus of the exception is where it should be: on the behavior of the holder of the privilege--the client. So, for example, an attorney's misuse of confidential information to defraud others will not invoke a crime-fraud exception if the client did not seek legal assistance to further this purpose and he was unaware of attorney's contemplated wrongdoing. *Glade v. Superior Court (1978) 76 Cal. App. 3d 738, 143 Cal. Rptr. 119* .

The application of Section 956 is especially difficult because of Section 915, which precludes an officer from examining the privileged communication in ruling on a claim of privilege. Without the ability to examine the communication, the presiding officer is handicapped in the effort to determine whether the attorney-client communication was used as part of a plan to perpetrate or the actual perpetration of a crime or fraud. This means that the proponent of the exception has to make a prima facie showing of a crime or fraud and show that the attorney-client communications were used to further that crime or fraud--all without using the privileged communication itself.



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2 COMPARISON TO FEDERAL RULE

Section 956 is generally consistent with federal case law, with two qualifications. First, where the party seeking disclosure makes a threshold showing, federal law provides access to in camera review to determine the nexus between an attorney-client communication and a crime or fraud. *United States v. Zolin* (1989) 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 ; *United States v. Laurins* (N.D. Cal. 1987) 659 F. Supp. 847 , *aff'd*, 857 F.2d 529 , *cert. denied*, 492 U.S. 906 . Section 915 appears to limit this possibility in California courts. Second, the federal case law suggests that the exception may apply to misconduct beyond a crime or fraud.



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3 ADDITIONAL AUTHORITY

Edna Selan Epstein & Michael M. Martin, *The Attorney-client Privilege and the Work Product Doctrine* 93-95 (2d ed. 1989)



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4 SIGNIFICANT CASES

Cunningham v. Connecticut Mut. Life Ins. (S.D. Cal. 1994) 845 F. Supp. 1403 (party seeking disclosure of information allegedly protected by attorney-client privilege based upon crime-fraud exception must establish facts to support good faith belief by reasonable person that exception applies).

State Farm Fire & Cas. Co. v. Superior Court (1997) 54 Cal. App. 4th 625, 62 Cal. Rptr. 2d 834 (a showing of probable cause to search an attorney's office does not, by itself, establish a prima facie showing of a crime or fraud for purposes of this exception).

People v. Superior Court (1995) 37 Cal. App. 4th 1757, 44 Cal. Rptr. 2d 734 (federal rule that crime-fraud exception applies to attorney work product does not apply in state cases because of differences between federal and state codes).

People v. Superior Court (1995) 37 Cal. App. 4th 1757, 44 Cal. Rptr. 2d 734 (evidence code makes privilege exception if services of lawyer were sought to enable or aid anyone to commit or plan to commit crime or fraud).

Geilim v. Superior Court (1991) 234 Cal. App. 3d 166, 285 Cal. Rptr. 602 (proponent of this very limited exception has the burden of proving its application).

BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 245 Cal. Rptr. 682 (prima facie showing that crime fraud exception to attorney-client privilege was applicable to some documents of party claiming that privilege, did not open all of that party's files to discovery; rather, other documents potentially protected by privilege must have reasonable relation to ongoing fraud to be discoverable).



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§ 956.5.syn Synopsis to Chapter 956.5: Exception: Reasonable Belief in Necessity of Disclosure to Prevent Death or Substantial Bodily Harm

Scope Exception: Reasonable Belief in Necessity of Disclosure to Prevent Death or Substantial Bodily Harm

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Scope Exception: Reasonable Belief in Necessity of Disclosure to Prevent Death or Substantial Bodily Harm

§ 956.5 reads as follows:

956.5 Exception: Reasonable Belief in Necessity of Disclosure to Prevent Death or Substantial Bodily Harm

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(Added by Stats. 1993, ch. 982, § 8. Amended by Stats. 2003, ch. 765 (A.B. 1101), § 2; Stats. 2004, ch. 183 (A.B. 3082), § 94)

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1 ANALYSIS

Section 956.5 attempts to strike a balance between the desire to protect a client's ability to freely communicate with his or her attorney and a situation in which society finds secrecy intolerable: where the attorney is prevented from disclosing a privileged communication that is reasonably likely to result in a death or substantial bodily injury. Effective in 2004, the California Legislature eased a conflict between this exception to privilege and the strong duty of confidentiality that an attorney owes his or her client, codified in *Business and Professions Code section 6068(e)*. The Legislature passed an exception to the confidentiality requirement that mirrors that in Section 956.5, where the criminal act will likely result in death or substantial bodily injury. *See Business and Professions Code section 6068(e)(2)*. In addition, Section 956.5 has been expanded to apply to a criminal act by any person, rather than just the client. *See Fred C. Zacharias, Privilege and Confidentiality in California, 28 U.C. Davis L. Rev. 367 (1995)*.



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2 COMPARISON TO FEDERAL RULE

Federal and California law differ here, with Section 956.5 being more expansive than the federal law. Although federal case law recognizes a crime-fraud exception, as discussed in *Section 956*, the federal exception does not apply to cases in which the attorney is not involved in the ongoing or future crime. The crime-fraud exception is intended to prevent the attorney-client privilege from being used to make a crime or fraud more likely; Section 956.5 goes beyond this, abrogating the privilege and turning an attorney into a witness against the client where the attorney has reason to believe the client or another person may carry out a murder or threat of substantial bodily harm. For example, a client who tells his or her attorney about a murder the client plans to commit is not necessarily using that communication to further the crime. It probably would not be covered by the crime-fraud exception, but would be covered by Section 956.5, if the attorney had reasonable cause to believe the client would carry out the threat, whether the client actually takes action or not. Note that under the amended version of 956.5, the attorney can disclose a privileged communication to prevent a criminal act by any actor, not just the client, if it is likely to result in death or substantial bodily injury.

Federal law, however, has moved in the direction of requiring some attorneys to abandon the professional duty of confidentiality and the obligation to assert the attorney-client privilege. In 2002, Congress passed the Sarbanes-Oxley Act, which required the Securities and Exchange Commission (SEC) to adopt new rules that set minimum standards for attorneys "appearing" and "practicing" before the SEC (this includes some attorneys who simply advise clients on securities matters). In response, the SEC adopted the "Part 205 Rules." These rules have been quite controversial. One rule requires attorneys to report evidence of a material violation of securities laws or breach of fiduciary duty to the issuer's chief legal officer and, in some cases, to continue to report the violation "up the corporate ladder" to the Board of Directors. *See* Rule 205.3(b)(1). A second rule permits attorneys to disclose confidential information in certain circumstances to the SEC without the consent of the issuer. *See* Rule 205.3(d)(2). Such required and permissive disclosures appear to conflict with both Section 956.5 (exception to attorney-client privilege) and *Business and Professions Code section 6068(e)* (duty of confidentiality) because these provisions only create exceptions where a criminal act is likely to result in death or substantial bodily injury; they do not extend to "white-collar crime."



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SECTION 957 Exception: Parties Claiming Through Deceased Client

1-957 California Evidence Courtroom Manual 957.syn

§ 957.syn Synopsis to Chapter 957: Exception: Parties Claiming Through Deceased Client

Scope Exception: Parties Claiming Through Deceased Client

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1-957 California Evidence Courtroom Manual Scope

Scope Exception: Parties Claiming Through Deceased Client

§ 957 reads as follows:

Rule 957 Exception: Parties Claiming Through Deceased Client

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

(Stats. 1965, ch. 299 § 2, eff. Jan. 1, 1967)

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1-957 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 957 is a well-established exception to the attorney-client privilege. It operates under the premise that the claimants are essentially all in privity to the deceased client and the deceased client would want the claimants to know what his or her intentions and thoughts were as to the disposition of his or her property.



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2 COMPARISON TO FEDERAL RULE

Federal case law is consistent with Section 957. *United States v. Osborn* (9th Cir. 1977) 561 F.2d 1334 .



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3 SIGNIFICANT CASES

Fletcher v. Superior Court (1996) 44 Cal. App. 4th 773, 52 Cal. Rptr. 2d 65 (the exception of Section 957 applies only to communications between the decedent and the decedent's attorney).



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1-958 California Evidence Courtroom Manual 958.syn

§ 958.syn Synopsis to Chapter 958: Exception: Breach of Duty Arising Out of Lawyer-Client Relationship

Scope Exception: Breach of Duty Arising Out of Lawyer-Client Relationship

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SECTION 958 Exception: Breach of Duty Arising Out of Lawyer-Client Relationship

1-958 California Evidence Courtroom Manual Scope

Scope Exception: Breach of Duty Arising Out of Lawyer-Client Relationship

§ 958 reads as follows:

Rule 958 Exception: Breach of Duty Arising Out of Lawyer-Client Relationship

There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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1-958 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 958 is an exception based in fairness and common sense. In cases where the client claims the attorney breached a duty, such as the duty of care or duty of loyalty, the client should not be able to hide behind the shield of the attorney-client privilege so that the attorney may defend the case. Nor should the client be able to assert the privilege as a defense to an action by the attorney against the client to recover fees. *Code of Civil Procedure section 2018(f)* provides a similar exception to the work product rule in actions between an attorney and his or her client or former client if the work product is relevant to an issue of breach of the attorney's duty. Moreover, the State Bar is entitled to discover the work product in a disciplinary action against an attorney for breach of duty to a client, subject to the client's consent to the disclosure and to a protective order, if requested and for good cause. *Code of Civil Procedure section 2018(e)*.



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2 COMPARISON TO FEDERAL RULE

Federal case law is consistent with Section 958.



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1-958 California Evidence Courtroom Manual 3

3 ADDITIONAL AUTHORITY

Edna Selan Epstein & Michael M. Martin, *The Attorney-Client Privilege and the Work Product Doctrine* 95-98 (2d ed. 1989)



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4 SIGNIFICANT CASES

People v. Ledesma (2006) 39 Cal. 4th 641, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (holding, as a question of first impression, that the attorney-client privilege continues to apply for purposes of retrial after otherwise privileged matters have been disclosed in connection with habeas corpus proceedings based on ineffective assistance of counsel (relying on *Evidence Code* section 958), but finding that defendant waived the protections of privilege as to his statements to psychotherapist by presenting the testimony of other experts who had reviewed and considered psychotherapist's report and his testimony at the habeas corpus hearing).

Brockway v. State Bar of California (1991) 53 Cal. 3d 51, 278 Cal. Rptr. 836, 806 P.2d 308 (statements client may have made to public defender concerning fee agreement with his retained attorney were protected by attorney-client privilege, and client did not waive privilege by complaining to State Bar about the agreement).



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SECTION 959 Exception: Lawyer as Attesting Witness

1-959 California Evidence Courtroom Manual 959.syn

§ 959.syn Synopsis to Chapter 959: Exception: Lawyer as Attesting Witness

Scope Exception: Lawyer as Attesting Witness

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SECTION 959 Exception: Lawyer as Attesting Witness

1-959 California Evidence Courtroom Manual Scope

Scope Exception: Lawyer as Attesting Witness

§ 959 reads as follows:

Rule 959 Exception: Lawyer as Attesting Witness

There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1-959 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 959 is a common exception to the attorney-client privilege. The rationale is similar to that of Section 957: the need to have the communication disclosed so the client's competence can be established and his or her intentions can be carried out outweighs the client's desire for privacy.



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2 COMPARISON TO FEDERAL RULE

This is also a fairly well-established exception to the attorney-client privilege, recognized by federal courts.



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SECTION 960 Exception: Intention of Deceased Client Concerning Writing Affecting Property Interest

1-960 California Evidence Courtroom Manual 960.syn

§ 960.syn Synopsis to Chapter 960: Exception: Intention of Deceased Client Concerning Writing Affecting Property Interest

Scope Exception: Intention of Deceased Client Concerning Writing Affecting Property Interest

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1-960 California Evidence Courtroom Manual Scope

Scope Exception: Intention of Deceased Client Concerning Writing Affecting Property Interest

§ 960 reads as follows:

Rule 960 Exception: Intention of Deceased Client Concerning Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 960 Exception: Intention of Deceased Client Concerning Writing Affecting Property Interest

1-960 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 960 is a common exception to the attorney-client privilege. The rationale is similar to that of Sections 957 and 959: the need to have the communication disclosed so the client's intentions can be carried out outweighs the client's desire for privacy.



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SECTION 960 Exception: Intention of Deceased Client Concerning Writing Affecting Property Interest

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2 COMPARISON TO FEDERAL RULE

This is also a fairly well-established exception to the attorney-client privilege, recognized by federal courts.



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SECTION 961 Exception: Validity of Writing Affecting Property Interest

1-961 California Evidence Courtroom Manual 961.syn

§ 961.syn Synopsis to Chapter 961: Exception: Validity of Writing Affecting Property Interest

Scope Exception: Validity of Writing Affecting Property Interest

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SECTION 961 Exception: Validity of Writing Affecting Property Interest

1-961 California Evidence Courtroom Manual Scope

Scope Exception: Validity of Writing Affecting Property Interest

§ 961 reads as follows:

Rule 961 Exception: Validity of Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 961 Exception: Validity of Writing Affecting Property Interest

1-961 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 961 is a common exception to the attorney-client privilege. The rationale is similar to that of Sections 957, 959 and 960: the need to have the communication disclosed so the client's intentions can be carried out outweighs the client's desire for privacy.



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2 COMPARISON TO FEDERAL RULE

This is also a fairly well-established exception to the attorney-client privilege, recognized by federal courts.



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SECTION 962 Exception: Joint Clients

1-962 California Evidence Courtroom Manual 962.syn

§ 962.syn Synopsis to Chapter 962: Exception: Joint Clients

Scope Exception: Joint Clients

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SECTION 962 Exception: Joint Clients

1-962 California Evidence Courtroom Manual Scope

Scope Exception: Joint Clients

§ 962 reads as follows:

Rule 962 Exception: Joint Clients

Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 962 Exception: Joint Clients

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1 ANALYSIS

Section 962 is one of the most common exceptions to the attorney-client privilege. Where two or more individuals are represented by an attorney, each of the clients is a holder of the privilege and each may assert the privilege against other parties. However, when civil litigation breaks out between the joint clients, the privilege disappears under this exception: neither the clients nor their successors in interest can assert the privilege against another joint client.

This section demonstrates one of the hazards of joint representation. The other hazard, of course, is the professional responsibility to avoid conflicts of interest. *Rule of Professional Conduct 3-310(C)(1)*. Whenever an attorney agrees to represent more than one client, it is prudent for the attorney to provide each client with written notification of the hazards. Where it is unclear whether an individual is a joint client for purposes of this section, it will be necessary for a court to carefully consider the facts of the situation.



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SECTION 962 Exception: Joint Clients

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2 COMPARISON TO FEDERAL RULE

Federal law is consistent with Section 962.



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3 ADDITIONAL AUTHORITY

Edna Selan Epstein & Michael M. Martin, *The Attorney-client Privilege and the Work Product Doctrine* 52-53 (2d ed. 1989)



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4 SIGNIFICANT CASES

Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd. (N.D. Cal. 1993) 150 F.R.D. 648 (principal purposes of joint client exception to attorney-client privilege under California law are to prevent unjustifiable inequality in access to information necessary to resolve fairly disputes arising between parties who were joint clients in the past when the disputes relate to matters involved in the joint representation, and to discourage abuses of fiduciary obligations and encourage parties to honor any legal duties they had to share information related to common interests).

Bank of the West v. Valley Nat. Bank of Arizona (N.D. Cal. 1990) 132 F.R.D. 250 (fact that one bank undertook defense of litigation in common interest with another did not satisfy requirements of joint defense doctrine; thus, joint client exception to attorney-client privilege did not apply to bank's attempt to compel disclosure of documents developed by other bank's law firm in that litigation).

Rockwell Internat. Corp. v. Superior Court (1994) 26 Cal. App. 4th 1255, 32 Cal. Rptr. 2d 153 (assuming attorneys representing insured were selected by insurance carriers, those attorneys were not "retained or consulted" by carriers within meaning of "joint client" or "common interest" exception to attorney-client privilege, but rather attorneys were retained to represent only insured when carriers disputed availability of coverage, and thus insured was entitled to assert attorney-client privilege in insurance coverage litigation).



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1-1 California Evidence Courtroom Manual Scope

Scope

Practice Tip: Two Types of Marital Privileges

Be sure to distinguish between the two types of marital privileges:

Section 970 provides *a privilege not to testify against one's current spouse*. This privilege is held by the witness-spouse, which means that the nonwitness-spouse cannot prevent the witness-spouse from testifying if she or he chooses to testify. For this privilege to apply, there must be a valid marriage between the spouses at the time the witness spouse is called to the stand. The privilege is broad and absolute; the witness-spouse need not testify as to anything heard or witnessed.

Section 980 provides *a privilege not to testify as to confidential communications made between spouses*, whether they are currently married or not. This privilege is held by each spouse, so that one spouse can prevent the other from testifying as to the confidential communication. The privilege is valid whether the spouses are currently married or not. However, the privilege only extends to communications made between the spouses in confidence while they were validly married; the privilege does not apply to matters merely observed or witnessed, or matters that were discussed in the presence of nonessential third parties.



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SECTION 970 Privilege Not to Testify Against Spouse

1-970 California Evidence Courtroom Manual 970.syn

§ 970.syn Synopsis to Chapter 970: Privilege Not to Testify Against Spouse

Scope Privilege Not to Testify Against Spouse

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SECTION 970 Privilege Not to Testify Against Spouse

1-970 California Evidence Courtroom Manual Scope

Scope Privilege Not to Testify Against Spouse

§ 970 reads as follows:

Rule 970 Privilege Not to Testify Against Spouse

Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)



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SECTION 970 Privilege Not to Testify Against Spouse

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1 ANALYSIS

The rationale for Section 970 is that to force one spouse to testify against the other would seriously disturb or disrupt the marital relationship. Of course, if the witness-spouse wants to testify against the other spouse, there is no need for the Legislature to try to protect marital harmony that may not be present. This privilege may be claimed only if there is a valid marriage in existence at time the witness-spouse is called to the stand. *People v. Bradford* (1969) 70 Cal. 2d 333, 74 Cal. Rptr. 726, 450 P.2d 46. See also Practice Tip Regarding the Two Types of Marital Privileges, above.



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SECTION 970 Privilege Not to Testify Against Spouse

1-970 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Federal law recognizes the spousal privilege not to testify against one's current spouse. *Trammel v. United States* (1980) 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 . Federal law differs from California law in one significant respect: the federal spousal privilege not to testify only applies in criminal cases; the California privilege applies "in any proceeding."



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1-970 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Sinohui (2002) 28 Cal. 4th 205, 120 Cal. Rptr. 2d 783, 47 P.3d 629 (a witness spouse may be compelled to testify against the defendant spouse under Section 972(e)(2) even if no accusatory pleading charges the defendant with a crime against the witness spouse when the defendant commits a crime against a third person "in the course of committing a crime against" the witness spouse if the crimes are part of a continuous course of criminal conduct and have some logical relationship to each other).

People v. Lucas (1995) 12 Cal. 4th 415, 48 Cal. Rptr. 2d 525, 907 P.2d 373 (marital privilege belongs to married person who is called to testify against his or her spouse, and not to spouse who is party in proceeding).

Jurcoane v. Superior Court (2001) 93 Cal. App. 4th 886, 113 Cal. Rptr. 2d 483 (wife of defendant in murder prosecution sought to invoke marital privilege, even though she had not lived with her husband for 17 years; held that wife retained marital privilege and could not be forced to testify; marital testimony privilege under Sections 970-973 applies even if a viable marital relationship no longer exists).

People v. Resendez (1993) 12 Cal. App. 4th 98, 15 Cal. Rptr. 2d 575 (witness spouse not entitled to be informed of existence of privilege prior to testifying, and the witness spouse has the burden of proof on the facts necessary to trigger privilege).



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SECTION 971 Privilege Not to be Called as a Witness Against Spouse

1-971 California Evidence Courtroom Manual 971.syn

§ 971.syn Synopsis to Chapter 971: Privilege Not to be Called as a Witness Against Spouse

Scope Privilege Not to be Called as a Witness Against Spouse

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SECTION 971 Privilege Not to be Called as a Witness Against Spouse

1-971 California Evidence Courtroom Manual Scope

Scope Privilege Not to be Called as a Witness Against Spouse

§ 971 reads as follows:

Rule 971 Privilege Not to be Called as a Witness Against Spouse

Except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 971 Privilege Not to be Called as a Witness Against Spouse

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1 ANALYSIS

The distinction between Section 971, the privilege not to be called as a witness against a spouse, and Section 970, the privilege not to testify against a spouse, is that Section 971 avoids the spectacle of having the prospective witness-spouse called to the witness stand, only to refuse to testify against the other spouse. However, the privilege not to be called as a witness provided by Section 971 applies only where the nonwitness-spouse is a party to the action. In contrast, a witness-spouse has privilege not to testify against the other spouse in any proceeding, whether the other spouse is a party or not. To illustrate the distinction between Sections 970 and 971, the Law Revision Commission used this example: a married person may be called as a witness in a grand jury proceeding because his or her spouse is not a party to that proceeding, but the witness in the grand jury proceeding may claim the privilege under Section 970 to refuse to answer a question that would compel the witness to testify against his spouse. 7 Cal. L. Rev. Comm. Rep. 1 (1965). *See also* Practice Tip Regarding the Two Types of Marital Privileges, preceding Section 970.



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2 COMPARISON TO FEDERAL RULE

Trammel v. United States (1980) 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 is consistent with Section 971, in that it permits the witness-spouse to avoid being called as a witness against the other spouse. However, the *Trammel* privilege only applies in criminal cases whereas Section 971 applies in all proceedings in which the nonwitness spouse is a party.



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SECTION 972 Exceptions to Spousal Testimonial Privilege

1-972 California Evidence Courtroom Manual 972.syn

§ 972.syn Synopsis to Chapter 972: Exceptions to Spousal Testimonial Privilege

Scope Exceptions to Spousal Testimonial Privilege

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1-972 California Evidence Courtroom Manual Scope

Scope Exceptions to Spousal Testimonial Privilege

§ 972 reads as follows:

Rule 972 Exceptions to Spousal Testimonial Privilege

A married person does not have a privilege under this article in:

- (a) A proceeding brought by or on behalf of one spouse against the other spouse.
- (b) A proceeding to commit or otherwise place his or her spouse or his or her spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition.
- (c) A proceeding brought by or on behalf of a spouse to establish his or her competence.
- (d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with *Section 200*) of *Part 1 of Division 2 of the Welfare and Institutions Code*.
- (e) A criminal proceeding in which one spouse is charged with:
 - (1) A crime against the person or property of the other spouse or of a child, parent, relative, or cohabitant of either, whether committed before or during marriage.

(2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage.

(3) Bigamy.

(4) A crime defined by *Section 270 or 270a of the Penal Code*.

(f) A proceeding resulting from a criminal act which occurred prior to legal marriage of the spouses to each other regarding knowledge acquired prior to that marriage if prior to the legal marriage the witness spouse was aware that his or her spouse had been arrested for or had been formally charged with the crime or crimes about which the spouse is called to testify.

(g) A proceeding brought against the spouse by a former spouse so long as the property and debts of the marriage have not been adjudicated, or in order to establish, modify, or enforce a child, family or spousal support obligation arising from the marriage to the former spouse; in a proceeding brought against a spouse by the other parent in order to establish, modify, or enforce a child support obligation for a child of a nonmarital relationship of the spouse; or in a proceeding brought against a spouse by the guardian of a child of that spouse in order to establish, modify, or enforce a child support obligation of the spouse. The married person does not have a privilege under this subdivision to refuse to provide information relating to the issues of income, expenses, assets, debts, and employment of either spouse, but may assert the privilege as otherwise provided in this article if other information is requested by the former spouse, guardian, or other parent of the child.

Any person demanding the otherwise privileged information made available by this subdivision, who also has an obligation to support the child for whom an order to establish, modify, or enforce child support is sought, waives his or her marital privilege to the same extent as the spouse as provided in this subdivision.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 71, § 2; Stats. 1982, ch. 256, § 1; Stats. 1983, ch. 244, § 1; Stats. 1986, ch. 769, § 1, effective Sept. 15, 1986; Stats. 1989, ch. 1359, § 9.7)

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1 ANALYSIS

The primary rationale behind the exceptions to the spousal privilege not to testify is that, for one of the reasons listed in the subdivisions of Section 972, there is no reason to protect marital harmony because, under the circumstances, either there is likely to be no marital harmony or marital harmony cannot be protected at the expense of hindering the prosecution of crimes against individuals, other family members, hindering proceedings to protect minors or to provide for their support (*Welfare and Institutions Code sections 200 et seq.*), or criminal proceedings for neglecting or abandoning a child or spouse (*Penal Code sections 270-270a*).



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2 COMPARISON TO FEDERAL RULE

Federal case law, which rests on the same rationale as the California privilege, is consistent with these exceptions.



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3 SIGNIFICANT CASES

Jurcoane v. Superior Court (2001) 93 Cal. App. 4th 886, 113 Cal. Rptr. 2d 483 (trial court erred in overruling murder defendant's wife's claim of marital privilege, even though she had not lived with her husband for 17 years; the plain language of the marital privilege applies to witnesses who are married when compelled to testify; the Legislature created no exception to the privilege where a still legally intact marriage is "moribund," "abandoned," or "no longer viable" and the judiciary has no power to create one).

People v. Bogle (1995) 41 Cal. App. 4th 770, 48 Cal. Rptr. 2d 739 (defendant, who lived in victims' home and shared kitchen and other living areas, was "cohabitant" of murder victims; thus, privilege did not preclude state from requiring defendant's wife to testify against him).

Dunn v. Superior Court (1993) 21 Cal. App. 4th 721, 26 Cal. Rptr. 2d 365 (spouse must testify about abuse of foster child under Section 972(e)(1) where foster parents have entered formal agreement to provide home for child, regardless of child's length of residence).

People v. Siravo (1993) 17 Cal. App. 4th 555, 21 Cal. Rptr. 2d 350 ("cohabitant," under exception to marital privilege statute for criminal proceeding in which one spouse is charged with crime against cohabitant of other spouse, means two people who live or dwell together in same household).

People v. Resendez (1993) 12 Cal. App. 4th 98, 15 Cal. Rptr. 2d 575 (Section 972(e)(2) did not apply to prosecution arising from defendant's assault on third party committed in presence of defendant's wife; no crime was committed against the person or property of the defendant's wife).



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§ 973.syn Synopsis to Chapter 973: Waiver of Privilege

Scope Waiver of Privilege

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SECTION 973 Waiver of Privilege

1-973 California Evidence Courtroom Manual Scope

Scope Waiver of Privilege

§ 973 reads as follows:

Rule 973 Waiver of Privilege

(a) Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 973 clarifies that where a married person's spouse is not a party, the privilege not to be called as a witness does not apply. Thus, a married person may testify without waiving the privilege not to testify against the other spouse under Section 970. However, if, in taking the stand, the witness spouse testifies against the other spouse, the privilege not to testify is waived. Moreover, Section 973(b) provides that there is no privilege not to testify if a married person brings or defends a civil proceeding, for the immediate benefit of either member of the couple or both of them.



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2 COMPARISON TO FEDERAL RULE

Section 973 essentially restates general principles of waiver. *See also Section 912* (relating specifically to waiver). California principles regarding waiver of privileges are generally consistent with federal law principles.



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3 ADDITIONAL AUTHORITY

Roger C. Park et al., Evidence Law § 8.08 at 413 (1998)



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4 SIGNIFICANT CASES

People v. Lucas (1995) 12 Cal. 4th 415, 48 Cal. Rptr. 2d 525, 907 P.2d 373 (if married person chooses to testify in proceeding in which his or her spouse is party, testifying spouse waives his or her marital privilege and may not invoke it on cross-examination to keep from testifying to unfavorable matters).

People v. Resendez (1993) 12 Cal. App. 4th 98, 15 Cal. Rptr. 2d 575 (statute under which married person who testifies against spouse loses testimonial privilege is operative even though witness spouse has not first been advised by trial court or by party to proceeding, including other spouse, of his or her privileges not to testify against spouse and of potential loss of those privileges).



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SECTION 980 Confidential Marital Communication Privilege

1-980 California Evidence Courtroom Manual 980.syn

§ 980.syn Synopsis to Chapter 980: Confidential Marital Communication Privilege

Scope Confidential Marital Communication Privilege

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Scope Confidential Marital Communication Privilege

§ 980 reads as follows:

Rule 980 Confidential Marital Communication Privilege

Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 980 Confidential Marital Communication Privilege

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1 ANALYSIS

Section 980 represents a second type of marital privilege, covering confidential communications between married individuals. This privilege applies even after the termination of the marriage because the policy reason for the privilege--to encourage the free and open communication between spouses--might be defeated if one of the spouses could be forced to testify about communications made in confidence after the marriage ends. *See Practice Tip Regarding the Two Types of Marital Privileges*, preceding Section 970. The privilege for confidential marital communications is vested in each spouse; if a spouse is called as a witness, he or she may not testify as to confidential communications without his or her own consent and the consent of the other spouse, and either spouse may claim the privilege. *People v. Dorsey* (1975) 46 Cal. App. 3d 706, 120 Cal. Rptr. 508 . A guardian of an incompetent spouse may claim the privilege on behalf of that spouse. However, when a spouse is dead, no one can claim the privilege for him; the privilege, if it is to be claimed at all, can be claimed only by or on behalf of the surviving spouse. 7 Cal. L. Rev. Comm. Rep. 1 (1965).



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2 COMPARISON TO FEDERAL RULE

Federal case law is consistent with Section 980.



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3 SIGNIFICANT CASES

People v. Badgett (1995) 10 Cal. 4th 330, 41 Cal. Rptr. 2d 635, 895 P.2d 877 (although California does not recognize common-law marriages, for the purpose of this privilege it will recognize such marriages validly created in other states).

People v. Gallego (1990) 52 Cal. 3d 115, 276 Cal. Rptr. 679, 802 P.2d 169, *reh'g denied*, 1991 Cal. LEXIS 854 (privilege for confidential communications between spouses applies only in case of valid marriage, therefore privilege did not attach when spouse had failed to dissolve a previous marriage).

People v. Bogle (1995) 41 Cal. App. 4th 770, 48 Cal. Rptr. 2d 739 (confidential marital communications privilege could not have been used to exclude defendant's suicide note containing salutation to his wife, in light of fact that defendant tore up note and threw it away without communicating it to wife).

People v. Von Villas (1992) 11 Cal. App. 4th 175, 15 Cal. Rptr. 2d 112 (recording marital conversations appears permissible and such conversations will be admissible absent showing that parties intended nondisclosure and had reasonable expectation of privacy).

Rubio v. Superior Court (1988) 202 Cal. App. 3d 1343, 249 Cal. Rptr. 419 (husband and wife intended tape depicting couple engaged in sex acts to be confidential and recordation of communication on videotape did not diminish their intent to communicate confidentially; husband and wife did not waive privilege by failing to object at preliminary hearing of housekeeper's son on felony molestation charges to minor daughter's description of what she saw on videotape).



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SECTION 981 Exception: Crime or Fraud

1-981 California Evidence Courtroom Manual 981.syn

§ 981.syn Synopsis to Chapter 981: Exception: Crime or Fraud

Scope Exception: Crime or Fraud

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1-981 California Evidence Courtroom Manual Scope

Scope Exception: Crime or Fraud

§ 981 reads as follows:

Rule 981 Exception: Crime or Fraud

There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 981 is consistent with the other exceptions to California privileges. Although the Legislature recognized the need to protect certain relationships by making them privileged, it would not hinder the discovery of truth where the relationship is being used to further a crime or fraud.



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2 COMPARISON TO FEDERAL RULE

Federal case law is consistent with Section 981.



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3 SIGNIFICANT CASES

People v. Von Villas (1992) 11 Cal. App. 4th 175, 15 Cal. Rptr. 2d 112 (statements of defendant to wife in jailhouse conversation advising wife to throw away her personal letters from him and that he would get rid of something could easily be construed as attempts to obstruct justice warranting application of crime or fraud exception to marital privilege).



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SECTION 982 Exception: Commitment or Similar Proceedings

1-982 California Evidence Courtroom Manual 982.syn

§ 982.syn Synopsis to Chapter 982: Exception: Commitment or Similar Proceedings

Scope Exception: Commitment or Similar Proceedings

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SECTION 982 Exception: Commitment or Similar Proceedings

1-982 California Evidence Courtroom Manual Scope

Scope Exception: Commitment or Similar Proceedings

§ 982 reads as follows:

Rule 982 Exception: Commitment or Similar Proceedings

There is no privilege under this article in a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 982 Exception: Commitment or Similar Proceedings

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1 ANALYSIS

Section 982 creates a commonsense exception to the privilege for confidential marital communications. Where the central issue is the mental or physical stability of an individual, the person likeliest to have knowledge of his or her condition is the other spouse. Societal interests would not be furthered by protecting this information from discovery.



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2 COMPARISON TO FEDERAL RULE

There is no federal authority directly on this issue.



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SECTION 983 Exception: Competency Proceedings

1-983 California Evidence Courtroom Manual 983.syn

§ 983.syn Synopsis to Chapter 983: Exception: Competency Proceedings

Scope Exception: Competency Proceedings

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SECTION 983 Exception: Competency Proceedings

1-983 California Evidence Courtroom Manual Scope

Scope Exception: Competency Proceedings

§ 983 reads as follows:

Rule 983 Exception: Competency Proceedings

There is no privilege under this article in a proceeding brought by or on behalf of either spouse to establish his competence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 983 Exception: Competency Proceedings

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1 ANALYSIS

Section 983 creates a commonsense exception to the privilege for confidential marital communications. Where the central issue is the mental or physical stability of an individual, the person likeliest to have knowledge of his or her condition is the other spouse. Societal interests would not be furthered by protecting this information from discovery.



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2 COMPARISON TO FEDERAL RULE

There is no federal authority directly on this issue.



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SECTION 984 Exception: Proceeding Between Spouses

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§ 984.syn Synopsis to Chapter 984: Exception: Proceeding Between Spouses

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SECTION 984 Exception: Proceeding Between Spouses

1-984 California Evidence Courtroom Manual Scope

Scope Exception: Proceeding Between Spouses

§ 984 reads as follows:

Rule 984 Exception: Proceeding Between Spouses

There is no privilege under this article in:

(a) A proceeding brought by or on behalf of one spouse against the other spouse.

(b) A proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 984 recognizes the overriding need for fairness in access to information where one spouse litigates against the other or, by extension, where one spouse is in litigation with an heir of the deceased spouse. In this situation, the public policy of protecting the privacy of marital communications is outweighed by the need for equitable access to information.



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2 COMPARISON TO FEDERAL RULE

There is no federal authority directly on point.



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SECTION 985 Exception: Criminal Proceedings

1-985 California Evidence Courtroom Manual 985.syn

§ 985.syn Synopsis to Chapter 985: Exception: Criminal Proceedings

Scope Exception: Criminal Proceedings

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1-985 California Evidence Courtroom Manual Scope

Scope Exception: Criminal Proceedings

§ 985 reads as follows:

Rule 985 Exception: Criminal Proceedings

There is no privilege under this article in a criminal proceeding in which one spouse is charged with:

- (a) A crime committed at any time against the person or property of the other spouse or of a child of either.
- (b) A crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse.
- (c) Bigamy.
- (d) A crime defined by *Section 270 or 270a of the Penal Code*.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 71, § 3)

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1 ANALYSIS

Section 985 establishes a commonsense exception to the privilege for confidential marital communications. The privacy considerations behind the privilege must give way to the need for relevant information in criminal cases in which the spouse or children are victims.



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2 COMPARISON TO FEDERAL RULE

Federal case law, which rests on the same rationale as the California privilege, is consistent with this exception.



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Dunn v. Superior Court (1993) 21 Cal. App. 4th 721, 26 Cal. Rptr. 2d 365 (foster child is a "child" within part (a) of Section 985; when the parents have entered into a formal agreement to provide a home for the child the child's length of stay in the home is not conclusive).



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§ 986.syn Synopsis to Chapter 986: Exception: Juvenile Court Proceedings

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1-986 California Evidence Courtroom Manual Scope

Scope Exception: Juvenile Court Proceedings

§ 986 reads as follows:

Rule 986 Exception: Juvenile Court Proceedings

There is no privilege under this article in a proceeding under the Juvenile Court Law, Chapter 2 (commencing with *Section 200*) of *Part 1 of Division 2 of the Welfare and Institutions Code*.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 986 establishes a commonsense exception to the privilege for confidential marital communications. The privacy considerations behind the privilege must give way to the need for relevant information when parental fitness is an issue.



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2 COMPARISON TO FEDERAL RULE

There is no comparable federal authority.



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1-987 California Evidence Courtroom Manual Scope

Scope Exception: Where Spouse is Criminal Defendant

§ 987 reads as follows:

Rule 987 Exception: Where Spouse is Criminal Defendant

There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 987 creates a sensible exception--where a criminal defendant needs to offer material information in his or her defense, fairness suggests that the defendant ought to be able to offer it over the claim of privilege of the other spouse.



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Federal law is consistent with Section 987. *United States v. Ammar* (3d Cir. 1983) 714 F.2d 238 , cert. denied, 464 U.S. 936 .



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1-990 California Evidence Courtroom Manual Scope

Scope Physician

§ 990 reads as follows:

Rule 990 Physician

As used in this article, "physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

The purpose of the physician-patient privilege is to preclude humiliation of the patient which might follow disclosure of his or her ailments and to encourage patient's full disclosure to the physician of all information necessary for effective diagnosis and treatment. *See Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 156 Cal. Rptr. 55*. Nonetheless, the physician-patient privilege has very little practical applicability. For example, it does not apply in the vast majority of trials in California: personal injury actions (or whenever the patient has tendered his or her physical condition in issue) and criminal cases. *See Sections 996 and 998*. Moreover, the definition of a "physician," for purposes of the privileged relationship is quite narrow. It only applies to those persons "reasonably believed by the patient to be authorized" to practice medicine. Thus, communications made to nurses, interns, pharmacists and paramedics would not be privileged.



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2 COMPARISON TO FEDERAL RULE

Federal courts have been reluctant to recognize a physician-patient privilege under *Federal Rule of Evidence 501*. See *Whalen v. Roe* (1977) 429 U.S. 589, 602 n. 28, 97 S. Ct. 869, 51 L. Ed. 2d 64 ; *United States v. Moore* (1992) 970 F.2d 48, 50 n. 3 ; contra *Mann v. University of Cincinnati* (S.D. Ohio 1993) 824 F. Supp. 1190, 1197-1198 (recognizing physician-patient privilege). However, some federal statutes create a qualified right of confidentiality for certain medical records, providing that those records may only be released on a showing of good cause. See 42 U.S.C. § 290dd-3(a) (records of federally funded alcohol abuse treatment facilities); 42 U.S.C. § 290ee-3 (records of federally funded drug abuse programs).



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Shulman v. Group W Prods. (1996) 51 Cal. App. 4th 850, 59 Cal. Rptr. 2d 434 (refusing to extend physician-patient privilege to communications made to paramedic where paramedic was not acting under direction of or as agent of physician).



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§ 991.syn Synopsis to Chapter 991: Patient

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1-991 California Evidence Courtroom Manual Scope

Scope Patient

§ 991 reads as follows:

Rule 991 Patient

As used in this article, "patient" means a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental or emotional condition.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

See Analysis of Section 990. *See also* Section 994, which extends the privilege to medical groups and corporations.



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1-992 California Evidence Courtroom Manual Scope

Scope Confidential Communication Between Patient and Physician

§ 992 reads as follows:

Rule 992 Confidential Communication Between Patient and Physician

As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967; Amended by Stats. 1967, ch. 650, § 4)

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1 ANALYSIS

See Analysis of Section 990. Section 992 was amended in 1967 to clarify that "a diagnosis" in the course of the physician-patient relationship is covered by the privilege, even if the diagnosis is not communicated to the patient. 8 Cal. L. Rev. Comm. Rep. 101 (1967).



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Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 114 Cal. Rptr. 603, 523 P.2d 643 (the existence of a "confidential communication between patient and physician," within meaning of this section is determined at the time information is communicated to or ascertained by the physician).

Hale v. Superior Court (1994) 28 Cal. App. 4th 1421, 34 Cal. Rptr. 2d 279 (patient's alleged inability to communicate with physicians did not thwart physician-patient privilege since it extends to all information obtained by examination of patient).

Province v. Center for Women's Health and Family Birth (1993) 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667 (physician-patient privilege protects confidential communications transmitted in course of physician-patient relationship).



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§ 993.syn Synopsis to Chapter 993: Holder of the Privilege

Scope Holder of the Privilege

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1-993 California Evidence Courtroom Manual Scope

Scope Holder of the Privilege

§ 993 reads as follows:

Rule 993 Holder of the Privilege

As used in this article, "holder of the privilege" means:

- (a) The patient when he has no guardian or conservator.
- (b) A guardian or conservator of the patient when the patient has a guardian or conservator.
- (c) The personal representative of the patient if the patient is dead.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 993 parallels other California statutes defining who is a "holder" of, and thus entitled to claim, a privilege. California law is unique in that the statute provides that where there is no personal representative, because the estate has never been probated or because the personal representative has been discharged after distribution of the estate, there is no longer a holder who may claim the privilege. If there is no holder to claim the privilege, the evidence cannot be barred on the basis of the privilege. 7 Cal. L. Rev. Comm. Rep. 1 (1965). *Compare* Section 953 (holder of lawyer-client privilege); Section 1013 (holder of psychotherapist-patient privilege).



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Hale v. Superior Court (1994) 28 Cal. App. 4th 1421, 34 Cal. Rptr. 2d 279 (physician-patient privilege continued after patient's death, and only personal representative could waive it).

Palay v. Superior Court (1993) 18 Cal. App. 4th 919, 22 Cal. Rptr. 2d 839 (mother had privilege to medical records for her child).



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§ 994.syn Synopsis to Chapter 994: Physician-Patient Privilege

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Scope Physician-Patient Privilege

§ 994 reads as follows:

Rule 994 Physician-Patient Privilege

Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

The relationship of a physician and patient shall exist between a medical or podiatry corporation as defined in the Medical Practice Act and the patient to whom it renders professional services, as well as between such patients and licensed physicians and surgeons employed by such corporation to render services to such patients. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations, and other groups and entities.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1968, ch. 1375, § 3; Stats. 1980, ch. 1313, § 12; Stats. 1994, ch. 1010 (S.B. 2053), § 105)

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1 ANALYSIS

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Palay v. Superior Court (1993) 18 Cal. App. 4th 919, 22 Cal. Rptr. 2d 839 (scope of patient-physician privilege is affected by constitutional principles).



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Scope When Physician Required to Claim Privilege

§ 995 reads as follows:

Rule 995 When Physician Required to Claim Privilege

The physician who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 994.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

See Analysis of Section 990. See also Business and Professions Code section 2379 (requiring physician to maintain confidentiality of patient communications unless otherwise instructed by a person authorized to order disclosure).



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Scope Exception: Where Patient is Litigant

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Scope Exception: Where Patient is Litigant

§ 996 reads as follows:

Rule 996 Exception: Where Patient is Litigant

There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by:

- (a) The patient;
- (b) Any party claiming through or under the patient;
- (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
- (d) The plaintiff in an action brought under *Section 376 or 377 of the Code of Civil Procedure* for damages for the injury or death of the patient.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This section is a major limitation on the applicability of the physician-patient privilege. The purpose of the physician-patient privilege is to prevent the humiliation of a patient that might follow disclosure of his or her ailments; thus, when the patient discloses those ailments by bringing an action in which they are in issue, the rationale for the privilege evaporates. *See City and County of San Francisco v. Superior Court (1951) 37 Cal. 2d 227, 231 P.2d 26*. *See* Analysis of Section 990. *See also Section 999* (permitting disclosures relating to patient's condition on showing of "good cause" in an action to recover damages on account of patient's conduct). A patient "tenders" issue of his or her physical health by filing an action for personal injuries, but only as to information which relates to the claimed injuries. *Slagle v. Superior Court (1989) 211 Cal. App. 3d 1309, 260 Cal. Rptr. 122*. This exception is commonly invoked in administrative proceedings, such as workers' compensation claims. *See Labor Code sections 4055, 5701, 5703*.



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2 COMPARISON TO FEDERAL RULE

See Comparison to Federal Rule in Section 990. Even those federal courts that have considered the existence of a physician-patient privilege opine that it is waived when the patient puts the condition in issue. *See, e.g., United States v. Meagher* (5th Cir. 1976) 531 F.2d 752 , cert. denied, 429 U.S. 853 .



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3 SIGNIFICANT CASES

Hale v. Superior Court (1994) 28 Cal. App. 4th 1421, 34 Cal. Rptr. 2d 279 (even if patient's medical condition was in issue, physician-patient privilege was not waived as to otherwise protected aspects of medical history during lifetime or as to unrelated condition patient may have suffered from at time of death).

Province v. Center for Women's Health and Family Birth (1993) 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667 (regardless of whether patient may have waived her physician-patient privilege by filing malpractice suit, defense counsel had to avoid ex parte communications with physician until after discovery was completed).

Palay v. Superior Court (1993) 18 Cal. App. 4th 919, 22 Cal. Rptr. 2d 839 (prenatal medical records of a mother, a nonparty to her 16-month-old child's medical malpractice action, were discoverable and not subject to physician-patient privilege; child waived right to claim privilege when he brought action, and medical histories of mother and child, while child was in utero, were inextricably related). *But see Jones v. Superior Court* (1981) 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (mother, by providing certain information or assistance to her daughter suing for injuries allegedly sustained as a result of mother's ingestion of a defendant's drug, did not tender her medical condition as an issue within the meaning of the patient-litigant exception of this section, notwithstanding that mother was closely allied with her daughter in the matter, where nothing in the legislative background of the patient-litigant exception or in its judicial implementation supported its application to a witness who was not a party to the proceeding).

Rittenhouse v. Superior Court (1991) 235 Cal. App. 3d 1584, 1 Cal. Rptr. 2d 595 (when issue is injected into the proceedings by the opposing party, privilege is not waived because holder of privilege has not voluntarily tendered his physical condition into issue, he has merely responded to factual allegations).



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1-997 California Evidence Courtroom Manual 997.syn

§ 997.syn Synopsis to Chapter 997: Exception: Crime or Tort

Scope Exception: Crime or Tort

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1-997 California Evidence Courtroom Manual Scope

Scope Exception: Crime or Tort

§ 997 reads as follows:

Rule 997 Exception: Crime or Tort

There is no privilege under this article if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

The California Law Revision Commission notes that this section was intended to be significantly broader than Section 956, which provides that the lawyer-client privilege does not apply when the communication was made to enable anyone to commit or plan to commit a crime or a fraud (that is, it does not extend generally to "torts"). The Commission reasoned that individuals "seldom, if ever, consult their physicians in regard to matters which might subsequently be determined to be a tort, and there is no desirable end to be served by encouraging such communications. On the other hand, people often consult lawyers about matters which may later turn out to be torts and it is desirable to encourage discussion of such matters with lawyers." 7 Cal. Law Rev. Comm. Rep. 1 (1965). In a similar way, the marital communication privilege has a narrow exception for communications made in furtherance of a "crime or fraud," Section 981, while the psychotherapist-patient privilege has the broader exception for communications made in furtherance of a "crime or tort," Section 1018.



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1-998 California Evidence Courtroom Manual 998.syn

§ 998.syn Synopsis to Chapter 998: Exception: Criminal Proceeding

Scope Exception: Criminal Proceeding

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1-998 California Evidence Courtroom Manual Scope

Scope Exception: Criminal Proceeding

§ 998 reads as follows:

Rule 998 Exception: Criminal Proceeding

There is no privilege under this article in a criminal proceeding.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 998 provides a major limitation on the applicability of the physician-patient privilege; the privilege simply does not apply in criminal cases. *See* Analysis of Section 990.



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3 SIGNIFICANT CASES

Menendez v. Superior Court (1992) 3 Cal. 4th 435, 11 Cal. Rptr. 2d 92, 834 P.2d 786 (psychotherapist-patient privilege is not required to yield to People's interest in successful criminal prosecutions and their state constitutional right to due process of law).



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SECTION 999 Exception: Civil Proceeding to Recover Damages

1-999 California Evidence Courtroom Manual 999.syn

§ 999.syn Synopsis to Chapter 999: Exception: Civil Proceeding to Recover Damages

Scope Exception: Civil Proceeding to Recover Damages

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1-999 California Evidence Courtroom Manual Scope

Scope Exception: Civil Proceeding to Recover Damages

§ 999 reads as follows:

Rule 999 Exception: Civil Proceeding to Recover Damages

There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure of the communication is shown.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 318, § 1)

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1 ANALYSIS

Section 999 differs from Section 996 (patient-litigant exception) in that Section 999 permits disclosure not only in a case where the patient is a party to the action but also in a case where a party's liability is based on the conduct of the patient. However, the statute requires that good cause be shown for the disclosure permitting the court to protect the defendant against a "fishing expedition" into his medical records. *See also* Analysis of Sections 990 and 996.



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2 COMPARISON TO FEDERAL RULE

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John B. v. Superior Court (2006) 38 Cal. 4th 1177 ; 137 P.3d 153 ; 45 Cal. Rptr. 3d 316 (in an action where woman sought damages from a man she suspected infected her with HIV, court held that the "good cause" requirement of Section 999 requires a showing of more than "conjecture" or a "speculative presumption" to justify the requested discovery, but it does not require "an expert declaration regarding the [plaintiff's] infection status; the probable exposure period; and a description of the plaintiff's sexual history that establishes the defendant as a probable transmitter.").



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SECTION 1000 Exception: Parties Claiming Through Deceased Patient

1-1000 California Evidence Courtroom Manual 1000.syn

§ 1000.syn Synopsis to Chapter 1000: Exception: Parties Claiming Through Deceased Patient

Scope Exception: Parties Claiming Through Deceased Patient

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1-1000 California Evidence Courtroom Manual Scope

Scope Exception: Parties Claiming Through Deceased Patient

§ 1000 reads as follows:

Rule 1000 Exception: Parties Claiming Through Deceased Patient

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1-1001 California Evidence Courtroom Manual 1001.syn

§ 1001.syn Synopsis to Chapter 1001: Exception: Breach of Duty Arising Out of Physician-Patient Relationship

Scope Exception: Breach of Duty Arising Out of Physician-Patient Relationship

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1-1001 California Evidence Courtroom Manual Scope

Scope Exception: Breach of Duty Arising Out of Physician-Patient Relationship

§ 1001 reads as follows:

Rule 1001 Exception: Breach of Duty Arising Out of Physician-Patient Relationship

There is no privilege under this article as to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1002 Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

1-1002 California Evidence Courtroom Manual 1002.syn

§ 1002.syn Synopsis to Chapter 1002: Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

Scope Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

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1-1002 California Evidence Courtroom Manual Scope

Scope Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

§ 1002 reads as follows:

Rule 1002 Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1003 Exception: Validity of Writing Affecting Property Interest

1-1003 California Evidence Courtroom Manual 1003.syn

§ 1003.syn Synopsis to Chapter 1003: Exception: Validity of Writing Affecting Property Interest

Scope Exception: Validity of Writing Affecting Property Interest

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1-1003 California Evidence Courtroom Manual Scope

Scope Exception: Validity of Writing Affecting Property Interest

§ 1003 reads as follows:

Rule 1003 Exception: Validity of Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1004 Exception: Commitment or Similar Proceeding

1-1004 California Evidence Courtroom Manual 1004.syn

§ 1004.syn Synopsis to Chapter 1004: Exception: Commitment or Similar Proceeding

Scope Exception: Commitment or Similar Proceeding

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SECTION 1004 Exception: Commitment or Similar Proceeding

1-1004 California Evidence Courtroom Manual Scope

Scope Exception: Commitment or Similar Proceeding

§ 1004 reads as follows:

Rule 1004 Exception: Commitment or Similar Proceeding

There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1004 establishes a common sense exception for cases such as commitment proceedings or proceedings to appoint a conservator under Probate Code section 1751, since these proceedings are being conducted for the benefit of the patient and the court needs the arguably privileged information in order to act in the patient's interest. 7 Cal. L. Rev. Comm. Rep. 1 (1965). *See also* Analysis of Section 990.



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3 SIGNIFICANT CASES

In re Jeannie Q. (1973) 32 Cal. App. 3d 288, 107 Cal. Rptr. 646 (Section 1004 is applicable in a proceeding to have a minor declared to be a dependent child of the court where the child's physical or mental condition is in issue).

People v. Lipscomb (1968) 263 Cal. App. 2d 59, 69 Cal. Rptr. 127 (physician-patient privilege did not apply to testimony of physician who examined suspected narcotic addict for purpose of commitment proceeding but who treated addict for other physical disabilities discovered during examination).



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SECTION 1005 Exception: Proceeding to Establish Competence

1-1005 California Evidence Courtroom Manual 1005.syn

§ 1005.syn Synopsis to Chapter 1005: Exception: Proceeding to Establish Competence

Scope Exception: Proceeding to Establish Competence

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SECTION 1005 Exception: Proceeding to Establish Competence

1-1005 California Evidence Courtroom Manual Scope

Scope Exception: Proceeding to Establish Competence

§ 1005 reads as follows:

Rule 1005 Exception: Proceeding to Establish Competence

There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1005 essentially establishes a corollary to the patient-litigant exception of Section 996. When a patient has placed his or her mental condition in issue by instituting a proceeding to establish mental competence, the patient should not be permitted to withhold essential evidence from the decision maker. 7 Cal. L. Rev. Comm. Rep. 1 (1965). *See also* Analysis of Section 990.



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SECTION 1006 Exception: Required Report

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§ 1006.syn Synopsis to Chapter 1006: Exception: Required Report

Scope Exception: Required Report

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SECTION 1006 Exception: Required Report

1-1006 California Evidence Courtroom Manual Scope

Scope Exception: Required Report

§ 1006 reads as follows:

Rule 1006 Exception: Required Report

There is no privilege under this article as to information that the physician or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

See Analysis of Section 990.



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2 COMPARISON TO FEDERAL RULE

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SECTION 1007 Exception: Proceeding to Terminate Right, License or Privilege

1-1007 California Evidence Courtroom Manual 1007.syn

§ 1007.syn Synopsis to Chapter 1007: Exception: Proceeding to Terminate Right, License or Privilege

Scope Exception: Proceeding to Terminate Right, License or Privilege

1 ANALYSIS

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1-1007 California Evidence Courtroom Manual Scope

Scope Exception: Proceeding to Terminate Right, License or Privilege

§ 1007 reads as follows:

Rule 1007 Exception: Proceeding to Terminate Right, License or Privilege

There is no privilege under this article in a proceeding brought by a public entity to determine whether a right, authority, license, or privilege (including the right or privilege to be employed by the public entity or to hold a public office) should be revoked, suspended, terminated, limited, or conditioned.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

See Analysis of Section 990. *Government Code* section 11513 governs the applicability of privilege provisions in administrative proceedings.



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§ 1010.syn Synopsis to Chapter 1010: Psychotherapist

Scope Psychotherapist

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1-1010 California Evidence Courtroom Manual Scope

Scope Psychotherapist

§ 1010 reads as follows:

Rule 1010 Psychotherapist

As used in this article, "psychotherapist" means a person who is, or is reasonably believed by the patient to be:

- (a) A person authorized to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry.
- (b) A person licensed as a psychologist under Chapter 6.6 (commencing with *Section 2900*) of *Division 2 of the Business and Professions Code*.
- (c) A person licensed as a clinical social worker under Article 4 (commencing with *Section 4996*) of *Chapter 14 of Division 2 of the Business and Professions Code*, when he or she is engaged in applied psychotherapy of a nonmedical nature.
- (d) A person who is serving as a school psychologist and holds a credential authorizing that service issued by the state.
- (e) A person licensed as a marriage and family therapist under Chapter 13 (commencing with *Section 4980*) of *Division 2 of the Business and Professions Code*.
- (f) A person registered as a psychological assistant who is under the supervision of a licensed psychologist or board certified psychiatrist as required by *Section 2913 of the Business and Professions Code*, or a person registered as a marriage and family therapist intern who is under the supervision of a licensed marriage and family therapist, a licensed clinical social worker, a licensed psychologist, or a licensed physician certified in psychiatry, as specified in *Section 4980.44 of the Business and Professions Code*.

(g) A person registered as an associate clinical social worker who is under the supervision of a licensed clinical social worker, a licensed psychologist, or a board certified psychiatrist as required by *Section 4996.20 or 4996.21 of the Business and Professions Code*.

(h) A person exempt from the Psychology Licensing Law pursuant to subdivision (d) of *Section 2909 of the Business and Professions Code* who is under the supervision of a licensed psychologist or board certified psychiatrist.

(i) A psychological intern as defined in *Section 2911 of the Business and Professions Code* who is under the supervision of a licensed psychologist or board certified psychiatrist.

(j) A trainee, as defined in subdivision (c) of *Section 4980.03 of the Business and Professions Code*, who is fulfilling his or her supervised practicum required by subdivision (b) of *Section 4980.40 of the Business and Professions Code* and is supervised by a licensed psychologist, board certified psychiatrist, a licensed clinical social worker, or a licensed marriage and family therapist.

(k) A person licensed as a registered nurse pursuant to Chapter 6 (commencing with *Section 2700*) of *Division 2 of the Business and Professions Code*, who possesses a master's degree in psychiatric-mental health nursing and is listed as a psychiatric-mental health nurse by the Board of Registered Nursing.

(l) An advanced practice registered nurse who is certified as a clinical nurse specialist pursuant to Article 9 (commencing with *Section 2838*) of *Chapter 6 of Division 2 of the Business and Professions Code* and who participates in expert clinical practice in the specialty of psychiatric-mental health nursing.

(m) A person rendering mental health treatment or counseling services as authorized pursuant to *Section 6924 of the Family Code*.

(Stats. 1965, ch. 299, §§ 2, eff. Jan. 1, 1967. Amended by Stats. 1967, ch. 1677, p. 4211, § 3; Stats. 1970, ch. 1396, p. 2624, § 1.5; Stats. 1970, ch. 1397, p. 2626, § 1.5; Stats. 1972, ch. 888, p. 1584, § 1; Stats. 1974, ch. 546, p. 1359, § 16; Stats. 1983, ch. 928, § 8; Stats. 1987, ch. 724, § 1; Stats. 1988, ch. 488, § 1; Stats. 1989, ch. 1104, § 37; Stats. 1990, ch. 662 (A.B. 3613), § 1; Stats. 1992, ch. 308 (A.B. 3035), § 2; Stats. 1994, ch. 1270 (A.B. 2659), § 1; Stats. 2001, ch. 142 (S.B. 716), § 1; Stats. 2001, ch. 420 (A.B. 1253), § 1, eff. Oct. 2, 2001; Stats. 2001, ch. 420 (A.B. 1253), § 1.5, eff. Oct. 2, 2001, eff. Jan. 1, 2002)

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1 ANALYSIS

Unlike the physician-patient privilege, the psychotherapist-patient privilege has broad application. The rationale for the more generous application of privilege is that psychoanalysis and psychotherapy are dependent upon the most candid and complete revelation of the most intimate details of the patient's life. Without an assurance of complete confidentiality, a patient might be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends.



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2 COMPARISON TO FEDERAL RULE

Communication between a patient and social worker occurring in the course of psychotherapy sessions is privileged under *Federal Rule of Evidence 501*, according to the Supreme Court in *Jaffee v. Redmond* (*Jaffee v. Redmond* (1996) 518 U.S. 1). The Court noted that Rule 501 allows federal courts to define new evidentiary privileges as dictated by interpretation of the principles of common law and by reason and experience. In that light, it found that a psychotherapist privilege is supported both by private and public interests. The privilege serves private interests by promoting the confidence and trust necessary for effective psychotherapy. The Court recognized that the possibility that confidential information shared with a psychotherapist could be disclosed "may impede development of the confidential relationship needed for successful treatment." The privilege also serves the public interest in that, by facilitating effective treatment, it promotes the mental and emotional health of the citizenry.

The psychotherapist privilege extends not only to psychiatrists and psychologists, but also to social workers performing psychotherapy. Recognizing that a significant amount of mental health treatment is provided by social workers, the Court saw no reason to distinguish between professionals whose counseling services further the same public goals. California law is essentially the same. Under Section 1010(c), the privilege would cover licensed social workers.



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3 SIGNIFICANT CASES

In re Mark L. (2002) 94 Cal. App. 4th 573, 114 Cal. Rptr. 2d 499 (Section 1012 allows a psychotherapist to provide court with limited information needed to make an informed decision on future conjoint therapy or visitation at a reunification hearing even if the child invokes the patient-psychotherapist privilege; legislature did not intend, by amending *Welfare and Institutions Code section 317(f)* to allow dependent child of "sufficient age and maturity" to invoke the privilege, to prevent therapist from disclosing information that the court needs to make reasoned recommendations and decisions regarding the child's welfare).

In re Kristine W. (2001) 94 Cal. App. 4th 521, 114 Cal. Rptr. 2d 369 (court could compel minor's therapist to disclose confidential communications between minor and therapist to agency social worker to protect the minor in dependency proceedings).

Pollock v. Superior Court (2001) 93 Cal. App. 4th 817, 113 Cal. Rptr. 2d 453 (in bad faith action against insurer, appellate court denied discovery of identity of other insureds whose psychiatric disability claims had been denied, holding that the information would necessarily violate the psychotherapist-patient privilege by revealing that the individual suffered from mental or emotional problems).

People v. Felix (2001) 92 Cal. App. 4th 905, 112 Cal. Rptr. 2d 311 (although Section 1024 creates an exception to the psychotherapist-patient privilege, trial court erred in excluding content of alleged threat defendant made against potential victim during psychotherapy session; evidence failed to show that therapist communicated threat to intended victim).

San Diego Trolley, Inc. v. Superior Court (2001) 87 Cal. App. 4th 1083, 105 Cal. Rptr. 2d 476 (waiver of psychotherapist-patient privilege must be narrowly construed; to be effective waiver must be made voluntarily and with sufficient awareness of the relevant circumstances and likely consequences of disclosure; although patients may waive the statutory psychotherapist-patient privilege by putting their mental state at issue in litigation, they do not lose other privacy rights under California law; court held that communications between psychotherapist and patient were not waived by patient's disclosure in deposition that she was being treated for anxiety; patient's personnel records were protected by the state and federal Constitutions unless the party seeking discovery could show a compelling need for the

documents and that the information could not be obtained from non-confidential sources).

People v. Castro (1994) 30 Cal. App. 4th 390, 35 Cal. Rptr. 2d 839 (for policy reasons, psychotherapist-patient privilege is broadly construed in favor of patient and exceptions to privilege are narrowly construed. Though psychotherapist-patient privilege is part of patient's constitutional right to privacy, it is not absolute and may yield in furtherance of compelling state interests).



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SECTION 1010.5 Privileged Communication Between Patient and Educational Psychologist

1-1010.5 California Evidence Courtroom Manual 1010.5.syn

§ 1010.5.syn Synopsis to Chapter 1010.5: Privileged Communication Between Patient and Educational Psychologist

Scope Privileged Communication Between Patient and Educational Psychologist

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1-1010.5 California Evidence Courtroom Manual Scope

Scope Privileged Communication Between Patient and Educational Psychologist

§ 1010.5 reads as follows:

1010.5 Privileged Communication Between Patient and Educational Psychologist

A communication between a patient and an educational psychologist, licensed under Article 5 (commencing with *Section 4986*) of *Chapter 13 of Division 2 of the Business and Professions Code*, shall be privileged to the same extent, and subject to the same limitations, as a communication between a patient and a psychotherapist described in subdivisions (c), (d), and (e) of *Section 1010*.

(Added by Stats. 1985, ch. 545, § 1)

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1 ANALYSIS

Section 1010.5 extends the already broad definition of "psychotherapist" provided by Section 1010 to licensed educational psychologists.



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2 COMPARISON TO FEDERAL RULE

There is no comparable federal rule, but Proposed Federal Rule of Evidence 504, which would have created a federal psychotherapist-patient privilege, has been cited with approval and used as a model for the common law development of the privilege under Federal Rule of Evidence 501. See *Jaffee v. Redmond* (1996) 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337.



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§ 1011.syn Synopsis to Chapter 1011: Patient

Scope Patient

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SECTION 1011 Patient

1-1011 California Evidence Courtroom Manual Scope

Scope Patient

§ 1011 reads as follows:

Rule 1011 Patient

As used in this article, "patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

In some respects, the psychotherapist-patient privilege has been interpreted broadly. For example, the definition of "patient" has been extended to include all relevant communications to psychotherapist and to psychiatric personnel by intimate family members of the patient. *Grosslight v. Superior Court* (1977) 72 Cal. App. 3d 502, 140 Cal. Rptr. 278 .



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2 COMPARISON TO FEDERAL RULE

See Comparison to Federal Rule in Sections 1010, 1010.5.



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3 SIGNIFICANT CASES

Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 15 Cal. Rptr. 3d 864 (in a wrongful death action against therapist brought by parents of victim killed by therapist's patient, based on therapist's failure to warn victim after therapist received communication of patient's threat from patient's father, Court of Appeals held that a communication between a patient's family members and the patient's therapist, made in the course of or functionally related to the diagnosis and treatment of the patient, also is protected by the psychotherapist-patient privilege; nevertheless, the therapist's duty to protect that information must yield once the therapist comes to believe the information must be revealed to prevent danger to his or her patient or another; no principled reason exists why equally important information in the form of an actual threat that a parent shares with his or her son's therapist about the risk of grave bodily injury the patient poses to another also should not be considered a "patient communication" in determining whether the therapist's duty to warn is triggered).

Story v. Superior Court (2003) 109 Cal. App. 4th 1007, 135 Cal. Rptr. 2d 532 (Court of Appeals held as matter of first impression that the fact that a defendant was motivated to attend psychotherapy as a means to obtain probation for prior offense was immaterial, for purposes of determining whether defendant was a patient within meaning of the psychotherapist-patient privilege statute and records of that psychotherapy were privileged; prosecution did not rebut the statutory presumption of confidentiality by analogizing to discovery of unprivileged psychotherapy records under the dangerous patient exception in the Sexually Violent Predators Act (*Welfare and Institutions Code section 6600 et seq.*); a defendant who has been granted probation is not comparable to a person who has been committed under this act).

In re Tabitha G. (1996) 45 Cal. App. 4th 1159, 53 Cal. Rptr. 2d 93 (mother was not a "patient" for purposes of the privilege and was not the subject of scientific research or seeking diagnosis or treatment of emotional condition in participating in a "bonding" study examining the relationship of mother and daughter for purposes of terminating parental rights).



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SECTION 1012 Confidential Communication Between Patient and Psychotherapist

1-1012 California Evidence Courtroom Manual 1012.syn

§ 1012.syn Synopsis to Chapter 1012: Confidential Communication Between Patient and Psychotherapist

Scope Confidential Communication Between Patient and Psychotherapist

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SECTION 1012 Confidential Communication Between Patient and Psychotherapist

1-1012 California Evidence Courtroom Manual Scope

Scope Confidential Communication Between Patient and Psychotherapist

§ 1012 reads as follows:

Rule 1012 Confidential Communication Between Patient and Psychotherapist

As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1967, ch. 650, § 5; Stats. 1970, ch. 1396, § 2; Stats. 1970, ch. 1397, § 2)

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1 ANALYSIS

Section 1012 sets forth the basic parameters regarding the psychotherapist-patient privilege. The statute was amended in 1969 to take into account the unique circumstance of communications made during the course of group therapy. Ordinarily, the presence of persons not strictly necessary to further the aims of the relationship, such as an agent of the therapist, would destroy the existence of the privilege. The phrase "including other patients present at joint therapy" [was] added in order to foreclose the possibility that the section would be construed not to embrace marriage counseling, family counseling, and other forms of group therapy. However, the Law Revision Commission cautioned that communications made in the course of joint therapy are within the privilege only if they are made "in confidence" and "by a means which ... discloses the information to no third persons other than those ... to whom disclosure is reasonably necessary for ... the accomplishment of the purpose for which the psychotherapist is consulted." 9 Cal. L. Rev. Comm. Rep. 153 (1969).



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2 COMPARISON TO FEDERAL RULE

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3 SIGNIFICANT CASES

Menendez v. Superior Court (1992) 3 Cal. 4th 435, 11 Cal. Rptr. 2d 92, 834 P.2d 786 (psychotherapist-patient privilege applied to communications made by patients during therapy session, even though sessions took place under conditions of threat; dispositive issue is what the patient does in therapy (to qualify under an exception), not why he goes into therapy).

In re Mark L. (2002) 94 Cal. App. 4th 573, 114 Cal. Rptr. 2d 499 (Section 1012 allows a psychotherapist to provide court with limited information needed to make an informed decision on future conjoint therapy or visitation at a reunification hearing even if the child invokes the patient-psychotherapist privilege; legislature did not intend, by amending *Welfare and Institutions Code* section 317(f) to allow dependent child of "sufficient age and maturity" to invoke the privilege, to prevent therapist from disclosing information that the court needs to make reasoned recommendations and decisions regarding the child's welfare).

Poliak v. Board of Psychology (1997) 55 Cal. App. 4th 342, 63 Cal. Rptr. 2d 866 (the privilege applies only to confidential communications between patient and psychotherapist during their professional relationship, but that privilege continues to protect the protected communications after the termination of the relationship).

In re Tabitha G. (1996) 45 Cal. App. 4th 1159, 53 Cal. Rptr. 2d 93 (mother was not a "patient" for purposes of the privilege and was not the subject of scientific research or seeking diagnosis or treatment of emotional condition in participating in a "bonding" study examining the relationship of mother and daughter for purposes of terminating parental rights).

People v. Castro (1994) 30 Cal. App. 4th 390, 35 Cal. Rptr. 2d 839 (proposed testimony of family therapist indicating that alleged child molestation victim's allegations of molestation were projections of alleged victim's own severe emotional problems was "diagnosis" protected by psychotherapist-patient privilege, and did not fall within exception to privilege for disclosure of belief that patient has been victim of crime, as therapist did not believe that alleged victim had been victim of crime).

People v. Cabral (1993) 12 Cal. App. 4th 820, 15 Cal. Rptr. 2d 866 (statutory requirement that person asserting

psychotherapist-patient privilege must have consulted psychotherapist for purpose of securing diagnosis or treatment of his mental or emotional condition will be strictly construed. Under "dominant purpose test," defendant charged with sexually abusing his daughter could not assert psychotherapist-patient privilege with respect to letter from defendant to psychotherapist where defendant's asserted purpose in writing to psychotherapist was to enter rehabilitative program and thus avoid prison sentence. Nowhere in his testimony did defendant suggest that even part of his purpose was to receive treatment).

Farrell L. v. Superior Court (1988) 203 Cal. App. 3d 521, 250 Cal. Rptr. 25 (witness's communication with other participants in group therapy comes within psychotherapist-patient privilege, and this privilege may be overridden only if and to extent necessary to insure defendant's constitutional rights of confrontation).



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SECTION 1013 Holder of the Privilege

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§ 1013.syn Synopsis to Chapter 1013: Holder of the Privilege

Scope Holder of the Privilege

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SECTION 1013 Holder of the Privilege

1-1013 California Evidence Courtroom Manual Scope

Scope Holder of the Privilege

§ 1013 reads as follows:

Rule 1013 Holder of the Privilege

As used in this article, "holder of the privilege" means:

- (a) The patient when he has no guardian or conservator.
- (b) A guardian or conservator of the patient when the patient has a guardian or conservator.
- (c) The personal representative of the patient if the patient is dead.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

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2 COMPARISON TO FEDERAL RULE

See Comparison to Federal Rule in Sections 1010, 1010.5.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1969, ch. 1436, § 1; Stats. 1972, ch. 1286, § 6; Stats. 1989, ch. 1104, § 38; Stats. 1990, ch. 605 (S.B. 2245), § 1; Stats. 1994, ch. 1010 (S.B. 2053), § 106; Stats. 2002, ch. 1013 (S.B. 2026), § 78)



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SECTION 1014 Who May Claim the Privilege

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§ 1014.syn Synopsis to Chapter 1014: Who May Claim the Privilege

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DIVISION 8 PRIVILEGES
CHAPTER 4 PARTICULAR PRIVILEGES
ARTICLE 7 PSYCHOTHERAPIST-PATIENT PRIVILEGE
SECTION 1014 Who May Claim the Privilege

1-1014 California Evidence Courtroom Manual Scope

Scope Who May Claim the Privilege

§ 1014 reads as follows:

Rule 1014 Who May Claim the Privilege

Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

- (a) The holder of the privilege.
- (b) A person who is authorized to claim the privilege by the holder of the privilege.
- (c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with *Section 2995*) of *Chapter 6.6 of Division 2 of the Business and Professions Code*, a marriage and family therapy corporation as defined in Article 6 (commencing with *Section 4987.5*) of *Chapter 13 of Division 2 of the Business and Professions Code*, or a licensed clinical social workers corporation as defined in Article 5 (commencing with *Section 4998*) of *Chapter 14 of Division 2 of the Business and Professions Code*, and the patient to whom it renders professional services, as well as between those patients and psychotherapists employed by those corporations to render services to those patients. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1969, ch. 1436, § 1; Stats. 1972, ch. 1286, § 6; Stats. 1989, ch. 1104, § 38; Stats. 1990, ch. 605 (S.B. 2245), § 1; Stats. 1994, ch. 1010 (S.B. 2053), § 106; Stats. 2002, ch. 1013 (S.B. 2026), § 78)

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1 ANALYSIS

See Analysis of Sections 1010, 1010.5.



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2 COMPARISON TO FEDERAL RULE

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3 SIGNIFICANT CASES

Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 15 Cal. Rptr. 3d 864 (in a wrongful death action against therapist brought by parents of victim killed by therapist's patient, based on therapist's failure to warn victim after therapist received communication of patient's threat from patient's father, Court of Appeals held that a communication between a patient's family members and the patient's therapist, made in the course of or functionally related to the diagnosis and treatment of the patient, also is protected by the psychotherapist-patient privilege; nevertheless, the therapist's duty to protect that information must yield once the therapist comes to believe the information must be revealed to prevent danger to his or her patient or another; no principled reason exists why equally important information in the form of an actual threat that a parent shares with his or her son's therapist about the risk of grave bodily injury the patient poses to another also should not be considered a "patient communication" in determining whether the therapist's duty to warn is triggered).

Story v. Superior Court (2003) 109 Cal. App. 4th 1007, 135 Cal. Rptr. 2d 532 (Court of Appeals held as matter of first impression that the fact that a defendant was motivated to attend psychotherapy as a means to obtain probation for prior offense was immaterial, for purposes of determining whether defendant was a patient within meaning of the psychotherapist-patient privilege statute and records of that psychotherapy were privileged; prosecution did not rebut the statutory presumption of confidentiality by analogizing to discovery of unprivileged psychotherapy records under the dangerous patient exception in the Sexually Violent Predators Act (*Welfare and Institutions Code section 6600 et seq.*); a defendant who has been granted probation is not comparable to a person who has been committed under this act).

Garcetti v. Superior Court (2000) 85 Cal. App. 4th 782, 102 Cal. Rptr. 2d 440 (psychotherapist-patient privilege was not absolute and must yield to compelling state interests, including detaining mentally disordered offenders so as to provide them treatment and protect the public; in evaluating prisoner for civil commitment as a sexually violent predator, Department of Mental Health evaluators could consider prisoner's therapy records).

Nielsen v. Superior Court (1997) 55 Cal. App. 4th 1150, 64 Cal. Rptr. 2d 566 (the psychotherapist-patient privilege is to be broadly construed in favor of the patient; thus party must initially show good cause for the discovery and, given such a showing, the trial court must examine the records *in camera* to decide whether defendants' right of confrontation

can be adequately protected by access to nonprivileged material and, if not, the extent to which access to privileged material was necessary for that purpose).

People v. Dancer (1996) 45 Cal. App. 4th 1677, 53 Cal. Rptr. 2d 282 ("To obtain a *Reber* view [of privileged material], defendant must establish 'good cause' for doing so" which means defendant "must describe the records 'with reasonable specificity' and prove a 'plausible justification' for providing them").

In re Daniel C.H. (1990) 220 Cal. App. 3d 814, 269 Cal. Rptr. 624 (attorney representing minor in juvenile dependency proceeding could claim psychotherapist-patient privilege on behalf of the minor).



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SECTION 1015 When Psychotherapist Required to Claim Privilege

1-1015 California Evidence Courtroom Manual 1015.syn

§ 1015.syn Synopsis to Chapter 1015: When Psychotherapist Required to Claim Privilege

Scope When Psychotherapist Required to Claim Privilege

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1-1015 California Evidence Courtroom Manual Scope

Scope When Psychotherapist Required to Claim Privilege

§ 1015 reads as follows:

Rule 1015 When Psychotherapist Required to Claim Privilege

The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

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3 SIGNIFICANT CASES

Roberts v. Superior Court (1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309 (psychotherapist has no power to waive patient's privilege and has a duty to assert privilege whenever he is present and privileged communication is sought to be disclosed).



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SECTION 1016 Exception: Patient-Litigant

1-1016 California Evidence Courtroom Manual 1016.syn

§ 1016.syn Synopsis to Chapter 1016: Exception: Patient-Litigant

Scope Exception: Patient-Litigant

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SECTION 1016 Exception: Patient-Litigant

1-1016 California Evidence Courtroom Manual Scope

Scope Exception: Patient-Litigant

§ 1016 reads as follows:

Rule 1016 Exception: Patient-Litigant

There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

- (a) The patient;
- (b) Any party claiming through or under the patient;
- (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
- (d) The plaintiff in an action brought under *Section 376 or 377 of the Code of Civil Procedure* for damages for the injury or death of the patient.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1016 Exception: Patient-Litigant

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1 ANALYSIS

Section 1016 provides a patient-litigant exception for the psychotherapist-patient privilege. However, this exception tends to be interpreted more narrowly than its counterpart for the physician-patient privilege, or even the related waiver doctrine of affirmative reliance in the attorney-client context. This is because of the heightened privacy interest at stake where the privileged information concerns the innermost thoughts and feelings of the patient receiving psychotherapy. Thus, a party seeking to obtain or to use such information in evidence must show a clear connection between the sought after information and the issues placed in controversy by the patient. *See, e.g., Roberts v. Superior Court (1973) 9 Cal. 3d 330, 107 Cal. Rptr. 309, 508 P.2d 309* (where there is no specific mental condition of patient at issue, and discovery of privileged communications with psychotherapist is sought merely upon speculation that there may be connection between patient's past psychiatric treatment and some "mental component" of his present injury, communications remain protected). *See also Code of Civil Procedure section 2032* (requiring court order for mental examination).



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3 SIGNIFICANT CASES

People v. Ledesma (2006) 39 Cal. 4th 641, 47 Cal. Rptr. 3d 326, 140 P.3d 657 (holding, as a question of first impression, that the attorney-client privilege continues to apply for purposes of retrial after otherwise privileged matters have been disclosed in connection with habeas corpus proceedings based on ineffective assistance of counsel (relying on *Evidence Code* section 958), but finding that defendant waived the protections of privilege as to his statements to psychotherapist by presenting the testimony of other experts who had reviewed and considered psychotherapist's report and his testimony at the habeas corpus hearing).

People v. Mickle (1991) 54 Cal. 3d 140, 284 Cal. Rptr. 511, 814 P.2d 290 (patient-litigant exception to psychotherapist privilege authorizes disclosure of otherwise privileged matters bearing directly upon emotional or mental condition voluntarily disclosed by patient; defendant waived psychotherapist-patient privilege during penalty phase of capital murder trial by testifying that mental problems had prompted his admission into mental hospital and continued through his incarceration at another hospital following his arrest).

People v. Wharton (1991) 53 Cal. 3d 522, 280 Cal. Rptr. 631, 809 P.2d 290 (defendant, whose counsel stated that, if psychotherapist took witness stand, counsel would cross-examine psychotherapist as to whether he made diagnosis of defendant, placed his mental state in issue, thus waiving psychotherapist-patient privilege, despite defendant's contention that waiver was coerced by trial court's pretrial ruling that exception to privilege applied).

In re Daniel C.H. (1990) 220 Cal. App. 3d 814, 269 Cal. Rptr. 624 (child who was allegedly molested by his father did not tender his mental condition by complaining of his molestation).

People v. Caplan (1987) 193 Cal. App. 3d 543, 238 Cal. Rptr. 478, *overruled*, 15 Cal. 4th 1117 (trial court should have reviewed records, notes or files of complainant's psychotherapist *in camera* prior to denying suspected child abuser's discovery request).

Simek v. Superior Court (1981) 117 Cal. App. 3d 169, 172 Cal. Rptr. 564 (mother who had been awarded physical custody of minor children could not compel disclosure of records otherwise protected by the psychotherapist-patient and physician-patient privileges in order to demonstrate that father suffered from emotional instability of such nature

that he was not entitled to visitation rights, since father did not waive his privilege simply by asserting his presumptive right of visitation).

Huelter v. Superior Court (1978) 87 Cal. App. 3d 544, 151 Cal. Rptr. 138 (in dissolution proceeding, wife's disclosure of certain physiological ailments which allegedly prevented her from seeking and obtaining gainful employment did not open the door to the entire issue of her physical and mental fitness, in absence of showing of connection between wife's psychiatric treatment and her ability to obtain employment, and the mere exchange of wife's psychiatric records between wife's psychiatrist and wife's internist in the normal course of internist's treatment of wife did not constitute waiver of the psychotherapist-patient privilege).



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SECTION 1017 Exception: Psychotherapist Appointed by Court or Board of Prison Terms

1-1017 California Evidence Courtroom Manual 1017.syn

§ 1017.syn Synopsis to Chapter 1017: Exception: Psychotherapist Appointed by Court or Board of Prison Terms

Scope Exception: Psychotherapist Appointed by Court or Board of Prison Terms

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1-1017 California Evidence Courtroom Manual Scope

Scope Exception: Psychotherapist Appointed by Court or Board of Prison Terms

§ 1017 reads as follows:

Rule 1017 Exception: Psychotherapist Appointed by Court or Board of Prison Terms

(a) There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

(b) There is no privilege under this article if the psychotherapist is appointed by the Board of Prison Terms to examine a patient pursuant to the provisions of Article 4 (commencing with *Section 2960*) of *Chapter 7 of Title 1 of Part 3 of the Penal Code*.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1967, ch. 650, § 6; Stats. 1987, ch. 687, § 1)

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1 ANALYSIS

Section 1017 creates a commonsense exception to the psychotherapist-patient privilege. Where a criminal defendant consults with a psychotherapist under court order for purposes other than diagnosis and treatment, here in order to have the defendant's mental state assessed for trial or appropriate conditions of incarceration, there is no rationale for the privilege. However, under subdivision (b), where a criminal defendant's lawyer requires the assistance of a court-appointed psychotherapist in order to adequately advise the defendant of his or her best defense, the privilege is maintained.



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2 COMPARISON TO FEDERAL RULE

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1-1017 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Angulo (2005) 129 Cal. App. 4th 1349, 30 Cal. Rptr. 3d 189 , as mod. on denial of reh'g, review denied (the rule set forth in section 1017, that the psychotherapist-patient privilege applies to a court-appointed expert in a criminal proceeding, should not apply in an Sexually Violent Predators Act (SVPA) proceeding because if defendant's expert concluded he was no longer dangerous, defendant would not want to keep that conclusion confidential; thus, trial court's denial of confidential experts did not violate the psychotherapist-patient privilege).

In re Eduardo A. (1989) 209 Cal. App. 3d 1038, 261 Cal. Rptr. 68 (juvenile court referral for counseling does not constitute court-ordered examination of patient by psychotherapist within meaning of exception to patient-psychotherapist privilege in this section).



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SECTION 1018 Exception: Crime or Tort

1-1018 California Evidence Courtroom Manual 1018.syn

§ 1018.syn Synopsis to Chapter 1018: Exception: Crime or Tort

Scope Exception: Crime or Tort

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1-1018 California Evidence Courtroom Manual Scope

Scope Exception: Crime or Tort

§ 1018 reads as follows:

Rule 1018 Exception: Crime or Tort

There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1018 adopts a broad exception to the privilege where the services of the psychotherapist are used to further criminal or tortious conduct on the part of the patient. This exception is identical to that created for the physician-patient privilege. *See Section 997.*



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SECTION 1019 Exception: Parties Claiming Through Deceased Patient

1-1019 California Evidence Courtroom Manual 1019.syn

§ 1019.syn Synopsis to Chapter 1019: Exception: Parties Claiming Through Deceased Patient

Scope Exception: Parties Claiming Through Deceased Patient

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1-1019 California Evidence Courtroom Manual Scope

Scope Exception: Parties Claiming Through Deceased Patient

§ 1019 reads as follows:

Rule 1019 Exception: Parties Claiming Through Deceased Patient

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This exception is based on need for the information and the assumption that the patient would want to waive the privacy interest in the privileged information in order to carry out his or her intentions regarding the patient's estate. Section 1000 creates an identical exception to the physician-patient privilege.



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SECTION 1020 Exception: Breach of Duty Arising Out of Psychotherapist-Patient Relationship

1-1020 California Evidence Courtroom Manual 1020.syn

§ 1020.syn Synopsis to Chapter 1020: Exception: Breach of Duty Arising Out of Psychotherapist-Patient Relationship

Scope Exception: Breach of Duty Arising Out of Psychotherapist-Patient Relationship

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1-1020 California Evidence Courtroom Manual Scope

Scope Exception: Breach of Duty Arising Out of Psychotherapist-Patient Relationship

§ 1020 reads as follows:

Rule 1020 Exception: Breach of Duty Arising Out of Psychotherapist-Patient Relationship

There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

(Stats. 1965, ch. 299, § 2, effective Jan. 1, 1967)

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1 ANALYSIS

Section 1020 creates an exception based in fairness. Where the patient alleges a breach of duty on the part of the psychotherapist, the psychotherapist ought not to be constrained by privilege in attempts to defend him or herself against the patient's allegations. Section 1001 creates an identical exception to the physician-patient privilege.



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SECTION 1021 Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

1-1021 California Evidence Courtroom Manual 1021.syn

§ 1021.syn Synopsis to Chapter 1021: Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

Scope Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

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1-1021 California Evidence Courtroom Manual Scope

Scope Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

§ 1021 reads as follows:

Rule 1021 Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1021 is based on need for the information and the assumption that the patient, now deceased, would want to waive the privacy interest in the privileged information in order to carry out his or her intentions regarding his or her estate. Section 1002 creates an identical exception to the physician-patient privilege.



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2 COMPARISON TO FEDERAL RULE

See Comparison to Federal Rule in Sections 1010 to 1012.



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1-1022 California Evidence Courtroom Manual 1022.syn

§ 1022.syn Synopsis to Chapter 1022: Exception: Validity of Writing Affecting Property Interest

Scope Exception: Validity of Writing Affecting Property Interest

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1-1022 California Evidence Courtroom Manual Scope

Scope Exception: Validity of Writing Affecting Property Interest

§ 1022 reads as follows:

Rule 1022 Exception: Validity of Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1022 is based on need for certain information to determine proper ownership of property and the assumption that the patient, now deceased, would want to waive the privacy interest in the privileged information in order to ensure that his or her property interests are adequately protected. Section 1022 differs from Section 1021 in that the communication covered by Section 1022 relates to the actual validity of a writing purporting to affect an interest in property, such as a deed or a will, as opposed to revealing the patient's intentions in disposing of such property, which is covered by Section 1021. Section 1003 creates an exception identical to Section 1022 for the physician-patient privilege.



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SECTION 1023 Exception: Proceeding to Determine Sanity of Criminal Defendant

1-1023 California Evidence Courtroom Manual 1023.syn

§ 1023.syn Synopsis to Chapter 1023: Exception: Proceeding to Determine Sanity of Criminal Defendant

Scope Exception: Proceeding to Determine Sanity of Criminal Defendant

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1-1023 California Evidence Courtroom Manual Scope

Scope Exception: Proceeding to Determine Sanity of Criminal Defendant

§ 1023 reads as follows:

Rule 1023 Exception: Proceeding to Determine Sanity of Criminal Defendant

There is no privilege under this article in a proceeding under Chapter 6 (commencing with *Section 1367*) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1023 creates an exception to the psychotherapist-patient privilege where a criminal defendant consults with a psychotherapist for purposes other than diagnosis and treatment, here in order to have the defendant's mental state assessed for trial. Section 1016, the patient-litigant exception, would presumably also cover this situation. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965) (suggesting that this section was unnecessary given Section 1016).



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SECTION 1024 Exception: Patient Dangerous to Himself or Others

1-1024 California Evidence Courtroom Manual 1024.syn

§ 1024.syn Synopsis to Chapter 1024: Exception: Patient Dangerous to Himself or Others

Scope Exception: Patient Dangerous to Himself or Others

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SECTION 1024 Exception: Patient Dangerous to Himself or Others

1-1024 California Evidence Courtroom Manual Scope

Scope Exception: Patient Dangerous to Himself or Others

§ 1024 reads as follows:

Rule 1024 Exception: Patient Dangerous to Himself or Others

There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1024 Exception: Patient Dangerous to Himself or Others

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1 ANALYSIS

Section 1024 creates a difficult exception to the psychotherapist-patient privilege. On the one hand, there is a strong public policy interest in allowing psychotherapists to disclose privileged communications where the patient poses a danger to him or herself or to others. On the other hand, this exception does interpose a potential barrier in the free and full disclosure of the deep and potentially disturbing thoughts of the mentally ill, disclosure which is necessary to provide adequate diagnosis and treatment. The exception places the burden on the psychotherapist to determine whether disclosure is "necessary to prevent the threatened danger." The therapist's situation was further complicated by the California Supreme Court's decision in *Tarasoff v. Regents of University of California* (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334, which recognized a duty on the part of a psychotherapist to disclose otherwise privileged information where such disclosure is necessary to avert danger to others. See also Section 1027 (child crime victims).



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2 COMPARISON TO FEDERAL RULE

See Comparison to Federal Rule in Sections 1010, 1010.5. In *Jaffee v. Redmond* (1996) 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337, the United States Supreme Court, in dicta in a footnote suggested that there are some circumstances under which the privilege might need to give way to the greater social need for the communications, such as "serious threat of harm to the patient or to others."



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3 SIGNIFICANT CASES

Menendez v. Superior Court (1992) 3 Cal. 4th 435, 11 Cal. Rptr. 2d 92, 834 P.2d 786 (psychotherapist's warning to possible victim of patient is not privileged under psychotherapist-patient privilege, so long as requirements of "dangerous patient" exception are met; patient need not be "dangerous" to a person in addition to psychotherapist).

People v. Wharton (1991) 53 Cal. 3d 522, 280 Cal. Rptr. 631, 809 P.2d 290 (where psychotherapist warns victim, who later dies, of danger from patient, this section permits psychotherapist to reveal, in later trial or proceeding, both substance of warning and patient's statements, made in therapy, which caused or triggered warning; exception does not extend to communications outside those that "triggered" psychotherapist's decision to warn potential victim).

Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 15 Cal. Rptr. 3d 864 (in a wrongful death action against therapist brought by parents of victim killed by therapist's patient, based on therapist's failure to warn victim after therapist received communication of patient's threat from patient's father, Court of Appeals held that a communication between a patient's family members and the patient's therapist, made in the course of or functionally related to the diagnosis and treatment of the patient, also is protected by the psychotherapist-patient privilege; nevertheless, the therapist's duty to protect that information must yield once the therapist comes to believe the information must be revealed to prevent danger to his or her patient or another; no principled reason exists why equally important information in the form of an actual threat that a parent shares with his or her son's therapist about the risk of grave bodily injury the patient poses to another also should not be considered a "patient communication" in determining whether the therapist's duty to warn is triggered).

Luhdorff v. Superior Court (1985) 166 Cal. App. 3d 485, 212 Cal. Rptr. 516 (trial court's finding that certain records were discoverable because defendant was danger to other persons could not be based solely on defendant's alleged past conduct with victim; only evidence of future danger presented was that defendant made statements in past concerning suicide, and suicidal feelings resulted from remorse and feelings of guilt).



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1-1025 California Evidence Courtroom Manual 1025.syn

§ 1025.syn Synopsis to Chapter 1025: Exception: Proceeding to Establish Competence

Scope Exception: Proceeding to Establish Competence

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1-1025 California Evidence Courtroom Manual Scope

Scope Exception: Proceeding to Establish Competence

§ 1025 reads as follows:

Rule 1025 Exception: Proceeding to Establish Competence

There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1025 creates an exception to the psychotherapist-patient privilege that follows from the rationale behind the privilege. Where a patient consults with a psychotherapist for purposes other than diagnosis and treatment, here in order to have the psychotherapist determine his or her competency, the communications are not privileged.



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2 COMPARISON TO FEDERAL RULE

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SECTION 1026 Exception: Required Report

1-1026 California Evidence Courtroom Manual 1026.syn

§ 1026.syn Synopsis to Chapter 1026: Exception: Required Report

Scope Exception: Required Report

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1-1026 California Evidence Courtroom Manual Scope

Scope Exception: Required Report

§ 1026 reads as follows:

Rule 1026 Exception: Required Report

There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1026 Exception: Required Report

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1 ANALYSIS

The exception of Section 1026 follows from the terms of the privilege itself. The privilege only protects confidential communications between psychotherapist and patient; the privilege creates a zone of privacy which is deemed essential for the therapeutic process to function. Where either the psychotherapist or the patient is required to report information to a third party, such as a public employee, or where the information will be readily accessible to third parties, there is no confidentiality.



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SECTION 1027 Exception: Child Under 16 Victim of Crime

1-1027 California Evidence Courtroom Manual 1027.syn

§ 1027.syn Synopsis to Chapter 1027: Exception: Child Under 16 Victim of Crime

Scope Exception: Child Under 16 Victim of Crime

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1-1027 California Evidence Courtroom Manual Scope

Scope Exception: Child Under 16 Victim of Crime

§ 1027 reads as follows:

Rule 1027 Exception: Child Under 16 Victim of Crime

There is no privilege under this article if all of the following circumstances exist:

- (a) The patient is a child under the age of 16.
- (b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.

(Stats. 1970, ch. 1397, § 3)

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1 ANALYSIS

Section 1027 can be characterized as a necessary exception to the psychotherapist-patient privilege. Because of statutory reporting requirements, such as *Penal Code section 11166* (child abuse reporting act), psychotherapists cannot offer the same level of confidentiality to children as to adults. This exception is somewhat unique, however, in that it requires the psychotherapist to make two presumably subjective determinations: that the child has been a victim of a crime and that the disclosure is in the child's best interest. Section 1027 bears some relationship to Section 1024 (patient dangerous to self or others) in that they are based in the same value judgment that the need for the information in order to protect individuals from harm outweighs the desire to protect the privacy of the therapeutic relationship.



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1-1027 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Castro (1994) 30 Cal. App. 4th 390, 35 Cal. Rptr. 2d 839 (proposed testimony of family therapist indicating that alleged child molestation victim's allegations of molestation were projections of alleged victim's own severe emotional problems was "diagnosis" protected by psychotherapist/patient privilege, and did not fall within exception to privilege for disclosure of belief that patient has been victim of crime, as therapist did not believe that alleged victim had been victim of crime).

People v. Caplan (1987) 193 Cal. App. 3d 543, 238 Cal. Rptr. 478, overruled, 15 Cal. 4th 1117 (child could no longer assert privilege for statements which she had made to psychotherapist who was treating her for alleged abuse, so that trial court committed error of constitutional dimension when it limited defendant's cross-examination of child regarding statements; disclosures are in "best interest of child," for purpose of this section, not just if they consist of child's allegations of molestation, but also if they bear on truthfulness of those allegations and enable others to ascertain how child can best be treated).



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SECTION 1030 Clergy

1-1030 California Evidence Courtroom Manual 1030.syn

§ 1030.syn Synopsis to Chapter 1030: Clergy

Scope Clergy

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1-1030 California Evidence Courtroom Manual Scope

Scope Clergy

§ 1030 reads as follows:

Rule 1030 Clergy

As used in this article, a "member of the clergy" means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 2002, ch. 806 (A.B. 3027), § 19.)

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SECTION 1030 Clergy

*1-1030 California Evidence Courtroom Manual 1***1 ANALYSIS**

Sections 1030 et seq. recognize a privilege for confidential communications between a "penitent," as defined in Section 1031 and a "member of the clergy," as defined in Section 1030. Section 1032 sets forth the basic privilege, which focuses on whether the member of the clergy is authorized or accustomed to hearing such communications in the course of his or her religion and, under the tenets of that religion, has a duty to keep such communications confidential. The penitent-clergy privilege exists not only to protect religious practices but also to prevent the unseemly possibility of sending a member of the clergy to jail on contempt charges for refusal to divulge information that he or she is obligated to keep secret pursuant to his or her religious obligations. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965). Both the penitent and the member of the clergy are holders of the privilege. Sections 1033 (penitent); 1034 (clergy). Thus, even if the penitent waives the privilege, the member of the clergy may assert the privilege to protect his or her obligations to keep faithful to the religious tenets requiring clergy to keep such communications secret. Such a religious obligation, however, may be required to yield to the constitutional right under the *Sixth Amendment of the United States Constitution* to call and confront witnesses in criminal cases.

It is worth noting that Section 1032 covers "penitential communications," rather than "confessions." Thus, the rule covers more communications than simply those made within the traditional Catholic Sacrament of Confession, now called the Sacrament of Reconciliation. However, there are limits to the communications protected; they must be of the kind that the member of the clergy is both permitted to hear and is required to keep confidential. Thus, the court in *People v. Johnson* (1969) 270 Cal. App. 2d 204, 75 Cal. Rptr. 605 held that there was no privilege when defendant, while being pursued by police, crashed into a church and spoke to a minister inside when minister was sitting in his church office with door open dressed in a business suit. Under the circumstances, there were no facts to show that defendant felt the call of conversion or was otherwise communicating with the minister pursuant to his religious position at that particular moment.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Sections 1030 et seq. in the Federal Rules of Evidence, but federal courts have recognized the clergy-penitent privilege within the common law. See *Trammel v. United States* (1980) 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 (dicta noting existence of the priest-penitent privilege in long tradition of federal case law).



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3 ADDITIONAL AUTHORITY

Jacob M. Yellin, *History and Current Status of the Clergy-Penitent Privilege*, 23 *Santa Clara L. Rev.* 95 (1983)



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4 SIGNIFICANT CASES

Roman Catholic Archbishop of Los Angeles v. Superior Court (2005) 131 Cal. App. 4th 417, 32 Cal. Rptr. 3d 209 , as mod. on denial of reh'g, review denied, remittitur stayed, review filed (Dec 16, 2005) (Catholic Archdiocese moved to quash grand jury subpoenas *duces tecum* seeking documents related to investigation of child sexual assault; petitioners objected to disclosure of the subpoenaed documents, primarily relying on the freedom of religion clauses in the federal and California Constitutions and on California's evidentiary privileges; court of appeals held that the constitutional right to freedom of religion does not bar disclosure of documents subpoenaed from the Archdiocese).



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SECTION 1031 Penitent

1-1031 California Evidence Courtroom Manual 1031.syn

§ 1031.syn Synopsis to Chapter 1031: Penitent

Scope Penitent

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SECTION 1031 Penitent

1-1031 California Evidence Courtroom Manual Scope

Scope Penitent

§ 1031 reads as follows:

Rule 1031 Penitent

As used in this article, "penitent" means a person who has made a penitential communication to a member of the clergy.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 2002, ch. 806 (A.B. 3027), § 20.)

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1 ANALYSIS

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2 COMPARISON TO FEDERAL RULE

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3 SIGNIFICANT CASES

Doe 2 v. Superior Court (2005) 132 Cal. App. 4th 1504, 34 Cal. Rptr. 3d 458 (trial court erred by failing to determine whether statements were made in confidence to authorized clergy member who was under duty to keep communications secret; attorney-client privilege did not bar disclosure of letter sent by church pastor to supervisor, despite pastor's stated intent that the correspondence would be relayed to an attorney, where pastor did not transmit, or even copy, letter to attorney).

Roman Catholic Archbishop of Los Angeles v. Superior Court (2005) 131 Cal. App. 4th 417, 32 Cal. Rptr. 3d 209 , *as mod. on denial of reh'g, review denied, remittitur stayed, review filed (Dec 16, 2005)* (Catholic Archdiocese moved to quash grand jury subpoenas *duces tecum* seeking documents related to investigation of child sexual assault; petitioners objected to disclosure of the subpoenaed documents, primarily relying on the freedom of religion clauses in the federal and California Constitutions and on California's evidentiary privileges; court of appeals held that the constitutional right to freedom of religion does not bar disclosure of documents subpoenaed from the Archdiocese).



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SECTION 1032 Penitential Communication

1-1032 California Evidence Courtroom Manual 1032.syn

§ 1032.syn Synopsis to Chapter 1032: Penitential Communication

Scope Penitential Communication

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1-1032 California Evidence Courtroom Manual Scope

Scope Penitential Communication

§ 1032 reads as follows:

Rule 1032 Penitential Communication

As used in this article, "penitential communication" means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of his or her church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep such communications secret.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 2002, ch. 806 (A.B. 3027), § 21.)

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1 ANALYSIS

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3 SIGNIFICANT CASES

Doe 2 v. Superior Court (2005) 132 Cal. App. 4th 1504, 34 Cal. Rptr. 3d 458 (trial court erred by failing to determine whether statements were made in confidence to authorized clergy member who was under duty to keep communications secret; attorney-client privilege did not bar disclosure of letter sent by church pastor to supervisor, despite pastor's stated intent that the correspondence would be relayed to an attorney, where pastor did not transmit, or even copy, letter to attorney).

Roman Catholic Archbishop of Los Angeles v. Superior Court (2005) 131 Cal. App. 4th 417, 32 Cal. Rptr. 3d 209, as mod. on denial of reh'g, review denied, remittitur stayed, review filed (Dec 16, 2005) (Catholic Archdiocese moved to quash grand jury subpoenas *duces tecum* seeking documents related to investigation of child sexual assault; petitioners objected to disclosure of the subpoenaed documents, primarily relying on the freedom of religion clauses in the federal and California Constitutions and on California's evidentiary privileges; court of appeals held that the constitutional right to freedom of religion does not bar disclosure of documents subpoenaed from the Archdiocese).

People v. Edwards (1988) 203 Cal. App. 3d 1358, 248 Cal. Rptr. 53 (theft defendant's confidential statements to Episcopal priest did not constitute "penitential communication" in view of priest's testimony that he believed defendant's statements were in the nature of secular or pastoral confession seeking counseling and not absolution, and that when he offered to help, requiring that confidential subject matter be divulged, defendant willingly agreed).

People v. Thompson (1982) 133 Cal. App. 3d 419, 184 Cal. Rptr. 72 (denial of defendant's claim of penitent privilege when defendant's employer hired scientologist as a business consultant whose purpose was to improve sales, and not to serve as a representative of that church; in addition, privilege could not be justified as "counselor-counselee" privilege).



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1-1033 California Evidence Courtroom Manual 1033.syn

§ 1033.syn Synopsis to Chapter 1033: Privilege of Penitent

Scope Privilege of Penitent

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1-1033 California Evidence Courtroom Manual Scope

Scope Privilege of Penitent

§ 1033 reads as follows:

Rule 1033 Privilege of Penitent

Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 2002, ch. 806 (A.B. 3027), § 22.)

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1 ANALYSIS

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2 COMPARISON TO FEDERAL RULE

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Roman Catholic Archbishop of Los Angeles v. Superior Court (2005) 131 Cal. App. 4th 417, 32 Cal. Rptr. 3d 209 , as mod. on denial of reh'g, review denied, remittitur stayed, review filed (Dec 16, 2005) (Catholic Archdiocese moved to quash grand jury subpoenas *duces tecum* seeking documents related to investigation of child sexual assault; petitioners objected to disclosure of the subpoenaed documents, primarily relying on the freedom of religion clauses in the federal and California Constitutions and on California's evidentiary privileges; court of appeals held that the constitutional right to freedom of religion does not bar disclosure of documents subpoenaed from the Archdiocese).



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1-1034 California Evidence Courtroom Manual 1034.syn

§ 1034.syn Synopsis to Chapter 1034: Privilege of Clergy

Scope Privilege of Clergy

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1-1034 California Evidence Courtroom Manual Scope

Scope Privilege of Clergy

§ 1034 reads as follows:

Rule 1034 Privilege of Clergy

Subject to Section 912, a member of the clergy, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 2002, ch. 806 (A.B. 3027), § 23.)

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Doe 2 v. Superior Court (2005) 132 Cal. App. 4th 1504, 34 Cal. Rptr. 3d 458 (trial court erred by failing to determine whether statements were made in confidence to authorized clergy member who was under duty to keep communications secret; attorney-client privilege did not bar disclosure of letter sent by church pastor to supervisor, despite pastor's stated intent that the correspondence would be relayed to an attorney, where pastor did not transmit, or even copy, letter to attorney).

Roman Catholic Archbishop of Los Angeles v. Superior Court (2005) 131 Cal. App. 4th 417, 32 Cal. Rptr. 3d 209 , *as mod. on denial of reh'g, review denied, remittitur stayed, review filed (Dec 16, 2005)* (Catholic Archdiocese moved to quash grand jury subpoenas *duces tecum* seeking documents related to investigation of child sexual assault; petitioners objected to disclosure of the subpoenaed documents, primarily relying on the freedom of religion clauses in the federal and California Constitutions and on California's evidentiary privileges; court of appeals held that the constitutional right to freedom of religion does not bar disclosure of documents subpoenaed from the Archdiocese).



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1-1035 California Evidence Courtroom Manual 1035.syn

§ 1035.syn Synopsis to Chapter 1035: Victim

Scope Victim

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SECTION 1035 Victim

1-1035 California Evidence Courtroom Manual Scope

Scope Victim

§ 1035 reads as follows:

Rule 1035 Victim

As used in this article, "victim" means a person who consults a sexual assault counselor for the purpose of securing advice or assistance concerning a mental, physical, or emotional condition caused by a sexual assault.

(Added by Stats. 1980, ch. 917, § 2, Amended by Stats. 2006, ch. 689 (S.B. 1743) § 4)

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1 ANALYSIS

See Analysis of Section 1035.4.



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SECTION 1035 Victim

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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SECTION 1035 Victim

1-1035 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

People v. Gilbert (1992) 5 Cal. App. 4th 1372, 7 Cal. Rptr. 2d 660 (purpose of sexual assault victim-counselor privilege is to protect confidences of one who consults sexual assault victim counselor for purpose of securing advice or assistance concerning mental, physical, or emotional condition caused by sexual assault, and thus to encourage those who believe they have been victimized by sexual assault to come forward and to make full and frank reports so that they may be advised and assisted).



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SECTION 1035.2 Sexual Assault Counselor

1-1035.2 California Evidence Courtroom Manual 1035.2.syn

§ 1035.2.syn Synopsis to Chapter 1035.2: Sexual Assault Counselor

Scope Sexual Assault Victim Counselor

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SECTION 1035.2 Sexual Assault Counselor

1-1035.2 California Evidence Courtroom Manual Scope

Scope Sexual Assault Victim Counselor

§ 1035.2 reads as follows:

1035.2 Sexual Assault Victim Counselor

As used in this article, "sexual assault counselor" means any of the following:

(a) A person who is engaged in any office, hospital, institution, or center commonly known as a rape crisis center, whose primary purpose is the rendering of advice or assistance to victims of sexual assault and who has received a certificate evidencing completion of a training program in the counseling of sexual assault victims issued by a counseling center that meets the criteria for the award of a grant established pursuant to *Section 13837 of the Penal Code* and who meets one of the following requirements:

(1) Is a psychotherapist as defined in Section 1010; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape crisis counseling.

(2) Has 40 hours of training as described below and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas:

(A) Law.

(B) Medicine.

(C) Societal attitudes.

(D) Crisis intervention and counseling techniques.

(E) Role playing.

(F) Referral services.

(G) Sexuality.

(b) A person who is employed by any organization providing the programs specified in *Section 13835.2 of the Penal Code*, whether financially compensated or not, for the purpose of counseling and assisting sexual assault victims, and who meets one of the following requirements:

(1) Is a psychotherapist as defined in Section 1010; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape assault counseling.

(2) Has the minimum training for sexual assault counseling required by guidelines established by the employing agency pursuant to *subdivision (c) of Section 13835.10 of the Penal Code*, and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas:

(A) Law.

(B) Victimology.

(C) Counseling.

(D) Client and system advocacy.

(E) Referral services.

(Added by Stats. 1980, ch. 917, § 2. Amended by Stats. 1983, ch. 580, § 1; Stats. 1983, ch. 1072, § 1; Stats. 1990, ch. 1342 (S.B. 2501), § 1, Stats. 2006, ch. 189 (S.B. 1743) § 5)

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SECTION 1035.2 Sexual Assault Counselor

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1 ANALYSIS

See Analysis of Section 1035.4. It should be noted here that there is some overlap between this section and the psychotherapist-patient privilege of Section 1010. However, unless nondisclosure would constitute a constitutional violation, the court may not order disclosure of the psychotherapist-patient communications. In contrast, Section 1035.4 permits disclosure under limited circumstances.



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1-1035.2 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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1-1035.4 California Evidence Courtroom Manual 1035.4.syn

§ 1035.4.syn Synopsis to Chapter 1035.4: Confidential Communication Between the Sexual Assault Counselor and the Victim

Scope Confidential Communication Between the Sexual Assault Counselor and the Victim

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1-1035.4 California Evidence Courtroom Manual Scope

Scope Confidential Communication Between the Sexual Assault Counselor and the Victim

§ 1035.4 reads as follows:

1035.4 Confidential Communication Between the Sexual Assault Counselor and the Victim

As used in this article, "confidential communication between the sexual assault counselor and the victim" means information transmitted between the victim and the sexual assault counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the sexual assault counselor is consulted. The term includes all information regarding the facts and circumstances involving the alleged sexual assault and also includes all information regarding the victim's prior or subsequent sexual conduct, and opinions regarding the victim's sexual conduct or reputation in sexual matters.

The court may compel disclosure of information received by the sexual assault counselor which constitutes relevant evidence of the facts and circumstances involving an alleged sexual assault about which the victim is complaining and which is the subject of a criminal proceeding if the court determines that the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled. The court may also compel disclosure in proceedings related to child abuse if the court determines the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled.

When a court is ruling on a claim of privilege under this article, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged and must not be disclosed, neither he or she nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

If the court determines certain information shall be disclosed, the court shall so order and inform the defendant. If the court finds there is a reasonable likelihood that particular information is subject to disclosure pursuant to the balancing test provided in this section, the following procedure shall be followed:

- (1) The court shall inform the defendant of the nature of the information which may be subject to disclosure.
- (2) The court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the sexual assault counselor regarding the information which the court has determined may be subject to disclosure.
- (3) At the conclusion of the hearing, the court shall rule which items of information, if any, shall be disclosed. The court may make an order stating what evidence may be introduced by the defendant and the nature of questions to be permitted. The defendant may then offer evidence pursuant to the order of the court. Admission of evidence concerning the sexual conduct of the complaining witness is subject to Sections 352, 782, and 1103.

(Added by Stats. 1980, ch. 917, § 2. Amended by Stats. 1983, ch. 1072, § 2)

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SECTION 1035.4 Confidential Communication Between the Sexual Assault Counselor and the Victim

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1 ANALYSIS

This section should be contrasted with the psychotherapist-patient privilege of Section 1010 et seq. Where the counselor is also a psychotherapist, as defined by Section 1010, the psychotherapist-patient privilege would provide much stronger protection than the sexual assault victim-counselor privilege. If it applies, the psychotherapist-patient privilege is absolute; unless nondisclosure would constitute a constitutional violation, the court may not order disclosure of the psychotherapist-patient communications. In contrast, Section 1035.4 permits disclosure under limited circumstances: where the communications concern a sexual assault that is the subject of a criminal proceeding or communications related to child abuse proceedings and the judge determines that the probative value of the information outweighs the effect on the complainant and the complainant's treatment. Section 1035.4 provides for a procedure for in camera review of the privileged communications. Where the court finds, based on the balancing test, that the information should not be disclosed, the information remains privileged; the judge or any other party present in chambers may never disclose the information without the consent of the holder of the privilege. If the judge finds there is a reasonable likelihood that particular information should be disclosed, the section provides for a further hearing to determine the admissibility of the privileged information.

See also Sections 352, 782 and 1103, which limit the admissibility of evidence about the sexual conduct of the complainant.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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3 SIGNIFICANT CASES

People v. Gilbert (1992) 5 Cal. App. 4th 1372, 7 Cal. Rptr. 2d 660 (purpose of the privilege is to encourage victims of sexual assault to seek treatment; thus, trial court may compel disclosure of information only if court determines that probative value outweighs effect on victim, treatment relationship, and treatment services).



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SECTION 1035.6 Holder of the Privilege

1-1035.6 California Evidence Courtroom Manual 1035.6.syn

§ 1035.6.syn Synopsis to Chapter 1035.6: Holder of the Privilege

Scope Holder of the Privilege

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SECTION 1035.6 Holder of the Privilege

1-1035.6 California Evidence Courtroom Manual Scope

Scope Holder of the Privilege

§ 1035.6 reads as follows:

1035.6 Holder of the Privilege

As used in this article, "holder of the privilege" means:

- (a) The victim when such person has no guardian or conservator.
- (b) A guardian or conservator of the victim when the victim has a guardian or conservator.
- (c) The personal representative of the victim if the victim is dead.

(Added by Stats. 1980, ch. 917, § 2)

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1 ANALYSIS

See Analysis of Section 1035.4.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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See Section 1035.4.



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§ 1035.8.syn Synopsis to Chapter 1035.8: Sexual Assault Counselor-Victim Privilege

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1-1035.8 California Evidence Courtroom Manual Scope

Scope Sexual Assault Victim-Counselor Privilege

§ 1035.8 reads as follows:

1035.8 Sexual Assault Victim-Counselor Privilege

A victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault victim counselor if the privilege is claimed by any of the following:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the sexual assault counselor at the time of the confidential communication, but that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

(Added by Stats. 1980, ch. 917, § 2, Amended by Stats. 2006, ch. 689 (S.B. 1743) § 6)

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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People v. Gilbert (1992) 5 Cal. App. 4th 1372, 7 Cal. Rptr. 2d 660 (purpose of sexual assault victim-counselor privilege is to protect confidences of one who consults sexual assault victim counselor for purpose of securing advice or assistance concerning mental, physical, or emotional condition caused by sexual assault, and thus to encourage those who believe they have been victimized by sexual assault to come forward and to make full and frank reports so that they may be advised and assisted).



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1-1036 California Evidence Courtroom Manual 1036.syn

§ 1036.syn Synopsis to Chapter 1036: Claim of Privilege by Sexual Assault Counselor

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1-1036 California Evidence Courtroom Manual Scope

Scope Claim of Privilege by Sexual Assault Counselor

§ 1036 reads as follows:

Rule 1036 Claim of Privilege by Sexual Assault Victim Counselor

The sexual assault counselor who received or made a communication subject to the privilege under this article shall claim the privilege if he or she is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1035.8

(Added by Stats. 1980, ch. 917, § 2, Amended by Stats. 2006, ch. 689 (S.B. 1743) § 7).

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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See also Section 1035.4.



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1-1036.2 California Evidence Courtroom Manual 1036.2.syn

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Scope Sexual Assault Defined for Purpose of Privilege

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1-1036.2 California Evidence Courtroom Manual Scope

Scope Sexual Assault Defined for Purpose of Privilege

§ 1036.2 reads as follows:

1036.2 Sexual Assault Defined for Purpose of Privilege

As used in this article, "sexual assault" includes all of the following:

- (a) Rape, as defined in *Section 261 of the Penal Code*.
- (b) Unlawful sexual intercourse, as defined in *Section 261.5 of the Penal Code*.
- (c) Rape in concert with force and violence, as defined in *Section 264.1 of the Penal Code*.
- (d) Rape of a spouse, as defined in *Section 262 of the Penal Code*.
- (e) Sodomy, as defined in *Section 286 of the Penal Code*, except a violation of subdivision (e) of that section.
- (f) A violation of *Section 288 of the Penal Code*.
- (g) Oral copulation, as defined in *Section 288a of the Penal Code*, except a violation of subdivision (e) of that section.
- (h) Sexual penetration, as defined in *Section 289 of the Penal Code*.
- (i) Annoying or molesting a child under 18, as defined in *Section 647a of the Penal Code*.
- (j) Any attempt to commit any of the above acts.

(Added by Stats. 1980, ch. 917, p. 2916, § 2. Amended by Stats. 1988, ch. 102, § 1; Stats. 2001, ch. 517 (A.B. 380), § 1; Stats. 2001, ch. 854 (S.B. 205), § 4)

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Section 1036.2 defines the term "sexual assault" broadly to encompass more types of criminal sexual conduct than the various types of rape crimes and child abuse. The term also includes the attempt to commit such crimes. *See also* Analysis of Section 1035.4.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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§ 1037.syn Synopsis to Chapter 1037: Victim

Scope Victim

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SECTION 1037 Victim

1-1037 California Evidence Courtroom Manual Scope

Scope Victim

§ 1037 reads as follows:

Rule 1037 Victim

As used in this article, "victim" means any person who suffers domestic violence, as defined in Section 1037.7.

(Added by Stats. 1986, ch. 854, § 1)

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There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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SECTION 1037.1 Domestic Violence Counselor

1-1037.1 California Evidence Courtroom Manual 1037.1.syn

§ 1037.1.syn Synopsis to Chapter 1037.1: Domestic Violence Counselor

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1-1037.1 California Evidence Courtroom Manual Scope

Scope Domestic Violence Counselor

§ 1037.1 reads as follows:

1037.1 Domestic Violence Counselor

(a)

(1) As used in this article, "domestic violence counselor" means a person who is employed by a domestic violence victim service organization, as defined in this article, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of domestic violence and who has at least 40 hours of training as specified in paragraph (2).

(2) The 40 hours of training shall be supervised by an individual who qualifies as a counselor under paragraph (1), and who has at least one year of experience counseling domestic violence victims for the domestic violence victim service organization. The training shall include, but need not be limited to, the following areas: history of domestic violence, civil and criminal law as it relates to domestic violence, the domestic violence victim-counselor privilege and other laws that protect the confidentiality of victim records and information, societal attitudes towards domestic violence, peer counseling techniques, housing, public assistance and other financial resources available to meet the financial needs of domestic violence victims, and referral services available to domestic violence victims.

(3) A domestic violence counselor who has been employed by the domestic violence victim service organization for a period of less than six months shall be supervised by a domestic violence counselor who has at least one year of experience counseling domestic violence victims for the domestic violence victim service organization.

(b) As used in this article, "domestic violence victim service organization" means a non-governmental organization or entity that provides shelter, programs, or services to victims of domestic violence and their children, including, but not limited to, either of the following:

(1) Domestic violence shelter-based programs, as described in *Section 18294 of the Welfare and Institutions Code*.

(2) Other programs with the primary mission to provide services to victims of domestic violence whether or not that program exists in an agency that provides additional services.

Legislative History

(Added by Stats. 1986, ch. 854, § 1. Amended by Stats. 1990, ch. 1342, (S.B. 2501) § 2; Stats. 2007, ch. 206, (S.B. 407) § 2)

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1 ANALYSIS

However, it should be noted here that there is some overlap between this section and the psychotherapist-patient privilege of Section 1010. Where the counselor is also a psychotherapist, as defined by Section 1010, the scope of the privilege is broader--the privilege is absolute; unless nondisclosure would constitute a constitutional violation, the court may not order disclosure of the psychotherapist-patient communications. In contrast, Section 1037.2 permits disclosure under limited circumstances. *Also see Analysis Under section 1037.2.*



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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§ 1037.2.syn Synopsis to Chapter 1037.2: Confidential Communication

Scope Confidential Communication

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1-1037.2 California Evidence Courtroom Manual Scope

Scope Confidential Communication

§ 1037.2 reads as follows:

1037.2 Confidential Communication

(a) As used in this article, "confidential communication" means any information, including, but not limited to, written or oral communication, transmitted between the victim and the counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the domestic violence counselor is consulted. The term includes all information regarding the facts and circumstances involving all incidences of domestic violence, as well as all information about the children of the victim or abuser and the relationship of the victim with the abuser.

(b) The court may compel disclosure of information received by a domestic violence counselor which constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim or another household member and which is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services. The court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator. The court may also compel disclosure in proceedings related to child abuse if the court determines that the probative value of the evidence outweighs the effect of the disclosure on the victim, the counseling relationship, and the counseling services.

(c) When a court rules on a claim of privilege under this article, it may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the

presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege consents to have present. If the judge determines that the information is privileged and shall not be disclosed, neither he nor she nor any other person may disclose, without the consent of a person authorized to permit disclosure, any information disclosed in the course of the proceedings in chambers.

(d) If the court determines that information shall be disclosed, the court shall so order and inform the defendant in the criminal action. If the court finds there is a reasonable likelihood that any information is subject to disclosure pursuant to the balancing test provided in this section, the procedure specified in subdivisions (1), (2), and (3) of Section 1035.4 shall be followed.

Legislative History

(Added by Stats. 1986, ch. 854, § 1. Amended by Stats. 2007, ch. 206, (S.B. 407) § 3)

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1 ANALYSIS

Section 1037.2 is intended to encourage victims of domestic violence to seek counseling and advice by guaranteeing a minimum level of privacy and confidentiality. The term "domestic violence" is defined under *Family Code section 6211* and is discussed in the Analysis of Section 1037.7.

Section 1037.2 should be contrasted with the psychotherapist-patient privilege of Section 1010 et seq. Where the counselor is also a psychotherapist, as defined by Section 1010, the psychotherapist-patient privilege would provide much stronger protection than the domestic violence victim-counselor privilege. If it applies, the psychotherapist-patient privilege is absolute; unless nondisclosure would constitute a constitutional violation, the court may not order disclosure of the psychotherapist-patient communications. In contrast, Section 1037.2 permits disclosure under limited circumstances: where the communications concern facts and circumstances relating to a crime allegedly committed by the defendant against the complainant or another household member and the judge determines that the probative value of the information outweighs the effect on the complainant and the complainant's treatment. Section 1037.2 provides for a procedure for *in camera* review of the privileged communications. Where the court finds, based on the balancing test, that the information should not be disclosed, the information remains privileged; the judge or any other party present in chambers may never disclose the information without the consent of the holder of the privilege. If the judge finds there is a reasonable likelihood that particular information should be disclosed, the section provides for a further hearing to determine the admissibility of the privileged information.

Evidence Code Sections 1037.1, 1037.2, 1037.4, 1037.5 were amended by Stats. 2007, ch. 206 (S.B. 407) §§ 2-5, to expand and clarify the scope of the domestic violence victim-counselor privilege. Since the initial enactment of this privilege, there has been some confusion about who is eligible to invoke the privilege and the types of communications that are covered by the privilege. These amendments were intended to address those concerns. Specifically, the legislation (1) broadens the definition of domestic violence counselor, "to cover individuals who do not possess formal schooling, but who have the stated experience and training in domestic violence issues and expands that required training to include understanding the nature of this privilege and confidentiality concerns; (2) defines "domestic violence victim service organization" more generally; (3) alters the definition of what constitutes a "confidential communication," so it applies to all kinds of communication, and is not limited to oral or written communication; (4) expressly provides that a guardian or conservator accused of committing domestic violence against a victim cannot be a holder of that privilege; and (5) expressly references which proceedings the privilege applies to (by cross-referencing to

Cal. Evid. Code § 901).



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2 COMPARISON TO FEDERAL RULE

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SECTION 1037.3 Reporting of Child Abuse

1-1037.3 California Evidence Courtroom Manual 1037.3.syn

§ 1037.3.syn Synopsis to Chapter 1037.3: Reporting of Child Abuse

Scope Reporting of Child Abuse

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SECTION 1037.3 Reporting of Child Abuse

1-1037.3 California Evidence Courtroom Manual Scope

Scope Reporting of Child Abuse

§ 1037.3 reads as follows:

1037.3 Reporting of Child Abuse

Nothing in this article shall be construed to limit any obligation to report instances of child abuse as required by *Section 11166 of the Penal Code*.

(Added by Stats. 1986, ch. 854, § 1)

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1 ANALYSIS

This section attempts to reconcile a counselor's statutory obligation, under *Penal Code section 11166*, to report child abuse with the domestic violence victim-counselor privilege. *See Analysis of Section 1037.2*. The statutory duty to report child abuse appears to trump the privacy considerations protected by the privilege.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal evidence rules or case law.



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SECTION 1037.4 Holder of the Privilege

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§ 1037.4.syn Synopsis to Chapter 1037.4: Holder of the Privilege

Scope Holder of the Privilege

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SECTION 1037.4 Holder of the Privilege

1-1037.4 California Evidence Courtroom Manual Scope

Scope Holder of the Privilege

§ 1037.4 reads as follows:

1037.4 Holder of the Privilege

As used in this article, "holder of the privilege" means:

- (a) The victim when he or she has no guardian or conservator.
- (b) A guardian or conservator of the victim when the victim has a guardian or conservator, unless the guardian or conservator is accused of perpetrating domestic violence against the victim.

Legislative History

(Added by Stats. 1986, ch. 854, § 1. Amended by Stats. 2007, ch. 206 (S.B. 407) § 4)

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1 ANALYSIS

See Analysis of Section 1037.2.



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There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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SECTION 1037.5 Asserting Privilege to Disclose Communication

1-1037.5 California Evidence Courtroom Manual 1037.5.syn

§ 1037.5.syn Synopsis to Chapter 1037.5: Asserting Privilege to Disclose Communication

Scope Asserting Privilege to Disclose Communication

1 ANALYSIS

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SECTION 1037.5 Asserting Privilege to Disclose Communication

1-1037.5 California Evidence Courtroom Manual Scope

Scope Asserting Privilege to Disclose Communication

§ 1037.5 reads as follows:

1037.5 Asserting Privilege to Disclose Communication

A victim of domestic violence, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a domestic violence counselor in any proceeding specified in Section 901 if the privilege is claimed by any of the following persons:

- (a) The holder of the privilege.
- (b) A person who is authorized to claim the privilege by the holder of the privilege.
- (c) The person who was the domestic violence counselor at the time of the confidential communication. However, that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

Legislative History

(Added by Stats. 1986, ch. 854, § 1. Amended by Stats 2007, ch. 206 (S.B. 407) § 5)

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1 ANALYSIS

See Analysis of Section 1037.2.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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§ 1037.6.syn Synopsis to Chapter 1037.6: Claim of Privilege by Counselor

Scope Claim of Privilege by Counselor

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1-1037.6 California Evidence Courtroom Manual Scope

Scope Claim of Privilege by Counselor

§ 1037.6 reads as follows:

1037.6 Claim of Privilege by Counselor

The domestic violence counselor who received or made a communication subject to the privilege granted by this article shall claim the privilege whenever he or she is present when the communication is sought to be disclosed and he or she is authorized to claim the privilege under subdivision (c) of Section 1037.5.

(Added by Stats. 1986, ch. 854, § 1)

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1 ANALYSIS

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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1-1037.7 California Evidence Courtroom Manual 1037.7.syn

§ 1037.7.syn Synopsis to Chapter 1037.7: Domestic Violence

Scope Domestic Violence

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SECTION 1037.7 Domestic Violence

1-1037.7 California Evidence Courtroom Manual Scope

Scope Domestic Violence

§ 1037.7 reads as follows:

1037.7 Domestic Violence

As used in this article, "domestic violence" means "domestic violence" as defined in *Section 6211 of the Family Code*.

(Added by Stats. 1993, ch. 219 (A.B. 1500), § 77.4)

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SECTION 1037.7 Domestic Violence

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1 ANALYSIS

"Domestic violence," as defined by *Family Code section 6211*, means abuse against a family or household member. Section 6211 defines "abuse" as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to herself, himself, or another." The same section defines "a family or household member" as "a spouse, a former spouse, parent, child, any other adult person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who within the last six months regularly resided in the household." *Id.* The term "domestic violence" also extends beyond cohabitants to include abuse against a person who is currently in a dating, courtship or engagement relationship by the other member of that relationship. *Id.* Finally, the term includes abuse against the mother of a minor where the alleged abuser is presumed, under the Uniform Parentage Act, to be the other parent of the minor.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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1-1037.8 California Evidence Courtroom Manual 1037.8.syn

§ 1037.8.syn Synopsis to Chapter 1037.8: Informing Victim of Limits on Confidentiality

Scope Informing Victim of Limits on Confidentiality

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1-1037.8 California Evidence Courtroom Manual Scope

Scope Informing Victim of Limits on Confidentiality

§ 1037.8 reads as follows:

1037.8 Informing Victim of Limits on Confidentiality

A domestic violence counselor shall inform a domestic violence victim of any applicable limitations on confidentiality of communications between the victim and the domestic violence counselor. This information may be given orally.

(Added by Stats. 2002, ch. 629 (S.B. 1735), § 1)

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1 ANALYSIS

Unlike some evidentiary privileges, such as the psychotherapist-patient privilege (*see Section 1010 et seq.*), the domestic violence counselor-victim privilege is not absolute. This new provision requires a domestic violence counselor to inform a domestic violence victim of any applicable limitations on confidentiality of communications between the victim and the domestic violence counselor. The warning can be either in writing or orally.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1037.8 in the Federal Rules.



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SECTION 1038 Claiming Human Trafficking Caseworker-Victim Privilege

1-1038 California Evidence Courtroom Manual 1038.syn

§ 1038.syn Synopsis to Chapter 1038: Claiming Human Trafficking Caseworker-Victim Privilege

Scope Claiming Human Trafficking Caseworker-Victim Privilege

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1-1038 California Evidence Courtroom Manual Scope

Scope Claiming Human Trafficking Caseworker-Victim Privilege

§ 1038 reads as follows:

Rule 1038 Claiming Human Trafficking Victim-Caseworker Privilege

(a) A trafficking victim, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a human trafficking caseworker if the privilege is claimed by any of the following persons:

(1) The holder of the privilege.

(2) A person who is authorized to claim the privilege by the holder of the privilege.

(3) The person who was the human trafficking caseworker at the time of the confidential communication. However, that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. The human trafficking caseworker who received or made a communication subject to the privilege granted by this article shall claim the privilege whenever he or she is present when the communication is sought to be disclosed and he or she is authorized to claim the privilege under this section.

(b) A human trafficking caseworker shall inform a trafficking victim of any applicable limitations on confidentiality of communications between the victim and the caseworker. This information may be given orally.

(Added by Stats. 2005, ch. 240, § 4)

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SECTION 1038 Claiming Human Trafficking Caseworker-Victim Privilege

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1 ANALYSIS

Sections 1038, 1038.1, 1038.2 were added to the Evidence Code in 2005, creating a new qualified privilege as part of legislation entitled "California Trafficking Victims Protection Act."

These statutes, taken together, provide that confidential communications between a victim of human trafficking, as defined in *Penal Code section 236.1*, and a human trafficking caseworker, who is defined in *Evidence Code section 1038.2*, receive qualified protection from discovery. Although the confidential communications are privileged, in a criminal prosecution, a court may, pursuant to *Evidence Code section 1038.1*, order discovery of relevant information to the commission of a crime allegedly perpetrated against the victim "if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services." The statute also provides that "the court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator."

California law provides for both an action for civil damages (*Civil Code section 52.5*) and criminal prosecution (*Penal Code section 236.1*) for acts of human trafficking. The crime of human trafficking is defined in *Penal Code section 236.1(a)* as "any person who deprives or violates the personal liberty of another with the intent to effect or maintain a felony violation of Section 266, 266h, 266i, 267, 311.4, or 518 or to obtain forced labor or services, is guilty of human trafficking." The referenced sections pertain to the inducement of unmarried minors into prostitution, pimping or pandering, abduction for purposes of prostitution and extortion.

Penal Code section 236.1(d)(1) defines "unlawful deprivation or violation of the personal liberty of another" as "substantial and sustained restriction of another's liberty accomplished through fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out." *Penal Code section 236.1(d)(2)* defines "duress" as "knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the victim." *Penal Code section 236.1(e)* defines "forced labor or services" as "labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, or coercion, or equivalent conduct that would reasonably overbear the will of the person."



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SECTION 1038 Claiming Human Trafficking Caseworker-Victim Privilege

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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SECTION 1038.1 Order Compelling Disclosure of Privileged Information

1-1038.1 California Evidence Courtroom Manual 1038.1.syn

§ 1038.1.syn Synopsis to Chapter 1038.1: Order Compelling Disclosure of Privileged Information

Scope Order Compelling Disclosure of Privileged Information

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1-1038.1 California Evidence Courtroom Manual Scope

Scope Order Compelling Disclosure of Privileged Information

§ 1038.1 reads as follows:

1038.1 Order Compelling Disclosure of Privileged Information

(a) The court may compel disclosure of information received by a human trafficking caseworker that constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim and that is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services. The court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator.

(b) When a court rules on a claim of privilege under this article, it may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and those other persons that the person authorized to claim the privilege consents to have present.

(c) If the judge determines that the information is privileged and shall not be disclosed, neither he nor she nor any other person may disclose, without the consent of a person authorized to permit disclosure, any information disclosed in the course of the proceedings in chambers. If the court determines that information shall be disclosed, the court shall so order and inform the defendant in the criminal action. If the court finds there is a reasonable likelihood that any information is subject to disclosure pursuant to the balancing test provided in this section, the procedure specified in paragraphs (1), (2), and (3) of Section 1035.4 shall be followed.

(Added by Stats. 2005, ch. 240, § 4)

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1 ANALYSIS

See Analysis of Section 1038.



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SECTION 1038.1 Order Compelling Disclosure of Privileged Information

1-1038.1 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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SECTION 1038.2 Definitions

1-1038.2 California Evidence Courtroom Manual 1038.2.syn

§ 1038.2.syn Synopsis to Chapter 1038.2: Definitions

Scope Definitions

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SECTION 1038.2 Definitions

1-1038.2 California Evidence Courtroom Manual Scope

Scope Definitions

§ 1038.2 reads as follows:

1038.2 Definitions

(a) As used in this article, "victim" means any person who is a "trafficking victim" as defined in Section 236.1.

(b) As used in this article, "human trafficking caseworker" means any of the following:

(1) A person who is employed by any organization providing the programs specified in *Section 18294 of the Welfare and Institutions Code*, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of human trafficking, who has received specialized training in the counseling of human trafficking victims, and who meets one of the following requirements:

(A) Has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in the counseling of human trafficking victims.

(B) Has at least 40 hours of training as specified in this paragraph and is supervised by an individual who qualifies as a counselor under subparagraph (A), or is a psychotherapist, as defined in Section 1010. The training, supervised by a person qualified under subparagraph (A), shall include, but need not be limited to, the following areas: history of human trafficking, civil and criminal law as it relates to human trafficking, societal attitudes towards human trafficking, peer

counseling techniques, housing, public assistance and other financial resources available to meet the financial needs of human trafficking victims, and referral services available to human trafficking victims. A portion of this training must include an explanation of privileged communication.

(2) A person who is employed by any organization providing the programs specified in *Section 13835.2 of the Penal Code*, whether financially compensated or not, for the purpose of counseling and assisting human trafficking victims, and who meets one of the following requirements:

(A) Is a psychotherapist as defined in Section 1010, has a master's degree in counseling or a related field, or has one year of counseling experience, at least six months of which is in rape assault counseling.

(B) Has the minimum training for human trafficking counseling required by guidelines established by the employing agency pursuant to subdivision (c) of *Section 13835.10 of the Penal Code*, and is supervised by an individual who qualifies as a counselor under subparagraph (A). The training, supervised by a person qualified under subparagraph (A), shall include, but not be limited to, law, victimology, counseling techniques, client and system advocacy, and referral services. A portion of this training must include an explanation of privileged communication.

(c) As used in this article, "confidential communication" means information transmitted between the victim and the caseworker in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the human trafficking counselor is consulted. It includes all information regarding the facts and circumstances involving all incidences of human trafficking.

(d) As used in this article, "holder of the privilege" means the victim when he or she has no guardian or conservator, or a guardian or conservator of the victim when the victim has a guardian or conservator.

(Added by Stats. 2005, ch. 240, § 4)

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1 ANALYSIS

See Analysis of Section 1038.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this particular section, but where the counselor is a psychotherapist, the federal common-law version of the psychotherapist-patient privilege may apply.



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ARTICLE 9 OFFICIAL INFORMATION AND IDENTITY OF INFORMER
SECTION 1040 Privilege for Official Information

1-1040 California Evidence Courtroom Manual 1040.syn

§ 1040.syn Synopsis to Chapter 1040: Privilege for Official Information

Scope Privilege for Official Information

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3 SIGNIFICANT CASES



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SECTION 1040 Privilege for Official Information

1-1040 California Evidence Courtroom Manual Scope

Scope Privilege for Official Information

§ 1040 reads as follows:

Rule 1040 Privilege for Official Information

(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(c) Notwithstanding any other provision of law, the Employment Development Department shall disclose to law enforcement agencies, in accordance with the provisions of subdivision (k) of Section 1095 and subdivision (b) of *Section 2714 of the Unemployment Insurance Code*, information in its possession relating to any person if an arrest warrant has been issued for the person for commission of a felony.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1984, ch. 1127, § 2)

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SECTION 1040 Privilege for Official Information

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1 ANALYSIS

Section 1040 establishes a qualified, or conditional, privilege for certain types of information in governmental possession. If the government asserts the privilege, the defendant must make prima facie showing for disclosure, after which court holds in camera hearing attended by party claiming privilege. The trial court must first determine whether information sought was acquired in confidence and whether reasons for claiming privilege are outweighed by defendant's need for disclosure. See *People v. Montgomery* (1988) 205 Cal. App. 3d 1011, 252 Cal. Rptr. 779 ; *Parnes v. Superior Court* (1978) 81 Cal. App. 3d 831, 146 Cal. Rptr. 818 ; 2 Witkin, California Evidence §§ 2040-42.



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SECTION 1040 Privilege for Official Information

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1040 in the Federal Rules of Evidence. However, there are many federal statutes providing confidentiality for documents submitted to the government. *See* 3 Weinstein 2d §§ 501.01-.05. Moreover, some courts have recognized a qualified "deliberative privilege" for government internal communications. *See id.*; *Brinton v. United States Dep't of State* (D.D.C. 1979) 476 F. Supp. 535; *New York City Managerial Employee Ass'n v. Dinkins* (S.D.N.Y. 1992) 807 F. Supp. 955.



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3 SIGNIFICANT CASES

Fox v. Kramer (2000) 22 Cal. 4th 531, 994 P.2d 343 (state medical board investigator, who reviewed hospital peer review records in the course of official duties, could not give testimony based on review of those records; evidence was privileged under Section 1040, the official information privilege, and Section 1157, privilege for hospital peer review committee records).

Firestone v. Hoffman (2006) 140 Cal. App. 4th 1408, 45 Cal. Rptr. 3d 534 (Although California case law interprets provisions in the California tax code to preclude discovery of federal and state tax returns in certain situations (*Webb v. Standard Oil Co.*, 49 Cal. 2d 509, 319 P.2d 621 (1957) (construing former Cal. Rev. & Tax Code § 19282); *Sav-on Drugs, Inc. v. Superior Court*, 15 Cal. 3d 1, 123 Cal.Rptr. 283, 538 P.2d 739 (1975) (construing Cal. Rev. & Tax Code § 7056), there is no legal authority for application of the privilege to foreign tax returns. As a matter of policy, California has no interest in devising means to ensure effective tax enforcement in Canada--that is exclusively the prerogative of the Canadian government).

People v. Navarro (2006) 138 Cal.App. 4th 146 , 41 Cal. Rptr. 3d 164 (affirming denial of motions to disclose the identity of an informant, quash a search warrant, and suppress evidence; the government did not procure a breach of the attorney-client privilege when lawyer became confidential informant against defendant; in camera hearing on motion to quash is proper when defendant believes informant was his lawyer and police procured breach of privilege).

Pitchess v. Superior Court (1974) 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305 (records of investigations conducted by sheriff's department internal unit which inquired into citizens' complaints of official misconduct were within privilege attaching to official information where the records were compiled on the basis of statements made in confidence to members of the unit and investigations conducted pursuant thereto; *see Sections 1043-1047*).

Union Bank of California v. Superior Court (2005) 130 Cal. App. 4th 378, 29 Cal. Rptr. 3d 894 (in action by investors alleging fraud, trial court erred in ordering bank to produce its internal forms used in preparing confidential suspicious activity reports (SAR) required by federal law; privilege created by federal law for SAR is applicable in California without necessity of reliance on California's official information privilege; the privilege protects from discovery not just the SAR and its contents, but also information that would disclose preparation of a SAR).

Department of Motor Vehicles v. Superior Court (2002) 100 Cal. App. 4th 363, 122 Cal. Rptr. 2d 504 (Vehicle Code section 1808.5, which provides for confidentiality of DMV records, does not create a privilege for DMV to withhold defendant's unredacted medical records in response to a *subpoena duces tecum*; applying Section 1040 to the case at hand, the necessity for disclosure of complete driving records, in a prosecution for vehicular homicide, outweighs DMV's interest in preserving confidentiality).

Michael P. v. Superior Court (2001) 92 Cal. App. 4th 1036, 113 Cal. Rptr. 2d 11 (where the prime suspect in a murder investigation, in protecting his parental rights in civil court, subpoenas material protected by Evidence Code section 1040(b)(2), the official information privilege, the court must conduct an *in camera* inspection of the evidence; departments did not waive official information privilege by providing information to social services agency).

Marylander v. Superior Court (2000) 81 Cal. App. 4th 1119, 97 Cal. Rptr. 2d 439 (defendant in civil litigation sought to compel discovery of a memoranda from a state agency to the Governor's Office; appellate court reversed trial court, rejecting application of a common law "deliberative process" privilege, and holding that only applicable privilege was the conditional official information privilege of Section 1040(b)(2), which required trial court to first determine as a threshold matter that the information was acquired in confidence and, if so, then to balance the defendant's need for disclosure against the public interest in preserving the confidentiality of the information).

County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 94 Cal. Rptr. 2d 261 (appellate court reversed trial court, holding that evidence gathered by police investigating a crime is inherently confidential and subject to several privileges including official information privilege and the information practices privilege in Civil Code section 1798; thus plaintiffs in civil case could not review the contents of their investigative file through civil discovery if the need for confidentiality outweighed the benefits of disclosure).

People v. Haider (1995) 34 Cal. App. 4th 661, 40 Cal. Rptr. 2d 369 (government has privilege to refuse to disclose exact location of surveillance site if public interest in preserving confidentiality of that information outweighs need for disclosure, but disclosure is nonetheless required if location is material to defense; whether trial court properly exercised its discretion in deciding that exact location of surveillance site should not be disclosed depends on facts of particular case).

People v. Garza (1995) 32 Cal. App. 4th 148, 38 Cal. Rptr. 2d 11 (test of materiality, to determine whether public entity must disclose source of official information used as evidence in criminal proceeding, is not simple relevance, but rather is whether nondisclosure might deprive defendant of his or her due process right to fair trial).

People v. Marghzar (1987) 192 Cal. App. 3d 1129, 239 Cal. Rptr. 130 (expert witness not required to disclose how to determine when a vehicle identification number has been altered because such disclosure would compromise an important investigatory tool, so public interest in preserving confidentiality of that information outweighed defendant's interest in disclosure).



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SECTION 1041 Privilege for Identity of Informer

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§ 1041.syn Synopsis to Chapter 1041: Privilege for Identity of Informer

Scope Privilege for Identity of Informer

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1-1041 California Evidence Courtroom Manual Scope

Scope Privilege for Identity of Informer

§ 1041 reads as follows:

Rule 1041 Privilege for Identity of Informer

(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished in confidence by the informer to:

(1) A law enforcement officer;

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

(c) There is no privilege under this section to prevent the informer from disclosing his identity.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)



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1 ANALYSIS

Section 1041, which is similar in many respects to Section 1040, attempts to balance the public interest in effective law enforcement with the need for relevant and crucial information in particular cases. Thus, Section 1041 establishes a qualified, or conditional, privilege for the identity of an informer, a person who discloses information about the violation of law. Where a public entity claims the privilege provided by Section 1041, the defendant seeking to discover identity of informant bears the burden of demonstrating that the informant would be material witness on issue of guilt and that nondisclosure of his or her identity would deprive the defendant of fair trial. The defendant can meet this burden by demonstrating a reasonable possibility that anonymous informant whose identity is sought could give evidence on issue of guilt which might result in defendant's exoneration. See *People v. Borunda* (1974) 11 Cal. 3d 523, 113 Cal. Rptr. 825, 522 P.2d 1. However, where the privilege is held inapplicable, the prosecution is obligated only to provide the identity and last known whereabouts of the informer and is not obligated to produce the informer. *People v. Lara* (1967) 253 Cal. App. 2d 600, 61 Cal. Rptr. 303.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1041 in the Federal Rules of Evidence. However, the United States Supreme Court recognized a common law privilege for the identity of a confidential informant in *Roviaro v. United States* (1957) 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 .



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People v. Garza (1995) 32 Cal. App. 4th 148, 38 Cal. Rptr. 2d 11 (nondisclosure of informant's identity must amount to potential violation of defendant's constitutional right to a fair trial under the due process clause before disclosure may be ordered).

People v. Ruiz (1992) 9 Cal. App. 4th 1485, 12 Cal. Rptr. 2d 234 (as general rule, public entity has privilege to refuse to disclose identity of person reporting violation of law and to prevent another from disclosing such identity if necessity for preserving confidentiality of informant's identity outweighs necessity for disclosure in interest of justice).

In re Benny S. (1991) 230 Cal. App. 3d 102, 281 Cal. Rptr. 1 (informant must possess information sufficient to acquit defendant of the charged offense in order to justify disclosure of informant's identity under Section 1041).

People v. Seibel (1990) 219 Cal. App. 3d 1279, 269 Cal. Rptr. 313 (privilege of concealing identity of informant protects not only informant's name but also those portions of communication from and about informant which could tend to reveal his or her identity).

People v. Otte (1989) 214 Cal. App. 3d 1522, 263 Cal. Rptr. 393 (concept of confidentiality under this section does not refer to information communicated, unless contents would disclose or tend to disclose identity of informant, nor does it depend on subjective intent or desires of informant; the decision to order disclosure of informant's identity turns not on whether informant demanded that his identity not be disclosed, or was in physical danger, but whether investigation was of such type as disclosure would cause public interest to suffer).



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SECTION 1042 Adverse Order or Finding in Certain Cases

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§ 1042.syn Synopsis to Chapter 1042: Adverse Order or Finding in Certain Cases

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1-1042 California Evidence Courtroom Manual Scope

Scope Adverse Order or Finding in Certain Cases

§ 1042 reads as follows:

Rule 1042 Adverse Order or Finding in Certain Cases

(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

(c) Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure.

(d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may

present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1965, ch. 937, § 2, eff. Jan. 1, 1967; Stats. 1969, ch. 1412, § 1)

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1 ANALYSIS

Section 1042 sets forth a procedure for determining whether the identity of a confidential informant should be disclosed. See Analysis of Section 1041.



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See Comparison to Federal Rule in Section 1041.



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People v. Hobbs (1994) 7 Cal. 4th 948, 30 Cal. Rptr. 2d 651, 873 P.2d 1246 (when the material facts relied on by the prosecution to establish probable cause cannot be revealed without disclosing an informant's identity, certain *in camera* review and discovery procedures should be followed in order to strike a fair balance between the People's right to assert the informant's privilege and the defendant's discovery rights).

People v. Ruiz (1992) 9 Cal. App. 4th 1485, 12 Cal. Rptr. 2d 234 (when, in criminal proceeding, party demands disclosure of informant's identity on ground that informant is material witness on issue of guilt, trial court shall conduct hearing at which all parties may present evidence on issue of disclosure, and if confidential informant privilege is claimed, prosecutor may request trial court to hold *in camera* hearing outside presence of defendant and defense counsel at which prosecutor may offer evidence which discloses identity of informant and aids trial court in determining whether disclosure to defense is necessary for fair trial; there is no general requirement that informant be present or testify at *in camera* hearing on motion to disclose informant's identity).

People v. Seibel (1990) 219 Cal. App. 3d 1279, 269 Cal. Rptr. 313 (where portion or all of affidavit in support of warrant is sealed so that, even if requisite facts exist, defendant cannot reasonably be expected to make preliminary showing required for unsealing of affidavit, magistrate and trial court, upon defense motion, must first determine if affidavit is properly sealed, and, if it is, they must then treat matter as if defendant has made preliminary showing and hold *in camera* examination; because defendant may be completely ignorant of all critical portions of affidavit, defense would be unable to specify what materials court should review *in camera*, and court must therefore take it upon itself both to examine affidavit for possible inconsistencies and to inform prosecution what materials or witnesses it requires, which will invariably include such items as police reports and other information on informant and informant's reliability).

People v. Greenstreet (1990) 218 Cal. App. 3d 1516, 267 Cal. Rptr. 377 (a probable cause determination for the execution of a warrant that has been edited to delete information about a confidential informant should be based on the original affidavit, rather than on the one edited; thus the identity of the informant need not be revealed to establish probable cause, but when the entire affidavit is sealed the defendant's due process rights are violated).



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1-1043 California Evidence Courtroom Manual Scope

Scope Disclosure of Peace Officer Personnel Records

§ 1043 reads as follows:

Rule 1043 Disclosure of Peace Officer Personnel Records

(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to *Section 832.5 of the Penal Code* or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of *Section 1005 of the Code of Civil Procedure*. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

(b) The motion shall include all of the following:

(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

(2) A description of the type of records or information sought.

(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.

(Added by Stats. 1978, ch. 630, § 1. Amended by Stats. 1989, ch. 693, § 7; Stats. 2002, ch. 784 (S.B. 1316), § 103)



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1 ANALYSIS

Section 1043 creates a conditional privilege for the personnel records and records of citizen complaints against peace officers and as a result in 2002, custodial officers as detailed in *Penal Code* § 831.5 (such as correctional officers or jailors). Although the statute recognizes the need for privacy of such government documents, it also provides for limited discovery of personnel records in order to facilitate the finding of facts and to assure a fair trial. Under Section 1043, the defendant must bring a motion for disclosure of such records, complying with Section 1043(b). Such a motion is called a *Pitchess* motion. See *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305. Section 1043(b)(3) requires affidavits demonstrating good cause for disclosure, but does not require personal knowledge on part of affiant whose affidavit is used in support of discovery request; the requirement that materiality of requested information be shown may be satisfied by affidavits based on information and belief. See *City of Santa Cruz v. Municipal Court* (1989) 49 Cal. 3d 74, 260 Cal. Rptr. 520, 776 P.2d 222. In *Alford v. Superior Court* (2003) 29 Cal. 4th 1033, 130 Cal. Rptr. 2d 672, 63 P.3d 228, the court held that a protective order under these provisions must restrict the use of the material to the case in which it is sought.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1043 in the Federal Rules of Evidence. However, the same kind of information may be available through the Freedom of Information Act. *See* 3 Weinstein 2d § 509.62.



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Chambers v. Superior Court (2007) 42 Cal. 4th 673, 68 Cal. Rptr. 3d 43, 170 P.3d 617 (defendant charged with resisting, delaying, or obstructing a peace officer claimed that the arresting officer used unnecessary force and lied about the incident. In response to defendant's initial *Pitchess* motion, the trial court inspected the personnel file but found no relevant information to disclose regarding complaints of excessive force or dishonesty. However, several months later, defendant filed a supplemental *Pitchess* motion through his public defender, who had obtained confidential information from the officer's personnel file while representing another defendant. Held: Once the disclosure of confidential information from officer's file was granted, there was little justification for precluding review of the information by defendant in a separate case, but involving the same officer and same allegations).

Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 48 Cal. Rptr. 3d 183, 141 P.3d 288 (newspaper publisher sought information about a terminated officer's administrative appeal; the court rejected the demand for the files because the press has no constitutional right of access to peace officer personnel records, *Cal. Const., art. I, § 3, subd. (b)(3)* specifically exempts such records, and there is no *First Amendment* right to particular government information).

Warrick v. Superior Court ***Warrick v. Superior Court*** ***Warrick v. Superior Court*** ***Warrick v. Superior Court*** (2005) 35 Cal. 4th 1011, 29 Cal. Rptr. 3d 2 (the California Supreme Court provided a roadmap for bringing a *Pitchess* motion in *Warrick*; to obtain in-chambers review of documents in the personnel records of a police officer accused of misconduct, a defendant is required to show plausible factual foundation, i.e., the scenario of alleged officer misconduct "could or might have occurred"; defendant need not show that factual foundation is "reasonably probable" or "apparently credible"; defendant here provided such plausible factual foundation warranting in-camera review of documents).

Alford v. Superior Court (2003) 29 Cal. 4th 1033, 130 Cal. Rptr. 2d 672, 63 P.3d 228 (Protective order required by Section 1045(e) must restrict use of information of arresting officers' past misconduct to the proceeding in which disclosure is sought; criminal defendant is not allowed to share the disclosed information with other defendants; prosecution lacks due process right to be heard regarding a defendant's *Pitchess* motion and has no right to discover information disclosed to the defendant).

City of Los Angeles v. Superior Court (2002) 29 Cal. 4th 1, 124 Cal. Rptr. 2d 202, 52 P.3d 129 (Section 1045(b)(1)'s five-year limitation on court-ordered discovery of citizen complaints against police officers does not, on its face, violate supremacy clause or the due process of defendant, charged with sexually molesting a minor; discovery barred by § 1045(b)(1), however, five-year statutory limitation of *Pitchess* process does not bar discovery pursuant to the prosecution's *Brady* obligations; nonetheless, there was no *Brady* violation in withholding ten-year-old complaint against arresting officer for failure to report his partner's use of force).

People v. Mooc (2001) 26 Cal. 4th 1216, 114 Cal. Rptr. 2d 482, 36 P.3d 21 (to permit appellate review of order denying defendant's *Pitchess* request for discovery of officer's personnel records, trial court should have made a record of what documents it has examined *in camera* and the transcript and all copies of documents should be sealed; custodian of those records need not produce entire personnel file in response to a defendant's discovery motion, but only those documents that are potentially responsive to defendant's specific request; order of Court of Appeal, directing custodian to lodge officer's entire personnel file with Court of Appeal, was improper; denial of discovery motion was not an abuse of discretion).

People v. Jackson (1996) 13 Cal. 4th 1164, 56 Cal. Rptr. 2d 49, 920 P.2d 1254 (showing of good cause under Sections 1043, 1045 must be based on a discovery request tailored to specific officer misconduct alleged).

City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 260 Cal. Rptr. 520, 776 P.2d 222 (a showing of "good cause" under Sections 1043, 1045 requires defendant to demonstrate the relevance of the requested information by providing a "specific factual scenario" that establishes a "plausible factual foundation" for the allegations of officer misconduct toward the defendant; defendant's motion satisfied "good cause" requirement).

Zanone v. City of Whittier (2008) 162 Cal. App. 4th 174, 75 Cal. Rptr. 3d 439 (*Pitchess* motion is only required for the types of records specified in Cal. Penal Code § 832.8; thus, plaintiff police officer could impeach police chief's testimony with a memorandum that reported the details and conclusions of an unrelated investigation into claims of racial discrimination which were made by another officer and contained in that other officer's personnel file, even though plaintiff did not obtain the memorandum through the *Pitchess* motion procedure, because that memorandum does not fall within one of the statutory classes of "personnel records").

Giovanni B. v. Superior Court (2007) 152 Cal. App. 4th 312, 60 Cal. Rptr. 3d 469 (trial court did not err in ruling that the materials sought by defendant's *Pitchess* motion were irrelevant to the proposed defense because the officers had probable cause to detain and search the juvenile based on uncontested facts that were independent of the alleged falsehoods as to the juvenile's physical dishevelment and statements of gang affiliation).

People v. Johnson (2004) 118 Cal. App. 4th 292, 12 Cal. Rptr. 3d 885 (trial court erred in summarily denying defendant's *Pitchess* motion; defendant was not required to prove that it was likely that police officer was lying about defendant's actions, but only that police officer's credibility was material to the defense offered; here defendant was entitled to an *in camera* inspection of responsive documents because his *Pitchess* motion satisfied the requirements of Section 1043).

Abatti v. Superior Court (2003) 112 Cal. App. 4th 39, 4 Cal. Rptr. 3d 767 (the trial court abused its discretion in denying defendant's hybrid *Pitchess/Brady* motion without conducting an *in camera* hearing to examine police officer's counseling records to determine whether they contain information relevant to the issues presented in this case; the trial court erred in concluding that the affidavit supporting the motion had to be based on the "personal knowledge" of the declarant; appellate court thoroughly reviews the process and rationale for bringing these motions).

City of Los Angeles v. Superior Court (2003) 111 Cal. App. 4th 883, 3 Cal. Rptr. 3d 915, overruled in part, 42 Cal. 4th 319 (as a matter of first impression, peace officer payroll records are "personnel records," within meaning of Penal Code § 832.8, and are therefore subject to the discovery provisions of Sections 1043-1045 (*Pitchess* motions));

however, in a divorce proceeding, a peace officer's spouse is not required to bring a *Pitchess* motion to discover the peace officer's payroll records); *disapproved in part in International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal. 4th 319, 344-345, 64 Cal. Rptr. 3d 693, 165 P.3d 488 (disapproving dicta in *City of Los Angeles* that the amount of public employee salaries was personal information the disclosure of which would be an invasion of personal privacy).

Fagan v. Superior Court (2003) 111 Cal. App. 4th 607, 4 Cal. Rptr. 3d 239 (police officers who were indicted for felony assault and battery, filed motion for protective order, seeking to prevent district attorney from disclosing urinalysis test results obtained from confidential peace officer personnel files; district attorney has ability to review confidential peace officer personnel files without giving notice to involved officers when investigating police misconduct, but district attorney is statutorily required to maintain non-public nature of peace officer personnel files absent judicial review in compliance with *Pitchess* procedures of Sections 1043 and 1045).

Brant v. Superior Court (2003) 108 Cal. App. 4th 100, 132 Cal. Rptr. 2d 783 (it was error to deny Brant's *Pitchess* where Brant challenged the officers' account of the detention, search and manner in which his confession was obtained by providing his own version of the events, thereby making the officers' truthfulness material to the issues in the case; as a result, Brant demonstrated good cause under Section 1043 and was entitled to an in camera review of the requested complaints against the officers regarding "allegations of false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, false testimony, perjury, [and] making false arrests" to determine relevance under Section 1045).

California Highway Patrol v. Superior Court (2000) 84 Cal. App. 4th 1010, 101 Cal. Rptr. 2d 379 (rule that nonfelony conduct involving moral turpitude is admissible to impeach a criminal witness did not eliminate defendant's burden of showing good cause as required by Sections 1043, 1045 for discovery of documents from a peace officer's personnel file; only documentation of past officer conduct that is similar to the misconduct alleged by defendant in pending litigation is relevant and therefore subject to discovery).

Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 48 Cal. Rptr. 3d 183, 141 P.3d 288 (newspaper publisher sought information about a terminated officer's administrative appeal; the court rejected the demand for the files because the press has no constitutional right of access to peace officer personnel records, *Cal. Const., art. I, § 3, subd. (b)(3)* specifically exempts such records, and there is no *First Amendment* right to particular government information).

Alt v. Superior Court (1999) 74 Cal. App. 4th 950, 88 Cal. Rptr. 2d 530 (Sections 1043 et seq. apply only when request involves an issue concerning an arrest or post-arrest/pre-booking incident; these sections should not be confused with general discovery provisions that apply to a request for police officer's personnel records).

People v. Hustead (1999) 74 Cal. App. 4th 410, 87 Cal. Rptr. 2d 875 (defendant was entitled to discover prior complaints of false police reports against officer to show that officer was not being truthful in the case at hand).

People v. Gill (1997) 60 Cal. App. 4th 743, 70 Cal. Rptr. 2d 369 (records of past officer misconduct must be similar to misconduct alleged by defendant in motion for discovery under Sections 1043, 1045).

People v. Superior Court (1997) 58 Cal. App. 4th 397, 67 Cal. Rptr. 2d 910 (Section 1043's general limitations on discovery of peace officer's personnel records govern prosecution's discovery of personnel records of criminal defendant who was no longer a police officer when crime was allegedly committed and where his role as police officer had no relation to crime charged; exception to Section 1045 where investigation of "police officer" in *Penal Code* sections 832.7, 832.8 does not apply).

Michael v. Gates (1995) 38 Cal. App. 4th 737, 45 Cal. Rptr. 2d 163 (city attorney's review of personnel files of retired

police officer serving as expert for plaintiff in action against city did not violate officer's state constitutional right to privacy; statutory privilege accorded such records is conditional and the right to privacy in records is limited; officer had no reasonable expectation of privacy in records).

City of Hemet v. Superior Court (1995) 37 Cal. App. 4th 1411, 44 Cal. Rptr. 2d 532 (newspaper's request for police department internal investigation report of officer misconduct was scrutinized under standards set forth in Evidence Code, rather than provisions of California Public Records Act (CPRA) since Evidence Code sections were more specific, and thus controlled over more general provisions of Public Records Act).

Davis v. City of Sacramento (1994) 24 Cal. App. 4th 393, 29 Cal. Rptr. 2d 232 (statute setting forth procedure for requesting official police information is exclusive method for obtaining both police officer personnel records and information contained in them).

City and County of San Francisco v. Superior Court (1993) 21 Cal. App. 4th 1031, 27 Cal. Rptr. 2d 201 (to compel production of case report prepared by police department's office of citizen complaints, police officers whose records were sought had to be notified of request before there could be hearing or examination of requested report).

Hackett v. Superior Court (1993) 13 Cal. App. 4th 96, 16 Cal. Rptr. 2d 405 (conditional privilege protected all information in deputy sheriff's personnel file, including deputy's home address and telephone number, from discovery in civil suit by former inmate, regardless of whether information could also be found elsewhere).

Albritton v. Superior Court (1990) 225 Cal. App. 3d 961, 275 Cal. Rptr. 314 (because a Pitchess motion is grounded in Evidence Code section 1043 it is an exception to the Crime Victims Justice Reform Act of 1990 (Prop. 115), and therefore remains operative).

County of Los Angeles v. Superior Court (1990) 219 Cal. App. 3d 1605, 269 Cal. Rptr. 187 (where plaintiff in personal injury action against deputy sheriff did not utilize specific procedures set forth in this section, County was under no obligation to respond to plaintiff's request for production of deputy's personnel file; thus, County did not waive its right to object to production of those documents by failing to respond or object in timely manner).

Welsh v. City and County of San Francisco (N.D. Cal. 1995) 887 F. Supp. 1293 (California statutes permitting disclosure of police personnel records in pretrial discovery do not restrict discovery in federal courts).

Soto v. City of Concord (N.D. Cal. 1995) 162 F.R.D. 603 (under California law, party requesting discovery of privileged materials must come forward with affidavits showing good cause for disclosure, while in federal privilege cases, party resisting discovery has burden of specifically identifying disputed records, so that requesting party has opportunity to challenge the assertions of the privilege).



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SECTION 1044 Right of Access to Medical or Psychological History Records

1-1044 California Evidence Courtroom Manual 1044.syn

§ 1044.syn Synopsis to Chapter 1044: Right of Access to Medical or Psychological History Records

Scope Right of Access to Medical or Psychological History Records

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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1-1044 California Evidence Courtroom Manual Scope

Scope Right of Access to Medical or Psychological History Records

§ 1044 reads as follows:

Rule 1044 Right of Access to Medical or Psychological History Records

Nothing in this article shall be construed to affect the right of access to records of medical or psychological history where such access would otherwise be available under Section 996 or 1016.

(Stats. 1978, ch. 630, § 2)

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1 ANALYSIS

Section 1044 clarifies that where the medical or psychological history of an officer would be discoverable under the patient-litigant exceptions to the physician-patient privilege (Section 996) or psychotherapist-privilege (Section 1016), such records will not be privileged under Section 1043.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1044 in the Federal Rules of Evidence.



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§ 1045.syn Synopsis to Chapter 1045: Records of Complaints or Discipline Imposed on Peace Officers

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1-1045 California Evidence Courtroom Manual Scope

Scope Records of Complaints or Discipline Imposed on Peace Officers

§ 1045 reads as follows:

Rule 1045 Records of Complaints or Discipline Imposed on Peace Officers

(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in *Section 831.5 of the Penal Code*, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.

(b) In determining relevance the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure:

- (1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.
- (2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to *Section 832.5 of the Penal Code*.
- (3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual

personnel records.

(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.

(Stats. 1978, ch. 630, § 2. Amended by Stats. 1982, ch. 946, § 1; Stats. 2002, ch. 784 (S.B. 1316), § 103)

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1 ANALYSIS

Section 1045 attempts to balance the need for information as to the misconduct of law enforcement officers with the desire to protect the privacy of individuals. The statute does this by placing a strong burden of relevancy on the party seeking disclosure, and by encouraging the court to use its power to fashion protective orders to screen or to redact out information that is only marginally relevant to the proceedings. Moreover, the California Supreme Court has clarified that the protective order must limit the use of the information to the case in which it is sought. No other criminal defendants may see or use the material nor may the prosecution discover it. *Alford v. Superior Court (2003) 29 Cal. 4th 1033, 130 Cal. Rptr. 2d 672, 63 P.3d 228*.



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2 COMPARISON TO FEDERAL RULE

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3 SIGNIFICANT CASES

Chambers v. Superior Court (2007) 42 Cal. 4th 673, 68 Cal. Rptr. 3d 43, 170 P.3d 617 (defendant charged with resisting, delaying, or obstructing a peace officer claimed that the arresting officer used unnecessary force and lied about the incident. In response to defendant's initial *Pitchess* motion, the trial court inspected the personnel file but found no relevant information to disclose regarding complaints of excessive force or dishonesty. However, several months later, defendant filed a supplemental *Pitchess* motion through his public defender, who had obtained confidential information from the officer's personnel file while representing another defendant. Held: Once the disclosure of confidential information from officer's file was granted, there was little justification for precluding review of the information by defendant in a separate case, but involving the same officer and same allegations).

Alford v. Superior Court (2003) 29 Cal. 4th 1033, 130 Cal. Rptr. 2d 672, 63 P.3d 228 (Protective order required by Section 1045(e) must restrict use of information of arresting officers' past misconduct to the proceeding in which disclosure is sought; criminal defendant is not allowed to share the disclosed information with other defendants; prosecution lacks due process right to be heard regarding a defendant's *Pitchess* motion and has no right to discover information disclosed to the defendant).

City of Los Angeles v. Superior Court (2002) 29 Cal. 4th 1, 124 Cal. Rptr. 2d 202, 52 P.3d 129 (Section 1045(b)(1)'s five-year limitation on court-ordered discovery of citizen complaints against police officers does not, on its face, violate supremacy clause or the due process of defendant, charged with sexually molesting a minor; discovery barred by § 1045(b)(1), however, five-year statutory limitation of *Pitchess* process does not bar discovery pursuant to the prosecution's *Brady* obligations; nonetheless, there was no *Brady* violation in withholding ten-year-old complaint against arresting officer for failure to report his partner's use of mace).

People v. Jackson (1996) 13 Cal. 4th 1164, 56 Cal. Rptr. 2d 49, 920 P.2d 1254 (showing of good cause under Sections 1043, 1045 must be based on a discovery request tailored to specific officer misconduct alleged).

City of San Jose v. Superior Court (1993) 5 Cal. 4th 47, 19 Cal. Rptr. 2d 73, 850 P.2d 621 (statute protecting confidentiality of peace officer personnel records from disclosure applies in juvenile delinquency cases, even though confidentiality statute did not expressly refer to juvenile proceedings, because the same considerations that operate to

protect the confidentiality of the officer in adult proceedings apply).

City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 260 Cal. Rptr. 520, 776 P.2d 222 (a showing of "good cause" under Sections 1043, 1045 requires defendant to demonstrate the relevance of the requested information by providing a "specific factual scenario" that establishes a "plausible factual foundation" for the allegations of officer misconduct toward the defendant; defendant's motion satisfied "good cause" requirement).

People v. Memro (1985) 38 Cal. 3d 658, 214 Cal. Rptr. 832, 700 P.2d 446 (defendant, who asserted his confession was coerced during interrogation, was not entitled to discovery of the conclusions resulting from internal investigations of citizen's excessive force complaints against police officers).

Giovanni B. v. Superior Court (2007) 152 Cal. App. 4th 312, 60 Cal. Rptr. 3d 469 . (trial court did not err in ruling that the materials sought by defendant's *Pitchess* motion were irrelevant to the proposed defense because the officers had probable cause to detain and search the juvenile based on uncontested facts that were independent of the alleged falsehoods as to the juvenile's physical dishevelment and statements of gang affiliation).

People v. Thompson (2006) 141 Cal. App. 4th 1312, 46 Cal. Rptr. 3d 884 (trial court did not err in finding that defendant's *Pitchess* motion did not meet even the unquestionably low threshold for *Pitchess* motions; although his factual showing was possible, it was not plausible by any rational standard where it was not internally consistent or complete, did not present a factual account of the scope of the alleged police misconduct, and did not explain defendant's own actions in a manner that adequately supported his defense).

People v. Johnson (2004) 118 Cal. App. 4th 292, 12 Cal. Rptr. 3d 885 (trial court erred in summarily denying defendant's *Pitchess* motion; defendant was not required to prove that it was likely that police officer was lying about defendant's actions, but only that police officer's credibility was material to the defense offered; here defendant was entitled to an in camera inspection of responsive documents because his *Pitchess* motion satisfied the requirements of Section 1043).

Abatti v. Superior Court (2003) 112 Cal. App. 4th 39, 4 Cal. Rptr. 3d 767 (the trial court abused its discretion in denying defendant's hybrid *Pitchess/Brady* motion without conducting an in camera hearing to examine police officer's counseling records to determine whether they contain information relevant to the issues presented in this case; the trial court erred in concluding that the affidavit supporting the motion had to be based on the "personal knowledge" of the declarant; appellate court thoroughly reviews the process and rationale for bringing these motions).

City of Los Angeles v. Superior Court (2003) 111 Cal. App. 4th 883, 3 Cal. Rptr. 3d 915 , *overruled in part*, 42 Cal. 4th 319 (as a matter of first impression, peace officer payroll records are "personnel records," within meaning of *Penal Code* § 832.8, and are therefore subject to the discovery provisions of Sections 1043-1045 (*Pitchess* motions); however, in a divorce proceeding, a peace officer's spouse is not required to bring a *Pitchess* motion to discover the peace officer's payroll records); *disapproved in part in* **International Federation of Professional and Technical Engineers, Local 21, AFI-CIO v. Superior Court** (2007) 42 Cal. 4th 319, 344-345, 64 Cal. Rptr. 693, 165 P.3d 488 (disapproving dicta in *City of Los Angeles* that the amount of public employee salaries was personal information the disclosure of which would be an invasion of personal privacy).

Fagan v. Superior Court (2003) 111 Cal. App. 4th 607, 4 Cal. Rptr. 3d 239 (police officers who were indicted for felony assault and battery, filed motion for protective order, seeking to prevent district attorney from disclosing urinalysis test results obtained from confidential peace officer personnel files; district attorney has ability to review confidential peace officer personnel files without giving notice to involved officers when investigating police misconduct, but district attorney is statutorily required to maintain non-public nature of peace officer personnel files absent judicial review in compliance with *Pitchess* procedures of Sections 1043 and 1045).

Brant v. Superior Court (2003) 108 Cal. App. 4th 100, 132 Cal. Rptr. 2d 783 (it was error to deny Brant's *Pitchess* where Brant challenged the officers' account of the detention, search and manner in which his confession was obtained by providing his own version of the events, thereby making the officers' truthfulness material to the issues in the case; as a result, Brant demonstrated good cause under Section 1043 and was entitled to an in camera review of the requested complaints against the officers regarding "allegations of false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, false testimony, perjury, [and] making false arrests" to determine relevance under Section 1045).

California Highway Patrol v. Superior Court (2000) 84 Cal. App. 4th 1010, 101 Cal. Rptr. 2d 379 (rule that nonfelony conduct involving moral turpitude is admissible to impeach a criminal witness did not eliminate defendant's burden of showing good cause as required by Sections 1043, 1045 for discovery of documents from a peace officer's personnel file; only documentation of past officer conduct that is similar to the misconduct alleged by defendant in pending litigation is relevant and therefore subject to discovery).

Alt v. Superior Court (1999) 74 Cal. App. 4th 950, 88 Cal. Rptr. 2d 530 (Sections 1043 et seq. apply only when request involves an issue concerning an arrest or post-arrest/pre-booking incident; these sections should not be confused with general discovery provisions that apply to a request for police officer's personnel records).

People v. Hustead (1999) 74 Cal. App. 4th 410, 87 Cal. Rptr. 2d 875 (defendant was entitled to discover prior complaints of false police reports against officer to show that officer was not being truthful in the case at hand).

People v. Gill (1997) 60 Cal. App. 4th 743, 70 Cal. Rptr. 2d 369 (records of past officer misconduct must be similar to misconduct alleged by defendant in motion for discovery under Sections 1043, 1045).

People v. Superior Court (1997) 58 Cal. App. 4th 397, 67 Cal. Rptr. 2d 910 (Section 1045's general limitations on discovery of "peace officer's personnel records govern prosecution's discovery of personnel records of criminal defendant who was no longer a police officer when crime was allegedly committed and where his role as police officer had no relation to crime charged; exception to Section 1045 where investigation of "police officer" in *Penal Code* sections 832.7, 832.8 does not apply).

City of Azusa v. Superior Court (1987) 191 Cal. App. 3d 693, 236 Cal. Rptr. 621 (individuals bringing tort and personal injury action against police officers for use of excessive force in arrests were entitled, at most, to names and addresses of other persons who complained that two officers had used excessive force in course of arrest within five years preceding plaintiffs' arrests, but were not entitled to obtain officers' personnel files, absent showing that other complainants were unavailable for interviews or could not remember details of events about which they complained; at a minimum, personnel files should have been redacted, excluding medical records and other intimate information that had no relevance to plaintiffs' claims).

City and County of San Francisco v. Superior Court (1981) 125 Cal. App. 3d 879, 178 Cal. Rptr. 435 (subdivision (b)(1) of this section excluding from disclosure to any litigant including one criminally accused "Information consisting of complaints concerning conduct [of a police officer] occurring more than five years before the event or transaction which is the subject of the litigation in aid of which discovery or disclosure is sought" is valid under state and federal constitutions).



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SECTION 1046 Disclosure Where Allegation of Excessive Force

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§ 1046.syn Synopsis to Chapter 1046: Disclosure Where Allegation of Excessive Force

Scope Disclosure Where Allegation of Excessive Force

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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1-1046 California Evidence Courtroom Manual Scope

Scope Disclosure Where Allegation of Excessive Force

§ 1046 reads as follows:

Rule 1046 Disclosure Where Allegation of Excessive Force

In any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer or custodial officer, as defined in *Section 831.5 of the Penal Code*, in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility.

(Stats. 1985, ch. 539, § 1. Amended by Stats. 2002, ch. 784 (S.B. 1316), § 103)

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1 ANALYSIS

Section 1046 appears to be a clear example of politics creeping in to the California Evidence Code, requiring a party seeking disclosure of records of potential police misconduct to put before a judge the circumstances of the party's own alleged misconduct, in the form of a police report setting forth the reasons the party was stopped and arrested. The ostensible reason for such a statute is to put the entire context of the incident before the judge, but it appears unnecessary to make such factual determinations when the issue is whether the disclosure sought by the plaintiff is relevant to the plaintiff's allegations of excessive force. At any rate, it would seem that the necessary context or affirmative defenses, if any, should be raised in the defendant's answer and/or the defendant's response to plaintiff's motion for disclosure.



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2 COMPARISON TO FEDERAL RULE

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Alt v. Superior Court (1999) 74 Cal. App. 4th 950, 88 Cal. Rptr. 2d 530 (Sections 1043 et seq. apply only when request involves an issue concerning an arrest or post-arrest/pre-bookings incident; these sections should not be confused with general discovery provisions that apply to a request for police officer's personnel records).



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SECTION 1047 Records of Peace Officers Not Involved in Arrest

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§ 1047.syn Synopsis to Chapter 1047: Records of Peace Officers Not Involved in Arrest

Scope Records of Peace Officers Not Involved in Arrest

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1-1047 California Evidence Courtroom Manual Scope

Scope Records of Peace Officers Not Involved in Arrest

§ 1047 reads as follows:

Rule 1047 Records of Peace Officers Not Involved in Arrest

Records of peace officers or custodial officers, as defined in *Section 831.5 of the Penal Code*, including supervisorial officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct is alleged to have occurred within a jail facility, shall not be subject to disclosure.

(Stats. 1985, ch. 539, § 1. Amended by Stats. 2002, ch. 784 (S.B. 1316), § 103)

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1 ANALYSIS

This section limits the scope of discovery of police personnel records. It differs from Sections 1043 to 1045 in that it makes an absolute determination as to irrelevancy, stating that records of law enforcement personnel who had no contact with a party contesting the circumstances of an arrest are simply not discoverable.



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2 COMPARISON TO FEDERAL RULE

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Alt v. Superior Court (1999) 74 Cal. App. 4th 950, 88 Cal. Rptr. 2d 530 (Sections 1043 et seq. apply only when request involves an issue concerning an arrest or post-arrest/pre-bookings incident; these sections should not be confused with general discovery provisions that apply to a request for police officer's personnel records).

Davis v. City of Sacramento (1994) 24 Cal. App. 4th 393, 29 Cal. Rptr. 2d 232 (Section 1047 creates a qualified privilege that is held by the individual officer and the police department; privilege extends to personnel records of retired police officers functioning as expert witnesses; statute was not intended to apply only to criminal prosecution where there has been arrest).



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SECTION 1050 Privilege to Protect Secrecy of Vote

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§ 1050.syn Synopsis to Chapter 1050: Privilege to Protect Secrecy of Vote

Scope Privilege to Protect Secrecy of Vote

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 8 PRIVILEGES
CHAPTER 4 PARTICULAR PRIVILEGES
ARTICLE 10 POLITICAL VOTE
SECTION 1050 Privilege to Protect Secrecy of Vote

1-1050 California Evidence Courtroom Manual Scope

Scope Privilege to Protect Secrecy of Vote

§ 1050 reads as follows:

Rule 1050 Privilege to Protect Secrecy of Vote

If he claims the privilege, a person has a privilege to refuse to disclose the tenor of his vote at a public election where the voting is by secret ballot unless he voted illegally or he previously made an unprivileged disclosure of the tenor of his vote.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

In an age of instant election results and "exit polls," it is sometimes forgotten that individuals have a privacy interest in refusing to reveal how they have voted. This privacy interest is also reflected in the *California Constitution, Article II, Section 7* (requiring that "voting shall be secret"). The privilege of Section 1050 has only two exceptions--one for illegality and one reflecting the principle of waiver.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1050 in the Federal Rules of Evidence, but federal courts do recognize this privilege.
See 3 Weinstein 2d §§ 501.01-.05.



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3 SIGNIFICANT CASES

People v. Wells (1983) 149 Cal. App. 3d 721, 197 Cal. Rptr. 163 (defense counsel's question during voir dire of prospective jurors as to what caused juror to vote the way he or she did on Proposition 8 was properly precluded as impinging on juror's constitutional right to privacy and indirectly calling for revelation of privileged matter).



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DIVISION 8 PRIVILEGES
CHAPTER 4 PARTICULAR PRIVILEGES
ARTICLE 11 TRADE SECRET
SECTION 1060 Privilege to Protect Trade Secret

1-1060 California Evidence Courtroom Manual 1060.syn

§ 1060.syn Synopsis to Chapter 1060: Privilege to Protect Trade Secret

Scope Privilege to Protect Trade Secret

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ARTICLE 11 TRADE SECRET
SECTION 1060 Privilege to Protect Trade Secret

1-1060 California Evidence Courtroom Manual Scope

Scope Privilege to Protect Trade Secret

§ 1060 reads as follows:

Rule 1060 Privilege to Protect Trade Secret

If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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ARTICLE 11 TRADE SECRET
SECTION 1060 Privilege to Protect Trade Secret

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1 ANALYSIS

Section 1060 creates a qualified or conditional privilege for trade secrets so that secret information essential to the continued operation of a business or industry could be given some measure of protection against unnecessary disclosure. However, this protection is limited to cases where its application will not tend to conceal fraud or otherwise work injustice. 7 Cal. L. Rev. Comm. Rep. 1 (1965).



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SECTION 1060 Privilege to Protect Trade Secret

1-1060 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1060 in the Federal Rules of Evidence, but federal courts have long recognized and protected privacy interests in trade secrets. *See* 3 Weinstein 2d §§ 501.01-.05. Congress has also enacted a federal Trade Secrets Act, 18 U.S.C. § 1905 and exempted trade secrets under the Freedom of Information Act, 5 U.S.C. § 552(b)(4).



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3 ADDITIONAL AUTHORITY

Note, *Employer-Employee Trade Secrets Disputes*, 31 *Hastings L.J.* 671 (1980)

Douglas K. Southard, *To Catch a Thief: High Tech Information Thieves*, 6 *Cal. Law.* 23 (1986)



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4 SIGNIFICANT CASES

Steiny & Co. v. California Elec. Supply Co. (2000) 79 Cal. App. 4th 285, 93 Cal. Rptr. 2d 920 (cross-complainant's invocation of trade secret privilege to protect calculations regarding damages cross-complainant had paid to defendant warranted trial court's decision to grant plaintiff's motion to exclude cross-complainant's evidence of damages at trial; a party cannot both pursue a claim and assert a privilege to withhold evidence that is crucial to that claim).

Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal. App. 4th 1384, 9 Cal. Rptr. 2d 709 (party claiming trade secret privilege has burden of establishing its existence, but once privilege is established party seeking disclosure must make prima facie showing of the need for disclosure of trade secrets; plaintiff's expert's testimony that trade secrets would be helpful to analysis of case and to ability of plaintiff's expert to reach conclusions concerning tire's failure did not satisfy plaintiff's burden).



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SECTION 1061 Procedure for Assertion of Trade Secret Privilege

1-1061 California Evidence Courtroom Manual 1061.syn

§ 1061.syn Synopsis to Chapter 1061: Procedure for Assertion of Trade Secret Privilege

Scope Procedure for Assertion of Trade Secret Privilege

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SECTION 1061 Procedure for Assertion of Trade Secret Privilege

1-1061 California Evidence Courtroom Manual Scope

Scope Procedure for Assertion of Trade Secret Privilege

§ 1061 reads as follows:

Rule 1061 Procedure for Assertion of Trade Secret Privilege

(a) For purposes of this section, and Sections 1062 and 1063:

(1) "Trade secret" means "trade secret," as defined in subdivision (d) of *Section 3426.1 of the Civil Code*, or paragraph (9) of subdivision (a) of *Section 499c of the Penal Code*.

(2) "Article" means "article," as defined in paragraph (2) of subdivision (a) of *Section 499c of the Penal Code*.

(b) In addition to Section 1062, the following procedure shall apply whenever the owner of a trade secret wishes to assert his or her trade secret privilege, as provided in Section 1060, during a criminal proceeding:

(1) The owner of the trade secret shall file a motion for a protective order, or the people may file the motion on the owner's behalf and with the owner's permission. The motion shall include an affidavit based upon personal knowledge listing the affiant's qualifications to give an opinion concerning the trade secret at issue, identifying, without revealing, the alleged trade secret and articles which disclose the secret, and presenting evidence that the secret qualifies as a trade secret under either subdivision (d) of *Section 3426.1 of the Civil Code* or paragraph (9) of subdivision (a) of *Section 499c of the Penal Code*. The motion and affidavit shall be served on all parties in the proceeding.

(2) Any party in the proceeding may oppose the request for the protective order by submitting affidavits based upon the affiant's personal knowledge. The affidavits shall be filed under seal, but shall be provided to the owner of the trade secret and to all parties in the proceeding. Neither the owner of the

trade secret nor any party in the proceeding may disclose the affidavit to persons other than to counsel of record without prior court approval.

(3) The movant shall, by a preponderance of the evidence, show that the issuance of a protective order is proper. The court may rule on the request without holding an evidentiary hearing. However, in its discretion, the court may choose to hold an in camera evidentiary hearing concerning disputed articles with only the owner of the trade secret, the people's representative, the defendant, and defendant's counsel present. If the court holds such a hearing, the parties' right to examine witnesses shall not be used to obtain discovery, but shall be directed solely toward the question of whether the alleged trade secret qualifies for protection.

(4) If the court finds that a trade secret may be disclosed during any criminal proceeding unless a protective order is issued and that the issuance of a protective order would not conceal a fraud or work an injustice, the court shall issue a protective order limiting the use and dissemination of the trade secret, including, but not limited to, articles disclosing that secret. The protective order may, in the court's discretion, include the following provisions:

(A) That the trade secret may be disseminated only to counsel for the parties, including their associate attorneys, paralegals, and investigators, and to law enforcement officials or clerical officials.

(B) That the defendant may view the secret only in the presence of his or her counsel, or if not in the presence of his or her counsel, at counsel's offices.

(C) That any party seeking to show the trade secret, or articles containing the trade secret, to any person not designated by the protective order shall first obtain court approval to do so:

(i) The court may require that the person receiving the trade secret do so only in the presence of counsel for the party requesting approval.

(ii) The court may require the person receiving the trade secret to sign a copy of the protective order and to agree to be bound by its terms. The order may include a provision recognizing the owner of the trade secret to be a third-party beneficiary of that agreement.

(iii) The court may require a party seeking disclosure to an expert to provide that expert's name, employment history, and any other relevant information to the court for examination. The court shall accept that information under seal, and the information shall not be disclosed by any court except upon termination of the action and upon a showing of good cause to believe the secret has been disseminated by a court-approved expert. The court shall evaluate the expert and determine whether the expert poses a discernible risk of disclosure. The court shall withhold approval if the expert's economic interests place the expert in a competitive position with the victim, unless no other experts are available. The court may interview the expert in camera in aid of its ruling. If the court rejects the expert, it shall state its reasons for doing so on the record and a transcript of those reasons shall be prepared and sealed.

(D) That no articles disclosing the trade secret shall be filed or otherwise made a part of the court record available to the public without approval of the court and prior notice to the owner of the secret. The owner of the secret may give either party permission to accept the notice on the owner's behalf.

(E) Other orders as the court deems necessary to protect the integrity of the trade secret.

(c) A ruling granting or denying a motion for a protective order filed pursuant to subdivision (b) shall not be construed as a determination that the alleged trade secret is or is not a trade secret as defined by subdivision (d) of *Section 3426.1 of the Civil Code* or paragraph (9) of subdivision (a) of *Section 499c of the Penal Code*. Such a ruling shall not have any effect on any civil litigation.

(d) This section shall have prospective effect only and shall not operate to invalidate previously entered protective orders.

(Stats. 1990, ch. 149 (A.B. 2986), § 1. Amended by Stats. 1990, ch. 714 (A.B. 2553), § 1; Stats. 2002, ch. 784 (S.B. 1316), § 103)

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SECTION 1061 Procedure for Assertion of Trade Secret Privilege

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1 ANALYSIS

See Analysis of Section 1060. Section 1061 sets out the procedural guidelines for seeking and opposing disclosure of trade secrets. The general rule authorizing California courts to fashion protective orders for trade secrets is *Code of Civil Procedure* section 2019.



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2 COMPARISON TO FEDERAL RULE

See Comparison to Federal Rule in Section 1060. Federal courts commonly fashion protective orders to protect trade secrets under *Federal Rule of Civil Procedure 26(c)*.



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CHAPTER 4 PARTICULAR PRIVILEGES

ARTICLE 11 TRADE SECRET

SECTION 1062 Motion to Exclude Public from Criminal Proceeding Involving Trade Secret

1-1062 California Evidence Courtroom Manual 1062.syn

§ 1062.syn Synopsis to Chapter 1062: Motion to Exclude Public from Criminal Proceeding Involving Trade Secret

Scope Motion to Exclude Public from Criminal Proceeding Involving Trade Secret

1 ANALYSIS

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1-1062 California Evidence Courtroom Manual Scope

Scope Motion to Exclude Public from Criminal Proceeding Involving Trade Secret

§ 1062 reads as follows:

Rule 1062 Motion to Exclude Public from Criminal Proceeding Involving Trade Secret

(a) Notwithstanding any other provision of law, in a criminal case, the court, upon motion of the owner of a trade secret, or upon motion by the People with the consent of the owner, may exclude the public from any portion of a criminal proceeding where the proponent of closure has demonstrated a substantial probability that the trade secret would otherwise be disclosed to the public during that proceeding and a substantial probability that the disclosure would cause serious harm to the owner of the secret, and where the court finds that there is no overriding public interest in an open proceeding. No evidence, however, shall be excluded during a criminal proceeding pursuant to this section if it would conceal a fraud, work an injustice, or deprive the People or the defendant of a fair trial.

(b) The motion made pursuant to subdivision (a) shall identify, without revealing, the trade secrets which would otherwise be disclosed to the public. A showing made pursuant to subdivision (a) shall be made during an in camera hearing with only the owner of the trade secret, the People's representative, the defendant, and defendant's counsel present. A court reporter shall be present during the hearing. Any transcription of the proceedings at the in camera hearing, as well as any articles presented at that hearing, shall be ordered sealed by the court and only a court may allow access to its contents upon a showing of good cause. The court, in ruling upon the motion made pursuant to subdivision (a), may consider testimony presented or affidavits filed in any proceeding held in that action.

(c) If, after the in camera hearing described in subdivision (b), the court determines that exclusion of trade secret information from the public is appropriate, the court shall close only that portion of the criminal proceeding necessary to prevent disclosure of the trade secret. Before granting the motion, however, the court shall find and state for the record that the moving party has met its burden pursuant to subdivision (b), and that the closure of that portion of the

proceeding will not deprive the People or the defendant of a fair trial.

(d) The owner of the trade secret, the People, or the defendant may seek relief from a ruling denying or granting closure by petitioning a higher court for extraordinary relief.

(e) Whenever the court closes a portion of a criminal proceeding pursuant to this section, a transcript of that closed proceeding shall be made available to the public as soon as practicable. The court shall redact any information qualifying as a trade secret before making that transcript available.

(f) The court, subject to *Section 867 of the Penal Code*, may allow witnesses who are bound by a protective order entered in the criminal proceeding protecting trade secrets, pursuant to Section 1061, to remain within the courtroom during the closed portion of the proceeding.

(Stats. 1990, ch. 149 (A.B. 2986), § 1. Amended by Stats. 1990, ch. 714 (A.B. 2553), § 2)

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1 ANALYSIS

Section 1062 deals with a specific method of protecting trade secrets--shutting out individuals other than those who can demonstrate a right to be exposed to the trade secrets. Closing the courthouse doors to the public creates strong tension with the strong tradition of public trials, which courts grapple with on a case-by-case basis pursuant to Section 1062.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1062 in the Federal Rules of Evidence. However, federal courts have grappled with the issue of closing public trials, even criminal proceedings, to protect trade secrets. *See* Annot., *Propriety of Federal Court's Exclusion of Public from Criminal or Civil Trial in Order to Protect Trade Secret*, 69 A.L.R. Fed. 892 (1984). *See also* *Press-Enterprise Co. v. Superior Court of California* (1984) 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (recognizing that the presumption of openness of criminal trials can be overcome by a case-specific showing of overriding interests and use of narrowest alternatives).



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SECTION 1063 Sealing of Articles Protected by Protective Order

1-1063 California Evidence Courtroom Manual 1063.syn

§ 1063.syn Synopsis to Chapter 1063: Sealing of Articles Protected by Protective Order

Scope Sealing of Articles Protected by Protective Order

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1-1063 California Evidence Courtroom Manual Scope

Scope Sealing of Articles Protected by Protective Order

§ 1063 reads as follows:

Rule 1063 Sealing of Articles Protected by Protective Order

The following provisions shall govern requests to seal articles which are protected by a protective order entered pursuant to *Evidence Code Section 1060 or 1061*:

- (a)** The People shall request sealing of articles reasonably expected to be filed or admitted into evidence as follows:
- (1) No less than 10 court days before trial, and no less than five court days before any other criminal proceeding, the People shall file with the court a list of all articles which the People reasonably expect to file with the court, or admit into evidence, under seal at that proceeding. That list shall be available to the public. The People may be relieved from providing timely notice upon showing that exigent circumstances prevent that notice.
 - (2) The court shall not allow the listed articles to be filed, admitted into evidence, or in any way made a part of the court record otherwise open to the public before holding a hearing to consider any objections to the People's request to seal the articles. The court at that hearing shall allow those objecting to the sealing to state their objections.
 - (3) After hearing any objections to sealing, the court shall conduct an in camera hearing with only the owner of the trade secret contained within those articles, the People's representative, defendant, and defendant's counsel present. The court shall review the articles sought to be sealed, evaluate objections to sealing, and determine whether the People have satisfied the constitutional standards governing public access to articles which are part of the judicial record. The court may consider testimony presented or affidavits filed in any proceeding held in that action. The People, defendant, and the owner of the trade secret may file affidavits based on the affiant's personal knowledge to be considered at that hearing. Those affidavits are to be sealed and not released to the public, but shall be made available to the parties.

The court may rule on the request to seal without taking testimony. If the court takes testimony, examination of witnesses shall not be used to obtain discovery, but shall be directed solely toward whether sealing is appropriate.

(4) If the court finds that the movant has satisfied appropriate constitutional standards with respect to sealing particular articles, the court shall seal those articles if and when they are filed, admitted into evidence, or in any way made a part of the court record otherwise open to the public. The articles shall not be unsealed absent an order of a court upon a showing of good cause. Failure to examine the court file for notice of a request to seal shall not constitute good cause to consider objections to sealing.

(b) The following procedure shall apply to other articles made a part of the court record:

(1) Where any articles protected by a protective order entered pursuant to Section 1060 or 1061 are filed, admitted into evidence, or in any way made a part of the court record in such a way as to be otherwise open to the public, the People, a defendant, or the owner of a trade secret contained within those articles may request the court to seal those articles.

(2) The request to seal shall be made by noticed motion filed with the court. It may also be made orally in court at the time the articles are made a part of the court record. Where the request is made orally, the movant must file within 24 hours a written description of that request, including a list of the articles which are the subject of that request. These motions and lists shall be available to the public.

(3) The court shall promptly conduct hearings as provided in paragraphs (2), (3), and (4) of subdivision (a). The court shall, pending the hearings, seal those articles which are the subject of the request. Where a request to seal is made orally, the court may conduct hearings at the time the articles are made a part of the court record, but shall reconsider its ruling in light of additional objections made by objectors within two court days after the written record of the request to seal is made available to the public.

(4) Any articles sealed pursuant to these hearings shall not be unsealed absent an order of a court upon a showing of good cause. Failure to examine the court file for notice of a request to seal shall not constitute good cause to consider objections to sealing.

(Stats. 1990, ch. 149 (A.B. 2986), § 3)

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1 ANALYSIS

Section 1063 provides a specific procedure for protecting trade secrets. *See also* Analysis of Section 1060.



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2 COMPARISON TO FEDERAL RULE

See Comparison to Federal Rule in Section 1060.



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CHAPTER 5 IMMUNITY OF NEWSMAN FROM CITATION FOR CONTEMPT
SECTION 1070 Refusal to Disclose News Source

1-1070 California Evidence Courtroom Manual 1070.syn

§ 1070.syn Synopsis to Chapter 1070: Refusal to Disclose News Source

Scope Refusal to Disclose News Source

1 ANALYSIS

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SECTION 1070 Refusal to Disclose News Source

1-1070 California Evidence Courtroom Manual Scope

Scope Refusal to Disclose News Source

§ 1070 reads as follows:

Rule 1070 Refusal to Disclose News Source

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1971, ch. 1717, § 1; Stats. 1972, ch. 1431, § 1; Stats.

1974, ch. 1323, § 1; Stats. 1974, ch. 1456, § 2)

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DIVISION 8 PRIVILEGES

CHAPTER 5 IMMUNITY OF NEWSMAN FROM CITATION FOR CONTEMPT

SECTION 1070 Refusal to Disclose News Source

*1-1070 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 1070 is an odd member of Division 8, which sets forth privileges under California law, both absolute and conditional or qualified. Section 1070 recognizes the public interest in maintaining a free flow of information, but it is not a privilege--disclosure of information can be compelled, but Section 1070 limits the remedy available under certain circumstances if disclosure is not forthcoming. The only remedy Section 1070 forecloses is contempt. *Delaney v. Superior Court* (1990) 50 Cal. 3d 785, 268 Cal. Rptr. 753, 789 P.2d 934. Even if Section 1070 applies, reporters or news agencies are still subject to other discovery sanctions or lawsuits based on their refusal to disclose information. *Id.* In *Delaney*, the California Supreme Court interpreted the essential elements of Section 1070. The Court held that to overcome prima facie showing by a newsperson that he or she is entitled to withhold information under the shield law, criminal defendant must show a reasonable possibility that the information will materially assist in his defense such that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial. *Id.* The Court set forth several factors to balance in determining whether a criminal defendant is entitled to newsperson's unpublished information including: whether information is confidential or sensitive; interests sought to be protected by shield law; importance of information to criminal defendant; and, depending on particular facts, whether there is alternative source for unpublished information. *Id.*

In *Miller v. Superior Court* (1999) 21 Cal. 4th 883, 89 Cal. Rptr. 2d 834, 986 P.2d 170, the California Supreme Court refused to narrow the shield law to favor criminal prosecutors. The Court reversed the Court of Appeal's ruling that a newsperson can be held in contempt for refusing to disclose unpublished information where the prosecutor has sought such information pursuant to its right of due process in criminal cases. The Court held that although Proposition 115 granted prosecutors the right to due process in criminal prosecutions, this provision does not require limiting the evidentiary shield law, which can also be found in the *California Constitution, Article I, Section 2(b)*.

In 2000, the California Legislature added a statute clarifying the rights of journalists under the media shield law. *Code of Civil Procedure section 1986.1*. Added by Stats. 2000, ch. 377 (A.B. 1860), § 1. The statute provides (1) that no testimony or other evidence given by a journalist under subpoena in a civil or criminal proceeding may be construed as a waiver of immunity provided by the media shield law of the California Constitution; (2) except in exigent circumstances, a journalist who is subpoenaed in any civil or criminal proceeding shall be given at least five days' notice by the party issuing the subpoena that an appearance will be required; (3) and where the judge in a criminal trial holds a journalist asserting protection under the media shield law in contempt of court, the court must set forth findings on the record stating why the information will be of material assistance to the party seeking the evidence, and why alternative

sources of information are not sufficient to satisfy the defendant's right to a fair trial.



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2 COMPARISON TO FEDERAL RULE

Federal courts have recognized a limited qualified privilege for newsmen. See *United States v. Vastola* (D.N.J. 1988) 685 F. Supp. 917 ; *Von Bulow v. Von Bulow* (2d Cir. 1987) 811 F.2d 136 ; *Miller v. Mecklenburg County* (W.D.N.C. 1985) 602 F. Supp. 675 , *aff'd without op.*, 813 F.2d 402 , *cert. denied*, 479 U.S. 1100 (collecting cases).



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3 ADDITIONAL AUTHORITY

Paula D. Salinger, *California's Media Shield Law: It Is Possible to Simultaneously Protect the Free Flow of Information and Due Process Rights?* 32 *McGeorge L. Rev.* 801 (2001)

Note, *California's "New" Newsmen's Shield Law and Criminal Defendant's Right to a Fair Trial*, 26 *Santa Clara L. Rev.* 219 (1986)

Timothy L. Alger, *Promises Not to Be Kept: The Illusory Newsgatherer's Privilege in California*, 25 *Loy. L.A. L. Rev.* 155 (1991)



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Miller v. Superior Court (1999) 21 Cal. 4th 883, 89 Cal. Rptr. 2d 834, 986 P.2d 170 (news reporters cannot be held in contempt for refusing to provide unpublished information even if a request is based on the prosecution's right under Proposition 115 to due process).

People v. Sanchez (1995) 12 Cal. 4th 1, 47 Cal. Rptr. 2d 843, 906 P.2d 1129, cert. denied, 519 U.S. 835 (in order to compel disclosure of information covered by newsperson's shield law, criminal defendant must make threshold showing of reasonable possibility that information will materially assist his defense; showing need not be detailed or specific, but must rest on more than mere speculation, and if threshold showing is made, court then balances various factors in determining whether to compel disclosure of information; defendant failed to make such showing).

People v. Cooper (1991) 53 Cal. 3d 771, 281 Cal. Rptr. 90, 809 P.2d 865 (in order to compel disclosure of information covered by this section, defendant must make special showing of reasonable possibility that information will materially assist his defense; showing need not be detailed or specific, but must rest on more than mere speculation).

New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 273 Cal. Rptr. 98, 796 P.2d 811 (this section did not preclude sanctions other than contempt so that newspaper disobeying subpoena to produce unpublished photographs could be assessed monetary sanctions under Code of Civil Procedure section 1992).

Mitchell v. Superior Court (1988) 37 Cal. 3d 268, 208 Cal. Rptr. 152, 690 P.2d 625 (1984) (noting first amendment concerns in newsperson's refusal to disclose information and taking such concerns into account in determination of whether sanctions other than contempt ought to be imposed on newsperson).

O'Grady v. Superior Court (2006) 139 Cal. App. 4th 1423; 44 Cal. Rptr. 3d 72 (trial court erred in denying protective order to operators of an online news magazine who were subpoenaed by a company alleging that its trade secrets had been stolen by a confidential source and published in online magazine; protective order was justified under the federal Stored Communications Act and because subpoena would be unenforceable through contempt proceedings in light of the California reporter's shield privilege in Cal. Const., art. I, § 2, subd. (b) and Evid. Code § 1070).

People v. Vasco (2005) 131 Cal. App. 4th 137, 31 Cal. Rptr. 3d 643 , review denied (defendant was unable to meet the threshold requirement for overcoming the shield law because she did not show a reasonable possibility the information would materially assist her defense).

Rancho Publications v. Superior Court (1999) 68 Cal. App. 4th 1538, 81 Cal. Rptr. 2d 274 (paid advertisements or "advertorials" criticizing a local community hospital, which were published in a weekly newspaper, did not qualify as "information for communication to the public" protected by the media shield law; however, hospital failed to meet its burden to defeat newspaper's qualified constitutional privilege by showing a compelling need for the names of the anonymous authors of advertisements critical of hospital).

SCI-Sacramento, Inc. v. Superior Court (1997) 54 Cal. App. 4th 654, 62 Cal. Rptr. 2d 868 (there was no waiver of immunity under Section 1070 where television station submitted videotape to court for *in camera* review).



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CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

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Scope

General Practice Tip on Character Evidence

When a party offers evidence of a person's character to suggest that the individual acted consistently with his or her character on a particular occasion, you must ask two questions:

1. Can evidence of character be used? (*see Sections 1101(a), 1102, 1103, 1108 and 1109; 780-791* regarding the character of witnesses; and in criminal cases, case law on Prop. 8); and if so,
2. How can it be proved? (*see Section 1100*).

The answers to these questions are always subject to the court's discretion to exclude character evidence under Section 352.

General Practice Tip on Responding to Character Evidence Objections

There are basically four ways around the prohibition of character evidence:

1. Argue that *an exception applies* (see the requirements of specific rule):
 - (a) Character of a defendant in criminal cases (*Section 1102*).
 - (b) Character of a victim in criminal cases (*Section 1103*).
 - (c) Character of a witness (*Sections 1101(c) and 780-791*).
2. Argue that *the evidence is not character evidence*, but rather evidence of another material issue in the case, such as motive, opportunity, intent, preparation, plan, knowledge, identity, etc. (*Section 1101(b)*).

3. Argue that *the evidence is evidence of habit or custom (Section 1105)*.
4. Argue that *character is an ultimate issue in the case* and thus must be proved by opinion, reputation or specific acts (*Section 1100*).
5. Argue that *this is character evidence of a special nature* (prior sexual misconduct of defendant--*Section 1108*; prior acts of domestic violence or elder abuse--*Section 1109*).



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SECTION 1100 Manner of Proof of Character

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§ 1100.syn Synopsis to Chapter 1100: Manner of Proof of Character

Scope Manner of Proof of Character

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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1-1100 California Evidence Courtroom Manual Scope

Scope Manner of Proof of Character

§ 1100 reads as follows:

Rule 1100 Manner of Proof of Character

Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1100 Manner of Proof of Character

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1 ANALYSIS

Section 1100 answers the question, "If I can use character evidence (pursuant to Sections 1101(a), 1102, 1103, and 1108, and 780-791), how can I prove it?" Section 1100 recognizes three methods of proving a person's character or character trait. First, a person familiar with the character of an individual may provide opinion testimony as to the character in question. Second, reputation within a pertinent community may be used to establish circumstantially the character of an individual. Third, specific instances of conduct may be offered to establish the character of an individual.

The use of a particular methodology depends upon the way in which character is used in conjunction with the issues of a case. Where character is "in issue," all methods of proving character are available. Where character is used circumstantially to establish conforming conduct, only reputation and opinion evidence are available. Where, however, character evidence is utilized to impeach the credibility of a witness, method of proof is governed by Sections 780-791.

Character or character traits are established through a character witness. A person qualifies as a character witness where the witness is a member of some pertinent community in which the person characterized is known, and where the character witness has been a member of that community for a reasonably extensive period of time. Both of these elements must be established through a foundation in the course of the preliminary examination of the character witness. The character witness must also know the reputation of the person characterized and be prepared to testify to such reputation within the pertinent community. Reputation is the collective opinion of persons within the pertinent community. Section 1100 also provides that the character witness may respond to questions as to the character witness's personal opinion of the individual who is characterized. The character witness is permitted to testify to his personal opinion of the existence of the pertinent trait.

Illustration

Embezzlement trial.

Q:

Are you acquainted with the defendant, Mr. Bowman?

A:

Yes.

Q:

Please state the basis for your acquaintance.

A:

I have worked with him at the downtown branch of the Mega Bank Corp. for twelve years.

Q:

And during that time, have you had an opportunity to become familiar with Mr. Bowman's reputation for trustworthiness in the downtown banking community?

A:

I have.

Q:

What is his reputation?

A:

He is known to be an honest and trustworthy person.

Q:

During the twelve years you have known Mr. Bowman, have you had an opportunity to observe him in situations in which you would be able to determine his trustworthiness?

A:

I have.

Q:

And as consequence, have you developed a personal opinion as to Mr. Bowman's trustworthiness?

A:

Yes.

Q:

What is that opinion?

A:

It is my opinion that Mr. Bowman is honest and trustworthy.

In the rare situation where character is "in issue," specific instances of conduct of the person characterized may be proven in order to establish the person's character or character traits. Character is in issue when it constitutes an element of a claim, charge or defense. Specific instances of conduct may be proven through a character witness or through the testimony of any person who has firsthand knowledge of the relevant specific acts of the person characterized.

On cross-examination of a character witness, the witness may be asked about specific instances of conduct of the person characterized which are pertinent to the trait being considered. The question on cross-examination may be asked in the traditional form which provides that the cross-examiner may ask: "Have you heard that Mr. X was terminated from his job in May of 1989 because of embezzlement?" Alternately, the cross-examiner may use the more contemporary form: "Do you know that Mr. X was terminated from his job in May of 1989 because of embezzlement?"



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SECTION 1100 Manner of Proof of Character

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2 COMPARISON TO FEDERAL RULE

Section 1100 is the counterpart of *Federal Rule of Evidence 405*. Federal Rule of *Evidence 405* provides the methodology for proving character where it is determined that character evidence is admissible under Rule 404 (the federal counterpart to Sections 1101(a), 1102, 1103, and 1108).



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3 SIGNIFICANT CASES

Opinion Evidence

People v. McAlpin (1991) 53 Cal. 3d 1289, 283 Cal. Rptr. 382, 812 P.2d 563 (lay opinion testimony admissible as to whether accused is a child molester based on witness's firsthand observations).

In re Mark C. (1992) 7 Cal. App. 4th 433, 8 Cal. Rptr. 2d 856 (expert opinion testimony about the propensities of abusive parents).

People v. Hurd (1970) 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (a witness's opinion about a defendant's good character may be rebutted on cross-examination by asking if he has heard of specific acts by the defendant inconsistent with good character. The prosecution must be able to test the basis of the witness's opinions, which will consist of personal knowledge and knowledge of reputation).

Reputation Evidence

People v. Wrigley (1968) 69 Cal. 2d 149, 70 Cal. Rptr. 116, 443 P.2d 580 (on cross-examination, counsel may rebut a witness's testimony about a defendant's good reputation by asking in good faith whether the witness has heard of acts by the defendant which are inconsistent with good character. The defendant may challenge counsel's good faith belief and require him, out of the presence of the jury, to show that he had information to base his questions upon).

People v. McDaniel (1943) 59 Cal. App. 2d 672, 140 P.2d 88 (reputation is the character imputed upon a person by the community. A reputation witness can only testify to a person's standing in the community, since what the witness actually knows about him is irrelevant).

People v. Piazza (1927) 84 Cal. App. 58 (a witness can properly conclude from a defendant's lack of a general reputation for certain traits, that such reputation is good, because reputation is seldom discussed unless there is some fault to be found).

Specific Acts of Evidence Where Character Is an Ultimate Fact in Issue

People v. Loeun (1997) 17 Cal. 4th 1, 69 Cal. Rptr. 2d 776, 947 P.2d 1313 (a separate, concurrent assault by a fellow gang member may be used, along with evidence of the charged offense to establish the requisite pattern of criminal activity to support sentencing enhancement based on defendant's commission of an assault for the benefit of a criminal street gang (*Penal Code section 186.22(e)*)).

Pugh v. See's Candies, Inc. (1988) 203 Cal. App. 3d 743, 250 Cal. Rptr. 195 (specific acts of misconduct are admissible to show unfitness in wrongful termination actions).

In re Dorothy I. (1984) 162 Cal. App. 3d 1154, 209 Cal. Rptr. 5 (a parent's character is at issue in dependency and child custody actions in order to determine the future well-being of the child).

Allen v. Toledo (1980) 109 Cal. App. 3d 415, 167 Cal. Rptr. 270 (specific acts are admissible in negligent entrust actions to show the operator's unfitness to operate a vehicle or instrumentality).

Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 103 Cal. Rptr. 120 (1972) (specific acts are admissible in wrongful death actions to show decedent's likelihood to provide support to the survivors).



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CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

SECTION 1101 Evidence of Character to Prove Conduct

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§ 1101.syn Synopsis to Chapter 1101: Evidence of Character to Prove Conduct

Scope Evidence of Character to Prove Conduct

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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SECTION 1101 Evidence of Character to Prove Conduct

1-1101 California Evidence Courtroom Manual Scope

Scope Evidence of Character to Prove Conduct

§ 1101 reads as follows:

Rule 1101 Evidence of Character to Prove Conduct

(a) Except as provided in this Section and in Sections 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.

(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.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967, Amended by Stats. 1986, ch. 1432, § 1; Stats. 1995, ch. 439 (A.B. 882), § 1, Stats. 1996, ch. 261 (S.B. 1876), § 1)

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SECTION 1101 Evidence of Character to Prove Conduct

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1 ANALYSIS

Evidence of a person's character or character traits tends to distract the trier of fact from the primary issues of the case. Such evidence creates a substantial risk that a finding will be predicated on the trier's attitude toward a person's character, rather than upon an objective determination of the facts. Consequently, specialized rules have developed to limit the use of character evidence in order to protect the integrity of the fact finding process.

Section 1101(a) contains the general prohibition on using evidence of a person's character (whether in the form of reputation, opinion, or specific acts) as circumstantial evidence to prove that person's conduct on a particular occasion, except as provided in this section and Sections 1102, 1103, and 1108. The basic exclusionary principle of Section 1101(a) is often called the "propensity rule." Essentially, the rule creates a forbidden inferential pattern. Under Section 1101(a), a person's character or propensity to act in a certain way may not be offered as a basis for the inference that on a specific occasion he or she acted in conformity with the propensity or the character trait. The basic exclusionary principle applies both in civil and criminal cases, but it most frequently will be applied to exclude evidence in a criminal case. For example, a negative character trait of an accused may not be established by the prosecution as evidence of the propensity of the accused to commit the crime in question.

Illustration

In a prosecution for murder, the prosecution cannot seek to show the violent character or the violent propensity of the accused in order to establish that, in connection with the operative facts of the case, the accused acted in conformity with his propensity and murdered the victim in question. Such evidence of the accused's character trait or propensity would be relevant under *Section 350*. It would tend to alter the probabilities that the accused committed the murder in question, i.e., as a matter of common experience, murders are more frequently committed by those with violent propensities than by those who lack such propensities. Nevertheless, such evidence is rejected under Section 1101(a) because evidence of a person's character may unduly excite the emotions and prejudices of the trier of fact; the trier might seek to penalize the accused for his violent propensities rather than making a dispassionate and objective evaluation of the facts of the case.

Section 1101(a) prohibits the use of a specific type of inference. It does not forbid the use of character evidence generally. Consequently, when character evidence is used to establish something other than conforming conduct, such

character evidence is not within the forbidden inferential pattern prohibited by Section 1101(a). Such situations where character evidence is used in a manner other than to prove conforming conduct will generally fall into the application of character evidence known as "character in issue." Where character is "in issue," character evidence itself forms an essential element of a charge, claim, or a defense. Character is "in issue" where it is not used as a basis for a further inference, but it is a terminal point of proof.

Illustration

In a libel or slander case involving certain alleged character traits, the character traits may constitute an element of a defense. Accordingly, if the substantive law dictates that character or a character trait is an element of a defense, character then is "in issue," and it is outside the basic prohibition of Section 1101(a). Consequently, if *P* charged *D* with slander claiming that *D* said, "*P* is dishonest," and *D* pleads truth as a defense, *D* must prove *P*'s dishonesty to prevail. *P*'s character trait of dishonesty is a terminal point of proof. It is not used as the basis for a further inference. Consequently, *P*'s trait is "in issue," and such use of character evidence is not prohibited by Section 1101(a).

Section 1101(b) states that evidence of particular acts may be used to prove any material issue in the case *other* than character. See the Special Practice Tip on 1101(b), below, for suggestions on making or responding to a Section 1101(b) objection. Section 1101(b) applies in both civil and criminal cases, and its scope encompasses any extrinsic act, not merely acts resulting in criminal conviction or subject to criminal prosecution. As used in Section 1101(b), an "other act" or an "extrinsic act" is simply any act which is not part of the operative facts or episode of the case; *i.e.*, it is "extrinsic" usually because of a separation in time, space, or both.

The list of bases for properly offering an extrinsic act set forth in Section 1101(b) is not exhaustive, and the fundamental issue under both provisions is whether the act is offered only to prove character and conforming conduct. If so, the evidence is inadmissible. The list of possible bases for offering an extrinsic act under Section 1101(b) should be seen only as a suggestive catalogue.

Illustration 1

A prior act may be utilized to show the motive of the accused rather than to show the accused's propensity to commit antisocial acts. For example, if the defendant is charged with stealing an expensive diamond cutting device, the prosecution may seek to offer evidence that the month prior to the alleged theft of the diamond cutting device, the defendant stole a bag of uncut diamonds. Proof of the prior act would give rise to the inference that the defendant had a motive for stealing the diamond cutting machine.

Illustration 2

Often, prior acts of an accused are offered by the prosecution to establish the identity of the perpetrator of the crime which is charged. For example, where the defendant is charged with armed robbery and the defendant denies that he is the perpetrator, the prosecution may seek to establish his identity through the accused's unique modus operandi of committing crimes. If the robbery in question was committed by a man wearing a Halloween mask who claimed to have dynamite wired to his body, and the accused has committed robberies on three prior occasions using the same method of operation, evidence of the accused's prior acts would tend to identify him as the perpetrator of the crime. The prosecution would argue that the prior acts of the defendant are outside the exclusionary rule because they are not offered to establish character or criminal propensity.

Special Practice Tip on 1101(b) (or "Other Act") Evidence

Although Section 1101(b) evidence is sometimes labeled "prior bad act" or "prior uncharged misconduct" evidence, the proffered evidence neither needs to occur prior to the event in dispute, nor needs to amount to misconduct. See *People v. Balcom* (1994) 7 Cal. 4th 414, 27 Cal. Rptr. 2d 666, 867 P.2d 777. While it is used most frequently in criminal cases, most of Section 1101 applies to both civil and criminal cases. 7 Cal L. Rev. Comm. Rep. 1 (1965).

The admissibility of Section 1101(b) evidence depends on whether it satisfies the following analysis:

1. *Is the evidence relevant to an issue in the case other than character?* More specifically:

(a) *Does the evidence go to an issue of consequence in the case?*

The issue sought to be proved by evidence of other acts must be in dispute (or constitute an intermediate fact from which an ultimate fact can be inferred) to prevent introduction of merely cumulative and prejudicial evidence. *People v. Alcala* (1984) 36 Cal. 3d 604, 205 Cal. Rptr. 775, 685 P.2d 1126, cert. denied, 510 U.S. 877; *People v. Thompson* (1980) 27 Cal. 3d 303, 165 Cal. Rptr. 289, 611 P.2d 883.

(b) *Logically, does the evidence help to prove the issue of consequence?*

Evidence of other acts must tend logically, naturally and by reasonable inference to prove the issue it is offered upon. *People v. Guerrero* (1976) 16 Cal. 3d 719, 129 Cal. Rptr. 166, 548 P.2d 366. Note that depending on the theory being used, the proponent of the evidence may have to prove similarity between the "other act" and the act in dispute. In *People v. Ewoldt* (1994) 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757, the California Supreme Court linked the degree of similarity required to the purpose for which the evidence is offered: (1) a high degree of similarity and distinctiveness is required for the other act(s) to be logically probative of "identity"; (2) a significant or high degree of similarity, but not distinctiveness is required for the other act(s) to be logically probative of "common plan or scheme"; only some similarity is required for the other act(s) to be logically probative of "intent." This hierarchy is easier to state in theory than to apply in practice.

(c) *Is there enough evidence of the "other act" for the purpose for which it is being offered?*

The proponent must provide the trial court initially with enough evidence that a reasonable person could find the existence of the "other act," but the proponent must ultimately persuade the jury that the other act occurred by a preponderance of the evidence before the jury may consider the other acts as evidence. *People v. Carpenter* (1997) 15 Cal. 4th 312, 63 Cal. Rptr. 2d 1, 935 P.2d 708, cert. denied, 531 U.S. 838; *People v. Singh* (1995) 37 Cal. App. 4th 1343, 44 Cal. Rptr. 2d 644; see also CALJIC No. 2.50.1 and CALJIC No. 2.01 and User Notes (noting that where prosecution's evidence is primarily circumstantial, CALJIC No. 2.01 should control).

2. *Is the probative value of the "other act" substantially outweighed by its dangers? (Section 352).*

The most obvious danger is the danger of *undue prejudice*; a jury may decide the case on the basis of a person's bad conduct or character rather than on the evidence admitted in the case. However, there are other dangers, such as whether the evidence is so old it would be unfair to use it in this case, whether it would be a waste of time or whether it would mislead or confuse the jury.

In any case in which the court accepts the proponent's theory of the admissibility of evidence of a prior act and proceeds to admit the prior act, the judge should be asked to provide the jury with a limiting instruction. Such an instruction would advise the jury that the evidence of the prior act may not be

considered as a basis for an inference that the individual in question acted in conformity with his prior conduct or with his indicated propensity. *See CALJIC No. 2.50* (model limiting instruction).

Section 1101(c) provides an exception to the prohibition on character evidence; a party may always prove the character of a witness for truthfulness or untruthfulness (whether because the witness is lying, biased, unworthy of belief because of a prior conviction, or has a weakness in capacity to testify on a particular issue). This exception to the basic exclusionary principle is more specifically codified in *Sections 780-791*. It is important to note that the exception relating to the character of witnesses will apply to the accused if he takes the stand on his own behalf. (You can think of it this way: When is a defendant not a defendant? When the defendant is also a witness.) Consequently, if the accused elects to be a witness in his own case, certain aspects of the accused's character may be explored by the prosecution pursuant to *Sections 780-791*. *See People v. Millwee (1998) 18 Cal. 4th 96, 74 Cal. Rptr. 2d 418, 954 P.2d 990, cert. denied, 525 U.S. 1149* (contrasting use of prior misconduct to impeach defendant with use of prior misconduct to show motive, intent, etc.).



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

SECTION 1101 Evidence of Character to Prove Conduct

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2 COMPARISON TO FEDERAL RULE

Section 1101 is the counterpart of *Federal Rule of Evidence 404(a)*'s general ban on character evidence, *Federal Rule of Evidence 404(b)*, and *Federal Rule of Evidence 404(a)(3)*'s exception for the character of a witness. However, *Federal Rule of Evidence 404(b)* contains a pretrial notice requirement for criminal defendants that Section 1101(b) lacks. In addition, California courts are less generous in admitting "other act" evidence than are federal courts. See *People v. Sam* (1969) 71 Cal. 2d 194, 77 Cal. Rptr. 804, 454 P.2d 700, holding that courts must view evidence of other acts with extreme caution so as not to admit improper character evidence; courts should resolve any doubts in favor of the party against whom the evidence is being used. See also *People v. Hawkins* (1996) 10 Cal. 4th 920, 42 Cal. Rptr. 2d 636, 897 P.2d 574; *Frank v. Superior Court* (1989) 48 Cal. 3d 632, 257 Cal. Rptr. 550, 770 P.2d 1119; *People v. Alcala* (1984) 36 Cal. 3d 604, 205 Cal. Rptr. 775, 685 P.2d 1126.



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3 ADDITIONAL AUTHORITY

Miguel A. Mendez, Evidence: The California Code and the Federal Rules, A Problem Approach § 3.14, at 64-71 (1995) (commentators have been extremely critical of the "plan or common scheme" theory for admitting "other act" evidence, because of its vagueness)



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4 SIGNIFICANT CASES

People v. Kelly (2007) 42 Cal. 4th 763, 68 Cal. Rptr. 3d 531, 171 P.3d 548, modified, 2008 Cal. LEXIS 1904 (in first degree murder, death penalty case, trial court did not err, under Cal. Evid. Code, §§ 352 and 1101, in admitting evidence of uncharged misconduct, including evidence of defendant's financial dealings with other women from the fitness center and evidence of assaults on other women where each act occurred as part of a pattern that was highly relevant to understanding what happened to the murder victim: (1) defendant continually lied to women about his personal wealth after befriending them at the fitness center; (2) manipulated the women; (3) was very charming to the women; (4) lured them to his home; and (5) robbed and raped them. Evidence of defendant's financial dealings with other women strongly suggested that he took the murder victim's property pursuant to a common plan rather than merely as an afterthought. In addition, trial court did not err in admitting, during penalty phase, a 20-minute videotape montage of still photographs and video clips of the victim's life, from her infancy until shortly before she was killed, narrated unemotionally by her mother; any error in the inclusion of background music and an irrelevant clip of people riding horseback was harmless).

People v. Carpenter (1997) 15 Cal. 4th 312, 63 Cal. Rptr. 2d 1, 935 P.2d 708, cert. denied, 522 U.S. 1078, cert. denied, (Section 403 controls the process of determining whether defendant committed "other acts" used to prove an issue other than character under Section 1101(b); thus, jury was properly instructed that it must find by a preponderance of the evidence that defendant committed prior acts before the jury could consider them as evidence of intent in the case at hand).

People v. Ewoldt (1994) 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (the California Supreme Court has held that Section 1101 is valid even under Cal. Const. art. I, § 28(d) (enacted in 1982 as Proposition 8, "Victims' Bill of Rights," and this provision specifically labeled "Right to Truth-in-Evidence") because, even if Section 1101 was repealed by Section 28(d)'s enactment, the Legislature later properly reenacted Section 1101 in its entirety).

Bowen v. Ryan (2008) 163 Cal. App. 4th 916, 78 Cal. Rptr. 3d 128 (trial court committed reversible error in admitting testimony from 13 witnesses to describe defendant's treatment of other problem patients, some of which occurred as many as 11 years earlier and involved different circumstances and different conduct on the part of defendant; such evidence had slight probative value in proving the allegations in the current case but it was time-consuming and essentially led to a series of mini-trials over each incident, with testimony not only from the patients and/or their

parents, but also from defendant and his assistants; the evidence tended to evoke an emotional bias against defendant that clouded the relevant issues in the case).

People v. Gunder (2007) 151 Cal. App. 4th 412, 59 Cal. Rptr. 3d 817, review denied (trial court did not err in admitting, under Cal. Evid. Code §§ 352 and 1101, evidence that defendant possessed a firearm a few days before the crime because the evidence was relevant to refute the claim that the police planted the firearm found in defendant's possession).

People v. Ortiz (2003) 109 Cal. App. 4th 104, 134 Cal. Rptr. 2d 467 (evidence of defendant's previous misconduct involving the use of alcohol while driving was relevant and admissible in current prosecution for vehicular murder even though current charge involved the use of excessive speed and reckless driving rather than the use of alcohol; a motor vehicle driver's previous encounters with the consequences of recklessness on the highway--whether provoked by the use of alcohol, of another intoxicant, by rage, or some other motivator--sensitizes him to the dangerousness of such life-threatening conduct; thus, evidence of prior acts of recklessness are admissible to prove defendant's knowledge or mens rea in current prosecution; where prior acts were nowhere near as dramatic as the current charge, defendant was punished for prior acts, and proper limiting instruction was given, trial court did not err in concluding that probative value of prior act evidence was not substantially outweighed by prejudicial effect of the evidence).

People v. Robinson (2000) 85 Cal. App. 4th 434, 102 Cal. Rptr. 2d 179 (in case where defendant was charged with murdering and dumping victim in dumpster in Los Angeles, defendant's statement to witness while driving five days later in Oxnard that if anything ever happened to her, he would get rid of her body by dumping in Los Angeles was not barred by the hearsay rule because it was an admission under Section 1220; the law does not require an admission relevant to a completed crime to be independently admissible as proof of identity under Section 1101(b)).

Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 100 Cal. Rptr. 2d 662 (Section 1101(b) applies in civil as well as criminal cases, but evidence concerning prior wrongful acts of tree trimming by billboard company was not admissible to show identity of wrongdoer in that activities described by witness were not so unusual or distinctive as to support inference that billboard company trimmed the tree in the case at hand; without showing of identity of wrongdoer, same evidence could not logically serve as evidence of motive, lack of mistake or accident).

People v. Beuer (2000) 77 Cal. App. 4th 1433, 92 Cal. Rptr. 2d 572 (state may use evidence illegally obtained in a search incident to prior arrest to establish defendant's knowledge of narcotics and his intent to transport drugs for sale in case at hand; nexus between search and the instant case was so attenuated that exclusion would not deter police conduct).

Beyda v. City of Los Angeles (1998) 65 Cal. App. 4th 511, 76 Cal. Rptr. 2d 547 (evidence of other acts of sexual harassment was not admissible to prove hostile work environment where complainant did not have personal knowledge of the other incidents while in the work environment; it would be error to allow plaintiff to prove her case by arguing that alleged harassers were likely to have harassed plaintiff simply because they did the same things before).

Brown v. Smith (1997) 55 Cal. App. 4th 767, 64 Cal. Rptr. 2d 301 (when evaluating admissibility of other acts of sexual harassment, record must reflect that trial court performed necessary balancing of relevant factors before evidence of other acts may be admitted).

1101(b) Admissibility--Examples of Acts Used to Prove Issues Other Than Character Common Plan

People v. Farnam (2002) 28 Cal. 4th 107, 121 Cal. Rptr. 2d 106, 47 P.3d 988 (defendant's prior act of refusing to provide blood and hair samples despite a court order was offered for appropriate purpose of showing consciousness of guilt of capital murder rather than improper purpose of showing defendant's criminal propensity; if defendant felt jury

might draw the improper inference, his remedy was to ask for a limiting instruction).

People v. Catlin (2001) 26 Cal. 4th 81, 26 P.3d 357, 109 Cal. Rptr. 2d 31, *reh'g denied*, 2001 Cal. LEXIS 648 (trial court did not err in admitting evidence regarding murder of defendant's fifth wife in prosecution for first-degree murder of his mother and fourth wife; evidence of murder of fifth wife demonstrated identity and common scheme or plan, where each victim was a close female relative of defendant, defendant stood to gain financially from each victim, expert evidence established that each victim died from paraquat poisoning; trial court did not err in ruling that no marital privilege existed between defendant and former wife where they were not legally married).

People v. Loeun (1997) 17 Cal. 4th 1, 69 Cal. Rptr. 2d 776, 947 P.2d 1313 (a separate, concurrent assault by a fellow gang member may be used, along with evidence of the charged offense to establish the requisite pattern of criminal activity to support sentencing enhancement based on defendant's commission of an assault for the benefit of a criminal street gang (*Penal Code* section 186.22(e)).

In re Malone (1996) 12 Cal. 4th 935, 50 Cal. Rptr. 2d 281, 911 P.2d 468 (evidence that a prosecution witness had consistently collected incriminating information about fellow jail inmates and offered it to law enforcement officials with the hope of receiving favorable treatment was admissible in habeas corpus proceeding to show plan or scheme by witness to give false testimony).

People v. Ewoldt (1994) 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (proof of a common plan demands a high degree of similarity between the other act and the present act. Their shared features naturally must indicate the existence of a general plan. The marks need not be distinctive. The proponent of the other act(s) need not show that the other acts and the charged act were the product of a single plan).

Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (appeal of consolidated civil actions against O. J. Simpson for wrongful deaths of Nicole Brown Simpson and Ronald Goldman; it was not error to admit under Section 1101(b) five instances of defendant's prior abuse of his ex-wife because instances were relevant to issues of motive, intent and identity).

People v. Scheer (1998) 68 Cal. App. 4th 1009, 80 Cal. Rptr. 2d 676 (evidence of prior offense of evading officer with willful disregard for safety was not admissible as evidence of common plan or design, despite some similarity with charged offense of felony hit and run, as both offenses were spontaneous events).

Lande v. Southern California Freight Lines (1948) 85 Cal. App. 2d 416, 193 P.2d 144 (in a breach of contract claim, evidence of other contracts between similar or different parties may be admissible to show a common plan if they share the sufficient level of similarity).

Identity

People v. Kipp (1998) 18 Cal. 4th 349, 75 Cal. Rptr. 2d 716, 956 P.2d 1169 (uncharged rape-murder admissible to show identity where crimes displayed highly distinctive features and were close in time and place).

People v. Medina (1995) 11 Cal. 4th 694, 47 Cal. Rptr. 2d 165, 906 P.2d 2 (uncharged robberies and murders were sufficiently similar to charged offense to be admissible in capital murder case to prove identity; both uncharged and charged crimes involved robbery and murder of a convenience store employee who was working alone, victims were each shot in the head at close range, ballistic reports indicated that same gun, traced to defendant, was used to kill all three victims, and the offenses all occurred near the places defendant was staying at time of the murders).

People v. Champion (1995) 9 Cal. 4th 879, 39 Cal. Rptr. 2d 547, 891 P.2d 93 (prosecution could use evidence that defendant was involved in murders committed by a codefendant in considering whether defendant was guilty of charged

murders; murders occurred in the same neighborhood, murders occurred 15 days apart, both murders involved four perpetrators in one getaway car, getaway car had stolen items from murder victims, and both cases involved drug dealers who were forced to lie on their beds and then were shot in the back of the head at close range).

People v. Ewoldt (1994) 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (use of other acts to prove identity requires both a high degree of similarity and distinctiveness. The other acts and the act at issue must share a sufficient amount of common features that are so unusual or distinctive that they suggest a signature).

Intent

People v. Carpenter (1997) 15 Cal. 4th 312, 63 Cal. Rptr. 2d 1, 935 P.2d 708, cert. denied, 522 U.S. 1078, cert. denied, (Section 403 controls the process of determining whether defendant committed "other acts" used to prove an issue other than character under Section 1101(b); thus, jury was properly instructed that it must find by a preponderance of the evidence that defendant committed prior acts before the jury could consider them as evidence of intent in the case at hand).

People v. Memro (1995) 11 Cal. 4th 786, 47 Cal. Rptr. 2d 219, 905 P.2d 1305 (photographs of young boys and pornographic magazines containing sexually explicit stories, photos and drawings of young males were admissible to prove intent to molest young boy in prosecution for first-degree murder on felony-murder theory; jury could use the evidence to infer that defendant had sexual attraction to young boys and intended to act on it).

People v. Ewoldt (1994) 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (use of other acts to show intent does not require a high degree of similarity. The other acts need only be sufficiently similar to the act at issue to support an inference that a person probably possessed the same intent in all the instances).

People v. McCray (1997) 58 Cal. App. 4th 159, 67 Cal. Rptr. 2d 872 (evidence of defendant's violence toward victim in the past was relevant to whether defendant had intent to cause victim fear, which in turn was relevant to stalking and other charges).

People v. Linkenauger (1995) 32 Cal. App. 4th 1603, 38 Cal. Rptr. 2d 868, review denied (evidence of defendant's prior domestic violence was admissible to show defendant's premeditation, his intent to beat, torture, and ultimately murder his wife).

People v. Brandon (1995) 32 Cal. App. 4th 1033, 38 Cal. Rptr. 2d 751 (other crimes evidence was admissible in prosecution for kidnapping and robbery, where the two prior crimes were sufficiently similar to charged offense to be admissible to prove defendant's intent to rob. Key factors were the defendant's ambiguous actions while in victim's car, and that both prior crimes and charged offenses occurred in parking lots where victims were approached by defendant with a weapon and told them to move into passenger seat, and later asked about money. Trial court also properly analyzed the evidence under Section 352 and gave limiting instruction).

Motive

People v. Barnett (1998) 17 Cal. 4th 1044, 954 P.2d 384, 74 Cal. Rptr. 2d 121, cert. denied, 549 U.S. 835 (evidence that murder victim had made report to sheriff claiming that defendant had assaulted murder victim's friend and sabotaged victim's vehicle relevant to defendant's motive to kill victim).

People v. Quartermain (1997) 16 Cal. 4th 600, 66 Cal. Rptr. 2d 609, 941 P.2d 788 (evidence that defendant used racial epithets to refer to black murder victim was admissible as evidence of motive and attitude toward victim).

People v. Williams (1997) 16 Cal. 4th 153, 66 Cal. Rptr. 2d 123, 940 P.2d 710, cert. denied, (evidence of

defendant's gang membership was relevant to issues of defendant's motive and intent even if victim was not in fact a member of rival gang but was killed in area of disputed gang control and victim was wearing clothing consistent with colors worn by rival gang).

People v. Wilson (1992) 3 Cal. 4th 926, 13 Cal. Rptr. 2d 259, 838 P.2d 1212 (indebtedness or poverty is inadmissible to show motive for robbery or theft, unless the defendant claims he did not commit robbery or theft because he did not need money).

People v. Wesson (2006) 138 Cal. App. 4th 959, 41 Cal. Rptr. 3d 883, review denied, 2006 Cal. LEXIS 9676 (on appeal of conviction for sodomy by force, inflicting corporal injury on spouse, making criminal threats, and attempting to dissuade witness, court held that defendant's prior convictions for sexual offenses could be proved by documentary evidence in lieu of live testimony).

People v. Hawkins (2002) 98 Cal. App. 4th 1428, 121 Cal. Rptr. 2d 627 (evidence that defendant possessed unauthorized computer source code on a prior occasion was admissible to rebut his claim of inadvertent possession of source code in case at hand).

People v. Scheer (1998) 68 Cal. App. 4th 1009, 80 Cal. Rptr. 2d 676 (trial court erred in admitting evidence of prior offense of evading officer but it was not reversible error).

People v. Kelley (1997) 52 Cal. App. 4th 568, 60 Cal. Rptr. 2d 653 (evidence of defendant's prior conviction for molestation of victim was properly admitted in prosecution for stalking as evidence of motive; the prior conviction showed the extent of defendant's obsession with the victim; although the prior conviction was prejudicial, the fact that it was a conviction minimized the chance that the jury would want to punish defendant for his prior bad act and the fact that the prior conviction was for molestation and current prosecution was for stalking would prevent the jury from confusing the acts).

People v. Gibson (1976) 56 Cal. App. 3d 119, 128 Cal. Rptr. 302 (motive is a state of mind which impels a person to act in accordance with that particular feeling or belief, and therefore closely resembles a character trait. The difficulty in distinguishing these two requires a court to view "other act" evidence showing motive with considerable scrutiny, more so than with intent).

1101(b) in Civil Cases

Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 100 Cal. Rptr. 2d 662 (Section 1101(b) applies in civil as well as criminal cases, but evidence concerning prior wrongful acts of tree trimming by billboard company was not admissible to show identity of wrongdoer in that activities described by witness were not so unusual or distinctive as to support inference that billboard company trimmed the tree in the case at hand; without showing of identity of wrongdoer, same evidence could not logically serve as evidence of motive, lack of mistake or accident).

Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 74 Cal. Rptr. 2d 510 (prior incidents of harassment were admissible to prove liability for punitive damages because of individual's disregard of warnings about prior incidents).

Bihun v. AT&T Information Systems Inc. (1993) 13 Cal. App. 4th 976, 16 Cal. Rptr. 2d 787 (in a sexual harassment action, evidence of other instances of sexual misconduct by employee's supervisor admitted to prove that employer had knowledge and opportunity to deal with supervisor's misconduct).

In re Estate of Zalud (1972) 27 Cal. App. 3d 945, 104 Cal. Rptr. 329 (looking to the unique method of preparation of three different wills as circumstantial evidence that they were all prepared by one beneficiary of all three wills).

Constitutionality Under Double Jeopardy Clause

Dowling v. United States (1990) 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (the United States Supreme Court determined that the *double jeopardy clause of the Constitution* did not prohibit testimony regarding a previous robbery of which the defendant had been acquitted; the Court noted that the acquittal did not determine the ultimate issue in the case at bar. Further, the jury could "reasonably conclude" that the defendant committed the previous robbery even if it did not believe so beyond a reasonable doubt).



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CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

SECTION 1102 Opinion and Reputation Evidence of Character of Criminal Defendant to Prove Conduct

1-1102 California Evidence Courtroom Manual 1102.syn

§ 1102.syn Synopsis to Chapter 1102: Opinion and Reputation Evidence of Character of Criminal Defendant to Prove Conduct

Scope Opinion and Reputation Evidence of Character of Criminal Defendant to Prove Conduct

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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SECTION 1102 Opinion and Reputation Evidence of Character of Criminal Defendant to Prove Conduct

1-1102 California Evidence Courtroom Manual Scope

Scope Opinion and Reputation Evidence of Character of Criminal Defendant to Prove Conduct

§ 1102 reads as follows:

Rule 1102 Opinion and Reputation Evidence of Character of Criminal Defendant to Prove Conduct

In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

- (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.
- (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1102 Opinion and Reputation Evidence of Character of Criminal Defendant to Prove Conduct

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1 ANALYSIS

Section 1102 is commonly called the "Defendant's Mercy Rule." It creates an exception to the general ban on character evidence, not because this evidence is more reliable or less prejudicial, but because it allows the defendant to present some evidence in his or her favor. *See CALJIC No. 2.40* (character evidence capable of generating reasonable doubt about guilt of defendant). Under Section 1102, the accused in a criminal case may seek to introduce pertinent evidence of his good character in order to raise the inference that on a particular occasion involving the crime for which he is charged, he acted in conformity with his good character and did not commit the operative facts of the crime. It should be noted that this exception applies only to an accused in a criminal proceeding.

Illustration

Where an accused is charged with murder, he may introduce evidence of his character trait for peacefulness in the hope that the jury will make the inference that he acted in conformity with his peaceful character on the particular occasion and did not commit the murder. Such application of character evidence is particularly useful where the prosecution's case is based on circumstantial evidence. Character evidence is often used by the accused in this situation to establish reasonable doubt as to whether or not he committed the crime.

A defendant may introduce only good character evidence that is relevant to the elements of the particular crime charged. 7 Cal. L. Rev. Comm. Rep. 1 (1965).



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2 COMPARISON TO FEDERAL RULE

Section 1102 is substantially similar to *Federal Rule of Evidence 404(a)(1)*.



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3 SIGNIFICANT CASES

Good Faith

People v. Eli (1967) 66 Cal. 2d 63, 56 Cal. Rptr. 916, 424 P.2d 356 (a court may test a prosecutor's good faith belief outside the presence of the jury by ascertaining if the act inquired about actually occurred and would probably cause some comment in the defendant's acquaintances).

Proof of Defendant's Character Limited to Reputation or Opinion

People v. Wagner (1975) 13 Cal. 3d 612, 119 Cal. Rptr. 457, 532 P.2d 105 (specific acts are inadmissible to show or rebut good character, but the prosecution may inquire on good faith if a defense witness has heard of acts by the defendant which tend to negate his good character).

People v. Felix (1999) 70 Cal. App. 4th 426, 82 Cal. Rptr. 2d 701 (evidence of defendant's prior conviction for possessing heroin and cocaine with intent to distribute was not admissible to rebut character evidence that he used only heroin and that police must therefore have planted the cocaine; character witness should not have been permitted to testify in the form of specific acts; Prop. 8 did not abrogate Section 1102; erroneous admission of evidence was harmless).

Rebutting Good Character

People v. Payton (1992) 3 Cal. 4th 1050, 13 Cal. Rptr. 2d 526, 839 P.2d 1035 (where the defendant introduced evidence of his good character for mitigation during the penalty phase of trial, the prosecution may rebut such evidence because a defendant should not be able to mislead the jury with one-sided character evidence).



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CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

SECTION 1103 Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

1-1103 California Evidence Courtroom Manual 1103.syn

§ 1103.syn Synopsis to Chapter 1103: Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

Scope Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

1 ANALYSIS

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SECTION 1103 Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

1-1103 California Evidence Courtroom Manual Scope

Scope Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

§ 1103 reads as follows:

Rule 1103 Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.

(2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

(b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).

(c)(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under *Section 261, 262 or 264.1 of the Penal Code*, or under *section 286, 288a, or 289 of the Penal Code*, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those actions, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

(2) Notwithstanding paragraph (3), evidence of the manner in which the victim was dressed at the time of the commission of the offense shall not be admissible when offered by either party on the issue of consent in any prosecution for an offense specified in paragraph (1), unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence shall make an offer of proof outside the hearing of the jury. The court shall then make its determination and at that time, state the reasons for its ruling on the record. For the purposes of this paragraph, "manner of dress" does not include the condition of the victim's clothing before, during, or after the commission of the offense.

(3) Paragraph (1) shall not be applicable to evidence of the complaining witness's sexual conduct with the defendant.

(4) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.

(5) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.

(6) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this subdivision.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1974, ch. 569, § 2; Stats. 1981, ch. 726, § 2; Stats. 1990, ch. 268, § 1; Stats. 1991, ch. 16, § 1, eff. March 18, 1991; Stats. 1996, ch. 1075 (S.B. 1444), § 7; Stats. 1998, ch. 127 (A.B. 1926), § 1).

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CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

SECTION 1103 Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

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1 ANALYSIS

This section provides an exception to the general ban on character evidence when a criminal defendant attacks the character of the victim. Section 1103 can best be explained by comparing it with its federal counterparts, as discussed below. *Section 1103* was amended in 1998 to allow the trial judge to restrict questioning regarding the manner in which the complaining witness was dressed, with the exception of the condition of the clothing, at the time the offense was committed, when offered by either party on the issue of consent, unless the court finds the evidence relevant and admissible in the interests of justice. The bill would require the court to state on the record the reasons for admitting or excluding the evidence.



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CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

SECTION 1103 Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

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2 COMPARISON TO FEDERAL RULE

Sections 1103(a) and (b) bear some similarity to *Federal Rules of Evidence 404(a)(2)* and 405(a), the basic federal rules on when and how a defendant can introduce evidence of the character of a victim. Section 1103(c) resembles Federal Rule of *Evidence 412*, the federal "rape-shield" statute. However, the California sections differ from their federal counterparts in significant ways.

Sections 1103(a) and (b) differ from *Federal Rule of Evidence 405(a)* in that they permit proof of the victim's character through specific acts, while the federal rule limits the proof to reputation or opinion evidence. Section 1103(a)(2) restricts the prosecution more than its federal counterpart. Under the federal rule, the prosecution in homicide cases can offer evidence of the victim's peaceful character to rebut evidence that the victim was the first aggressor (evidence that could simply be testimony that the victim started the fight). In California, the prosecution can offer evidence of the defendant's character only after the defendant has attacked the victim's character for violence. In California, once the defendant has impugned the victim's character for violence, the prosecution can attack the defendant's propensity for violence with evidence of specific acts. Federal Rules of *Evidence 404(a)(1)* and *404(a)(2)* were amended, effective December 1, 2000, to permit the prosecution to attack the defendant's character for violence once the defendant opens the door by attacking the victim's character for violence. This makes the federal rules similar to the California approach. However, the federal prosecutor is limited to reputation or opinion evidence of the victim's character for peacefulness.

Section 1103(c) and *Federal Rule of Evidence 412* are commonly called "rape-shield" rules. They bar the defense from offering evidence of the complainant's sexual conduct, other than with the accused, to prove consent. The rationale for these rules is that the complainant's sexual conduct with others is irrelevant to whether the complainant consented to sex with the defendant. In addition, the complainant may be deterred from bringing charges if the trial will focus on the complainant's sexual conduct. Federal Rule of *Evidence 412* uses the term "sexual predisposition" to provide broader protection of the alleged victim than "sexual behavior" alone. By prohibiting any evidence that may obliquely connote the alleged victim's sexual activity to the fact finder, Federal Rule of *Evidence 412(a)(2)* serves the Rule's policy objectives of safeguarding the alleged victim from irrelevant stereotyping and protecting the alleged victim from potential embarrassment. Consequently, evidence of an alleged victim's mode of dress, speech or lifestyle will be prohibited by the exclusionary principle of Federal Rule of *Evidence 412* unless one of the exceptions applies.

Section 1103(c) differs from Federal Rule of *Evidence 412* in several respects. First, Section 1103(c) uses the term

"sexual conduct," which suggests that it covers a narrower range of behavior than the federal counterpart. Second, unlike Federal Rule of *Evidence* 412, if the prosecution introduces evidence regarding the complainant's sexual conduct, Section 1103(c) allows the defendant the right both to cross-examine the testimony and to introduce rebuttal evidence, although the federal constitution may require some degree of cross-examination of witnesses as to bias or motive to lie. (*Olden v. Kentucky* (1988) 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513). Third, Section 1103(c) differs from Federal Rule of *Evidence* 412 in that it allows not only evidence in the form of reputation or opinion, but also specific acts. Finally, Federal Rule of *Evidence* 412 contains specific procedural requirements before evidence of complainant's prior sexual conduct can be admitted. Finally, Section 1103(c) permits the trial judge to restrict questioning regarding the complainant's clothing at the time of the offense; Federal Rule of *Evidence* 412 does not address this issue. *See also* Section 1106, which limits the admissibility of evidence of a complainant's sexual conduct in battery, assault or sexual harassment cases, and Section 782, which allows the complainant to be impeached with evidence of prior sexual conduct under certain circumstances.



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SECTION 1103 Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

*1-1103 California Evidence Courtroom Manual 3***3 SIGNIFICANT CASES****Character of Victim**

People v. Tackett (2006) 144 Cal. App. 4th 445, 50 Cal. Rptr. 3d 449 (in drunk-driving case that rested on question of whether defendant or passenger was driving, trial court did not err in excluding evidence of two occasions in which passenger recklessly drove a car while under the influence of alcohol, once a year before and once about two years after the crash. Passenger was not a "victim" under Section 1103(a), whose character could be proved under certain circumstances; a "victim" under this provision is a person at whom the defendant's conduct was directed and whose own conduct could serve to explain, justify, or excuse the defendant's conduct toward that person. Here, evidence of the passenger's character was not offered to support a claim of consent, self-defense, or any other theory of justification or excuse. Instead, defendant sought to introduce it to support his claim that passenger, not defendant, committed the crime; that is an impermissible use of character evidence. Nor is evidence of passenger's instances of drunk-driving admissible under *Cal. Evid. Code § 1101(b)*; because DUI and reckless driving are, unfortunately, common occurrences in California, passenger's acts of driving were not sufficiently distinctive or unique to be admissible to establish the identity of the person who was driving the truck that caused the fatal collision in this case. Nor did passenger's acts demonstrate a common plan to drive under the influence of alcohol).

Admissibility of Defendant's Character for Violence

People v. Walton (1996) 42 Cal. App. 4th 1004, 49 Cal. Rptr. 2d 917 (defendant's introduction of testimony that witness saw victim strike a woman with his fist on a prior occasion when defendant was present permitted prosecution to introduce evidence of defendant's character for violence despite defendant's claim that testimony was offered solely to show defendant's personal knowledge of victim's character).

People v. Halsey (1993) 12 Cal. App. 4th 885, 16 Cal. Rptr. 2d 47 (when criminal defendant offers evidence of victim's character for violence, prosecution may rebut with evidence of the defendant's character for violence).

Constitutionality

People v. Blanco (1992) 10 Cal. App. 4th 1167, 13 Cal. Rptr. 2d 176 (allowing evidence of a defendant's propensity for violence does not violate his due process rights because the defendant controls whether such evidence comes in and the rule does not place a heavy burden on him).

People v. Blackburn (1976) 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (the ban on evidence of the complainant's sexual history does not impinge a defendant's due process rights because (1) sexual acts with others bear little relevance to whether the victim consented to sexual conduct with the defendant, and (2) this section does not affect a defendant's ability to attack the victim's credibility) (Note that Section 782 permits prior sexual conduct of the complainant to impeach the credibility of the complainant under certain circumstances and with specific procedural protections. Moreover, the United States Supreme Court has held that limitations on cross-examination under a rape-shield provision may violate the *Sixth Amendment* rights of confrontation and compulsory process under the United States Constitution. *Olden v. Kentucky* (1988) 488 U.S. 227).

Evidence of Consent Versus Credibility of Complainant

People v. Rioz (1984) 161 Cal. App. 3d 905, 207 Cal. Rptr. 903 (where a defendant, pursuant to Section 782, makes an offer of proof under oath as to the relevance of the victim's sexual history to her credibility as a witness, Section 1103 will not apply, even if consent is the underlying element at issue. This rule resolves the overlap between the two sections because Section 782's strict procedural requirements protect the victim from unjust invasion of her private life).

Sexual Conduct

People v. Chandler (1997) 56 Cal. App. 4th 703, 65 Cal. Rptr. 2d 687 (trial court properly excluded some evidence of witness's sexual conduct under this section in that witness's willingness to exchange sex for drugs during long-term sexual relationship had little or no relevance to her willingness to do so out of that relationship; trial court committed harmless error in excluding evidence of witness's sexual conduct because trial court disbelieved testimony relating to prior conduct; trial court must apply guidelines under Section 352 and credibility of witnesses is not a factor to be balanced).

People v. Casas (1986) 181 Cal. App. 3d 889, 226 Cal. Rptr. 285 (solicitation of prostitution is sexual conduct within the meaning of Section 1103 because such evidence shows the complainant's willingness to engage in sexual acts).



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CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM
SECTION 1104 Character Trait for Care or Skill

1-1104 California Evidence Courtroom Manual 1104.syn

§ 1104.syn Synopsis to Chapter 1104: Character Trait for Care or Skill

Scope Character Trait for Care or Skill

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SECTION 1104 Character Trait for Care or Skill

1-1104 California Evidence Courtroom Manual Scope

Scope Character Trait for Care or Skill

§ 1104 reads as follows:

Rule 1104 Character Trait for Care or Skill

Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This rule simply makes explicit what is implied in Section 1101(a), that evidence of a person's character for care or skill is inadmissible to prove that person failed to use care or skill on a particular occasion.



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2 COMPARISON TO FEDERAL RULE

There is no comparable federal rule. However, this type of evidence would be excluded under the general ban against character evidence in Federal Rule of *Evidence 404(a)*.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM SECTION 1104 Character Trait for Care or Skill

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3 SIGNIFICANT CASES

In General

Hinson v. Clairemont Community Hospital (1990) 218 Cal. App. 3d 1110, 267 Cal. Rptr. 503 (overruled on other grounds by *Alexander v. Superior Court* (1993) 5 Cal. 4th 1218, 23 Cal. Rptr. 2d 397, 859 P.2d 96) (evidence of character for skill and care is inadmissible because prior lack of skill should not inculcate a person who acted skillfully in the present instance, and one's prior competence should not exonerate him if he acted poorly in this case).

Evidence of Physician's Due Care

Hinson v. Clairemont Community Hospital (1990) 218 Cal. App. 3d 1110, 267 Cal. Rptr. 503 (overruled on other grounds by *Alexander v. Superior Court* (1993) 5 Cal. 4th 1218, 23 Cal. Rptr. 2d 397, 859 P.2d 96) (evidence related to a physician's skill in the past is admissible only to show whether he possesses the minimum skills required by the standard of care, demonstrated by graduation from medical school, passing of the medical boards, and certification to practice medicine).

Expert Testimony

Buckwalter v. Airline Training Center (1982) 134 Cal. App. 3d 547, 184 Cal. Rptr. 659 (when little other information is available, experts, subject to other evidentiary rules, may rely upon evidence of lack of skill on prior occasions to opine about a possible cause for the event at issue and may explain to the jury the general basis for that reliance).

Negligent Entrustment

Jeld-Wen, Inc. v. Superior Court (2005) 131 Cal. App. 4th 853, 32 Cal. Rptr. 3d 351 rehearing denied, review denied (an employer's pretrial admission of liability may serve the purpose of protecting it from the admissibility of evidence of the employee's prior accidents, which would not be probative of the employee's actual negligence on the occasion in question; where employer has admitted before trial to vicarious liability for its employee's negligence, if proven, Section 1104's exclusionary rule operates to protect the employer from being exposed to prejudicial evidence that would be used

to show the employer's prior knowledge of an employee's prior accidents, for purposes of imposing direct and separate liability on the employer).

Allen v. Toledo (1980) 109 Cal. App. 3d 415, 167 Cal. Rptr. 270 (evidence of other incidents showing entrustee's lack of skill is admissible to show the defendant had knowledge of the entrustee's unfitness because knowledge of incompetence is an essential element of a negligent entrustment claim).



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

SECTION 1105 Habit or Custom to Prove Specific Behavior

1-1105 California Evidence Courtroom Manual 1105.syn

§ 1105.syn Synopsis to Chapter 1105: Habit or Custom to Prove Specific Behavior

Scope Habit or Custom to Prove Specific Behavior

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SECTION 1105 Habit or Custom to Prove Specific Behavior

1-1105 California Evidence Courtroom Manual Scope

Scope Habit or Custom to Prove Specific Behavior

§ 1105 reads as follows:

Rule 1105 Habit or Custom to Prove Specific Behavior

Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1105 Habit or Custom to Prove Specific Behavior

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1 ANALYSIS

Judges take different approaches to habit or custom evidence. Some tend to interpret the terms broadly, while others read them more narrowly. The narrow interpretation is probably the better one, for the wider the category of habit or custom evidence admitted, the more likely that the ban on character evidence will be violated.

The essential characteristics of habit or custom evidence appear to be specific and repetitive behavior. Some judges will also look for a psychological dimension; they will consider whether the conduct is almost unconscious or non-volitional. The theory is that if evidence is specific, repetitive and non-volitional, it is more reliable than character traits, which are broad, dynamic and subject to control. "Habit" is generally defined as a person's regular practice of meeting a particular kind of situation with a specific type of responsive conduct. In behavioral terms, habit refers to the tendency of a person to exhibit a regular response to a specific stimulus. Habit is unquestionably a form of propensity, and consequently, it is, in many cases, difficult to distinguish habit from what evidentiary law would designate as character. The distinction, nevertheless, is important, because the admissibility of character evidence is highly restricted by Section 1101, whereas the admissibility of habit evidence is authorized under Section 1105. Where the form of propensity is general and represents a behavioral inclination, it constitutes character governed by Section 1101; where the form of propensity is specific and connected with an identifiable prompting circumstance, it constitutes habit governed by Section 1105. While gradations of gray undoubtedly exist between these polar concepts, the law requires designation of the propensity as either character or habit to determine whether Section 1101 or Section 1105 applies.

Proof of the existence of a habit is normally made through the testimony of a person who has first-hand knowledge of the individual or business whose habit is sought to be proven. The witness must testify that he is familiar with the person or business, and that practice of meeting a particular kind of situation with a response that approaches invariability. Alternately and additionally, the witness may testify that he has observed the person or business conform to the habit on several occasions.

After establishing the existence of the habit, the proponent of the evidence then submits evidence that would prove that the stimulus for the response occurred on a particular occasion. Such stimulus can be established through any witness possessing first-hand knowledge as required by Section 702. Having established the habit and the stimulus, the response will be inferentially indicated by the habit rule.

Illustration

A party might seek to establish that an individual punched a time clock on a particular day. The proponent of such a consequential fact could offer testimony from the individual or other witnesses that the individual punched the time clock on the day in question. Such testimony would be based upon the first-hand knowledge of these witnesses. In addition, however, the proponent may wish to offer habit evidence to reinforce the testimony of the witnesses. In order to establish the conclusion indicated by the habit evidence, the proponent would first have to establish the existence of the habit of the individual to invariably punch the time clock when he or she arrived at work. Then the proponent of the evidence would establish that the individual in fact arrived at work on the particular day in question. The evidence having established that the individual arrived on the day in question, the operation of the habit rule would permit the inference that the individual punched the time clock on the particular day in question. The use of habit evidence creates a permissible, but not a mandatory inference that the habitual conduct occurred. In other words, the trier of fact may find that the habitual response occurred, but it is not required to make such a finding.

Habit evidence is distinguishable from inadmissible evidence of one's character in that habit is a consistent response to some event whereas character is merely a general disposition to act a certain way. 7 Cal. L. Rev. Comm. Rep. 1 (1965).



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2 COMPARISON TO FEDERAL RULE

Section 1105 is the counterpart of *Federal Rule of Evidence 406*, although the language of the California and federal rules differs in two respects. Federal Rule of *Evidence 406* expressly governs the admissibility of the habit of a natural person as well as the routine practice of a business or organization; Section 1105 does not specifically state that it applies to the habits or customs of businesses and organizations, but the language is broad enough to conclude that it does. Second, Federal Rule of *Evidence 406* explicitly rejects the common-law restriction that habit evidence is admissible only where there are no eyewitnesses while Section 1105 does not contain this express exclusion. However, legislative history states that the California drafters also rejected the common-law requirement. 7 Cal. L. Rev. Comm. Rep. 1 (1965) (admissibility of habit or custom evidence does not depend upon the absence of eyewitnesses).



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3 SIGNIFICANT CASES

In General

People v. Hughes (2002) 27 Cal. 4th 287, 116 Cal. Rptr. 2d 401, 39 P.3d 432, 39 P.3d 432 (trial court did not err in finding that testimony of two witnesses that murder victim left the top half of her door open while cleaning was insufficient to establish a habit or custom of murder victim to show that she acted in conformity with that habit on the day of the murder).

People v. Webb (1993) 6 Cal. 4th 494, 24 Cal. Rptr. 2d 779, 862 P.2d 779 (admissibility of evidence of habit of storing money in baby food jars and envelopes).

People v. Memro (1985) 38 Cal. 3d 658, 214 Cal. Rptr. 832, 700 P.2d 446 (police officers' practice of using particularized illegal techniques to obtain confessions constitutes habit or custom evidence).

Romeo v. Jumbo Market (1967) 247 Cal. App. 2d 817, 56 Cal. Rptr. 26 (habit evidence may be used to show the presence or lack of due care).

Definitions

People v. Memro (1985) 38 Cal. 3d 658, 214 Cal. Rptr. 832, 700 P.2d 446 (a habit is a person's regular response to a repeated specific situation; a custom is a routine practice by an organization or group which is equivalent to a habit).

Inadmissibility

People v. Humphries (1986) 185 Cal. App. 3d 1315, 230 Cal. Rptr. 536 (evidence of habitual conduct merely used to impeach a witness's testimony that he rarely acted in that manner is collateral and inadmissible for that purpose).

Hayward Tamkin & Co. v. Carpenteria Inv. Co. (1968) 265 Cal. App. 2d 617, 71 Cal. Rptr. 462 (evidence of custom is inadmissible to create additional contractual obligations because custom is a tool only used to interpret the contract at issue).



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SECTION 1106 Evidence in Sexual Harassment, Sexual Assault, or Sexual Battery Cases

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§ 1106.syn Synopsis to Chapter 1106: Evidence in Sexual Harassment, Sexual Assault, or Sexual Battery Cases

Scope Evidence in Sexual Harassment, Sexual Assault, or Sexual Battery Cases

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1-1106 California Evidence Courtroom Manual Scope

Scope Evidence in Sexual Harassment, Sexual Assault, or Sexual Battery Cases

§ 1106 reads as follows:

Rule 1106 Evidence in 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 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.

(c) If the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff.

(d) Nothing in this section shall be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783.

(Added by Stats. 1985, ch. 1328, § 4)

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SECTION 1106 Evidence in Sexual Harassment, Sexual Assault, or Sexual Battery Cases

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1 ANALYSIS

This section, like Section 1103(c) which is limited to criminal cases, restricts the admissibility of prior sexual conduct of the complainant in civil cases. It does not prevent the defendant from introducing evidence to rebut evidence or testimony offered by the plaintiff, nor does it prevent a defendant from impeaching the plaintiff pursuant to Section 783.



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2 COMPARISON TO FEDERAL RULE

Section 1106 differs from its federal counterpart, *Federal Rule of Evidence 412*. Section 1106 prohibits the use of evidence of a plaintiff's prior sexual conduct with individuals other than the defendant if offered only to prove the complainant's sexual predisposition or the absence of injury, unless the plaintiff claims loss of consortium. The rule retains, however, the right of the defendant to rebut evidence of the plaintiff's sexual conduct if any is offered by the plaintiff. Federal Rule of *Evidence 412(b)* takes a different approach, making the introduction of a civil plaintiff's sexual conduct subject to a balancing test. This test, however, is not the standard Rule 403 test. Unlike Rule 403, Rule 412(b) requires the proponent of the sexual conduct evidence to demonstrate its probative value and admissibility. Rule 412(b) requires the proponent of the evidence to show that the probative value of the evidence *substantially* outweighs its dangers not only to the parties, but also to any alleged victim. Thus, the bias of Rule 403 toward the admissibility of the evidence offered is reversed. Federal Rule of *Evidence 412* also differs from Section 1106, in that Rule 412(c) contains procedural safeguards to be used in determining the admissibility of sexual conduct evidence. Section 1106 contains no such provisions.



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3 SIGNIFICANT CASES

Rieger v. Arnold (2002) 104 Cal. App. 4th 451, 128 Cal. Rptr. 2d 295 (as a matter of first impression, the phrase "sexual conduct" evidence under Section 1106 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; thus testimony about plaintiff's racy banter, sexual horseplay, and statements concerning sexual exploits were "sexual conduct" evidence under Section 1106(b), which prohibits admission of such evidence in a civil action unless conduct involves alleged perpetrator; Section 1106(b) exception for plaintiff's conduct with "perpetrators" includes not only the named defendants but also any other actor whose conduct the plaintiff seeks to ascribe to a named defendant, for otherwise defendants would be hamstrung with imputed liability against which it could not effectively defend).

Patricia C. v. Mark D. (1993) 12 Cal. App. 4th 1211, 16 Cal. Rptr. 2d 71 (Section 1106 should be narrowly construed to apply only to sexual harassment, sexual assault, and sexual battery claims because (1) the Legislature specifically intended to protect plaintiffs' private lives against intrusion in these three cases, and (2) Section 1106's absolute ban should not conflict with other statutes which allow for limited use of evidence of the plaintiff's sexual conduct in other types of sexual offense cases).



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 1 EVIDENCE OF CHARACTER, HABIT, OR CUSTOM
SECTION 1107 Expert Testimony on Battered Women's Syndrome in Criminal Actions

1-1107 California Evidence Courtroom Manual 1107.syn

§ 1107.syn Synopsis to Chapter 1107: Expert Testimony on Battered Women's Syndrome in Criminal Actions

Scope Expert Testimony on Battered Women's Syndrome in Criminal Actions

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1-1107 California Evidence Courtroom Manual Scope

Scope Expert Testimony on Battered Women's Syndrome in Criminal Actions

§ 1107 reads as follows:

Rule 1107 Expert Testimony on Battered Women's Syndrome in Criminal Actions

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

(b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven.

(c) For purposes of this section, "abuse" is defined in *Section 6203 of the Family Code* and "domestic violence" is defined in *Section 6211 of the Family Code* or acts defined in Section 242, subdivision (e) of Section 243, or *Section 262, 273.5, 273.6, 422, or 653(m) of the Penal Code*.

(d) This section is intended as a rule of evidence only and no substantive change affecting the Penal Code is intended.

(e) This section shall be known, and may be cited as, the Expert Witness Testimony on Battered Women's Experiences Section of the Evidence Code.

(Added by Stats. 1991, ch. 812 (A.B. 785), § 1. Amended by Stats. 1992, ch. 163 (A.B. 2641), § 72; Stats. 1993, ch. 589 (A.B. 2211), § 60; Stats. 1993, ch. 219 (A.B. 1500), § 77.5; Stats. 2000, ch. 1001 (SB. 1944), § 1).

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1 ANALYSIS

Section 1107 allows either the prosecution or the defense to offer expert testimony about battered women's syndrome. The section expressly states that testimony on this theory is admissible because it is not "a new scientific technique whose reliability is unproven." Section 1107(b). Thus, the statute explicitly provides that this type of expert testimony satisfies the prevailing test of expert testimony in California: that the theory be generally accepted. *People v. Kelly* (1976) 17 Cal. 3d 24, 130 Cal. Rptr. 144, 549 P.2d 1240 (this is commonly called the "Kelly/Frye" test).



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1107 in the federal rules. The controlling federal case on scientific expert testimony such as battered women's syndrome is *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469. In *Daubert*, the Supreme Court held that such expert testimony, to be relevant, must be reliable under principles of sound scientific methodology. There is some question whether the research on battered women's syndrome satisfies the scientific method.



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3 ADDITIONAL AUTHORITY

David Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 Va. L. Rev. 619 (1986)

David L. Faigman and Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 Ariz. L. Rev. 67 (1997)



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4 SIGNIFICANT CASES

People v. Humphrey (1996) 13 Cal. 4th 1073, 56 Cal. Rptr. 2d 142, 921 P.2d 1 (expert testimony on battered women's syndrome is admissible on the issue of the reasonableness as well as the existence of the defendant's belief that killing the victim was necessary or, where the defendant has testified, on the issue of the defendant's credibility).

People v. Romero (2007) 149 Cal. App. 4th 29, 56 Cal. Rptr. 3d 678, review denied. (Section 1107 incorporates an objective standard, not a subjective standard; thus, the subject for expert testimony is whether a reasonable person, not a reasonable battered person, would believe that killing was justified).

People v. Erickson (1997) 57 Cal. App. 4th 1391, 67 Cal. Rptr. 2d 740 (Section 1107(a) does not establish an exception to *Penal Code* section 29, which generally precludes expert testimony about whether defendant had requisite mental state for charged crime; Section 1107(a) does not permit expert to opine on the defendant's state of mind at the time of the crime).



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1-1108 California Evidence Courtroom Manual Scope

Scope Evidence of Another Sexual Offense by Defendant

§ 1108 reads as follows:

Rule 1108 Evidence of Another Sexual Offense by Defendant

(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.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of *Section 1054.7 of the Penal Code*.

(c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.

(d) As used in this section, the following definitions shall apply:

(1) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:

(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or *Section 311.3, 311.4, 311.10, 311.11, 314*

, or 647.6, of the Penal Code.

(B) Any conduct proscribed by *Section 220 of the Penal Code*, except assault with intent to commit mayhem.

(C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

(D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

(E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

(F) An attempt or conspiracy to engage in conduct described in this paragraph.

(2) "Consent" shall have the same meaning as provided in *Section 261.6 of the Penal Code*, except that it does not include consent which is legally ineffective because of the age, mental disorder, or developmental or physical disability of the victim.

(Added by Stats. 1995, ch. 439 (A.B. 882), § 2. Amended by Stats. 2001, ch. 517 (A.B. 380), § 1; Stats. 2001, ch. 854 (S.B. 205), § 4; Stats. 2002, ch. 194 (A.B. 2252), § 1; Stats. 2002, ch. 828 (A.B. 2499), § 1)

* * * * *



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*1-1108 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 1108 allows the introduction of evidence of a defendant's prior sexual conduct for any purpose. This section is distinguishable from Section 1101(b), in which evidence of a defendant's prior sexual conduct would only be admissible for a non-character purpose. Under Section 1108, evidence of a defendant's prior sexual conduct is admissible for any purpose. The prior sexual conduct does not have to amount to a conviction or even an arrest. The only current limitations on the introduction of this evidence are a notice requirement and the discretion of the court to exclude the evidence under Section 352.

In *People v. Falsetta* (1999) 21 Cal. 4th 903, 89 Cal. Rptr. 2d 847, 986 P.2d 182, the California Supreme Court held that Section 1108 does not violate the due process clause. The Court acknowledged that Section 1108 creates an exception to the centuries-old ban on using propensity evidence to prove conduct on a particular occasion, but reasoned that given the secretive quality of sex crimes and the frequent lack of corroborating evidence in such cases, the exception is warranted. Under Section 1108, evidence may be considered not only to prove propensity to commit the crime charged but also to prove any relevant purpose. The Supreme Court noted that evidence admitted under Section 1108 is at least circumstantially relevant and stressed that the statute provides several safeguards, such as limiting the evidence to other sex offenses, requiring pretrial notice to the defendant of the offenses to be introduced, and requiring the trial court to weigh the probative value of the prior sex offense against the dangers of undue consumption of time and undue prejudice. The Court endorsed a pattern jury instruction for Section 1108, *CALJIC No. 2.50.01* (1999 Rev.), noting that it contains the proper principles for the admission of prior sex offenses: (1) that such evidence may be used to find that the defendant had a propensity to commit such crime, which in turn may show that he committed the charged offense; and (2) the impermissibility of convicting the defendant solely on the basis of the prior offense evidence. The Court found that the trial court's refusal to use the instruction was harmless error, given other evidence in the case. It is important to note that the Court stressed that this case involved "only admission of defendant's prior rape convictions arising from his *guilty pleas* in both cases." *Id.* (emphasis in original). Section 1108 does not, by its terms, require that the prior sex offense result in a conviction. Given the California Supreme Court's emphasis on the fact that the prior offenses in this case resulted in convictions, it is unclear whether a constitutional challenge to the admission of an uncharged or acquittal of a prior sex offense would be successful. *See also id.* Mosk, J. (concurring) (stating that Court's decision raises troubling questions where the defendant has not pled guilty in prior offenses).



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2 COMPARISON TO FEDERAL RULE

This section is the counterpart of *Federal Rules of Evidence 413-415* and was adopted following passage of those rules in 1994. There are three significant differences between the federal and California rules. First, Section 1108 does not apply in civil cases; Federal Rule of Evidence 415 allows evidence of a defendant's prior sexual conduct in civil cases. Second, Section 1108 covers a wider range of criminal cases, going beyond the sexual assault and child molestation cases covered by the federal rule to prosecutions for possessing pornographic materials depicting minors, employing minors for sexual depictions, and distributing obscene material to minors. Third, Section 1108(a) makes explicit that the trial court retains the discretion to exclude such evidence under Section 352. This language does, however, raise a statutory ambiguity; it suggests, through the canon of statutory construction of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), that no other evidentiary objection is preserved. The drafting of Federal Rules of Evidence 413-415 raises a roughly similar problem, as discussed below. However, this reading of Section 1108(a) seems to go beyond the intent of the drafters of the legislation of this type, as discussed below. In addition, Section 1108(a) can just as easily be read as mandating that the trial court pay special attention to the Section 352 problems of prejudice and confusion of the jury. Nevertheless, California's Proposition 8 may complicate matters by requiring the admission of this evidence despite hearsay, authentication or objections not based on Section 352. See *People v. Ewoldt* (1994) 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757.

Federal Rule of Evidence 413 is similar to Section 1108 in that the federal rule states that evidence of the commission of past sexual assaults is admissible for consideration on any matter to which it is relevant, including, as stated by Representative Susan Molinari in support of the legislation, "the defendant's propensity to commit sexual assault or child molestation offenses." 140 Cong. Rec. H8991 (Aug. 21, 1994) (Remarks of Rep. Molinari). The Federal Rule of Evidence 413 enlargement only applies to criminal trials where the defendant is accused of an offense of sexual assault; it does not allow evidence of other sexual assaults to be used against a defendant accused of a non-sexual assault crime.

The expansion was intended to help protect the public against those who commit offenses of sexual assault, whose conviction frequently depends upon the credibility of the victim, which is often vulnerable to attack. However, as it widens both the scope of evidence which may be admitted and the purposes for which that evidence may be considered, the rule may create the danger of convicting a defendant for past actions or on reputation alone (i.e., convicting the defendant because he or she is, or has been in the past, a "despicable person").

Federal Rule of Evidence 413 and its companion Rules 414 and 415 were heavily criticized by the Judicial Conference

of the United States. The Conference believed that the rules were poorly drafted, and that the concerns behind these rules were adequately addressed by the Federal Rules of Evidence, specifically through Federal Rule of *Evidence 404(b)*. As a result, the Conference proposed amending Federal Rules of *Evidence 404* and *405* to include specific provisions relating to sexual assaults rather than adopting these rules; the proposed amendments were not accepted.

The Conference's strongest objection to the rules is with the mandatory language of Federal Rule of *Evidence 413(a)* (and also of *414(a)* and *415(a)*) which states that the evidence described in the rule "is admissible" (not "is admissible, if otherwise admissible under these rules," the language used in Federal Rule of *Evidence 412*). The Conference argues that this mandatory language negates the application of other rules of evidence, most notably Federal Rule of *Evidence 403* and the hearsay rule. However, that was not the interpretation intended, and is unlikely to be the one adopted. Representative Molinari, in arguing for the adoption of the Rules, stated that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 140 Cong Rec. H8991 (Aug. 21, 1994) (Remarks of Rep. Molinari).

While Federal Rule of *Evidence 403* should still apply to evidence admitted under Rules 413-415, those rules will effect how courts consider the Federal Rule of *Evidence 403* balancing test. Since Rule 413 allows the trier of fact to consider evidence of other instances of sexual assault for any matter to which it is relevant, Federal Rule of *Evidence 413* imbues the evidence with more probative value than it would have under Federal Rule of *Evidence 404*. The evidence can be considered for its probative value establishing the defendant's propensity to engage in such conduct as well as for its probative value in establishing motive, knowledge, or intent. Because of the greater weight given to such evidence, the evidence is less likely to be excluded under Federal Rule of *Evidence 403*.



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3 ADDITIONAL AUTHORITY

David P. Leonard, *Character and Motive in Evidence Law* 34 *Loy. L.A. L. Rev.* 439 (2001)

Celia McGuinness, *Sliding Backwards: The Impact of Evidence Code Section 1108 on Character Evidence, Rape Shield Laws and the Presumption of Innocence*, 9 *Hastings Women's L.J.* 97 (1998)

Symposium, *Perspectives on Proposed Federal Rules of Evidence* 413-415, 22 *Fordham Urb. L.J.* 265 (1995)



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4 SIGNIFICANT CASES

People v. Reliford (2003) 29 Cal. 4th 1007, 130 Cal. Rptr. 2d 254, 62 P.3d 601 (1999 version of CALJIC No. 2.50.01, which allows the jury to infer that defendant had a disposition to commit a sex crime if the jury found that defendant had previously committed a prior sexual offense, did not permit the jury to rely on the prior sexual offense to convict defendant of the charged sexual offense and did not permit the jury to convict defendant of the charged offenses under the preponderance-of-the-evidence standard; thus jury instruction did not violate due process).

People v. Falsetta (1999) 21 Cal. 4th 903, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (Section 1108 does not violate due process clause).

People v. Wesson (2006) 138 Cal. App. 4th 959, 41 Cal. Rptr. 3d 883, review denied, 2006 Cal. LEXIS 9676 (on appeal of conviction for sodomy by force, inflicting corporal injury on spouse, making criminal threats, and attempting to dissuade witness, court held that defendant's prior convictions for sexual offenses could be proved by documentary evidence in lieu of live testimony).

People v. Walker (2006) 139 Cal. App. 4th 782; 43 Cal. Rptr. 3d 257 (where defendant was charged and convicted of second-degree murder, it was error to admit evidence of defendant's three prior sexual attacks as evidence of his propensity to commit the charged offense because murder is not an enumerated sexual offense in Section 1108(a), nor did the charged crime involve as one of its necessary adjudicated elements deriving sexual pleasure or gratification from inflicting death, bodily injury or physical pain on his victim; certain evidence of prior sexual attacks was admissible to prove motive, intent and, as to one of the victims, identity; however, evidentiary errors and related jury instruction errors were harmless in light of other evidence against defendant).

People v. Mullens (2004) 119 Cal. App. 4th 648, 14 Cal. Rptr. 3d 534 (trial court committed prejudicial error in sex offense prosecution; Court of Appeals held that where the trial court has admitted propensity evidence that the defendant has committed an uncharged sex offense, it is reversible error to exclude admission of evidence that the defendant has been acquitted of that offense).

People v. Pierce (2002) 104 Cal. App. 4th 893, 128 Cal. Rptr. 2d 397 (crime of assault with intent to commit rape is "sexual offense" within the meaning of Section 1108, permitting a trier of fact to consider defendant's prior sex offenses).

for any relevant purpose; admission of defendant's 23-year-old rape conviction under Section 1108 was not abuse of trial court's discretion).

People v. Britt (2002) 104 Cal. App. 4th 500, 128 Cal. Rptr. 2d 290 (Section 1108 assists the jury's task by allowing past sexual misconduct of the accused to be considered for whatever light it might shed on relevant issues; trial court did not err when it admitted the testimony concerning defendant's prior sexual misconduct under Section 1108, to prove his propensity and intent to commit the offenses, even though that testimony could have also established his identity as the perpetrator of the offenses).

People v. Branch (2001) 91 Cal. App. 4th 274, 109 Cal. Rptr. 2d 870 (in a child molestation case where the issue was whether defendant's touching of victim was accidental, probative value of victim's grandmother's testimony that defendant had sexually assaulted her almost 30 years earlier by inappropriately touching her was not substantially outweighed by danger of unfair prejudice).

People v. Frazier (2001) 89 Cal. App. 4th 30, 107 Cal. Rptr. 2d 100 (pre-1999 revision of CALJIC No. 2.50.01 violated due process by permitting conviction based on a determination by a preponderance of the evidence that defendant committed prior sexual offenses; jury was not given cautionary instruction added to the end of the revised CALJIC, which provides that even if jury finds by a preponderance that defendant did commit prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes).

People v. McFarland (2000) 78 Cal. App. 4th 489, 92 Cal. Rptr. 2d 884 (expert opinion testimony about defendant's unnatural or abnormal sexual interest constituted inadmissible character evidence and was not admissible under Section 1108 as it did not constitute evidence of defendant's prior commission of sexual offenses).

People v. Callahan (1999) 74 Cal. App. 4th 356, 87 Cal. Rptr. 2d 838 (defendant is entitled to present otherwise admissible character evidence in the form of specific acts, reputation or opinion to rebut prosecution evidence of prior sexual offenses under Section 1108).

People v. Soto (1998) 64 Cal. App. 4th 966, 75 Cal. Rptr. 2d 605 (defendant's due process rights were not violated where defendant was given proper notice of intent to use uncharged prior sex acts).

People v. Harris (1998) 60 Cal. App. 4th 727, 70 Cal. Rptr. 2d 689 (trial court abused its discretion in admitting evidence of prior sexual offenses under Sections 1108 and 352 where prior acts were particularly lurid and gruesome, jury was presented with an incomplete and distorted description of prior acts and the acts were remote in time from charged offense (23 years) and had very little probative value on the charged offense which was highly dissimilar from the prior act).

People v. Fitch (1997) 55 Cal. App. 4th 172, 63 Cal. Rptr. 2d 753 (Section 1108 does not violate constitutional guarantee of due process).



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§ 1109.syn Synopsis to Chapter 1109: Evidence of Other Acts of Domestic Violence or Abuse of Elder or Dependent Adults

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1-1109 California Evidence Courtroom Manual Scope

Scope Evidence of Other Acts of Domestic Violence or Abuse of Elder or Dependent Adults

§ 1109 reads as follows:

Rule 1109 Evidence of Other Acts of Domestic Violence or Abuse of Elder or Dependent Adults

(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(2) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(3) Except as provided in subdivision (e) or (f) and subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. Nothing in this paragraph prohibits or limits the admission of evidence pursuant to subdivision (b) of Section 1101.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of *Section 1054.7 of the Penal Code*.

(c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law.

(d) As used in this section:

(1) "Abuse of an elder or dependent person" means physical or sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment that results in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering.

(2) "Child abuse" means an act proscribed by *Section 273d of the Penal Code*.

(3) "Domestic violence" has the meaning set forth in *Section 13700 of the Penal Code*. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, "domestic violence" has the further meaning as set forth in *Section 6211 of the Family Code*, if the act occurred no more than five years before the charged offense.

(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.

(f) Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under *Section 1250 of the Health and Safety Code* is inadmissible under this section.

(Added by Stats. 1996, ch. 261, § 2. Amended by Stats. 1998, ch. 707 (S.B. 1682), § 1; Stats. 2000, ch. 97 (A.B. 2063), § 1; Stats. 2004, ch. 116 (A.B. 141), § 1; Stats. 2004, ch. 823 (A.B. 20), § 6.5; Stats. 2005, ch. 464 (A.B. 114), § 1.)

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*1-1109 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 1109, like Section 1108, creates a broad exception to the ban on character evidence. Section 1109 provides a direct route to the admissibility of the defendant's prior acts of domestic violence and, under the 2000 amendment, prior acts of abuse of an elder or dependent adult. Before this section was enacted, a prosecutor would have to argue that the evidence was admissible under Section 1101(b), to prove a material issue in the case other than character, such as intent, motive, common plan or scheme, or identity. Under this section, the prosecutor can argue directly that evidence that the defendant previously committed domestic violence or elder or dependent adult abuse demonstrates that the defendant has a character trait for such behavior, and thus, was likely to have engaged in such violence in the case at hand. The 1998 amendment to Section 1109 altered the procedure through which the prosecution must disclose the evidence it intends to offer against the defendant, making these procedures consistent with *Penal Code section 1054.7*. Although evidence offered under Section 1109 is subject to the remainder of the Evidence Code, the only serious barrier to admission of the prior acts of the defendant appears to be the discretion of the trial court pursuant to Section 352.

Section 1109 is unclear as to what constitutes evidence of "commission" of an act of domestic violence and elder or dependent adult abuse and how much evidence of the prior act is necessary. Would hearsay evidence only of the commission be sufficient? Interestingly the 2000 amendment excludes one source of evidence of prior acts of abuse of elder or dependent adults: evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities, such as nursing homes, licensed under *Section 1250 of the Health and Safety Code*. Thus, presumably, acts of elder or dependent adult abuse documented in the findings and determinations of regulatory agencies could not be proved through the use of those documents. But would any other prior accusation be sufficient evidence of the "commission" of an act covered by Section 1109? *See Section 1380* (hearsay exception for statements made by elderly and dependent adults).

Section 1109 is similarly unclear as to what kinds of prior acts would be admissible. Although the statute cross-references *Penal Code section 13700* to define "domestic violence," that definition only refers to the types of people who "count" for purposes of domestic violence actions, such as spouses or children. It does not define what types of actions constitute acts of domestic violence. Section 1109 does not define acts of elder or dependent adult abuse. The comment to *CALJIC No. 2.50.02* (1999 Rev.) states:

The statute does not contain any limitation or requirement that the prior domestic violence be of the same or similar type as the crime charged. Since the relevancy of this evidence turns on a two-step

process [using a prior act of domestic violence to prove (1) a party has a violent disposition and thus (2) probably committed this act of domestic violence], it would seem that the violent disposition established would have to be germane to the crime charged. Presumably, this is a factor the court could consider in applying *Evidence Code section 352*.

The extraordinary shift in the admissibility of character evidence now permitted by Sections 1108 and 1109 can perhaps be explained by the perception of necessity. As one court reasoned in upholding the constitutionality of Section 1109, the admission of previous similar offenses serves a legitimate legislative purpose in assisting the trier of fact in judging inevitable credibility contests between accuser and accused. *See People v. Jennings (2000) 81 Cal. App. 4th 1301, 97 Cal. Rptr. 2d 727*. Of course, Sections 1108 and 1109 are not limited to cases where there is no other evidence than the testimony of accuser and accused. Moreover, as noted above, there is no requirement that the prior act be similar to the offense charged.

Section 1109 was amended by Stats. 2005, ch. 464 (A.B. 114), § 1, to allow, in a criminal prosecution for child abuse, the admission of evidence of prior acts of child abuse to prove the conduct of the defendant in the case at hand, subject only to an evidentiary hearing conducted pursuant to the trial court's discretion under Section 352, but requiring "consideration of any corroboration and remoteness in time" of the prior act. *Id.* As amended, Section 1109 defines "child abuse" by reference to *Penal Code section 273(d)* as an act by a "person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition."



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1109 in the Federal Rules of Evidence.



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3 ADDITIONAL AUTHORITY

CALJIC No. 2.50.02 (2001) (jury instruction for evidence admitted under Section 1109).

CALJIC No. 2.50.03 (2001 New) (jury instruction for evidence of other elder abuse offenses).



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4 SIGNIFICANT CASES

People v. Quintanilla (2005) 132 Cal. App. 4th 572, 33 Cal. Rptr. 3d 782 (in prosecution for false imprisonment, inflicting injury on a cohabitant, forced sexual penetration, witness intimidation, assault with force likely to cause great bodily injury, criminal threats, and rape, modified instructions permitting the jury to consider other charged domestic violence offenses as evidence of criminal propensity without requisite weighing of their probative value against their potential for prejudice violated defendant's due process rights, but was harmless beyond reasonable doubt).

People v. Rucker (2004) 126 Cal. App. 4th 1107, 25 Cal. Rptr. 3d 62, mod. on denial of reh'g, review denied (appellate court affirmed defendant's conviction for attempted murder involving use of firearm and great bodily injury, holding that both the defendant's prior act of pointing gun at previous boyfriend and current charge involved acts of "domestic violence" under Section 1109; defendant's prior act was sufficiently similar to be relevant, since in both situations defendant had been dating the victim for a significant period of time, she reacted to the ending of the relationship by confronting the victim with a gun at the victim's residence, she intended to harm or kill each victim, and she stalked each victim; probative value of prior act of domestic violence was not outweighed by prejudice).

People v. Price (2004) 120 Cal. App. 4th 224, 15 Cal. Rptr. 3d 229, review denied (statute allowing admission of defendant's prior act of domestic violence was not unconstitutional as applied to defendant charged with inflicting corporal injury on a spouse; statute did not violate *equal protection clause* or due process clauses of state and federal constitutions).

People v. Younger (2000) 84 Cal. App. 4th 1360, 101 Cal. Rptr. 2d 624 (reasonable doubt existed as to whether jury, which was instructed it could use defendant's propensity to commit domestic violence to infer he had murdered victim and which had not been instructed not to consider prior offense sufficient evidence of guilt, convicted defendant by using a faulty inference based on propensity evidence in violation of due process).

People v. Escobar (2000) 82 Cal. App. 4th 1085, 98 Cal. Rptr. 2d 696, review denied (admission of evidence of prior incident of domestic violence in which defendant had punched his wife did not render defendant's trial for murder of his wife fundamentally unfair, and thus did not violate his due process rights; prior act need not have resulted in a conviction to be admissible under this section and trial court did not abuse its discretion in finding that probative value of prior act was not substantially outweighed by the danger of unfair prejudice).

People v. James (2000) 81 Cal. App. 4th 1343, 96 Cal. Rptr. 2d 823 , review denied, 2000 Cal. LEXIS 7762 , review denied (where prior domestic violence evidence merely corroborates direct evidence of a charged offense, the prior offenses may be established by a preponderance of the evidence; the jury must be instructed that propensity evidence alone cannot meet the prosecution's burden of proving the elements of the charged offense; otherwise, the jury is prompted to use evidence of prior offenses in precisely the wrong way, as a substitute for proof of the current offense).

People v. Jennings (2000) 81 Cal. App. 4th 1301, 97 Cal. Rptr. 2d 727 , review denied (Section 1109, which allows admission of evidence of prior acts of domestic violence to show propensity to commit present offense involving domestic violence does not violate due process or *equal protection clauses* of the United States or California constitutions).

People v. Brown (2000) 77 Cal. App. 4th 1324, 92 Cal. Rptr. 2d 433 review denied (admission of defendant's prior violence toward two girlfriends, other than the assault victim in this case, did not violate defendant's due process rights; evidence of past offenses was not inflammatory and was highly probative, prior acts of domestic violence were less serious than the charged offenses, and prior acts were not remote nor did evidence about acts consume much time at trial).

People v. Hoover (2000) 77 Cal. App. 4th 1020, 92 Cal. Rptr. 2d 208 , review denied (Section 1109 does not violate due process clause, when applied in connection with rule requiring weighing of evidence to determine whether its probative value is substantially outweighed by danger of unfair prejudice; in this case, evidence was not unduly inflammatory and was highly relevant, since it involved similar conduct against same victim; proper standard for proving past conduct, for purposes of admitting evidence of other acts of domestic violence to prove propensity to commit charged offense, is by a preponderance of the evidence; testimony of victim as to defendant's past acts of domestic violence against her was sufficient to prove those acts by preponderance of evidence, for purposes of admitting prior acts to show propensity to commit charged aggravated assault).

People v. Johnson (2000) 77 Cal. App. 4th 410, 91 Cal. Rptr. 2d 596 , review denied, 2008 Cal. LEXIS 11799 review denied (Section 1109 does not violate the defendant's due process rights or *Eighth Amendment* prohibition against cruel and unusual punishment).

People v. Poplar (1999) 70 Cal. App. 4th 1129, 83 Cal. Rptr. 2d 320 , reh'g denied, review denied (evidence of other acts of domestic violence by defendant charged with offense involving domestic violence is admissible during case-in-chief, subject to rule allowing exclusion if its probative value outweighs its prejudicial effect).



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§ 1115.syn Synopsis to Chapter 1115: Definitions

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1-1115 California Evidence Courtroom Manual Scope

Scope Definitions

§ 1115 reads as follows:

Rule 1115 Definitions

For purposes of this chapter:

- (a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.
- (b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.
- (c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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*1-1115 California Evidence Courtroom Manual 1***1 ANALYSIS**

Sections 1115 to 1128 were added to replace Sections 1152.5 and 1152.6, which were repealed in 1997. Section 1115(a) is drawn from *Code of Civil Procedure* section 1775.1 and adopts its broad definition of mediation in order to accommodate a wide range of types of mediation. The Law Revision Commission notes, for example, that the definition would cover a mediation conducted as a number of sessions, only some of which involve the mediator. "The definition focuses on the nature of a proceeding, not its label." 27 Cal. L. Rev. Comm. Rep. 5 (1997). Section 1115(b) incorporates a neutrality requirement that is drawn from *Code of Civil Procedure* section 1775.1. *Id.* "An attorney or other representative of a party is not neutral and so does not qualify as a "mediator" for purposes of this chapter." *Id.* A "mediator" may be an individual, group of individuals, or entity. *Id.* See Section 175 ("person" defined). See also Section 10 (singular includes the plural). The report of the Law Revision Commission emphasizes that, like the definition of "mediation," the definition of mediator should be applied functionally--in light of its purpose to encourage resolution of disputes. Thus, the term "mediator" "encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary. The definition focuses on a person's role, not the person's title." Indeed, a "mediator" may even have a different title such as "ombudsperson." 27 Cal. L. Rev. Comm. Rep. 5 (1997). Subdivision (c) is drawn from former Section 1152.5, which was amended in 1996 to explicitly protect mediation intake communications, and is intended to be applied broadly, encompassing contacts concerning whether to mediate, such as where a mediator contacts a disputant because another disputant desires to mediate, and contacts concerning initiation or recommencement of mediation, such as where a case-developer meets with a disputant before mediation. *Id.*

For examples of specialized mediation confidentiality provisions, see *Business and Professions Code* sections 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); *Code of Civil Procedure* sections 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); *Family Code* sections 1818 (family conciliation court), 3177 (child custody); *Food and Agricultural Code* section 54453 (agricultural cooperative bargaining associations); *Government Code* sections 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); *Insurance Code* section 10089.80 (earthquake insurance); *Labor Code* section 65 (labor disputes); *Welfare and Institutions Code* section 350 (dependency mediation). See also *Cal. Const. art. I, § 1* (right to privacy); *Garstang v. Superior Court* (1995) 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84, 88 (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson). 27 Cal. L. Rev. Comm. Rep. 5 (1997).



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2 COMPARISON TO FEDERAL RULE

There is no comparable federal rule, although some courts have created a federal privilege for communications in pre-preparation for and during the course of a formal mediation with a neutral mediator. *Folb v. Motion Picture Industry Pension & Health Plans* (1998 C.D. Cal.) 16 F. Supp. 2d 1164 .



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Rinaker v. Superior Court (1998) 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (both mediator and participants in mediation may assert mediation privilege of confidentiality; however privilege must yield to defendant's constitutional right to impeach an adverse witness in juvenile delinquency proceeding).

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality).



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CHAPTER 2 MEDIATION

SECTION 1116 Effect of Chapter

1-1116 California Evidence Courtroom Manual 1116.syn

§ 1116.syn Synopsis to Chapter 1116: Effect of Chapter

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Scope Effect of Chapter

§ 1116 reads as follows:

Rule 1116 Effect of Chapter

(a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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1 ANALYSIS

See Section 1115 Analysis. Section 1116 continues the first sentence of former Section 1152.5(c) without substantive change, expressly stating that evidence, while admissible under this provision, may be inadmissible under any other statute, including Section 1152, which concerns offers to compromise. 27 Cal. L. Rev. Comm. Rep. 5 (1997). *See also Section 1115 Analysis.*



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2 COMPARISON TO FEDERAL RULE

See Section 1115.



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Rinaker v. Superior Court (1998) 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (both mediator and participants in mediation may assert mediation privilege of confidentiality; however privilege must yield to defendant's constitutional right to impeach an adverse witness in juvenile delinquency proceeding).



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CHAPTER 2 MEDIATION

SECTION 1117 Application of Chapter

1-1117 California Evidence Courtroom Manual 1117.syn

§ 1117.syn Synopsis to Chapter 1117: Application of Chapter

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Scope Application of Chapter

§ 1117 reads as follows:

Rule 1117 Application of Chapter

(a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to *Rule 3.1380 of the California Rules of Court*.

Legislative History

(Added by Stats. 1997, ch. 772 (A.B. 939) § 3. Amended by Stats. 2007, ch. 130 (A.B. 299) § 84)

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1 ANALYSIS

See Section 1115 Analysis. Subdivision (b) sets forth two exceptions. Section 1117(b)(1) incorporates former Section 1152.5(b), and provides that special confidentiality rules apply to a proceeding in family conciliation court or a mediation of child custody or visitation issues. *See Section 1040; Family Code sections 1818, 3177.* Section 1117(b)(2) excludes court settlement conferences from the scope of this chapter. A judicial settlement conference is conducted under the court rules. 27 Cal. L. Rev. Comm. Rep. 5 (1997).



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2 COMPARISON TO FEDERAL RULE

See Section 1115.



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Rinaker v. Superior Court (1998) 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (both mediator and participants in mediation may assert mediation privilege of confidentiality; however privilege must yield to defendant's constitutional right to impeach an adverse witness in juvenile delinquency proceeding).



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CHAPTER 2 MEDIATION

SECTION 1118 Oral Agreements

1-1118 California Evidence Courtroom Manual 1118.syn

§ 1118.syn Synopsis to Chapter 1118: Oral Agreements

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Scope Oral Agreements

§ 1118 reads as follows:

Rule 1118 Oral Agreements

An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:

- (a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.
- (b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.
- (c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.
- (d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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SECTION 1118 Oral Agreements

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1 ANALYSIS

See Section 1115 Analysis. Section 1118 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include Sections 1121 (mediator reports and communications), 1122 (disclosure by agreement), 1123 (written settlement agreements reached through mediation), and 1124 (oral agreements reached through mediation). *See also Section 1125* (when mediation ends). 27 Cal. L. Rev. Comm. Rep. 5 (1997).



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2 COMPARISON TO FEDERAL RULE

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Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 80 Cal. Rptr. 3d 83, 187 P.3d 934 (evidence of alleged oral settlement agreement in mediation arising from a malpractice-based action was inadmissible on additional breach of contract claim; the Legislature did not intend for implied waiver to apply to mediation; thus, when there was no written evidence of the oral agreement existed, there was no written agreement signed by both parties, and the parties executed no express waivers of mediation confidentiality, evidence of the oral agreement was inadmissible).

Williams v. Saunders (1997) 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent").



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CHAPTER 2 MEDIATION

SECTION 1119 Admissibility of Communications During Mediation

1-1119 California Evidence Courtroom Manual 1119.syn

§ 1119.syn Synopsis to Chapter 1119: Admissibility of Communications During Mediation

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CHAPTER 2 MEDIATION

SECTION 1119 Admissibility of Communications During Mediation

1-1119 California Evidence Courtroom Manual Scope

Scope Admissibility of Communications During Mediation

§ 1119 reads as follows:

Rule 1119 Admissibility of Communications During Mediation

Except as otherwise provided in this chapter:

- (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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1 ANALYSIS

See Section 1115 Analysis. Subdivision (a) of Section 1119 continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. *See Section 120* ("civil action" includes civil proceedings). In addition, the protection of Section 1119(a) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation. 27 Cal. L. Rev. Comm. Rep. 5 (1997). Subdivision (b) continues without substantive change former Section 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. *See Section 120* ("civil action" includes civil proceedings). In addition, subdivision (b) expressly encompasses any type of "writing" as defined in Section 250, regardless of whether the representations are on paper or on some other medium. Subdivision (c) continues former Section 1152.5(a)(3) without substantive change. A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process.



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See Section 1115.



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Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 80 Cal. Rptr. 3d 83, 187 P.3d 934 (evidence of alleged oral settlement agreement in mediation arising from a malpractice-based action was inadmissible on additional breach of contract claim; the Legislature did not intend for implied waiver to apply to mediation; thus, when there was no written evidence of the oral agreement existed, there was no written agreement signed by both parties, and the parties executed no express waivers of mediation confidentiality, evidence of the oral agreement was inadmissible).

Fair v. Bakhtiari (2006) 40 Cal. 4th 189 ; 147 P.3d 653 ; 51 Cal. Rptr. 3d 871 In order to satisfy *Evidence Code Section 1123(b)*, a statutory exception to the general inadmissibility of communications made during mediation, the mediated settlement agreement must provide "that it is enforceable or binding or words to that effect." To qualify as "words to that effect," the writing must directly express the parties' agreement to be bound by the document they sign; thus, an arbitration clause in civil litigants' mediated written settlement agreement did not render the agreement admissible, as it did not directly express the parties' intent to be bound).

Rojas v. Superior Court (2004) 33 Cal. 4th 407, 15 Cal. Rptr. 3d 643, 93 P.3d 260 (holding that photographs, videotapes, witness statements, and raw test data from physical mold samples collected at an apartment complex, including reports describing the existence or amount of mold spores in a sample, are absolutely protected from admissibility and discovery in a subsequent action, even if such evidence can no longer be obtained because of destruction of the building, if such evidence was "prepared for the purpose of, in the course of, or pursuant to, [the] mediation").

Foxgate Homeowners Assn. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 108 Cal. Rptr. 2d 642, 25 P.3d 1117 (association's motion for sanctions against developer, general contractor and their attorney and trial court's consideration of the motion and supporting documents, which recited statements made during a mediation session, violated statutes requiring confidentiality of mediation; order granting sanctions was vacated as remedy for violating confidentiality).

Wimsatt v. Superior Court (2007) 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (trial court erred in ordering production of all mediation briefs and e-mails sent the day before the mediation that quoted from a mediation brief. Trial court had no power to create an exception to the mediation confidentiality statutes. However, there was no adequate showing that an oral communication made by client's attorney to the personal injury defendants, which

purportedly lowered the client's settlement demand, was related to the mediation, a showing that is required to protect the communication under the mediation confidentiality statutes).

Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565, 36 Cal. Rptr. 3d 901 (settlement agreement executed at conclusion of mediation by plaintiff, plaintiffs' attorney, and defendants' attorney satisfied statutory requirements for waiver of mediation confidentiality, despite fact that agreement lacked defendants' signature where validity of agreement was challenged by plaintiff, not defendants).

Saeta v. Superior Court (2004) 117 Cal. App. 4th 261, 11 Cal. Rptr. 3d 610 (statements made by a member of an employment termination review panel during that panel's hearing are not protected by the privileges of *Evidence Code* section 703.5 (foreclosing testimony by arbitrators) and 1119 (mediation) and the order compelling him to testify does not violate his right to privacy under the California Constitution; the proceeding, as constituted pursuant to an employment contract, was neither an arbitration nor a mediation).

Eisendrath v. Superior Court (2003) 109 Cal. App. 4th 351, 362, 134 Cal. Rptr. 2d 716 (trial court erred in holding that plaintiff impliedly waived his right to confidentiality; plain language of statutory waiver provisions in *Evidence Code* section 910 *et seq.* shows they do not apply to *Evidence Code* section 703.5 and 1115 *et seq.*, so trial court should have granted protective order to bar testimony of mediator and discovery of mediation communications concerning a spousal support agreement; conversations between ex-spouses were also protected by the mediation privilege of Section 1119, even if they occurred outside of the mediator's presence as long as they occurred before the end of mediation and "are materially related to the mediation," since Section 1119 protects communications made "pursuant to" a mediation).

Rinaker v. Superior Court (1998) 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (interpreting new Section 1119; both mediator and participants in mediation may assert mediation privilege of confidentiality; however privilege must yield to defendant's constitutional right to impeach an adverse witness in juvenile delinquency proceeding).

Barajas v. Oren Realty and Development Co. (1997) 57 Cal. App. 4th 209, 67 Cal. Rptr. 2d 62 (statute providing that all communications, negotiations, or settlement discussions during mediation "shall remain confidential" does not mandate that attorney who represents plaintiff in a mediation is disqualified from representing different plaintiff in a related case against the same defendant).

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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SECTION 1120 Evidence Otherwise Admissible

1-1120 California Evidence Courtroom Manual 1120.syn

§ 1120.syn Synopsis to Chapter 1120: Evidence Otherwise Admissible

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 2 MEDIATION

SECTION 1120 Evidence Otherwise Admissible

1-1120 California Evidence Courtroom Manual Scope

Scope Evidence Otherwise Admissible

§ 1120 reads as follows:

Rule 1120 Evidence Otherwise Admissible

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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CHAPTER 2 MEDIATION

SECTION 1120 Evidence Otherwise Admissible

1-1120 California Evidence Courtroom Manual 1

1 ANALYSIS

See Section 1115 Analysis. Section 1120 functions to clarify existing law. Subdivision (a) of Section 1120 continues former Section 1152.5(a)(6) without change. It limits the scope of Section 1119 (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure. Subdivision (b)(1) makes explicit that Section 1119 does not restrict admissibility of an agreement to mediate. Subdivision (b)(2) continues former Section 1152.5(e) without substantive change, but also includes an express exception for extensions of litigation deadlines. Subdivision (b)(3) makes clear that Section 1119 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial mediator. Similarly, mediation participants may express their views on a mediator's performance, so long as they do not disclose anything said or done at the mediation. 27 Cal. L. Rev. Comm. Rep. 5 (1997).



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CHAPTER 2 MEDIATION

SECTION 1120 Evidence Otherwise Admissible

1-1120 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

See Section 1115.



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CHAPTER 2 MEDIATION

SECTION 1120 Evidence Otherwise Admissible

1-1120 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 2 MEDIATION

SECTION 1121 Mediator's Reports and Findings

1-1121 California Evidence Courtroom Manual 1121.syn

§ 1121.syn Synopsis to Chapter 1121: Mediator's Reports and Findings

Scope Mediator's Reports and Findings

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 2 MEDIATION

SECTION 1121 Mediator's Reports and Findings

1-1121 California Evidence Courtroom Manual Scope

Scope Mediator's Reports and Findings

§ 1121 reads as follows:

Rule 1121 Mediator's Reports and Findings

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 2 MEDIATION

SECTION 1121 Mediator's Reports and Findings

1-1121 California Evidence Courtroom Manual 1

1 ANALYSIS

See Section 1115 Analysis. Section 1121 operates to clarify existing law. The California Law Revision Commission states:

Section 1121 continues the first sentence of former Section 1152.6 without substantive change, except to make clear that (1) the section applies to all submissions, not just filings, (2) the section is not limited to court proceedings but rather applies to all types of adjudications, including arbitrations and administrative adjudications, (3) the section applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. The section does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation. Rather, the focus is on preventing coercion. As Section 1121 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decision maker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral. *See Section 1117* (scope of chapter), which excludes settlement conferences from this chapter. The exception to Section 1121 (permitting submission and consideration of a mediator's report where "all parties to the mediation expressly agree" in writing) is modified to allow use of the oral procedure in Section 1118 (recorded oral agreement) and to permit making of the agreement at any time, not just before the mediation. A mediator's report to a court may disclose mediation communications only if all parties to the mediation agree to the reporting and all persons who participate in the mediation agree to the disclosure. *See Section 1122* (disclosure by agreement).

The second sentence of former Section 1152.6 is continued without substantive change in Section 1117 (scope of chapter), except that Section 1117 excludes proceedings under Part 1 (commencing with *Section 1800*) of *Division 5 of the Family Code*, as well as proceedings under Chapter 11 (commencing with *Section 3160*) of *Part 2 of Division 8 of the Family Code*. [27 Cal. L. Rev. Comm. Rep. 5 (1997).]



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 2 MEDIATION

SECTION 1121 Mediator's Reports and Findings

1-1121 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

See Section 1115.



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CHAPTER 2 MEDIATION

SECTION 1121 Mediator's Reports and Findings

1-1121 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Foxgate Homeowners Assn. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 108 Cal. Rptr. 2d 642, 25 P.3d 1117 (association's motion for sanctions against developer, general contractor and their attorney and trial court's consideration of the motion and supporting documents, which recited statements made during a mediation session, violated statutes requiring confidentiality of mediation; order granting sanctions was vacated as remedy for violating confidentiality).

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 2 MEDIATION

SECTION 1122 Conditions of Admissibility of Communications

1-1122 California Evidence Courtroom Manual 1122.syn

§ 1122.syn Synopsis to Chapter 1122: Conditions of Admissibility of Communications

Scope Conditions of Admissibility of Communications

1 ANALYSIS

2 SIGNIFICANT CASES



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CHAPTER 2 MEDIATION

SECTION 1122 Conditions of Admissibility of Communications

1-1122 California Evidence Courtroom Manual Scope

Scope Conditions of Admissibility of Communications

§ 1122 reads as follows:

Rule 1122 Conditions of Admissibility of Communications

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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CHAPTER 2 MEDIATION

SECTION 1122 Conditions of Admissibility of Communications

*1-1122 California Evidence Courtroom Manual 1***1 ANALYSIS**

See Section 1115. The California Law Revision Commission states:

Section 1122 supersedes former Section 1152.5(a)(4) and part of former Section 1152.5(a)(2), which were unclear regarding precisely whose agreement was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a)(1) states the general rule that mediation documents and communications may be admitted or disclosed only upon agreement of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Agreement must be express, not implied. For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program.

Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion. Materials that necessarily disclose mediation communications may be admitted or disclosed only upon satisfying the general rule of subdivision (a)(1).

Mediation materials that satisfy the requirements of subdivisions (a)(1) or (a)(2) are not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

Subdivision (b) makes clear that if the person who takes the lead in conducting a mediation agrees to disclosure, it is unnecessary to seek out and obtain assent from each assistant to that person, such as a case developer, interpreter, or secretary.

For exceptions to Section 1122, see *Sections 1123* (written settlement agreements reached through mediation) and *1124* (oral agreements reached through mediation) and Comments. [27 Cal. L. Rev. Comm. Rep. 5 (1997).]



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CHAPTER 2 MEDIATION

SECTION 1122 Conditions of Admissibility of Communications

1-1122 California Evidence Courtroom Manual 2

2 SIGNIFICANT CASES

Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 80 Cal. Rptr. 3d 83, 187 P.3d 934 (evidence of alleged oral settlement agreement in mediation arising from a malpractice-based action was inadmissible on additional breach of contract claim; the Legislature did not intend for implied waiver to apply to mediation; thus, when there was no written evidence of the oral agreement existed, there was no written agreement signed by both parties, and the parties executed no express waivers of mediation confidentiality, evidence of the oral agreement was inadmissible).

Garstang v. Superior Court (1995) 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84 (mediation privilege did not protect from discovery communications made before ombudsman in attempt to mediate employee dispute; even assuming ombudsman was conducting mediation for purposes of Evidence Code, none of the parties executed written agreement regarding privilege as required by Code).

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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CHAPTER 2 MEDIATION

SECTION 1123 Admissibility of Written Settlement Agreements

1-1123 California Evidence Courtroom Manual 1123.syn

§ 1123.syn Synopsis to Chapter 1123: Admissibility of Written Settlement Agreements

Scope Admissibility of Written Settlement Agreements

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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CHAPTER 2 MEDIATION

SECTION 1123 Admissibility of Written Settlement Agreements

1-1123 California Evidence Courtroom Manual Scope

Scope Admissibility of Written Settlement Agreements

§ 1123 reads as follows:

Rule 1123 Admissibility of Written Settlement Agreements

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

- (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- (b) The agreement provides that it is enforceable or binding or words to that effect.
- (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
- (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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CHAPTER 2 MEDIATION

SECTION 1123 Admissibility of Written Settlement Agreements

1-1123 California Evidence Courtroom Manual 1

1 ANALYSIS

See Section 1115 Analysis. The California Law Revision Commission states:

Section 1123 consolidates and clarifies provisions governing written settlements reached through mediation. For guidance on binding a disputant to a written settlement agreement, see *Williams v. Saunders* (1997) 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent").

As to an executed written settlement agreement, subdivision (a) continues part of former Section 1152.5(a)(2). See also *Ryan v. Garcia* (1994) 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162 (Section 1152.5 "provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings," i.e., the "parties may consent, as part of a writing, to subsequent admissibility of the agreement").

Subdivision (b) is new. It is added due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure.

As to fully executed written settlement agreements, subdivision (c) supersedes former Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only agreement of the parties. Agreement of the mediator and other mediation participants is not necessary. Subdivision (c) is thus an exception to the general rule governing disclosure of mediation communications by agreement. See Section 1122.

Subdivision (d) continues former Section 1152.5(a)(5) without substantive change.

A written settlement agreement that satisfies the requirements of subdivision (a), (b), (c), or (d) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion. [27 Cal. L. Rev. Comm. Rep. 5 (1997).]



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CHAPTER 2 MEDIATION

SECTION 1123 Admissibility of Written Settlement Agreements

1-1123 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

See Section 1115.



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CHAPTER 2 MEDIATION

SECTION 1123 Admissibility of Written Settlement Agreements

1-1123 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Fair v. Bakhtiari (2006) 40 Cal. 4th 189 ; 147 P.3d 653 ; 51 Cal. Rptr. 3d 871 ; 2006 In order to satisfy *Evidence Code Section 1123(b)*, a statutory exception to the general inadmissibility of communications made during mediation, the mediated settlement agreement must provide "that it is enforceable or binding or words to that effect." To qualify as "words to that effect," the writing must directly express the parties' agreement to be bound by the document they sign; thus, an arbitration clause in civil litigants' mediated written settlement agreement did not render the agreement admissible, as it did not directly express the parties' intent to be bound).

Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565, 36 Cal. Rptr. 3d 901 (settlement agreement executed at conclusion of mediation by plaintiff, plaintiffs' attorney, and defendants' attorney satisfied statutory requirements for waiver of mediation confidentiality, despite fact that agreement lacked defendants' signature where validity of agreement was challenged by plaintiff, not defendants).

Garstang v. Superior Court (1995) 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84 (mediation privilege did not protect from discovery communications made before ombudsman in attempt to mediate employee dispute; even assuming ombudsman was conducting mediation for purposes of Evidence Code, none of the parties executed written agreement regarding privilege as required by Code).

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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CHAPTER 2 MEDIATION

SECTION 1124 Admissibility of Oral Agreements

1-1124 California Evidence Courtroom Manual 1124.syn

§ 1124.syn Synopsis to Chapter 1124: Admissibility of Oral Agreements

Scope Admissibility of Oral Agreements

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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CHAPTER 2 MEDIATION

SECTION 1124 Admissibility of Oral Agreements

1-1124 California Evidence Courtroom Manual Scope

Scope Admissibility of Oral Agreements

§ 1124 reads as follows:

Rule 1124 Admissibility of Oral Agreements

An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

- (a) The agreement is in accordance with Section 1118.
- (b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.
- (c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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CHAPTER 2 MEDIATION

SECTION 1124 Admissibility of Oral Agreements

1-1124 California Evidence Courtroom Manual 1

1 ANALYSIS

See Section 1115 Analysis. The California Law Revision Commission states:

Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify the rule of *Ryan v. Garcia* (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of *Regents of University of California v. Sumner* (1996) 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200, review denied, 1996 Cal. LEXIS 2601 (mediation confidentiality does not protect oral statement of settlement terms).

Subdivision (a) of Section 1124 facilitates enforcement of an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. For guidance in applying subdivision (a), see Section 1125 (when mediation ends) and Comment.

Subdivision (b) parallels Section 1123(c).

Subdivision (c) parallels Section 1123(d).

An oral agreement that satisfies the requirements of subdivision (a), (b), or (c) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion. For guidance on binding a disputant to a settlement agreement, see *Williams v. Saunders* (1997) 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent"). [27 Cal. L. Rev. Comm. Rep. 5 (1997).]



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CHAPTER 2 MEDIATION

SECTION 1124 Admissibility of Oral Agreements

1-1124 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

See Section 1115.



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CHAPTER 2 MEDIATION

SECTION 1124 Admissibility of Oral Agreements

1-1124 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 80 Cal. Rptr. 3d 83, 187 P.3d 934 (evidence of alleged oral settlement agreement in mediation arising from a malpractice-based action was inadmissible on additional breach of contract claim; the Legislature did not intend for implied waiver to apply to mediation; thus, when there was no written evidence of the oral agreement existed, there was no written agreement signed by both parties, and the parties executed no express waivers of mediation confidentiality, evidence of the oral agreement was inadmissible).

Williams v. Saunders (1997) 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent").

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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CHAPTER 2 MEDIATION

SECTION 1125 End of Mediation

1-1125 California Evidence Courtroom Manual 1125.syn

§ 1125.syn Synopsis to Chapter 1125: End of Mediation

Scope End of Mediation

1 ANALYSIS

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CHAPTER 2 MEDIATION

SECTION 1125 End of Mediation

1-1125 California Evidence Courtroom Manual Scope

Scope End of Mediation

§ 1125 reads as follows:

Rule 1125 End of Mediation

(a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

- (1) The parties execute a written settlement agreement that fully resolves the dispute.
- (2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.
- (3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.
- (4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.
- (5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

- (1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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CHAPTER 2 MEDIATION

SECTION 1125 End of Mediation

1-1125 California Evidence Courtroom Manual 1

1 ANALYSIS

See Section 1115 Analysis. Section 1125 differs from existing law in providing when mediation ends. The California Law Revision Commission states:

By specifying when a mediation ends, Section 1125 provides guidance on which communications are protected by Section 1119 (mediation confidentiality).

Under subdivision (a)(1), if mediation participants reach an oral compromise and reduce it to a written settlement fully resolving their dispute, confidentiality extends until the agreement is signed by all the parties. For guidance on binding a disputant to a settlement agreement, *see Williams v. Saunders* (1997) 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent").

Subdivision (a)(2) applies where mediation participants fully resolve their dispute by an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. The mediation is over upon completion of that procedure, and the confidentiality protections of this chapter do not apply to any later proceedings, such as attempts to further refine the content of the agreement. *See Section 1124* (oral agreements reached through mediation). Subdivisions (a)(3) and (a)(4) are drawn from Rule 14 of the American Arbitration Association's Commercial Mediation Rules (as amended, Jan. 1, 1992). Subdivision (a)(5) applies where an affirmative act terminating a mediation for purposes of this chapter does not occur.

Subdivision (b) applies where mediation partially resolves a dispute, such as when the disputants resolve only some of the issues (e.g., contract, but not tort, liability) or when only some of the disputants settle.

Subdivision (c) limits the effect of Section 1125. [27 Cal. L. Rev. Comm. Rep. 5 (1997).]



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 2 MEDIATION

SECTION 1125 End of Mediation

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2 COMPARISON TO FEDERAL RULE

See Section 1115.



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Williams v. Saunders (1997) 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent").

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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SECTION 1126 Continuity of Confidentiality

1-1126 California Evidence Courtroom Manual 1126.syn

§ 1126.syn Synopsis to Chapter 1126: Continuity of Confidentiality

Scope Continuity of Confidentiality

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1-1126 California Evidence Courtroom Manual Scope

Scope Continuity of Confidentiality

§ 1126 reads as follows:

Rule 1126 Continuity of Confidentiality

Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

* * * * *



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SECTION 1126 Continuity of Confidentiality

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See Section 1115 Analysis. Section 1126 clarifies that mediation materials are confidential not only during a mediation, but also after the mediation ends pursuant to Section 1125 (when mediation ends). 27 Cal. L. Rev. Comm. Rep. 5 (1997).



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See Section 1115.



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Williams v. Saunders (1997) 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent").

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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CHAPTER 2 MEDIATION

SECTION 1127 Attorney's Fees and Costs

1-1127 California Evidence Courtroom Manual 1127.syn

§ 1127.syn Synopsis to Chapter 1127: Attorney's Fees and Costs

Scope Attorney's Fees and Costs

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1-1127 California Evidence Courtroom Manual Scope

Scope Attorney's Fees and Costs

§ 1127 reads as follows:

Rule 1127 Attorney's Fees and Costs

If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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1 ANALYSIS

See Section 1115 Analysis. Section 1127 continues former Section 1152.5(d) without substantive change, except to clarify that either a court or another adjudicative body (e.g., an arbitrator or an administrative tribunal) may award the fees and costs. Because Section 1115 (definitions) defines "mediator" to include not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, fees are available regardless of the role played by the person subjected to discovery. 27 Cal. L. Rev. Comm. Rep. 5 (1997).



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See Section 1115.



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Rinaker v. Superior Court (1998) 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (interpreting new Section 1119; both mediator and participants in mediation may assert mediation privilege of confidentiality; however privilege must yield to defendant's constitutional right to impeach an adverse witness in juvenile delinquency proceeding).

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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CHAPTER 2 MEDIATION

SECTION 1128 Subsequent References to Mediation

1-1128 California Evidence Courtroom Manual 1128.syn

§ 1128.syn Synopsis to Chapter 1128: Subsequent References to Mediation

Scope Subsequent References to Mediation

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1-1128 California Evidence Courtroom Manual Scope

Scope Subsequent References to Mediation

§ 1128 reads as follows:

Rule 1128 Subsequent References to Mediation

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of *Section 657 of the Code of Civil Procedure*. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

(Added by Stats. 1997, ch. 772 (A.B. 939), § 3)

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1 ANALYSIS

See Section 1115 Analysis. Section 1128 is drawn from *Code of Civil Procedure* section 1775.12. The first sentence makes it an irregularity to refer to a mediation in a subsequent civil trial; the second sentence extends that rule to other noncriminal proceedings, such as an administrative adjudication. An appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary's refusal to disclose mediation communications. 27 Cal. L. Rev. Comm. Rep. 5 (1997).



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3 SIGNIFICANT CASES

Foxgate Homeowners Assn. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 108 Cal. Rptr. 2d 642, 25 P.3d 1117 (association's motion for sanctions against developer, general contractor and their attorney and trial court's consideration of the motion and supporting documents, which recited statements made during a mediation session, violated statutes requiring confidentiality of mediation; order granting sanctions was vacated as remedy for violating confidentiality).

Rinaker v. Superior Court (1998) 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (interpreting new Section 1119; both mediator and participants in mediation may assert mediation privilege of confidentiality; however privilege must yield to defendant's constitutional right to impeach an adverse witness in juvenile delinquency proceeding).

Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality; evidence of statements made during mediation was inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation").



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Scope

General Practice Tip on Evidence Excluded by Extrinsic Policies

For Sections 1150 to 1160, you should ask two questions:

1. Does the evidence fall within one of the Section 1150-1160 "boxes"? (categories of evidence); and
2. If so, is the evidence being offered for a "forbidden purpose"?

The key to making or responding to an objection under these sections is understanding the policy reasons for excluding each type of Sections 1150-1160 evidence. If you can make an argument that the evidence is not being offered for an improper purpose, but rather to prove another relevant issue in the case, the evidence should satisfy the language of these sections. The evidence will be admissible (assuming there are no other evidentiary objections), but a limiting instruction under Section 355 will be given (if requested) instructing the jury to consider the evidence only for the permissible purpose.



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SECTION 1150 Evidence to Test a Verdict

1-1150 California Evidence Courtroom Manual 1150.syn

§ 1150.syn Synopsis to Chapter 1150: Evidence to Test a Verdict

Scope Evidence to Test a Verdict

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SECTION 1150 Evidence to Test a Verdict

1-1150 California Evidence Courtroom Manual Scope

Scope Evidence to Test a Verdict

§ 1150 reads as follows:

Rule 1150 Evidence to Test a Verdict

(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

(b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1150 Evidence to Test a Verdict

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1 ANALYSIS

This section relates to the first stage of a three-step inquiry as to whether a party should be granted a new trial on the basis of jury misconduct. In this first step, the court must consider the admissibility of jury declaration under Section 1150. Section 1150 attempts to balance the need to exclude any type of evidence that would chill free and uninhibited jury deliberations and the need to permit evidence that would reveal improper influences on jury decision making. Thus, this section excludes any evidence relating to jurors when such evidence is offered to show its effect on the actual decision-making process (also referred to as the "subjective reasoning process") of a jury. *See Chronakis v. Windsor* (1993) 14 Cal. App. 4th 1058, 18 Cal. Rptr. 2d 106. Once the court decides that the evidence is admissible, it goes on to consider whether the facts constitute misconduct, and if so, whether such misconduct was prejudicial. Thus, Section 1150 should also be read along with the grounds for setting aside a verdict on the grounds of jury misconduct. *See Code of Civil Procedure section 657* (civil cases); *Penal Code section 1181* (criminal cases); *In re Carpenter* (1995) 9 Cal. 4th 634, 38 Cal. Rptr. 2d 665, 889 P.2d 985, modified, 10 Cal. 4th 256a (discussing the meaning of "prejudicial" jury misconduct).

The section expressly preserves the rules and case law determining when testimony or affidavits of jurors may be received to impeach or support a verdict. The restrictions of this section apply only to inquiry after the verdict or indictment has been reached and recorded. Such restrictions, however, do not prevent a court from questioning members of a panel that returns with an ambiguous or internally inconsistent verdict. The dangers of continual uncertainty and tampering with jurors, sought to be prevented by Section 1150, are absent where the inquiry into the jury process is conducted by the court before the jurors are discharged and separated.

See also Section 704 (whether juror may testify as a witness before fellow jurors).



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2 COMPARISON TO FEDERAL RULE

This rule is similar to *Federal Rule of Evidence 606(b)*, which makes jurors incompetent to testify (in person or by affidavit) as to any matter regarding deliberations or a verdict except whether "extraneous prejudicial information" or improper "outside influence" was brought before the jurors. The chief difference between the federal rule and Section 1150 is that the California rule allows a wider scope of evidence to show "objective jury misconduct." *People v. Hutchinson* (1969) 71 Cal. 2d 342, 78 Cal. Rptr. 196, 455 P.2d 132. Thus, a juror could testify as to any kind of conduct observable through one's senses, including statements made by other jurors, and thus subject to corroboration. The federal rule does not permit this broad range of evidence from a juror. See Federal Rule of Evidence 606(b) Advisory Committee Note.

Current Trends and New Developments

Juror use of mind-altering substances was held not to be admissible under *Tanner v. United States* (1987) 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90.

Where a juror's testimony would be inadmissible for inquiry into a verdict, his affidavit or evidence from a third person are likewise inadmissible. For example, where a party makes a *Federal Rule of Civil Procedure 59(A)(1)* motion for a new trial alleging juror misconduct, and attaches an affidavit of a juror in support of this motion, the court may not consider the substance of this affidavit unless the tendered affidavit is of a type admissible under Federal Rule of Evidence 606(b). Similarly, the affidavit or testimony of a third person, such as a friend or spouse, concerning a juror's out-of-court statements may not be considered, unless this third person has firsthand knowledge of the offending conduct.



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3 SIGNIFICANT CASES

Jury Deliberations

People v. Engelman (2002) 28 Cal. 4th 436, 121 Cal. Rptr. 2d 862, 49 P.3d 209 (pattern instruction that jurors were required to conduct themselves as required by instructions at all times during deliberations and other jurors had obligation to advise court if a juror refused to deliberate or expressed an intention to decide the case on an improper basis creates unnecessary risks to proper functioning of the jury and should not be used in future trials).

People v. Steele (2002) 27 Cal. 4th 1230, 120 Cal. Rptr. 2d 432, 47 P.3d 225 (application of Section 1150, which prohibits impeaching jury verdict based on evidence concerning mental processes by which verdict was reached, did not violate federal or state constitutions).

Constitutionality of Excluding Subjective Evidence of Juror Misconduct

People v. Hill (1992) 3 Cal. App. 4th 16, 4 Cal. Rptr. 2d 258 (evidence of subjective reasoning processes of jurors was not "material" to impeach verdicts, and so was not "relevant evidence" as defined by Evidence Code or as used in constitutional article providing that relevant evidence shall not be excluded in any criminal proceeding; Evidence Code section excludes evidence of subjective reasoning processes of jurors to impeach their verdicts, and the constitutional article does not purport to make immaterial or irrelevant evidence admissible in criminal cases).

Determining Jury Misconduct

In re Carpenter (1995) 9 Cal. 4th 634, 38 Cal. Rptr. 2d 665, 889 P.2d 985, modified, 10 Cal. 4th 256a, cert. denied, (defendant need not affirmatively prove that jury's deliberations were improperly affected by juror misconduct; under statute, upon inquiry as to validity of verdict, any otherwise admissible evidence may be received as to statements likely to have influenced verdict improperly but no evidence is admissible to show effect of such statement upon juror either in influencing him to assent to or dissent from verdict).

People v. Zapien (1993) 4 Cal. 4th 929, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (Evidence Code proscription against admission of evidence of juror's mental processes in reaching verdict does not preclude court, upon learning of

misconduct prior to rendition of verdict, from questioning jurors concerning misconduct and admonishing them to disregard the improper influences).

Vomaska v. City of San Diego (1997) 55 Cal. App. 4th 905, 64 Cal. Rptr. 2d 492 (jury affidavits may be used to impeach a verdict if they refer to objectively ascertainable statements, conduct, conditions or events, but not subjective reasoning processes of jurors, which are likely to have influenced the verdict improperly).

People v. Duran (1996) 50 Cal. App. 4th 103, 57 Cal. Rptr. 2d 635 (Section 1150 can be violated by testimony concerning statements made by jurors during their deliberations, for when a juror gives the reasons for his or vote during deliberations, the words are a verbal reflection of the juror's mental processes).

People v. Dorsey (1995) 34 Cal. App. 4th 694, 40 Cal. Rptr. 2d 384 ; **People v. Perez** (1992) 4 Cal. App. 4th 893, 6 Cal. Rptr. 2d 141 (when a party seeks new trial based on jury misconduct, court must first determine whether affidavits supporting the motion are admissible, and must then consider whether facts establish misconduct and whether the misconduct was prejudicial; trial court has broad discretion in ruling on each of those three questions and its ruling cannot be disturbed absent an abuse of discretion).

Illustrations of Admissible Evidence of Jury Misconduct

People v. Smith (2007) 40 Cal. 4th 483, 54 Cal. Rptr. 3d 245, 150 P.3d 1224 , *reh'g denied, cert. denied*, 128 S. Ct. 488, 169 L. Ed. 2d 344 (2007) . (when defense expert expressly analyzed defendant's demeanor during trial, it was not misconduct for the jury to discuss defendant's off-stand demeanor during deliberations in the sanity phase of trial).

People v. Nesler (1997) 16 Cal. 4th 561, 66 Cal. Rptr. 2d 454, 941 P.2d 87 (considering juror testimony and affidavits regarding statements made by jurors during deliberation that indicated that juror improperly brought information obtained outside the trial to bear on deliberations).

People v. Deegan (1891) 88 Cal. 602, 26 P. 500 (a juror may give evidence that no misconduct was committed by the jury after independent evidence has been given that there was misconduct).

Vomaska v. City of San Diego (1997) 55 Cal. App. 4th 905, 64 Cal. Rptr. 2d 492 (considering juror affidavits that jurors took a "straw vote" shortly after retiring to deliberate and holding that such affidavits revealed no jury misconduct).

People v. Hord (1993) 15 Cal. App. 4th 711, 19 Cal. Rptr. 2d 55 (affidavits of jurors were admissible as evidence of jury discussion on improper topics of defendant's failure to testify and possible sentence defendant might receive; trial court had expressly instructed jurors not to discuss these issues).

People v. Perez (1992) 4 Cal. App. 4th 893, 6 Cal. Rptr. 2d 141 (evidence of jury's explicit or implicit agreement to violate court's instruction does not touch upon the juror's subjective reasoning process, and is admissible to impeach the verdict, since it constitutes misconduct).

Stark v. City of Los Angeles (1985) 168 Cal. App. 3d 276, 214 Cal. Rptr. 216 (in action against city for injuries sustained by motorist in collision with traffic violator pursued by police officers, trial court did not abuse its discretion in denying city's motion for new trial based on jury misconduct, in that affidavit of one juror submitted by city showed, at most, that one juror made passing reference to other police codes without communicating their content and that affiant properly stated jury could not discuss other police codes not in evidence, and counteraffidavit of another juror submitted by motorist stated that jury did not consider any other evidence).

Maple v. Cincinnati Inc. (1985) 163 Cal. App. 3d 387, 209 Cal. Rptr. 451 (Section 1150 does not alter the traditional

rule that jurors may not impeach their verdict except in cases of a verdict arrived at by lot or chance or where a juror has a bias which was concealed on voir dire).

Drust v. Drust (1980) 113 Cal. App. 3d 1, 169 Cal. Rptr. 750 (use by defendant of declarations by jurors to impeach award of damages to plaintiff was proper, in that while declarations might be evidence of jury's reasoning process and therefore inadmissible, declarations were more susceptible of being interpreted as describing overt act of awarding a particular sum for a particular element of damage, and declarations were originally prepared and filed by plaintiff for another purpose, and thus reference by defendant to jurors' declarations was not only substantively permissible but required by considerations of justice and fair play).

People v. Brown (1976) 61 Cal. App. 3d 476, 132 Cal. Rptr. 217 (juror's declaration, made under penalty of perjury, to the effect that one of the other jurors had told her during the course of the trial that defendant was guilty and that there was no doubt about it, was admissible to impeach the verdict).

Illustrations of Inadmissible Evidence of Jury Misconduct

People v. Nesler (1997) 16 Cal. 4th 561, 66 Cal. Rptr. 2d 454, 941 P.2d 87 (juror's testimony that extraneous information she received played no part in her consideration of issues was inadmissible in hearing on defendant's motion for a new trial).

People v. Cox (1991) 53 Cal. 3d 618, 280 Cal. Rptr. 692, 809 P.2d 351, cert. denied, 502 U.S. 1062 (allegation that juror involved in death penalty deliberations was drinking during lunch did not establish misconduct warranting new trial absent allegation of any impairment of juror's abilities during deliberations).

People v. Cox (1991) 53 Cal. 3d 618, 280 Cal. Rptr. 692, 809 P.2d 351, cert. denied, 502 U.S. 1062 (allegations of juror misconduct during death penalty deliberations, predicated on intimidation of nonsmoking jurors by smoking jurors and expressed desire of some jurors to resolve penalty and avoid prolonged deliberations, could not be considered as ground for new trial to extent they implicated fellow jurors' mental processes or reasons for assent or dissent).

Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 28 Cal. Rptr. 2d 62 (juror affidavits, which recited reasoning processes employed during deliberations in medical malpractice action to reach damages figures recorded on verdict form, were inadmissible to impeach verdict, as they reflected jurors' mental processes).

Mesecher v. County of San Diego (1992) 9 Cal. App. 4th 1677, 12 Cal. Rptr. 2d 279 (declarations from six jurors describing deliberations and indicating that court's battery instruction was misunderstood were inadmissible to impeach verdict, even if several jurors communicated their misunderstanding of the instructions during deliberations; declarations suggested deliberative error, rather than expressed or implied agreement to disregard court's battery instruction).

People v. Sassounian (1986) 182 Cal. App. 3d 361, 226 Cal. Rptr. 880 (one juror's statements that her verdict was affected by reference during deliberations to a piece of evidence which had not been admitted could not be considered on appeal).



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SECTION 1151 Subsequent Remedial Conduct

1-1151 California Evidence Courtroom Manual 1151.syn

§ 1151.syn Synopsis to Chapter 1151: Subsequent Remedial Conduct

Scope Subsequent Remedial Conduct

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1-1151 California Evidence Courtroom Manual Scope

Scope Subsequent Remedial Conduct

§ 1151 reads as follows:

Rule 1151 Subsequent Remedial Conduct

When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1151 reflects the public policy concern that admitting evidence of subsequent repairs to prove negligence would substantially discourage persons from making repairs or improvements after the occurrence of an accident. Virtually any kind of subsequent corrective action is within the scope of this section. Section 1151 is not directed only to the repair of a mechanical device after that device causes personal injury. The section is sufficiently broad to apply to the discharge of an employee subsequent to an accident or to a change in product design. As a basic principle, Section 1151 will apply to any measure, which if taken prior to the accident, would have made the injury less likely to occur.

Exclusion of evidence of subsequent remedial measures is only required where the evidence is offered to prove negligence or culpable conduct. Evidence of subsequent remedial action may be offered to establish other relevant issues within a case, such as ownership, control, or feasibility of precautionary measures. In order for such corrective actions to be admissible, the issue must be generally controverted in the case and the remedial action must be probative of the controverted consequential fact.

Illustration

Subsequent to an accident at a construction site, one of the subcontractors erects a barrier around the instrumentality of the injury. Where there is a dispute as to which subcontractor was responsible for the instrumentality of the injury, such action by a particular subcontractor would be probative of ownership or control. Under these facts, the subsequent remedial measure may be admissible on a theory other than to show negligence or culpability.

When the subsequent remedial action is only minimally probative of an issue other than negligence or culpability, the trial judge possesses discretion to exclude the evidence of the corrective action on the basis of prejudice, confusion of the issues, or misleading the jury. *See Section 352*. The trial judge should provide a limiting instruction pursuant to Section 355 where evidence of remedial action is admitted on a theory of relevance other than the forbidden purpose.



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2 COMPARISON TO FEDERAL RULE

Section 1151 is similar to *Federal Rule of Evidence 407*, which excludes evidence of subsequent remedial measures when that evidence is offered to prove negligence or culpable conduct. Like the California rule, the federal rule permits the evidence if it is offered for any other relevant purpose, such as to impeach a witness's direct testimony, to show control over the property or to show the feasibility of remedial measures, if controverted. Federal Rule of Evidence 407 states this explicitly while California courts reach the same result through interpretation of Section 1151.

The major difference between the federal and California rule is the treatment of products liability cases. In *Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148*, the California Supreme Court held that evidence of subsequent remedial measures in products liability actions is not excluded by this section because fault is not an issue in those cases. The *Ault* court also held that evidence of a manufacturer's activities subsequent to the accident or injury may be admissible on the issue of punitive damages.

The advocates of admitting evidence of a subsequent remedial measure argue that an action based upon strict product liability does not require the plaintiff to prove that the manufacturer was negligent in its design, manufacturing, or marketing of a product. The plaintiff need only prove the product was in a defective condition and unreasonably dangerous when it left the possession of the manufacturer. Logically, because the plaintiff need not prove manufacturer negligence, evidence of subsequent remedial measures should be admissible to prove the defect in the product that injured the plaintiff.

Courts and commentators that oppose admission of evidence of subsequent remedial measures in products liability actions do not refute the position that it is unlikely manufacturers will cease to repair or redesign their products if this type of evidence is admitted. Instead they espouse the traditional view that this type of evidence is irrelevant in determining liability. That is, the fact that the product was later changed or admittedly made safer does not tend to prove that the original condition was unsafe. However, jurors may be incapable of accepting this and be confused, reading the subsequent change as an admission of fault, as well as being unfairly prejudiced, desiring to punish a manufacturer who, at least in theory, could have done something to prevent an injury. The opponents of admissibility also fear that by receiving evidence of subsequent remedial measures, the defendant will be effectively required to prove his own due care in order to lessen the adverse impact caused by admitting the evidence. The defendant, of course, does not properly carry the burden of persuasion in this context.

Amended Federal Rule of Evidence 407 makes the principle of subsequent remedial measures applicable to products liability actions. Thus, evidence of remedial measures taken after an injury or harm allegedly caused by a particular event cannot be used to prove "a defect in a product, a defect in a product's design, or a need for a warning or instruction," as well as negligence or culpable conduct. The new rule resolves a split on the applicability of Federal Rule of Evidence 407 in these cases. See *Kelly v. Crown Equipment Co.* (3d Cir. 1992) 970 F.2d 1273, 1275 n. 1 .



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3 ADDITIONAL AUTHORITY

See Cal. L. Rev. Comm. Rep. 1 (1965) (Section 1151 does not prevent the use of evidence of subsequent remedial conduct for other purposes, such as impeachment (where, for example, a defense witness testifies that a safer scenario was not possible).)



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4 SIGNIFICANT CASES

Evidence Admissible on Issues Other Than Negligence or Culpable Conduct

Fox v. Kramer (2000) 22 Cal. 4th 531, 994 P.2d 343 (Section 1151 does not apply to medical peer review evidence in malpractice cases).

Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 60 Cal. Rptr. 2d 448, 929 P.2d 1239 (Section 1151 did not bar evidence that, following plaintiff's injury by stepping on a broken water meter box on a narrow strip of city-owned land, defendant landlord constructed fence around entire lawn, including the narrow strip; evidence was not being used to prove negligence, but to show that landlord exercised control over the narrow strip of land).

Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 196 Cal. Rptr. 117 (in action brought by patient against manufacturer of intrauterine device and others to recover for injuries allegedly resulting from patient's use of the device, evidence of manufacturer's activities in manufacturing and marketing the device subsequent to the device being placed in patient, subsequent to the device being removed from patient, and subsequent to the device being removed from the domestic market was admissible on the issues of malice and punitive damages, because admission of evidence of failure to make changes in a known defective product or failure to remove such products from market was consistent with the public policy considerations of this section).

People v. Lockheed Shipbuilding & Constr. Co. (1975) 50 Cal. App. 3d Supp. 15 (an exception to general rule against admission of remedial measures arises where evidence of subsequent remedial measures is offered to show possibility of feasibility of eliminating the cause of an accident; however, such exception is only applicable if there is a declaration that nothing could have been done to avoid the accident).

Sanchez v. Bagues & Sons Mortuaries (1969) 271 Cal. App. 2d 188, 76 Cal. Rptr. 372 (since, in action to recover damages for injuries suffered by plaintiff when she slipped and fell down two stairs on premises of defendant, there was no evidence that manager of defendant had anything to do with installing or ordering the installation of new abrasive tape for the stairs after the accident, no proper foundation was laid for impeaching the manager on cross-examination about post-accident repairs to the stairs).

Strict Liability

Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (this section, providing that when, after occurrence of an event, remedial measures are taken which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event, does not apply to suits founded upon strict liability of a manufacturer for placing a defective product on the market. Evidence, that manufacturer of motor vehicle had replaced the aluminum brake pedal on its fire engines with malleable iron pedal, was admissible in passenger's action against manufacturer, based on theory of strict liability, to recover for injuries sustained when the vehicle left the road and plunged into a canyon, allegedly as result of failure of aluminum gear box on the vehicle).

Santilli v. Otis Elevator Co. (1989) 215 Cal. App. 3d 210, 263 Cal. Rptr. 496 (evidence of post-accident remedial measures taken by nonparty hospital were not admissible in hospital employee's strict liability action against elevator manufacturer, due to likelihood that admission of evidence would deter remedial measures by entities such as hospital for which any liability for accident was predicated on negligence).



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SECTION 1152 Offers to Compromise

1-1152 California Evidence Courtroom Manual 1152.syn

§ 1152.syn Synopsis to Chapter 1152: Offers to Compromise

Scope Offers to Compromise

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Scope Offers to Compromise

§ 1152 reads as follows:

Rule 1152 Offers to Compromise

(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of *Section 790.03 of the Insurance Code*, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of *Section 790.03 of the Insurance Code*, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.

(c) This section does not affect the admissibility of evidence of any of the following:

- (1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.
- (2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

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(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1967, ch. 650, § 7; Stats. 1987, ch. 496, § 1)



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1 ANALYSIS

Section 1152 excludes evidence relating to an offer of compromise or to a completed compromise. The legislative history and case law interpretations of Section 1152 make clear that the section also excludes evidence of conduct or statements made during the course of compromise negotiations. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965). Section 1152 is based upon the public policy in favor of encouraging complete candor between the parties, which is most conducive to the settlement of disputes without litigation.

The language of the rule emphasizes that it excludes evidence of compromise negotiations only where such evidence is offered to establish liability for, or invalidity of a claim or its amount. The principle of exclusion does not operate when compromise-related evidence is used to establish some other fact of consequence in the litigation. For example, evidence of statements during the course of settlement discussions are not made inadmissible by the rule where the statements are offered to establish bias or prejudice of a witness, or where offered to show an effort to obstruct a criminal investigation or prosecution.

Section 1152 does not offer opportunities to immunize statements otherwise admissible by restating them as part of settlement negotiations thereby rendering the evidence inadmissible.

Illustration

Q:

Did you say to the policeman after the accident that your brakes were bad?

Objection:

Your Honor, counsel knows that statements concerning the brakes were made during settlement negotiations and, therefore, this line of inquiry is improper.

Court:

Overruled. Section 1152 applies to statements made during compromise negotiations and does not apply to similar or even identical statements made at another time.

Also, the fact that the settlement negotiations provided the impetus for discovering the other statements does not "taint" such other evidence and make it inadmissible. See *Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal. App. 4th 1481 ; 43 Cal. Rptr. 3d 723 .

Section 1152 should be read along with *Code of Civil Procedure* section 998 (offer of defendant to compromise) and *Insurance Code* section 11582 (settlement of claim under motor vehicle liability policy not construable as admission).



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*1-1152 California Evidence Courtroom Manual 2***2 COMPARISON TO FEDERAL RULE**

Following the 2006 amendments to Federal Rule of Evidence 408, one must now conclude that there is a substantial difference between the federal rule and *Cal. Evid. Code section 1152*. The amendments to Rule 408 resolved three conflicts that existed under federal case law. First, a statement or conduct regarding a claim made in the course of settlement negotiations in a civil dispute is barred in a subsequent criminal proceeding, unless the statement was made in a civil proceeding initiated by a government regulatory, investigative or enforcement agency. The amendment also distinguished between an offer or acceptance of compromise and statements made in the course of settlement discussions (such as an admission of fault). An offer or acceptance of settlement is never admissible in criminal cases if offered as an admission of fault because parties settle lawsuits for many reasons other than the merits of the case. Second, to protect and encourage a frank discussion during settlement negotiations, another amendment to Rule 408 prohibited the use of statements made in settlement negotiations to impeach a party who might make an inconsistent statement at trial. A final amendment to Rule 408 prohibits a party from introducing its own statement made during settlement negotiations to prove the validity, invalidity or amount of the claim; this protects the other party from disclosing that settlement negotiations took place and prevents lawyers from potential disqualification because they may be called as witnesses.

Section 1152 is quite different. It contains none of the restrictions or provisions in amended Rule 408. Moreover, while Rule 408 explicitly states that statements made during the course of settlement negotiations are inadmissible, the text of Section 1152 does not contain such language, although California courts reach that result through interpretation of Section 1152. In addition, Section 1152(b) and (c) limit the application of the section in other situations. Section 1152(b) makes evidence of settlement offers admissible in the narrow class of cases over bad faith breach of an insurance contract; the section states, however, that evidence of settlement offers is not admissible if a party seeks a new trial, additur (increase in damages awarded), remittitur (reduction of damages awarded) or appeals. Section 1152(c) provides that where the settlement offer has independent legal significance, such as proof of partial satisfaction to show the validity of a debt or as proof of consideration for a contract, the evidence is not made inadmissible by Section 1152.



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3 SIGNIFICANT CASES

Examples of Statements Admissible Despite Section 1152

Smith v. Whittier (1892) 95 Cal. 279, 30 P. 529 (a statement made by one of several defendants to his co-defendants, advocating the settlement of plaintiff's claim, is not within the rule excluding offers made for the purpose of compromise, but is competent as an admission of liability).

Zhou v. Unisource Worldwide (2007) 157 Cal. App. 4th 1471, 69 Cal. Rptr. 3d 273 (Section 1152, excluding offers to compromise in settlement discussions, only applies in the litigation in which the settlement discussions took place; thus, the trial court committed harmless error in excluding correspondence between plaintiff and the insurance company involved in a separate, later accident that was not the focus of the litigation at hand).

RLI Ins. Co. Group v. Superior Court (1996) 51 Cal. App. 4th 415, 59 Cal. Rptr. 2d 111 (evidence pertaining to consent orders and stipulations with other insurers on rate rollback obligations were not made inadmissible in rate rollback proceedings; documents would not be used to prove liability for loss or damage in these administrative proceedings pursuant to Proposition 103, a voter enacted insurance reform measure).

Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 52 Cal. Rptr. 2d 134 (trial court properly admitted evidence of settlement offers and discussions (but only after redacting the specific dollar amounts) made after filing of an automobile "Lemon Law" action where evidence was being used to show defendant's belief that it had no obligations under the "Lemon Law").

Carney v. Santa Cruz Women Against Rape (1990) 221 Cal. App. 3d 1009, 271 Cal. Rptr. 30 (letter of apology written to man by woman who had previously alleged that he had sexually assaulted her was properly admitted in man's libel action against anti-rape group which had published man's name as sexual attacker, despite group's contention that admission violated evidentiary rule governing offers of settlement, inasmuch as letter was not introduced to prove woman's liability for any loss or damage, but was admitted as evidence regarding truth or falsity of statements in newsletter).

People v. Muniz (1989) 213 Cal. App. 3d 1508, 262 Cal. Rptr. 743 (this section did not apply to criminal case in

which evidence was presented that defendant had offered to pay for the victim's medical expenses).

Truestone, Inc. v. Simi West Indus. Park II (1984) 163 Cal. App. 3d 715, 209 Cal. Rptr. 757 (in action alleging account stated, property owner's letter acknowledging debt in stated amount without contingencies was admissible against owner as admission against interest, independent of compromise offer).

Examples of Statements Inadmissible Under Section 1152

Citti v. Bava (1928) 204 Cal. 136, 266 P. 954 (in action by guest against automobile driver for personal injuries sustained in collision, admitting evidence of defendant's insurance carrier's settlement with motorist struck was reversible error).

Caira v. Offner (2005) 126 Cal. App. 4th 12, 24 Cal. Rptr. 3d 233 (trial court did not err in excluding e-mail that amounted to statement linked to settlement discussions regarding various disputes even though statement was only one piece of discussion).

Hasler v. Howard (2004) 120 Cal. App. 4th 1023, 16 Cal. Rptr. 3d 217 (trial court correctly applied Section 1152 to exclude evidence of home seller's offer to dismiss lawsuit against realtor for the amount of realtor's commission from realtor's motion for attorneys fees arising from seller's dismissed suit; although realtor claimed that this evidence was not being used to prove liability or the invalidity of the seller's, trial court correctly concluded that realtor was seeking to use fact that realtor's commission was an element of seller's damages and thus could be a basis for realtor's claim for attorneys fees).

Conderback, Inc. v. Standard Oil Co. of Cal. (1966) 239 Cal. App. 2d 664, 48 Cal. Rptr. 901 (plaintiff's theory of case at second trial that plaintiff was to be compensated according to pricing formula and in line with customary practices in the past did not justify admission of evidence of what were apparently offers to compromise then pending dispute, and admission of evidence of such offers was error).

Brown v. Pacific Elec. Ry. Co. (1947) 79 Cal. App. 2d 613, 180 P.2d 424 (where culpability of a defendant in an action based on his alleged negligence is an issue, court should not be guided by compromise settlement which defendant has made of other claims arising out of the same facts).



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§ 1153.syn Synopsis to Chapter 1153: Offer to Plead Guilty or Withdrawn Plea of Guilty by Criminal Defendant

Scope Offer to Plead Guilty or Withdrawn Plea of Guilty by Criminal Defendant

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1-1153 California Evidence Courtroom Manual Scope

Scope Offer to Plead Guilty or Withdrawn Plea of Guilty by Criminal Defendant

§ 1153 reads as follows:

Rule 1153 Offer to Plead Guilty or Withdrawn Plea of Guilty by Criminal Defendant

Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

The purpose of this section is to encourage parties to resolve criminal cases without necessity of trial. Section 1153, on its face, might appear to bar only the actual offer to plead guilty, but it also has been interpreted to cover statements made during "bona fide plea-bargaining negotiations." *People v. Tanner (1975) 45 Cal. App. 3d 345, 119 Cal. Rptr. 407* (error to admit letters from defendant to district attorney and to deputy district attorney, in which defendant made admissions regarding his guilt, indicated dissatisfaction with deal offered him, and expressed willingness to accept "fair deal").



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2 COMPARISON TO FEDERAL RULE

Federal Rule of Evidence 410 is the counterpart to Section 1153. *Federal Rule of Evidence 410* explicitly covers a broader category of cases, but courts have interpreted California rule 1153 to cover more than its text might indicate, such as statements made within the course of bona fide plea-bargaining.

Federal Rule of Evidence 410 bars evidence of the following in any criminal or civil proceedings when offered against the defendant who made the plea or statement, or who was a participant personally or through counsel in the plea discussions: (1) a plea of guilty that was later withdrawn; (2) a nolo contendere plea; (3) any statement made in the course of any proceedings under *Rule 11 of the Federal Rules of Criminal Procedure* or equivalent state procedure regarding the foregoing pleas; (4) any statement made in the course of plea discussions with counsel for the prosecuting attorney which do not result in a guilty plea or in a guilty plea that was later withdrawn.

Federal Rule of Evidence 410 further provides that statements otherwise rendered inadmissible under the Rule are nevertheless admissible in the following situations: (1) when offered in a proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should, in fairness, be considered contemporaneously with it; (2) when offered in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

In *United States v. Mezzanatto* (1995) 513 U.S. 196, 115 S. Ct. 797, 130 L. Ed. 2d 697, the United States Supreme Court held that an agreement to waive the exclusionary provisions of *Federal Rule of Evidence 410* and *Federal Rule of Criminal Procedure 11(c)(6)* is valid and enforceable absent some affirmative indication that the defendant entered the agreement unknowingly or involuntarily.



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People v. Leonard (2007) 40 Cal. 4th 1370, 58 Cal. Rptr. 3d 368, 157 P.3d 973, reh'g denied, cert. denied, 128 S. Ct. 539, 169 L. Ed. 2d 378 (2007) (during court's consideration of defense counsels motion to change venue, murder defendant's courtroom outburst--"I am guilty"--was not inadmissible under the statute precluding evidence of an offer to plead guilty by a defendant since defendant neither explained what he was guilty of nor were any plea negotiations underway).

People v. Silva (1988) 45 Cal. 3d 604, 247 Cal. Rptr. 573, 754 P.2d 1070, cert. denied, reh'g denied, (statement that murder defendant volunteered to undersheriff following his arrest that undersheriff might as well take him to the gas chamber, was admissible to show defendant's consciousness of guilt; statement was not mere offer to plead guilty rendered inadmissible by this section).

People v. Welch (1996) 51 Cal. App. 4th 1128, 60 Cal. Rptr. 2d 116 (evidence that defendant told polygraph examiner that he had intercourse with rape victim three times was admissible in criminal prosecution where defendant did not show that statements were motivated by a desire to further plea bargain negotiations and defendant had no obligation to disclose results of polygraph examination to prosecution).

People v. Crow (1994) 28 Cal. App. 4th 440, 33 Cal. Rptr. 2d 624 (Section 1153 must be limited to those situations in which those statements are offered as substantive evidence of guilt, either in prosecution's case-in-chief or otherwise; Section 1153 does not prevent prosecution from using evidence of those statements for limited purpose of impeaching defendant regarding testimony which was elicited either during direct examination of defendant or during cross-examination which is plainly within scope of defendant's direct examination).

People v. Magana (1993) 17 Cal. App. 4th 1371, 22 Cal. Rptr. 2d 59 (defendant's voluntary disclosures about plea bargaining process made to third persons uninvolved and unnecessary to plea negotiations are not part of "bona fide plea negotiations," as they cannot be seen as attempt to influence court or prosecutor to accept particular offer and thus are not barred by Section 1153).



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SECTION 1153.5 Offer for Civil Resolution of Crimes Against Property

1-1153.5 California Evidence Courtroom Manual 1153.5.syn

§ 1153.5.syn Synopsis to Chapter 1153.5: Offer for Civil Resolution of Crimes Against Property

Scope Offer for Civil Resolution of Crimes Against Property

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1-1153.5 California Evidence Courtroom Manual Scope

Scope Offer for Civil Resolution of Crimes Against Property

§ 1153.5 reads as follows:

1153.5 Offer for Civil Resolution of Crimes Against Property

Evidence of an offer for civil resolution of a criminal matter pursuant to the provisions of *Section 33 of the Code of Civil Procedure*, or admissions made in the course of or negotiations for the offer shall not be admissible in any action.

(Added by Stats. 1982, ch. 1518, § 2)

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1 ANALYSIS

See Analysis of Section 1152.



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2 COMPARISON TO FEDERAL RULE

There is no specific federal counterpart, but many of the cases falling under this section would be covered by *Federal Rule of Evidence 408* (offers and statements made during settlement negotiations).



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SECTION 1154 Offer to Discount a Claim

1-1154 California Evidence Courtroom Manual 1154.syn

§ 1154.syn Synopsis to Chapter 1154: Offer to Discount a Claim

Scope Offer to Discount a Claim

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CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1154 Offer to Discount a Claim

1-1154 California Evidence Courtroom Manual Scope

Scope Offer to Discount a Claim

§ 1154 reads as follows:

Rule 1154 Offer to Discount a Claim

Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1154 Offer to Discount a Claim

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1 ANALYSIS

See Analysis of Section 1152.



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SECTION 1154 Offer to Discount a Claim

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2 COMPARISON TO FEDERAL RULE

There is no specific federal counterpart, but many of the cases falling under this section would be covered by Federal Rule of Evidence 408 (offers and statements made during settlement negotiations).



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3 SIGNIFICANT CASES

Dennis v. Belt (1866) 30 Cal. 247 (in an action for damages for breach of a contract, where a counterclaim for a breach of the same contract is set up, evidence of an attempt to arbitrate and settle the matters at issue is not admissible).

Zelayeta v. Pacific Greyhound Lines (1951) 104 Cal. App. 2d 716, 232 P.2d 572 (in action against bus company and bus driver for death of motorist in head-on collision of automobile and bus, evidence of settlement of claims of bus passengers by bus company was not admissible as an admission by bus company that it was liable for motorist's death, but such evidence might be admissible to show bias or prejudice of such bus passengers who testified for bus company).



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CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1155 Liability Insurance

1-1155 California Evidence Courtroom Manual 1155.syn

§ 1155.syn Synopsis to Chapter 1155: Liability Insurance

Scope Liability Insurance

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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SECTION 1155 Liability Insurance

1-1155 California Evidence Courtroom Manual Scope

Scope Liability Insurance

§ 1155 reads as follows:

Rule 1155 Liability Insurance

Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1155 Liability Insurance

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1 ANALYSIS

This section provides that the fact that a person was or was not insured against liability is not admissible in order to establish negligent or wrongful conduct by the individual. Section 1155 is designed to minimize unfair prejudice relating to the consideration of liability insurance. On one hand, the probative value of liability insurance is exceedingly low regarding issues of liability. On the other hand, the risks of prejudice are extremely high.

The exclusionary principle of Section 1155 applies by its express terms to the fault of a defendant and to the possible contributory negligence or other fault of a plaintiff.

The exclusionary operation of Section 1155 applies only where liability insurance is offered to establish negligence or culpability. Where liability insurance is offered to establish some other consequential fact (such as agency, ownership or control, or to establish the bias or prejudice of a witness) the exclusionary principle will not prevent the admissibility of the evidence.

Illustration

Where a defendant claims that he is not the owner of a vehicle that was involved in an automobile accident, evidence that the defendant had purchased insurance for that vehicle may be admissible as tending to establish the fact that he owned the vehicle or had sufficient control over it to be liable for its use. If such evidence were admitted, it would be subject to a limiting instruction.



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2 COMPARISON TO FEDERAL RULE

Section 1155 is substantially similar to Federal Rule of *Evidence 411*. Federal Rule of *Evidence 411* specifically excludes evidence of not only the existence, but also the non-existence of insurance, where such evidence is offered to establish negligence or wrongful conduct. California judges would probably reach the same conclusion under general principles of relevancy.



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1-1155 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Schaefer/Karpf Productions v. CNA Ins. Cos. (1998) 64 Cal. App. 4th 1306, 76 Cal. Rptr. 2d 42 (in plaintiff's action against defendant for injury, evidence of whether plaintiff's loss is covered by defendant's insurance is irrelevant; whether defendant's insurer is responsible for loss is not a material issue in this case).

Brainard v. Cotner (1976) 59 Cal. App. 3d 790, 130 Cal. Rptr. 915 (because facts tending to show interest, bias or motive on part of a witness may always be brought out on cross-examination, even though it may thereby be disclosed that defendant was protected by insurance, trial court abused its discretion by excluding driver's alleged statement to passenger that accident was caused by passenger's unzipping her dress, because driver was fearful of endangering insurance coverage).

Menefee v. Williams (1968) 259 Cal. App. 2d 56, 66 Cal. Rptr. 108 (defendant's statements "Don't worry if your insurance doesn't cover this mine will" and "must have been out of my head when I said that," former of which was allegedly made at time of discovery of plaintiff who had been shot and latter of which was made at hospital, were not part of "res gestae" so as to be admissible in action for allegedly shooting plaintiff while they were hunting).



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SECTION 1156 Records of Medical or Dental Study of In-hospital Staff Committee

1-1156 California Evidence Courtroom Manual 1156.syn

§ 1156.syn Synopsis to Chapter 1156: Records of Medical or Dental Study of In-hospital Staff Committee

Scope Records of Medical or Dental Study of In-hospital Staff Committee

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1-1156 California Evidence Courtroom Manual Scope

Scope Records of Medical or Dental Study of In-hospital Staff Committee

§ 1156 reads as follows:

Rule 1156 Records of Medical or Dental Study of In-hospital Staff Committee

(a) In-hospital medical or medical-dental staff committees of a licensed hospital may engage in research and medical or dental study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such in-hospital medical or medical-dental staff committees relating to such medical or dental studies are subject to Title 4 (commencing with *Section 2016.010*) of *Part 4 of the Code of Civil Procedure* (relating to discovery proceedings) but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical or medical-dental staff committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) This section does not affect the admissibility in evidence of the original medical or dental records of any patient.

(d) This section does not exclude evidence which is relevant evidence in a criminal action.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 674, § 1; amended by Stats. 2004, ch. 182

(A.B. 3081), § 30)

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SECTION 1156 Records of Medical or Dental Study of In-hospital Staff Committee

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1 ANALYSIS

Section 1156 provides a limited level of confidentiality for hospital staff committee records of studies designed to reduce morbidity or mortality. The section provides that such records are subject to discovery under the Civil Discovery Act (*Code of Civil Procedure sections 2016 to 2036*) but are not admissible in any action or before any administrative body, agency, or person. However, Section 1156 does not preclude admission of the original medical or dental records of a patient or records that would be relevant evidence in a criminal case. Section 1156(b) states that the transmission of information about a patient to such a hospital staff committee does not waive the patient's physician-patient or psychotherapist-patient privileges, and that the records are discoverable despite the existence of those privileges, except that a patient's name cannot be disclosed except with the permission of the patient.



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SECTION 1156 Records of Medical or Dental Study of In-hospital Staff Committee

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2 COMPARISON TO FEDERAL RULE

The federal rules contain no counterpart to this section, although there are federal statutes that protect the confidentiality of medical records.



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3 SIGNIFICANT CASES

Arnett v. Dal Cielo (1996) 14 Cal. 4th 4, 56 Cal. Rptr. 2d 706, 923 P.2d 1 (records and proceedings of the relevant hospital review committees are subject to the Civil Discovery Act under Section 1156 and Section 1156.1, but are not subject to discovery under Section 1157).



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1156.1 Records of Medical or Psychiatric Studies of Quality Assurance Committees

1-1156.1 California Evidence Courtroom Manual 1156.1.syn

§ 1156.1.syn Synopsis to Chapter 1156.1: Records of Medical or Psychiatric Studies of Quality Assurance Committees

Scope Records of Medical or Psychiatric Studies of Quality Assurance Committees

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SECTION 1156.1 Records of Medical or Psychiatric Studies of Quality Assurance Committees

1-1156.1 California Evidence Courtroom Manual Scope

Scope Records of Medical or Psychiatric Studies of Quality Assurance Committees

§ 1156.1 reads as follows:

1156.1 Records of Medical or Psychiatric Studies of Quality Assurance Committees

(a) A committee established in compliance with *Sections 4070 and 5624 of the Welfare and Institutions Code* may engage in research and medical or psychiatric study for the purpose of reducing morbidity or mortality, and may make findings and recommendations to the county and state relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such committees relating to such medical or psychiatric studies are subject to Title 4 (commencing with *Section 2016.010*) of *Part 4 of the Code of Civil Procedure* but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him or her to such committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014. However, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) This section does not affect the admissibility in evidence of the original medical or psychiatric records of any patient.

(d) This section does not exclude evidence which is relevant evidence in a criminal action.

(Added by Stats. 1982, ch. 234, § 4, eff. June 2, 1982. Amended by Stats. 2004, ch. 182 (A.B. 3081), § 31)

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SECTION 1156.1 Records of Medical or Psychiatric Studies of Quality Assurance Committees

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1 ANALYSIS

See Analysis of Section 1156. Section 1156.1 applies to a special type of quality assurance committee, established pursuant to *Welfare and Institutions Code sections 4070 and 5624*.



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2 COMPARISON TO FEDERAL RULE

See comparison under Section 1156.



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3 SIGNIFICANT CASES

See Section 1156.



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SECTION 1157 Proceedings and Records of Quality of Care Committees

1-1157 California Evidence Courtroom Manual 1157.syn

§ 1157.syn Synopsis to Chapter 1157: Proceedings and Records of Quality of Care Committees

Scope Proceedings and Records of Quality of Care Committees

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SECTION 1157 Proceedings and Records of Quality of Care Committees

1-1157 California Evidence Courtroom Manual Scope

Scope Proceedings and Records of Quality of Care Committees

§ 1157 reads as follows:

Rule 1157 Proceedings and Records of Quality of Care Committees

(a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, marriage and family therapist, licensed clinical social worker or veterinary staffs in hospitals, or of a peer review body, as defined in *Section 805 of the Business and Professions Code*, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or for that peer review body, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietitian review or veterinary review or acupuncturist review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, acupuncture, or chiropractic societies, marriage and family therapist, licensed clinical social worker or psychological review committees of state or local marriage and family therapist, state or local licensed clinical social worker, or state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.

(c) The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(d) The prohibitions in this section do not apply to medical, dental, dental hygienist, podiatric, dietetic, psychological, marriage and family therapist, licensed clinical social worker, veterinary, acupuncture, or chiropractic society committees that exceed 10 percent of the membership of the society, nor to any of those committees if any person serves upon the committee when his or her own conduct or practice is being reviewed.

(e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, or at the 1990 portion of the 1989-90 Regular Session of the Legislature, or at the 2000 portion of the 1999-2000 Regular Session of the Legislature do not exclude the discovery or use of relevant evidence in a criminal action.

(Added by Stats. 1968, ch. 1122, § 1. Amended by Stats. 1975, ch. 674, § 2; Stats. 1978, ch. 7, § 1, eff. Feb. 10, 1978; Stats. 1978, ch. 503, § 2; Stats. 1982, ch. 705, § 3; Stats. 1983, ch. 289, § 3; Stats. 1983, ch. 422, § 1; Stats. 1983, ch. 1081, § 2.5; Stats. 1985, ch. 725, § 1; Stats. 1990, ch. 196 (A.B. 1565), § 2; Stats. 1994, ch. 815 (S.B. 1279), § 3; Stats. 2000, ch. 136 (A.B. 2374), § 1)

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1 ANALYSIS

Every licensed hospital must have a formally organized and self-governing medical staff responsible for the "adequacy and quality of the medical care rendered to patients in the hospital." 22 *Cal. Code Regs. § 70703(a)*. The medical staff adopts rules for practice and procedure for the hospital departments, establishes standards for patient care, evaluates doctors applying for staff privileges and assesses the performance of current staff doctors.

Section 1157 precludes discovery of the proceedings and records of medical staffs in order to encourage them to engage in candid assessments with the goal of fostering health care evaluation and improvement and to encourage hospital staff to communicate with the peer review process by exempting participating staff from the burden of discovery and involuntary testimony.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this rule, although there are federal statutes protecting the privacy of certain medical records. Where a case presents a federal question, federal courts have split over whether they should recognize a common-law privilege under Federal Rule of *Evidence* 501 for hospital peer review committee records. See *United States v. Harris Methodist Fort Worth* (5th Cir. 1992) 970 F.2d 94, 103 ; *Le Masters v. Christ Hospital* (S.D. Ohio 1991) 791 F. Supp. 188, 190 .



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1-1157 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Scope of Section 1157 Protection

Fox v. Kramer (2000) 22 Cal. 4th 531, 93 Cal. Rptr. 3d 497, 994 P.2d 343 (state medical board investigator, who reviewed hospital peer review records in the course of official duties, could not give testimony based on review of those records; evidence was privileged under Section 1040, the official information privilege, and Section 1157, privilege for hospital peer review committee records).

Arnett v. Dal Cielo (1996) 56 Cal. Rptr. 2d 706 (the State Medical Board, which issued an investigative subpoena to a hospital peer review committee for records concerning a physician with alleged drug problem, was not engaged in "discovery" in the sense of Section 1157, which exempts such information from "discovery").

Alexander v. Superior Court (1993) 5 Cal. 4th 1218, 23 Cal. Rptr. 2d 397, 859 P.2d 96 (scope of statute protecting hospital medical staff committee "records" from discovery is not limited to records that are "generated" by medical staff committee, nor does it exclude from its protection materials submitted to committee for review).

University of Southern California v. Superior Court (1996) 45 Cal. App. 4th 1283, 53 Cal. Rptr. 2d 260 (documents and proceedings of hospital committee evaluating surgical residents at a teaching hospital were exempt from discovery under Section 1157 where such committee was responsible for maintaining and improving quality of care rendered at the hospital; protection provided by Section 1157 was not an evidentiary privilege subject to *Evidence Code* section 912 dealing with waiver).

Cedars-Sinai Medical Center v. Superior Court (1993) 12 Cal. App. 4th 579, 16 Cal. Rptr. 2d 253 (public's interest in quality medical care did not outweigh its interest in keeping hospital's peer review board confidential, even if keeping identities secret might limit ability of plaintiff to discover relevant and admissible information; public good is best served where medical staff review committees evaluate physicians in confidence).

Mt. Diablo Hosp. Dist. v. Superior Court (1986) 183 Cal. App. 3d 30, 227 Cal. Rptr. 790 (minutes of medical staff committee meetings in which use of procedure were protected from discovery by patient and his wife who brought medical malpractice and products liability action against hospital, physicians, and drug manufacturer pursuant to this

section).

Mt. Diablo Hosp. Medical Center v. Superior Court (1984) 158 Cal. App. 3d 344, 204 Cal. Rptr. 626 (hospital which was defendant in medical malpractice action was not required to provide answers to interrogatories which it sufficiently established could not be given without divulging "proceedings" or "records" of medical staff committees covered by statutory privilege).

Schulz v. Superior Court (1977) 66 Cal. App. 3d 440, 136 Cal. Rptr. 67 (Section 1157 was designed to set aside immunity and permit discovery in suits by doctors claiming wrongful or arbitrary exclusion from hospital staff privileges, and it does not apply to a malpractice proceeding in which the doctor or hospital has been made a party; such circumstances do not open to discovery hospital staff records containing medical committee investigation reports and peer appraisals).

American Mut. Liability Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (assertion that without discovery of certain files, which had been worked up by attorney who had been retained by insurer to represent orthopedic surgeon in prior malpractice suits, the plaintiff in another malpractice suit could not rebut surgeon's testimony and contention that surgeon had been pressured by insurer into taking certain "positions" which were false, was to be carefully balanced against clearly expressed policy considerations underlying attorney-client privilege, work product privilege and statutory proscriptions against disclosure of proceedings and records of medical review committees).

Exceptions to Protection Under Section 1157

Alexander v. Superior Court (1993) 5 Cal. 4th 1218, 23 Cal. Rptr. 2d 397, 859 P.2d 96 (1993) (evidence rule precluding discovery of proceedings and peer review records of hospital medical staff committees does not prevent plaintiff from otherwise discovering relevant information by, inter alia, deposing physician and asking whether he or she was previously denied staff privileges, or by reviewing public records to determine whether physician has suffered malpractice judgment or disciplinary action).

West Covina Hosp. v. Superior Court (1986) 41 Cal. 3d 846, 226 Cal. Rptr. 132, 718 P.2d 119 (Section 1157 did not preclude committee member from testifying voluntarily about proceedings of the committee).

Scripps Memorial Hosp. v. Superior Court (1995) 37 Cal. App. 4th 1720, 44 Cal. Rptr. 2d 725, *contra* *People v. Superior Court (Memorial Medical Center)* (1991) 234 Cal. App. 3d 363, 286 Cal. Rptr. 478 (while Section 1157(e) opens the door to discovery in a criminal action, it is limited on its face to records of certain types of caregivers added to the statute after the passage of Proposition 8 ("Victims' Bill of Rights," "Right to Truth-in-Evidence") (those added by amendments of 1983, 1985 or 1990)).

Willits v. Superior Court (Health Dimensions, Inc.) (1993) 20 Cal. App. 4th 90, 24 Cal. Rptr. 2d 348 (hospital cannot avoid discovery of materials related to its independent administrative duties, such as those imposed by Labor Code and by Health and Safety Code, by delegating such duties to organized medical committees or by placing relevant documents in committee files; statutory privilege accorded to organized medical committees and peer review bodies does not apply to hospital's administrative functions and records).

People v. Superior Court (Memorial Medical Center) (1991) 234 Cal. App. 3d 363, 286 Cal. Rptr. 478 (statute granting immunity from discovery to proceedings or records of organized committees of hospital medical staffs or peer review bodies did not confer immunity against criminal discovery; public policy concerns implicated by discovery needs of injured plaintiff and prosecution in case of suspected criminal activity were not equivalent).

West Covina Hosp. v. Superior Court (1984) 153 Cal. App. 3d 134, 200 Cal. Rptr. 162 (term "any such committee" in

statute limiting discovery of medical staff committee proceedings, but allowing discovery of records of a medical society committee if the person whose conduct or practice is being reviewed serves on such committee, refers only to medical society committees; thus, such exception applies only when the proceedings or records sought to be discovered are those of a committee of a medical society, not those of a hospital staff).

Procedure for Determining Application of Section 1157

Leon v. County of San Diego (S.D. Cal. 2001) 202 F.R.D. 631 (in civil rights action brought in federal court against county and county officials alleging deliberate indifference to medical needs of pretrial detainee, nursing peer review records from county detention facility were relevant to municipal liability and therefore were discoverable; *California Evidence Code* section 1157, medical peer review privilege, did not apply; Section 1157 conflicts with liberal federal discovery rules).

Santa Rosa Memorial Hosp. v. Superior Court (1985) 174 Cal. App. 3d 711, 220 Cal. Rptr. 236 (burden of showing that information is protected by *Evidence Code* section 1157, providing that proceedings and records of organized medical staff committees are not subject to discovery, cannot be sustained except upon particularized judicial inquiry at an in camera hearing, when information sought to be discovered relates to matter that is not obviously within sole purview of protected committee, and need for such inquiry is not eliminated by fact that person from whom discovery is sought is member of medical staff committee).

Saddleback Community Hosp. v. Superior Court (1984) 158 Cal. App. 3d 206, 204 Cal. Rptr. 598 (to effectuate statutory immunity from discovery of hospital staff evaluations, the district court in a malpractice action, was to hold *in camera* hearings regarding each item of evidence requested on discovery).



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SECTION 1157.5 Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

1-1157.5 California Evidence Courtroom Manual 1157.5.syn

§ 1157.5.syn Synopsis to Chapter 1157.5: Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

Scope Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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California Evidence Courtroom Manual

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

SECTION 1157.5 Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

1-1157.5 California Evidence Courtroom Manual Scope

Scope Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

§ 1157.5 reads as follows:

1157.5 Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

Except in actions involving a claim of a provider of health care services for payment for such services, the prohibition relating to discovery or testimony provided by Section 1157 shall be applicable to the proceedings or records of an organized committee of any nonprofit medical care foundation or professional standards review organization which is organized in a manner which makes available professional competence to review health care services with respect to medical necessity, quality of care, or economic justification of charges or level of care.

(Added by Stats. 1973, ch. 848, § 1. Amended by Stats. 1980, ch. 524, § 1)

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

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SECTION 1157.5 Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

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1 ANALYSIS

This section extends the coverage of Section 1157 to certain committees of nonprofit medical care foundation or professional standards review organizations.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

SECTION 1157.5 Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

1-1157.5 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

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SECTION 1157.5 Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

1-1157.5 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Los Angeles County v. Superior Ct. (2006) 139 Cal. App. 4th 8, 42 Cal. Rptr. 3d 390 (vacating order to county to produce certain documents, regarding medical and mental health care generated by county mental health divisions and a county psychiatrist, is vacated where documents are exempt from disclosure under *Evidence Code* sections 1157 and 1157.6; "quality assurance committee of county jail mental health services division was "peer review body" covered by these privileges; privileges applied even though documents were prepared by single committee member; and privileges could apply in civil rights case).



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

SECTION 1157.6 Proceedings and Records of Quality Assurance Committees for County Health Facilities

1-1157.6 California Evidence Courtroom Manual 1157.6.syn

§ 1157.6.syn Synopsis to Chapter 1157.6: Proceedings and Records of Quality Assurance Committees for County Health Facilities

Scope Proceedings and Records of Quality Assurance Committees for County Health Facilities

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1157.6 Proceedings and Records of Quality Assurance Committees for County Health Facilities

1-1157.6 California Evidence Courtroom Manual Scope

Scope Proceedings and Records of Quality Assurance Committees for County Health Facilities

§ 1157.6 reads as follows:

1157.6 Proceedings and Records of Quality Assurance Committees for County Health Facilities

Neither the proceedings nor the records of a committee established in compliance with *Sections 4070 and 5624 of the Welfare and Institutions Code* having the responsibility of evaluation and improvement of the quality of mental health care rendered in county operated and contracted mental health facilities shall be subject to discovery. Except as provided in this section, no person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery or testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting, or to any person requesting facility staff privileges.

(Added by Stats. 1982, ch. 234, § 5, eff. June 2, 1982)

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

SECTION 1157.6 Proceedings and Records of Quality Assurance Committees for County Health Facilities

1-1157.6 California Evidence Courtroom Manual 1

1 ANALYSIS

This section is similar to Section 1157 except that it applies to the quality assurance committees for county health facilities.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1157.6 Proceedings and Records of Quality Assurance Committees for County Health Facilities

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1157.6 Proceedings and Records of Quality Assurance Committees for County Health Facilities

1-1157.6 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Los Angeles County v. Superior Ct. (2006) 139 Cal. App. 4th 8, 42 Cal. Rptr. 3d 390 (vacating order to county to produce certain documents, regarding medical and mental health care generated by county mental health divisions and a county psychiatrist, is vacated where documents are exempt from disclosure under *Evidence Code* sections 1157 and 1157.6; "quality assurance committee of county jail mental health services division was "peer review body" covered by these privileges; privileges applied even though documents were prepared by single committee member; and privileges could apply in civil rights case).



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1157.7 Application of Section 1157 Discovery or Testimony Prohibitions

1-1157.7 California Evidence Courtroom Manual 1157.7.syn

§ 1157.7.syn Synopsis to Chapter 1157.7: Application of Section 1157 Discovery or Testimony Prohibitions

Scope Application of Section 1157 Discovery or Testimony Prohibitions

1 ANALYSIS

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1157.7 Application of Section 1157 Discovery or Testimony Prohibitions

1-1157.7 California Evidence Courtroom Manual Scope

Scope Application of Section 1157 Discovery or Testimony Prohibitions

§ 1157.7 reads as follows:

1157.7 Application of Section 1157 Discovery or Testimony Prohibitions

The prohibition relating to discovery or testimony provided in Section 1157 shall be applicable to proceedings and records of any committee established by a local governmental agency to monitor, evaluate, and report on the necessity, quality, and level of specialty health services, including, but not limited to, trauma care services, provided by a general acute care hospital which has been designated or recognized by that governmental agency as qualified to render specialty health care services. The provisions of Chapter 3.5 (commencing with *Section 6250*) of *Division 7 of Title 1 of the Government Code* and Chapter 9 (commencing with *Section 54950*) of *Division 2 of Title 5 of the Government Code* shall not be applicable to the committee records and proceedings.

(Added by Stats. 1983, ch. 1237, § 1)

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1157.7 Application of Section 1157 Discovery or Testimony Prohibitions

1-1157.7 California Evidence Courtroom Manual 1

1 ANALYSIS

This section extends the protection provided by Section 1157 to committees established by a local governmental agency to monitor, evaluate, and report on the necessity, quality, and level of specialty health services, including, but not limited to, trauma care services, provided by a general acute care hospital which has been designated or recognized by that governmental agency as qualified to render specialty health care services. Section 1157.7 also exempts such committees from complying with "open meeting" laws.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1157.7 Application of Section 1157 Discovery or Testimony Prohibitions

1-1157.7 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

County of San Diego v. Superior Court (1986) 176 Cal. App. 3d 1009, 222 Cal. Rptr. 484 (Section 1157.7, which prevents discovery of records of committee appointed to monitor or evaluate trauma care at general acute care hospital, does not apply to records of committee considering request of hospital to be designated to provide specialty health care (trauma care) services).



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1158 Inspection and Copying of Patient's Records

1-1158 California Evidence Courtroom Manual 1158.syn

§ 1158.syn Synopsis to Chapter 1158: Inspection and Copying of Patient's Records

Scope Inspection and Copying of Patient's Records

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1158 Inspection and Copying of Patient's Records

1-1158 California Evidence Courtroom Manual Scope

Scope Inspection and Copying of Patient's Records

§ 1158 reads as follows:

Rule 1158 Inspection and Copying of Patient's Records

Whenever, prior to the filing of any action or the appearance of a defendant in an action, an attorney at law or his or her representative presents a written authorization therefor signed by an adult patient, by the guardian or conservator of his or her person or estate, or, in the case of a minor, by a parent or guardian of the minor, or by the personal representative or an heir of a deceased patient, or a copy thereof, a physician and surgeon, dentist, registered nurse, dispensing optician, registered physical therapist, podiatrist, licensed psychologist, osteopathic physician and surgeon, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or pharmacist or pharmacy, duly licensed as such under the laws of the state, or a licensed hospital, shall make all of the patient's records under his, hers or its custody or control available for inspection and copying by the attorney at law or his, or her, representative, promptly upon the presentation of the written authorization.

No copying may be performed by any medical provider or employer enumerated above, or by an agent thereof, when the requesting attorney has employed a professional photocopier or anyone identified in *Section 22451 of the Business and Professions Code* as his or her representative to obtain or review the records on his or her behalf. The presentation of the authorization by the agent on behalf of the attorney shall be sufficient proof that the agent is the attorney's representative.

Failure to make the records available, during business hours, within five days after the presentation of the written authorization, may subject the person or entity having custody or control of the records to liability for all reasonable expenses, including attorney's fees, incurred in any proceeding to enforce this section.

All reasonable costs incurred by any person or entity enumerated above in making patient records available pursuant to this section may be charged against the person whose written authorization required the availability of the records.

"Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents (\$0.10) per page for standard reproduction of documents of a size 8 1/2 by 14 inches or less; twenty cents (\$0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the

reproduction of documents requiring special processing which are made in response to an authorization; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of sixteen dollars (\$16) per hour per person, computed on the basis of four dollars (\$4) per quarter hour or fraction thereof; actual postage charges; and actual costs, if any, charged to the witness by a third person for the retrieval and return of records held by that third person.

Where the records are delivered to the attorney or the attorney's representative for inspection or photocopying at the record custodian's place of business, the only fee for complying with the authorization shall not exceed fifteen dollars (\$15), plus actual costs, if any, charged to the record custodian by a third person for retrieval and return of records held offsite by the third person.

(Added by Stats. 1968, ch. 1122, § 2. Amended by Stats. 1970, ch. 556, § 1; Stats. 1974, ch. 250, § 1; Stats. 1974, ch. 667, § 1; Stats. 1975, ch. 563, § 1; Stats. 1978, ch. 493, § 1; Stats. 1980, ch. 697, § 1; Stats. 1986, ch. 603, § 5; Stats. 1987, ch. 19, § 1, eff. May 12, 1987; Stats. 1993, ch. 226 (A.B. 1987), § 9; Stats. 1997, ch. 442 (A.B. 758), § 15)

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1158 Inspection and Copying of Patient's Records

1-1158 California Evidence Courtroom Manual 1

1 ANALYSIS

This statute provides explicit procedures for obtaining medical records.

This section should also be read in conjunction with *Health and Safety Code section 123110* (patient access to health records).



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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 SECTION 1158 Inspection and Copying of Patient's Records

*1-1158 California Evidence Courtroom Manual***SIGNIFICANT CASES**

Thornburg v. El Centro Regional Medical Center (2006) 143 Cal. App. 4th 198, 48 Cal. Rptr. 3d 840 (trial court erred in granting judgment on the pleadings for hospital in class action by patient who was charged \$2 per page for copying medical records despite *Cal. Evid. Code § 1158* mandate that patients not be charged more than 10 cents per page; the face of *Cal. Evid. Code § 1158*, its legislative history and the cases which have interpreted the statute all suggest that the cost limitation provisions of Section 1158 may be enforced directly by patients; "*Evidence Code section 1158* states a clear public policy of permitting a patient, before filing any action, to inspect and to copy any medical records concerning the patient. The legislative purpose behind the enactment is not stated, but its apparent goal is to permit a patient to evaluate the treatment he or she received before determining whether to bring an action against the medical provider. Section 1158 also enables the patient to seek freely advice concerning the adequacy of medical care and to create a medical history file for the patient's information or subsequent use. It operates to prevent a medical provider from maintaining secret notes which can be obtained by the patient only through litigation and potentially protracted discovery proceedings.").

Thornburg v. Superior Court (2006) 138 Cal. App. 4th 43 ; 41 Cal. Rptr. 3d 156 (patient who had requested copies of her medical records from a hospital filed a complaint alleging that hospital's agent violated *Evid. Code § 1158* by charging an excessive amount for the copies; trial court erred in sustaining a demurrer filed by a hospital's agent without leave to amend; although agents generally are not liable for statutory duties imposed on their principals, this protection can be lost when an agent's acts are undertaken for the agent's own benefit or advantage rather than solely on behalf of and at the direction of the principal; in an effort to balance the purpose of § 1158 to limit costs of copying of medical expenses against the danger of of an overly broad judicial construction, the court held that agents or contractors of entities expressly covered in the first paragraph of § 1158 can be held liable under the statute but only if (1) they assume the duty of responding to § 1158 requests and (2) they are acting for their own advantage and benefit as well as the interests of entities expressly covered by the statute; here, the terms of the agreement between the agent and the hospital, which made the agent responsible for producing copies and billing the requesting party but did not limit copying fees or require the agent to account for copying fees, indicated that the agent had assumed the hospital's statutory obligations).



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1159 Animal Experimentation in Product Liability Actions

1-1159 California Evidence Courtroom Manual 1159.syn

§ 1159.syn Synopsis to Chapter 1159: Animal Experimentation in Product Liability Actions

Scope Animal Experimentation in Product Liability Actions

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1159 Animal Experimentation in Product Liability Actions

1-1159 California Evidence Courtroom Manual Scope

Scope Animal Experimentation in Product Liability Actions

§ 1159 reads as follows:

Rule 1159 Animal Experimentation in Product Liability Actions

(a) No evidence pertaining to live animal experimentation, including, but not limited to, injury, impact, or crash experimentation, shall be admissible in any product liability action involving a motor vehicle or vehicles.

(b) This section shall apply to cases for which a trial has not actually commenced, as described in paragraph (6) of subdivision (a) of *Section 581 of the Code of Civil Procedure*, on January 1, 1993.

(Added by Stats. 1992, ch. 188 (A.B. 3691), § 1)

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1159 Animal Experimentation in Product Liability Actions

1-1159 California Evidence Courtroom Manual 1

1 ANALYSIS

This rule is a classic example of evidence that, while otherwise admissible, has been deemed inadmissible for reasons of public policy.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1159 Animal Experimentation in Product Liability Actions

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2 COMPARISON TO FEDERAL RULE

There is no counterpart to this section in the federal rules.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1160 Expressions of Sympathy or Benevolence

1-1160 California Evidence Courtroom Manual 1160.syn

§ 1160.syn Synopsis to Chapter 1160: Expressions of Sympathy or Benevolence

Scope Expressions of Sympathy or Benevolence

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
SECTION 1160 Expressions of Sympathy or Benevolence

1-1160 California Evidence Courtroom Manual Scope

Scope Expressions of Sympathy or Benevolence

§ 1160 reads as follows:

Rule 1160 Expressions of Sympathy or Benevolence

(a) The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

(b) For purposes of this section:

(1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) "Family" means the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of parent, or spouse's parents of an injured party.

(Added by Stats. 2000, ch. 195 (A.B. 2804), § 1)

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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1160 Expressions of Sympathy or Benevolence

1-1160 California Evidence Courtroom Manual 1

1 ANALYSIS

This bill was intended to remove an evidentiary disincentive a party might have in deciding whether to apologize or sympathize with someone whom the party may have injured or otherwise hurt. In this sense, the statute extends the idea of the statute prohibiting evidence of subsequent remedial measures (Section 1151) or offers to compromise (Section 1152). The idea behind these statutes is that the evidence covered by the rule may actually have low probative value--people may apologize not because they are admitting legal responsibility, but because they feel sorry for someone. Moreover, without these rules, courts run the danger of wasting time over disputes about what the individual meant in apologizing or otherwise expressing sympathy. In addition, expressions of sympathy or regret may have the benefit of reducing lawsuits fostered by notions of "the principle of the thing" or anger, and may encourage settlement. Section 1160 does not, however, exclude statements of fault attached to a statement of sympathy or apology, as direct admissions of fault have much more probative value than a simple apology. Thus, in the statement "I'm so sorry you are in pain. I should not have run that red light"--only the first sentence would be excluded under Section 1160.



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DIVISION 9 EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
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SECTION 1160 Expressions of Sympathy or Benevolence

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2 COMPARISON TO FEDERAL RULE

There is no direct federal counterpart to Section 1160. However, *Federal Rule of Evidence 409*, which excludes evidence of an offer to pay medical expenses but not statements of fault accompanying such offers, is structured along the same policy rationale. Acts of benevolence carry low probative value on the issue of legal responsibility; they may be gestures of simple kindness rather than admissions of fault. Moreover, there may be more intangible benefits to the legal system from encouraging individuals to be more humane to one another by refusing to allow those statements of benevolence to be used against them in court.



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DIVISION 10 HEARSAY EVIDENCE
CHAPTER 1 GENERAL PROVISIONS

1-1 California Evidence Courtroom Manual Scope

Scope

General Practice Tip on Hearsay

The basic questions you need to ask to determine whether evidence is excluded under the hearsay rule are:

1. ***Was this evidence said, either by this witness or another person, outside of the present courtroom hearing?*** Whenever a witness refers to his or her prior statements outside of the hearing, there is a potential hearsay problem. A person who makes an out-of-court statement is called a "declarant" (see Section 135). Do not be confused by the related evidentiary problem: whether the in-court witness is lying or mistaken about what was said out-of-court. This is not a hearsay issue; the in-court witness's sincerity and capacity will be tested by cross-examination before jury.
2. ***Is the evidence a "statement"?*** (As defined in Section 225--verbal or nonverbal conduct intended to communicate.)
3. ***Is the statement being offered to prove the truth of the matter asserted?*** If the statement is being offered for any other purpose, it is not hearsay. The three stock purposes that a statement may be offered for (in lieu of the truth) are:
 - (a) ***as evidence with independent legal significance or verbal acts and operative facts*** (such as a victim's statement, "I'm still alive," when offered to prove the victim was still alive. Or, "This is a loan," offered to prove that the exchange of money was not as gift).
 - (b) ***as evidence of notice or to show the effect on the hearer*** (such as the statement "The floor is slippery," when offered to show that the defendant had notice of a dangerous condition).
 - (c) ***as circumstantial evidence of the declarant's state of mind, including prior inconsistent or consistent statements as circumstantial evidence of credibility.*** (For example, the statement "You are a poor excuse for a human being," when offered to show

the declarant did not like that individual).

If the statement is used for one of these nonhearsay purposes (again, by being used to prove something other than the truth of the content of the statement), the court will give a limiting instruction (*see Section 355*), if requested, telling the jury that they may not use the statement as evidence of its truth.

As you determine whether a statement is hearsay or not, watch out for closely related, but separate evidentiary objections. With each of the three standard "nonhearsay" purposes for a statement, you should ensure that the nonhearsay purpose is a relevant issue in the case; the relevancy objection frequently rides along with a hearsay objection. For example, a prosecutor in a drug prosecution may argue that a bystander's out-of-court statement "He is a drug dealer" was only offered to show the effect on the hearer, a police officer, as to why she searched the defendant's briefcase. This nonhearsay purpose might be relevant in a hearing on whether to suppress evidence under the exclusionary rule, but it is generally irrelevant in a prosecution for distribution of illegal drugs. Another problem will be demonstrating the personal knowledge of the witness as required by Section 702. Frequently, a witness may appear to be testifying on what may appear to be his or her firsthand sensory perceptions, but is in fact simply the out-of-court observation of another. In the example above, the bystander's comment "He is a drug dealer" may be based either on his or her own interaction with the defendant or on what someone else has said. If the witness is relying on someone's statement, you are presented with two layers of hearsay rather than just one.

If the statement was made out of court, fits within the definition of a statement under Section 225, and is being offered to prove the truth of the matter asserted, then the statement is hearsay. However, you must ask one final question.

4. *Does an exception to the hearsay rule apply?*

See Gatton v. A.P. Green Services, Inc. (1998) 64 Cal. App. 4th 688, 75 Cal. Rptr. 2d 523 (proponent of hearsay evidence bears the burden of showing that hearsay exception applies). If the answer to the final question is yes, only the other evidentiary rules (such as Section 352), statutes or constitutional provisions will make the evidence inadmissible.



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California Evidence Courtroom Manual

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DIVISION 10 HEARSAY EVIDENCE
CHAPTER 1 GENERAL PROVISIONS
SECTION 1200 The Hearsay Rule

1-1200 California Evidence Courtroom Manual 1200.syn

§ 1200.syn Synopsis to Chapter 1200: The Hearsay Rule

Scope The Hearsay Rule

1 ANALYSIS

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CHAPTER 1 GENERAL PROVISIONS
SECTION 1200 The Hearsay Rule

1-1200 California Evidence Courtroom Manual Scope

Scope The Hearsay Rule

§ 1200 reads as follows:

Rule 1200 The Hearsay Rule

(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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DIVISION 10 HEARSAY EVIDENCE
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1 ANALYSIS

The hearsay rules govern the admissibility of out-of-court statements, that is, statements that are made by a person other than while testifying at the trial at which the statement is offered into evidence. The law of evidence has developed a system of exclusion which rejects the admission of certain out-of-court statements that fail to satisfy accepted standards of reliability. Usually, testimony received at trial is accompanied by the safeguards of cross-examination, oath, and the opportunity to observe the demeanor of the witness. Hearsay is inherently unreliable because it is lacking in these safeguards; the perception, memory, sincerity, and communicative ability of the declarant have not been adequately tested by cross-examination. The general hearsay exclusionary principle is codified in Section 1200(a).

Section 1200(b) provides that hearsay is excluded, unless there is an exception provided by case law or statute, or is constitutionally required to be admissible. The power of the courts to create hearsay exceptions by decisional law is discussed extensively in *In re Cindy L.* (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (the language of *Evidence Code* section 1200, read in light of *Evidence Code* section 160 and the comments thereon, makes clear that one source of exceptions to the hearsay rule is from judicial decisions; court recognizes child dependency hearsay exception allowing admission of statements by alleged victim of child sexual abuse in dependency hearings where there is sufficient indicia of reliability, such as the child is available for cross-examination or there is corroborating evidence of sexual abuse and other parties have notice).



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2 COMPARISON TO FEDERAL RULE

Section 1200(a) is virtually identical to *Federal Rule of Evidence 801(c)*. Unlike Federal Rule of *Evidence 801*, however, the California drafters placed the definitions of the terms "statement" and "declarant" in the general definition section at the beginning of the Evidence Code. Section 225, comparable to Federal Rule of *Evidence 801(a)*, defines a "statement." Section 135, comparable to Federal Rule of *Evidence 801(b)* defines "declarant."

Section 1200(b) is very similar to *Federal Rule of Evidence 802* with one significant qualification. Legislative history and case law suggest that California courts have the power to create additional hearsay exceptions under Section 1200(b), while federal courts can only make an exception to the hearsay ban under the terms of the residual exceptions (Federal Rules of *Evidence 803(24)* and *804(b)(5)*--combined into new Federal Rule of *Evidence 807*, effective December 1, 1997. See *In re Cindy L.* (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (*Evidence Code section 1360* does provide an exception to the hearsay rule in the case of criminal prosecutions for certain forms of child abuse or neglect, but does not directly apply to noncriminal cases such as dependency proceedings; the language of *Evidence Code section 1200*, read in light of *Evidence Code section 160* and the comments thereon, makes clear that one source of exceptions to the hearsay rule is from judicial decisions; court recognizes child dependency hearsay exception allowing admission of statements by alleged victim of child sexual abuse in dependency hearings where there is sufficient indicia of reliability, such as the child is available for cross-examination or there is corroborating evidence of sexual abuse and other parties have notice, adopting safeguards of Section 1360; incompetence to testify at trial is not categorical bar to admission of hearsay statements under child dependency exception); *Houghtaling v. Superior Court* (1993) 17 Cal. App. 4th 1128, 21 Cal. Rptr. 2d 855 ; Senate Committee on Judiciary Comment to Section 1200 ("Chapter 2 (commencing with Section 1220) of this division contains a series of exceptions to the hearsay rule. Other exceptions may be found in other statutes or in decisional law"); *In re Carmen O.* (1994) 28 Cal. App. 4th 908, 33 Cal. Rptr. 2d 848 (trial court properly invoked its common law power to create a hearsay exception for statements made in child dependency hearings where the juvenile court judge finds the statement reliable); *In re Nemis M.* (1996) 50 Cal. App. 4th 1344, 58 Cal. Rptr. 2d 324 , review denied (same but adding requirement of competency). See also *Welfare and Institutions Code section 355* (permitting juvenile court judge to consider evidence of "any matter or information relevant and material to the circumstances" which have brought the minor within the court's jurisdiction.) *In re Malinda S.* (1990) 51 Cal. 3d 368, 272 Cal. Rptr. 787, 795 P.2d 1244 (interpreting *Welfare and Institutions Code section 355* as creating a hearsay exception for social studies reports which social workers are required to make regarding matters of custody status or welfare of minors). To date, California courts have been restrained in using this power.



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3 ADDITIONAL AUTHORITY

1 Jefferson California Evidence Benchbook § 1.3, at 45-46 (discussing hearsay exception for medical and repair bills, created by court pursuant to power under Section 1200)

Kandis Scott, *California's Dormant Hearsay Exception: Section 1200(b) of the Evidence Code*, 23 Santa Clara L. Rev. 157 (1983)

Bernard S. Jefferson, *Determining When Evidence is Hearsay or Nonhearsay and Determining Its Relevance as One or the Other*, 25 U. West L.A. L. Rev. 59 (1994)

Glen Weissenberger, *Reconstructing the Definition of Hearsay*, 57 Ohio St. L.J. 1525 (1996)



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4 SIGNIFICANT CASES

Policy Reasons Against Hearsay

People v. Alvarez (2002) 27 Cal. 4th 1161, 119 Cal. Rptr. 2d 903, 46 P.3d 372 (Prop. 8, which added Section 28(d) to the California Constitution, eliminated the evidentiary objection to the admission of the defendant's out-of-court statements on the grounds that independent proof of the corpus delicti--independent prima facie proof that a criminal act was committed--is lacking; however, Section 28(d) did not eliminate the independent-proof rule prohibition of conviction based only on the defendant's own out-of-court statements).

People v. Otto (2001) 26 Cal. 4th 200, 109 Cal. Rptr. 2d 327, 26 P.3d 1061 (provision of the Sexually Violent Predators Act permitting the details of predicate offenses to be proven by documentary evidence in an SVP commitment proceeding allowed admission of multiple hearsay statements that did not fall within any exception to the hearsay rule; victim hearsay statements must contain special indicia of reliability to satisfy due process concerns).

People v. Ayala (2000) 23 Cal. 4th 225, 96 Cal. Rptr. 2d 682, 1 P.3d 3, cert. denied, 532 U.S. 908 (defendant did not have constitutional right to present hearsay statements from deceased declarants; there is no constitutional right to present unreliable evidence).

In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (*Evidence Code* section 1360 does provide an exception to the hearsay rule in the case of criminal prosecutions for certain forms of child abuse or neglect, but does not directly apply to noncriminal cases such as dependency proceedings; the language of *Evidence Code* section 1200, read in light of *Evidence Code* section 160 and the comments thereon, makes clear that one source of exceptions to the hearsay rule is from judicial decisions; court recognizes child dependency hearsay exception allowing admission of statements by alleged victim of child sexual abuse in dependency hearings where there is sufficient indicia of reliability, such as the child is available for cross-examination or there is corroborating evidence of sexual abuse and other parties have notice, adopting safeguards of Section 1360; incompetence to testify at trial is not categorical bar to admission of hearsay statements under child dependency exception).

People v. Cudjo (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (hearsay is generally excluded because out-of-court declarant is not under oath and cannot be cross-examined to test perception, memory, clarity of expression,

and veracity, and because jury (or other trier of fact) is unable to observe declarant's demeanor).

People v. Morgan (2005) 125 Cal. App. 4th 935, 23 Cal. Rptr. 3d 224, review denied (statements of telephone caller asking to buy drugs, which were heard by police officer who answered phone while executing search warrant for defendants' residence, are admissible under nonstatutory, judicially created exception to hearsay rule; statements of caller were nontestimonial in character, and thus their admission was not precluded by *confrontation clause*).

In re Michael G. (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (purpose of hearsay rule is to preserve party's Sixth Amendment right to confront and cross-examine adverse witness and to disallow testimony coming from witness who is not under oath and whose demeanor cannot be observed by trier of fact).

Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 155 Cal. Rptr. 63 (general rule in civil actions is that, absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit or a declaration under penalty or perjury is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant).

Nonassertive/Nonexpressive Behavior

People v. Snow (1987) 44 Cal. 3d 216, 242 Cal. Rptr. 477, 746 P.2d 452 (defendant's passive, silent response to news that witnesses against him had been killed was probative of his prior knowledge of witness's killing, but such nonassertive responses or reactions did not fall within proscriptions of hearsay rule).

Examples of Statements Used for Nonhearsay Purposes--Independent Legal Significance/Verbal Acts/Operative Fact

Correa v. Superior Court (2002) 27 Cal. 4th 444, 117 Cal. Rptr. 2d 27, 40 P.3d 739 (contemporaneously translated statements do not add a layer of hearsay if they are fairly attributable to a declarant after considering, on a case-by-case basis, the party who supplied the interpreter, the interpreter's qualifications and language skill and the consistency between the subsequent actions and the statements as translated; the translator acts as a language conduit).

People v. Lewis (2001) 25 Cal. 4th 610, 106 Cal. Rptr. 2d 629, 22 P.3d 392 (hearsay objection to certified copies of prior felony convictions offered during penalty phase of trial was not preserved by objection at trial on general grounds of relevancy; even if objection had been preserved, copies of conviction were not hearsay because they were not offered to show defendant had committed the felonies in question, but rather to prove that defendant had suffered felony convictions, which constitutes a statutory aggravating factor for purposes of sentencing).

Peters v. Saunders (1996) 50 Cal. App. 4th 1823, 58 Cal. Rptr. 2d 690 (certified shorthand reporter's statements about a competitor were not hearsay when offered as the basis for a defamation action against reporter).

People v. Jimenez (1995) 38 Cal. App. 4th 795, 45 Cal. Rptr. 2d 466 (operative fact, such as words forming agreement, is not hearsay).

Franklin v. Benevolent and Protective Order of Elks (1979) 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (documents offered as proof of a matter other than content is nonhearsay. For purposes of libel action brought by public high school teacher, newspaper clippings offered by defendants could be competent evidence only of fact that teacher had received considerable amount of publicity as that issue relates to the degree of damage suffered, but, by virtue of hearsay rule, collection of clippings was not admissible evidence of the facts stated therein).

--Notice/Effect on the Hearer

People v. Boyette (2002) 29 Cal. 4th 381, 127 Cal. Rptr. 2d 544, 58 P.3d 391 (defense's question, which asked witness whether she had heard defendant's mother express concern for her safety, called for hearsay as it was being offered to prove its truth--that defendant's mother was afraid for her safety; however, defendant's questions about specific threats leveled against him and his family did not call for hearsay because such statements were only offered to show the effect of the statements on the defendant, who changed his version of events to blame himself rather than the parties threatening his family; error was harmless given other evidence).

People v. Alvarez (1996) 14 Cal. 4th 155, 58 Cal. Rptr. 2d 385, 926 P.2d 365, *reh'g denied* (witness's statements to defendant that victim of homicide was a police officer were not hearsay where they were not offered to prove victim was a police officer, but rather to show that, in admitting he had killed a "police officer," defendant effectively admitted he had killed the victim).

People v. Lucero (1998) 64 Cal. App. 4th 1107, 75 Cal. Rptr. 2d 806 (police officer's testimony that he lifted fingerprints and shoe prints based on witnesses telling him that suspect had touched those areas was inadmissible in robbery prosecution because they were irrelevant for the nonhearsay purpose of showing the effect on the officer where the legality of the arrest was not in issue; error was harmless, however, as the trial court limited the admissibility to explaining the officer's conduct and where there was corroborating evidence linking defendant to crime).

Cantrell v. Zolin (1994) 23 Cal. App. 4th 128, 28 Cal. Rptr. 2d 238 (statement of deputy sheriff that motorist was weaving across centerline, which statement was offered in report of arresting officer at driver's license suspension hearing, was not hearsay, since it was offered not to show that motorist was weaving across centerline but to show that arresting officer had reasonable cause to believe that motorist had been driving under influence of alcohol).

Dincau v. Tamayose (1982) 131 Cal. App. 3d 780, 182 Cal. Rptr. 855 (in a medical malpractice action, mother's statements in telephone call to nurse and receptionist, describing symptoms of infant's illness, were admissible for nonhearsay purpose of showing that statements were made, where court gave limiting instruction that the statements were not to be used for their truth).

--Circumstantial Evidence of Declarant's State of Mind/Credibility

People v. Brown (1994) 8 Cal. 4th 746, 35 Cal. Rptr. 2d 407, 883 P.2d 949 (common-law "fresh complaint doctrine," providing that victim's extrajudicial report of sex offense is admissible to prove that such complaint was made, no longer provides sound basis for admitting such evidence, as premise underlying doctrine, that true victims will report such offenses to someone, has been discredited; however, under general evidentiary principles, such out-of-court statements may be admitted for limited, nonhearsay purpose of showing fact of, and circumstances surrounding, victim's disclosure of assault to others, whenever those facts and circumstances are relevant to issue whether the offense occurred).

People v. Fauber (1992) 2 Cal. 4th 792, 9 Cal. Rptr. 2d 24, 831 P.2d 249 (victim's statements that he had heard about his wife putting contract on his life, that there was enmity between his wife and him, and that he anticipated custody battle over infant were relevant to suggest attitudes or beliefs that might have led victim to choose to disappear without a trace, were not hearsay, and should have been admitted to disprove the homicide which was offered as prior violent activity supporting death penalty for subsequent murder).

Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 95 Cal. Rptr. 516, 485 P.2d 1132 (declarations by dissenting jurors in malpractice case as to statements made by majority jurors (including statements that plaintiff was a "black woman" and that "where he came from, they don't even let a black woman into the courtroom" and about how good defendant hospital was and that verdict for plaintiffs would be endangering the whole hospital system) were not offered to prove truth of matter stated but to show bias of speakers, and were thus not hearsay).

People v. Duran (2001) 94 Cal. App. 4th 923, 114 Cal. Rptr. 2d 595 (false statements made by defendant's codefendants to police were admissible as nonhearsay under Section 1200, as the statements were not admitted for their truth but rather tended to show that codefendants manifested a consciousness of guilt).

Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (appeal of consolidated civil actions against O. J. Simpson for wrongful deaths of Nicole Brown Simpson and Ronald Goldman; statements by defendant's ex-wife to police officers who responded in prior instances of alleged abuse were admissible under Section 1240, spontaneous statement hearsay exception; statements; ex-wife's statements which referred to defendant's past physical and verbal abuse and his threats to kill her were not hearsay because admitted for limited purpose of explaining victim's state of mind in terminating their relationship and allegedly provoking defendant to kill her; testimony given by police detective Mark Fuhrman in defendant's prior criminal trial was not admissible against plaintiffs under Section 1292, the former testimony exception to the hearsay rule, because plaintiffs had no opportunity to cross-examine Fuhrman--prosecution's direct examination of Fuhrman did not satisfy this requirement for admissibility of former testimony).

People v. Bolden (1996) 44 Cal. App. 4th 707, 52 Cal. Rptr. 2d 485 (communication offered to prove motive is not hearsay. Testimony of defendant's girlfriend that her grandmother, with whom girlfriend lived, told defendant to stay away from her house was admitted to prove defendant's motive in setting fire to grandmother's garage, and therefore it was not inadmissible hearsay).

--Statements Offered for Other "Nonhearsay" Purposes

People v. Combs (2004) 34 Cal. 4th 821, 22 Cal. Rptr. 3d 61, 101 P.3d 1007, cert. denied (although declarant's statements videotaped during the police interrogation are testimonial, and defendant apparently did not have had a prior opportunity for cross-examination, statements incriminating defendant were not admitted for purposes of establishing the truth of the matter asserted, but were admitted to supply meaning to defendant's conduct or silence in the face of the declarant's accusatory statement; admissibility of an adoptive admission is appropriate when a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the *Fifth Amendment to the United States Constitution*; because declarant's statements were admitted for a nonhearsay purpose, the *confrontation clause* was not implicated).

People v. Mayfield (1997) 14 Cal. 4th 668, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (hostage's pleas for help during telephone conversation with police were not hearsay because they were not offered to prove the truth of the matter asserted).

People v. Noguera (1992) 4 Cal. 4th 599, 15 Cal. Rptr. 2d 400, 842 P.2d 1160 (exculpatory statements by defendant's girlfriend to neighbor, 911 operator and police were not hearsay where they were offered to show plan by defendant and girlfriend to murder her mother and plant false trail of evidence indicating burglary and rape gone awry; conduct, including statements, evidencing consciousness of guilt, intent or plan are not hearsay).

Mitroff v. United Services Automobile Assn. (1999) 72 Cal. App. 4th 1230, 85 Cal. Rptr. 2d 759 (police and medical reports were not hearsay; those items were relevant to the state of insurer's knowledge, which is a pertinent issue in determining insurer's duty to defend).

Jauregi v. Superior Court (1999) 72 Cal. App. 4th 931, 85 Cal. Rptr. 2d 553 (hearsay evidence inadmissible to prove claimant's standing in civil forfeiture action brought under Uniform Controlled Substances Act, *Health and Safety Code* section 11488.4(g)).

Silva v. Lucky Stores Inc. (1998) 65 Cal. App. 4th 256, 76 Cal. Rptr. 2d 382 (reports created during company's investigation of sexual harassment claims against employee were not hearsay when offered to show "that the

investigation took place, that it was appropriate under the circumstances and that the termination decision was reasonable" based on the information before the company).

Legarra v. Federated Mutual Ins. Co. (1995) 35 Cal. App. 4th 1472, 42 Cal. Rptr. 2d 101 (evidence used to determine coverage is admissible for non-hearsay purpose of showing insurer's knowledge).

People v. Nealy (1991) 228 Cal. App. 3d 447, 279 Cal. Rptr. 36 (testimony of police officers, that, while they were searching the apartment in which cocaine was found, they answered the phone three times and in each conversation the other party said that they wanted to buy a "dove" of cocaine was not hearsay; the prosecution was not trying to prove that the defendant was an ornithologist or in the business of selling birds).

People v. Torres (1989) 213 Cal. App. 3d 1248, 262 Cal. Rptr. 323 (when declarant makes out-of-court statement through interpreter, and that statement is otherwise admissible, hearsay rule does not bar percipient witness other than interpreter from testifying to content of out-of-court statement, even though witness testifies to words uttered by interpreter rather than by declarant).

--Applicability of Hearsay Rule

People v. Johnson (2006) 38 Cal. 4th 717, 42 Cal. Rptr. 3d 887, 133 P.3d 1044 (in arguing against a *Penal Code* section 1538.5 suppression motion challenging a warrant-less search and seizure of evidence, the prosecution attempted to present its case through an affidavit of the police officer who had conducted the challenged search. The California Supreme Court held that the prosecution must actually produce the investigating officers and other pertinent witnesses so that the presiding magistrate or judge can assess their credibility. The court rejected the prosecution's argument that if defendant wished to cross-examine the officer with regard to the material set forth in the affidavit, defendant bore the burden of issuing a subpoena to the officer in order to obtain his presence at the hearing).

People v. Edwards (1991) 54 Cal. 3d 787, 1 Cal. Rptr. 2d 696, 819 P.2d 436, cert. denied, 506 U.S. 841 (in limited circumstances, reliable hearsay evidence must be admitted at the penalty phase of a capital trial even if the state rules of evidence provide otherwise).

Humphrey v. Appellate Division (2002) 29 Cal. 4th 569, 127 Cal. Rptr. 2d 645, 58 P.3d 476 (an affidavit in support of a search warrant issued under *Penal Code* section 1524.1, authorizing a court to test a criminal defendant's blood for HIV when certain sexual offenses are charged, may rely on hearsay and is not limited to the affiant's personal knowledge).

Houghtaling v. Superior Court (1993) 17 Cal. App. 4th 1128, 21 Cal. Rptr. 2d 855 (hearsay is admissible in small claims court even if no exception applies because such hearings are informal by statute and because it is unrealistic to require laypersons to abide by the formal rules of evidence).



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DIVISION 10 HEARSAY EVIDENCE
CHAPTER 1 GENERAL PROVISIONS
SECTION 1201 Multiple Hearsay

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§ 1201.syn Synopsis to Chapter 1201: Multiple Hearsay

Scope Multiple Hearsay

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1-1201 California Evidence Courtroom Manual Scope

Scope Multiple Hearsay

§ 1201 reads as follows:

Rule 1201 Multiple Hearsay

A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1967, ch. 650, § 8)

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DIVISION 10 HEARSAY EVIDENCE
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1 ANALYSIS

This section deals with a common problem, especially when documents of any sort are offered into evidence. Out-of-court statements often contain references to other statements. For example, a document, which is created out-of-court, is hearsay when offered for the truth of its contents. But the document will likely contain statements created by various people at various times. Section 1201 requires that each statement offered to prove the truth of the matter asserted qualify for a hearsay exception. One exception, such as the business records exception (Section 1271) may cover all of the statements, but each level of hearsay must be accounted for.



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2 COMPARISON TO FEDERAL RULE

Section 1201 is virtually identical to *Federal Rule of Evidence 805*.



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People v. Reed (1996) 13 Cal. 4th 217, 52 Cal. Rptr. 2d 106, 914 P.2d 184 (where multiple hearsay is involved, the question is whether each hearsay statement falls within an exception to the hearsay rule).

People v. Zapien (1993) 4 Cal. 4th 929, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (admission of prior inconsistent statement which was multiple hearsay did not violate *confrontation clauses* where each segment of hearsay evidence constituted prior inconsistent statement and each declarant testified at trial and was subject to cross-examination).

Whitman v. Superior Court (1991) 54 Cal. 3d 1063, 2 Cal. Rptr. 2d 160, 820 P.2d 262 (Section 1201 applies to preliminary hearings).

Pajaro Valley Water Management Agency v. McGrath (2005) 128 Cal. App. 4th 1093, 27 Cal. Rptr. 3d 741 , *rehearing denied* (summary judgment is reversed where relevant portions of a declaration on which summary judgment was based contained multiple hearsay and were not shown to be admissible under hearsay exceptions for business records or public records; declarations must be based on evidence complying with the Evidence Code).

People v. Ayers (2005) 125 Cal. App. 4th 988, 23 Cal. Rptr. 3d 242 , *review denied* (evidence of reports from battered women's advocacy group regarding victim's telephone call to hotline and her intake interview, which contained multiple hearsay, did not come within Section 1271, business records exception to hearsay rule).

Montez v. Superior Court (1992) 4 Cal. App. 4th 577, 5 Cal. Rptr. 2d 723 (Proposition 115 initiative, which permits use of hearsay in preliminary hearings by properly qualified law enforcement officer, constitutes an exception to hearsay rule. Thus, multiple level hearsay was inadmissible at preliminary examination even when offered by otherwise qualified investigating officer, for Proposition 115 could only account for the out-of-court statements of the law enforcement official making the statements, and not the underlying levels of hearsay).



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DIVISION 10 HEARSAY EVIDENCE
CHAPTER 1 GENERAL PROVISIONS
SECTION 1202 Credibility of Hearsay Declarant

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§ 1202.syn Synopsis to Chapter 1202: Credibility of Hearsay Declarant

Scope Credibility of Hearsay Declarant

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1-1202 California Evidence Courtroom Manual Scope

Scope Credibility of Hearsay Declarant

§ 1202 reads as follows:

Rule 1202 Credibility of Hearsay Declarant

Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

How do you test a "witness's" credibility and capacity when the "witness" did not give the evidence in court and is not testifying in court. In short, when is a witness not a witness? When the witness is a hearsay declarant. Section 1202 allows a party to impeach the credibility of a declarant by introducing evidence of prior inconsistent statements. Section 1203 expands the basis on which a declarant may be impeached and sets forth the procedure for cross-examination.

Sections 1202 and 1203 authorize the admissibility of any evidence that would be used to impeach or rehabilitate a declarant of hearsay if that declarant had testified as a witness. These rules reflect the position that justice is best served by the presentation of all evidence relevant to the reliability of statements made out of court. Where a party calls as a witness the declarant whose hearsay has been admitted against the party, Section 1203 provides that the party may examine the declarant on the hearsay as if on cross-examination.

Illustration

Impeachment evidence would be permitted, for example, in attacking the credibility of a declarant whose statement qualified under the dying declaration exception even though the court had found that the requisites of the dying declaration had been met. Such requisites are predicated upon the assumption that the person will not meet his maker with a lie on his lips. Impeachment might take the form of establishing that the declarant had a bad reputation for veracity through a character witness. Also, a witness might be called who would testify that the declarant had an extreme bias against the defendant. None of this evidence would affect the admissibility of the evidence in the first instance, but it would affect the credibility to be attached to the declarant's hearsay statement.

Section 1202 makes it easier to impeach a hearsay declarant with a prior inconsistent statement than it would be to impeach an in-court witness by eliminating two of the issues involved. Section 1202 makes clear that evidence that is used to impeach a hearsay declarant is not collateral so that extrinsic evidence of the inconsistent statement may always be used. Moreover, the normal foundation requirement, requiring that a witness be given an opportunity to explain an inconsistent statement that is being used to impeach, does not apply to hearsay declarants under Section 1202.

Do note, however, that while Section 1235 permits inconsistent statements made by a witness at trial to be used for any purpose (including their truth), this principle does not apply to a hearsay declarant's inconsistent statements admitted

under Section 1202. Thus, the statement is only admissible to impeach the hearsay declarant; it may not be used as evidence of the truth of their contents. There is an insufficient guarantee of trustworthiness, unless the hearsay falls within some exception to the hearsay rule.



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2 COMPARISON TO FEDERAL RULE

Sections 1202 and 1203 are substantially similar to *Federal Rule of Evidence 806*. However, recognizing that admissions by authorized persons, agents, or co-conspirators are technically not hearsay under an exception to the basic definition, Federal Rule of Evidence 806 treats such admissions as hearsay for the purposes of impeaching or rehabilitating the declarant. *See Federal Rule of Evidence 801(d)*.



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3 SIGNIFICANT CASES

In General

People v. Corella (2004) 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770 (although unavailable declarant's statements were inadmissible as prior testimony because they were stricken from the record, hearsay declarant's words were uttered and remain as her "statement"; Section 1202 applies to "a statement or other conduct," not "testimony" and once prosecution presented declarant's statements giving one version of events, defendant had the right to impeach hearsay declarant with her prior version of the events, allowing the jury to consider the truth of that prior version).

People v. Jacobs (2000) 78 Cal. App. 4th 1444, 93 Cal. Rptr. 2d 783 (it is permissible to use a felony conviction to impeach an exculpatory hearsay statement of a nontestifying defendant where defendant put the hearsay statement into evidence).

People v. Ross (1979) 92 Cal. App. 3d 391, 154 Cal. Rptr. 783 (provision of this section providing that evidence of declarant's statement inconsistent with his statement received in evidence is admissible for the purpose of impeachment does not require a preliminary showing of unavailability; it merely permits impeaching evidence without the necessity that declarant be given an opportunity to explain or deny the inconsistency).

O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 83 Cal. Rptr. 795 (impeachment by inconsistent statement of witness not present at trial when witness has not given testimony harmful to impeaching party is improper).

Examples of Impeachment of a Hearsay Declarant

People v. Romo (1975) 14 Cal. 3d 189, 121 Cal. Rptr. 111, 534 P.2d 1015 (since that portion of prosecution witness's tape-recorded statement, as alluded to by defendant and acquiesced to by the people, differed substantially from witness's trial testimony, there was no error in admitting the statement, for impeachment purposes, as being inconsistent with trial testimony).

People v. Mayfield (1972) 23 Cal. App. 3d 236, 100 Cal. Rptr. 104 (where preliminary hearing testimony of deputy

sheriff who died before trial was only evidence connecting defendant with sale of Seconal and marijuana, there was no surveillance of deputy sheriff at or about time alleged sales were made, and deputy had not been strip-searched or given marked money prior to making contact with defendant, entire case rested upon whether jurors believed deputy's testimony and denying defendant right to introduce evidence bearing upon credibility of deputy who had never been fully cross-examined at preliminary hearing denied defendant due process).



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DIVISION 10 HEARSAY EVIDENCE
CHAPTER 1 GENERAL PROVISIONS
SECTION 1203 Cross-Examination of Hearsay Declarant

1-1203 California Evidence Courtroom Manual 1203.syn

§ 1203.syn Synopsis to Chapter 1203: Cross-Examination of Hearsay Declarant

Scope Cross-Examination of Hearsay Declarant

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SECTION 1203 Cross-Examination of Hearsay Declarant

1-1203 California Evidence Courtroom Manual Scope

Scope Cross-Examination of Hearsay Declarant

§ 1203 reads as follows:

Rule 1203 Cross-Examination of Hearsay Declarant

(a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

(b) This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the statement.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for examination pursuant to this section.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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CHAPTER 1 GENERAL PROVISIONS
SECTION 1203 Cross-Examination of Hearsay Declarant

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1 ANALYSIS

Section 1203 expands the grounds on which a hearsay declarant may be impeached (beyond the prior inconsistent statements of Section 1202) and provides the procedure for doing so. This section allows a party to call and cross-examine a declarant whose statements have been admitted in evidence, unless the declarant is a party, a person identified with a party (*see Section 776*), a witness who has given in-court testimony or a child witness who falls under Section 1300. Section 1203 does not apply to statements admitted under the following hearsay exceptions of Chapter 2: admissions (Article 1), prior statements of witnesses (Article 3) (Section 1202 deals with these) and judgments (Article 10).



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2 COMPARISON TO FEDERAL RULE

Sections 1202 and 1203 are substantially similar to Federal Rule of Evidence 806.



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3 SIGNIFICANT CASES

See Section 1202.



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DIVISION 10 HEARSAY EVIDENCE

CHAPTER 1 GENERAL PROVISIONS

SECTION 1203.1 Statement Offered at Preliminary Examination

1-1203.1 California Evidence Courtroom Manual 1203.1.syn

§ 1203.1.syn Synopsis to Chapter 1203.1: Statement Offered at Preliminary Examination

Scope Statement Offered at Preliminary Examination

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1-1203.1 California Evidence Courtroom Manual Scope

Scope Statement Offered at Preliminary Examination

§ 1203.1 reads as follows:

1203.1 Statement Offered at Preliminary Examination

Section 1203 is not applicable if the hearsay statement is offered at a preliminary examination, as provided in *Section 872 of the Penal Code*.

(Added by Initiative Measure (Prop. 115), § 8, approved June 5, 1990)

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1 ANALYSIS

Penal Code section 872 was amended by Proposition 115, an initiative measure entitled "Crime Victims Justice Reform Act," to allow the finding of probable cause to be made upon the testimony of a police officer using hearsay statements. The initiative also added this section, which provides a preliminary hearing exception to the general rule that all hearsay declarants must be made available for cross-examination. In effect, this section limits the ability of an opponent of hearsay to impeach the credibility of hearsay declarants at a preliminary hearing. The California Supreme Court upheld the constitutionality of Proposition 115 against federal due process and federal and state *confrontation clause* challenges in *Whitman v. Superior Court* (1991) 54 Cal. 3d 1063, 2 Cal. Rptr. 2d 160, 820 P.2d 262 ; see also *People v. Lepe* (1997) 57 Cal. App. 4th 977, 67 Cal. Rptr. 2d 525 (no *confrontation clause* violation from the adoption of Proposition 115).



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2 COMPARISON TO FEDERAL RULE

Section 1203.1 is the counterpart of Federal Rule of *Evidence 1101(d)(3)*.



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3 SIGNIFICANT CASES

Whitman v. Superior Court (1991) 54 Cal. 3d 1063, 2 Cal. Rptr. 2d 160, 820 P.2d 262 (Proposition 115 does not violate the *confrontation clause*).

Izazaga v. Superior Court (1991) 54 Cal. 3d 356, 285 Cal. Rptr. 231, 815 P.2d 304 (Proposition 115 does not violate state or federal self-incrimination, due process, or attorney work product privileges, nor does it violate *Sixth Amendment* guarantee to effective assistance of counsel; it is constitutional on its face).



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DIVISION 10 HEARSAY EVIDENCE
CHAPTER 1 GENERAL PROVISIONS
SECTION 1204 Constitutional Prohibitions

1-1204 California Evidence Courtroom Manual 1204.syn

§ 1204.syn Synopsis to Chapter 1204: Constitutional Prohibitions

Scope Constitutional Prohibitions

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1-1204 California Evidence Courtroom Manual Scope

Scope Constitutional Prohibitions

§ 1204 reads as follows:

Rule 1204 Constitutional Prohibitions

A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This statute is redundant. It states the uncontrovertible proposition that hearsay statements are inadmissible if it would be unconstitutional to admit them against a criminal defendant. Section 1204 states a basic premise of evidence law. The fact that evidence is not inadmissible under one evidence rule, does not mean it will be admissible. The evidence may be excluded by another evidence rule or statute, case law or the federal and state constitutions.

There are several California and federal constitutional provisions that could apply to hearsay statements, including the *Fourth Amendment* right against unreasonable search and seizure (where, for example, a document has been illegally seized), the *Fifth Amendment* right against self-incrimination (where, for example a criminal defendant is required to give a statement despite the fact that the defendant has claimed that the statement may subject him or her to criminal penalties), the *Sixth Amendment* right to counsel (where, for example, a statement was obtained from the defendant without the defendant's attorney present after the defendant has requested such counsel) and the *Sixth Amendment* right to confrontation (where, for example, a declarant makes a statement against the defendant and is not present in the courtroom to testify against him or her).

Where hearsay is concerned, the most common constitutional problem is posed by the *Confrontation Clause of the Sixth Amendment to the federal Constitution* and the *Confrontation Clause of the California Constitution, Article I, Section 15*. The U.S. Supreme Court issued a landmark ruling in *Crawford v. Washington (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177* that has implications for many provisions of the California Evidence Code, including Section 711 (confrontation), Section 1204 (constitutional prohibitions), and all the hearsay exceptions in Division 10, Chapter 2, but especially Section 1231 (prior statements of deceased declarant in gang-related prosecution); Section 1360 (statements by children in child neglect and abuse proceedings); Section 1370 (statements regarding physical abuse); and Section 1380 (statements made by elderly and dependent adults). See *Section 711 (Confrontation)* for a thorough discussion of important current trends on the *Confrontation Clause*.



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2 COMPARISON TO FEDERAL RULE

Section 1204 is roughly similar to *Federal Rule of Evidence 402*, which makes all relevant evidence admissible unless it is excluded by a rule, statute, or constitutional provision.



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3 SIGNIFICANT CASES

A review of state and federal constitutional principles of criminal procedure is beyond the scope of this book. The following cases are illustrative of a wide body of authority.

Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 2244 (2006) (held that in 911 call and police field investigations, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency... . They are testimonial when the circumstances indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

Crawford v. Washington (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (holding that "testimonial" hearsay statements are no longer admissible against the accused in a criminal prosecution if the declarant does not testify at trial, unless (1) the witness is shown to be unavailable and (2) the accused had an earlier opportunity to confront and cross-examine the witness; unless those two requirements are satisfied, it no longer matters whether the statements are deemed reliable by the trial judge, thus explicitly overruling *Ohio v. Roberts*, (1980) 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, 17 Ohio Op. 3d 240).

People v. Lewis (2008) 43 Cal. 4th 415, 75 Cal. Rptr. 3d 588, 181 P.3d 947 (if co-defendants statements can be redacted so that they satisfy *Bruton's* requirement that the statements must not directly or indirectly implicate defendant such that the jury could not reasonably ignore them, then they are not admitted "against" the defendant for *Crawford* purposes).

People v. Mendoza (2007) 42 Cal. 4th 686, 68 Cal. Rptr. 3d 274, 171 P.3d 2 (in capital murder case, trial court did not err in admitting testimony that defendant's stepdaughter had accused defendant of sexually molesting her where the stepdaughter's statements were not offered to prove defendant actually molested her, but rather to prove he was aware of the accusations and to explain his motive for killing her; when offered solely for this non hearsay purpose, the statements did not violate defendant's right to confrontation).

People v. Geier (2007) 41 Cal. 4th 555, 61 Cal. Rptr. 3d 580, 161 P.3d 104 (in capital murder case, defendant's right

to confrontation under the *Sixth Amendment* was not violated by the admission of DNA test results through the testimony of an expert who did not personally perform the tests; holding that the observations of a nontestifying technician were a contemporaneous recordation of observable events rather than the documentation of past events and thus were not testimonial. Determining whether a statement was testimonial requires a court to consider the circumstances under which the statement was made, and a crucial point is whether the statement represented the contemporaneous recordation of observable events).

People v. Cage (2007) 40 Cal. 4th 965, 56 Cal.Rptr. 3d 789, 155 P.3d 205, cert. denied, 128 S. Ct. 612, 169 L. Ed. 2d 395 (2007) (in case where defendant was convicted for assaulting her son with a shard of glass, the court held that defendant's right to confront unavailable declarant or victim was not violated by admitting the victim's hearsay statement that his grandmother held him down while his mother cut him, which was made in response to treating physician's single question, "What happened?" The victim's statement was not testimonial where the primary purpose of the physician's question, objectively considered, was to deal with a medical situation that required immediate information. The circumstances under which the doctor questioned the patient had none of the solemnity that inhered in an interview by law enforcement officials. Trial court did err in admitting the victim's statements to a deputy in the hospital emergency room and later, on tape at the sheriff's station, because those statements were made in response to focused police questioning whose primary purpose, objectively considered, was not to deal with an ongoing emergency but to investigate the circumstances of the crime, but the error was harmless because the statements were cumulative of other evidence).

People v. Combs (2004) 34 Cal. 4th 821, 22 Cal. Rptr. 3d 61, 101 P.3d 1007, cert. denied (although declarant's statements videotaped during the police interrogation are testimonial, and defendant apparently did not have had a prior opportunity for cross-examination, statements incriminating defendant were not admitted for purposes of establishing the truth of the matter asserted, but were admitted to supply meaning to defendant's conduct or silence in the face of the declarant's accusatory statement; admissibility of an adoptive admission is appropriate when a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the *Fifth Amendment to the United States Constitution*; because declarant's statements were admitted for a nonhearsay purpose, the *confrontation clause* was not implicated).

People v. Monterroso (2004) 34 Cal. 4th 743, 22 Cal. Rptr. 3d 1, 101 P.3d 956 (dying declaration passes constitutional muster as common law in existence when *confrontation clause* was drafted allowed dying declarations against defendants in felony cases, even if defendant was not present when statement was made).

People v. Jefferson (2008) 158 Cal. App. 4th 830, 70 Cal. Rptr. 3d 451 (suspects incarcerated in bugged cell did not make "testimonial" statements to each other within the meaning of *Crawford*; suspects made no "formal statement to government officers" because they never intended to speak to anyone connected with the government).

People v. Ramirez (2007) 153 Cal. App. 4th 1422, 64 Cal. Rptr. 3d 96 (testimony of state's gang expert that two members of defendant's gang had prior convictions for murder and attempted murder, and that their crimes were committed for the benefit of the gang, did not violate *Confrontation Clause* even though it was based on hearsay statements of other gang members; hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned).

People v. Saracoglu (2007) 152 Cal. App. 4th 1584, 62 Cal. Rptr. 3d 418 (complainant demonstrated sufficient distress to qualify the statements as "excited utterances," an exception to the hearsay rule, even though statements were made over 30 minutes after the incident; disagreeing with both the defendant and the attorney general's office, Court of Appeal held that even though over 30 minutes had passed since the alleged assault, complainant's statements regarding domestic abuse made to police at the station house were nontestimonial because, objectively viewed, the primary purpose of complainant's initial interrogation by police was to deal with a contemporaneous emergency, rather than to

produce evidence about past events for possible use at a criminal trial).

People v. Brenn (2007) 152 Cal. App. 4th 166, 60 Cal. Rptr. 3d 830 , review denied (spontaneous statements made by a stabbing victim to a 911 operator and the first police officer on the scene were nontestimonial and thus did not implicate *Confrontation Clause*. The purpose and form of the statements were not the functional equivalents of trial testimony. It did not appear the information was elicited or provided for the primary purpose of making a case against defendant at trial. The officer only had a few moments with the victim before paramedics arrived, and during this brief period of time he was only able to ask the victim a few general questions about what was going on).

People v. Shepherd (2007) 151 Cal. App. 4th 1193, 60 Cal. Rptr. 3d 616 (trial court erred in admitting testimony of probation officer that included alleged out-of-court statements made by a treatment program administrator that defendant violated his probation by consuming alcohol and that defendant failed an alcohol test, where there was no showing of good cause for relying on hearsay in lieu of live testimony).

People v. Gunder (2007) 151 Cal. App. 4th 412, 59 Cal. Rptr. 3d 817 , review denied (a witness who appears at trial but who feigns forgetfulness on the stand is not "unavailable" for purposes of *Confrontation Clause* analysis because the witness is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior inconsistent statement's credibility).

People v. Chaney (2007) 148 Cal. App. 4th 772, 56 Cal. Rptr. 3d 128 , review denied. (Cal. Evid. Code, § 353 provides the trial court and any moving party the opportunity to meet and cure any defect to which an objection has been made; thus, by failing to specifically object to the evidence, defendant waived his objection based on the constitutional right of confrontation. Considering the issue nonetheless, the appellate court held that the trial court did not err in allowing the testimony of a police officer that a nontestifying witness told him that defendant would not let the woman open the door and had threatened her with a knife; the trial court correctly found that where the woman hyperventilated and cried hysterically during the interview, the questions the officer asked her were to determine the exact nature of an emergency. As such, those answers were nontestimonial and were not within the scope of the *Confrontation Clause*).

In re Miller (2006) 145 Cal. App. 4th 1228, 52 Cal. Rptr. 3d 256 (parole board erred in revoking petitioner's parole based on hearsay statements without determining either the unavailability of the declarant or the reliability of the hearsay evidence. The board also did not determine whether good cause existed to admit the hearsay by weighing factors favoring admitting the hearsay statements against petitioner's right of confrontation).

In re April C. (2005) 131 Cal. App. 4th 599, 31 Cal. Rptr. 3d 804 , review denied (although parents have constitutional right to due process in juvenile dependency proceedings, the *confrontation clause* and *Crawford* do not apply to juvenile dependency proceedings, which are civil in nature).

People v. Thomas (2005) 130 Cal. App. 4th 1202, 30 Cal. Rptr. 3d 582 , review denied (where deputy police officer learned of defendant's gang membership through casual conversations with other gang members, the statements were not offered to establish the truth of the matter asserted, but merely as one of the bases for an expert witness's opinion that defendant was a member of a gang; thus *Confrontation Clause*, as interpreted in *Crawford*, does not apply).

People v. Angulo (2005) 129 Cal. App. 4th 1349, 30 Cal. Rptr. 3d 189 (*confrontation clause* did not apply to civil recommitment proceeding under Sexually Violent Predators Act (SVPA)).

People v. Taulton (2005) 129 Cal. App. 4th 1218, 29 Cal. Rptr. 3d 203 , review denied (documentary evidence of prior convictions is not "testimonial" under *Crawford*).

People v. Castille (2005) 129 Cal. App. 4th 863, 29 Cal. Rptr. 3d 71 , review denied (admissions made during joint

interview were properly admitted against the other defendants under Section 1221's adoptive admissions exception to hearsay rule and over *Crawford* objection).

People v. Rincon (2005) 129 Cal. App. 4th 738, 28 Cal. Rptr. 3d 844 (attempted murder victim's statements, which qualified as spontaneous statements under Section 1240, were made to a civilian unconnected to law enforcement under circumstances in which victim could not reasonably anticipate they would be used in court, and thus were not testimonial under *Crawford*).

People v. Saffold (2005) 127 Cal. App. 4th 979, 26 Cal. Rptr. 3d 190 (proof of service of domestic relations order on defendant, executed by deputy sheriff who did not testify at trial, was not "testimonial" statement under *Crawford*).

People v. Butler (2005) 127 Cal. App. 4th 49, 25 Cal. Rptr. 3d 154 (in prosecution for murder, admission of two prior inconsistent statements, under Section 1235, implicating defendant were not "testimonial" statements that would violate defendant's right to confront his accusers; even though statements appeared in police reports, no government official was present when the statements were made, and statements were made spontaneously to coworkers).

People v. Corella (2004) 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770 (spontaneous exclamations (admissible under Section 1240) made to 911 operator and investigating police officer were not "testimonial" statements that would be barred under the Supreme Court's decision in *Crawford v. Washington*; nontestimonial statements are evaluated under the framework of *Ohio v. Roberts*).

People v. Johnson (2004) 121 Cal. App. 4th 1409, 18 Cal. Rptr. 3d 230 (*confrontation clause* does not apply in probation revocation hearing which is neither a "prosecution" nor a "trial"; thus, any right of confrontation in such proceedings comes from the *due process clause of the 14th amendment*; admission of laboratory report analyzing rock cocaine did not violate defendant's constitutional rights because the laboratory report was not a substitute for live testimony at defendant's probation revocation hearing; a laboratory report does not "bear testimony," or function as the equivalent of in-court testimony; if the person preparing the report had testified at the probation revocation hearing, he or she would merely have authenticated the document).

People v. Cervantes (2004) 118 Cal. App. 4th 162, 12 Cal. Rptr. 3d 774 , *review denied* (in prosecution for first degree murder, evidence of one defendant's incriminating hearsay statement, which also implicated codefendants, was nontestimonial, declarant made statement implicating himself and others to friend of long standing when asking for medical help; because friend was afraid to testify since she knew that all defendants were gang members, statement was not "testimonial" because it was made without a reasonable expectation that it would be used at trial; admissibility of such nontestimonial evidence was determined by examining indicia of reliability generally applicable to hearsay evidence; statement was declaration against interest under Section 1230, and was sufficiently trustworthy to comport with requirements of *confrontation clause* when reviewed *de novo* looking at the totality of circumstances surrounding the making of the statement).

People v. Gomez (2004) 117 Cal. App. 4th 531, 12 Cal. Rptr. 3d 398 (*Crawford* and *confrontation clause* analysis does not apply to probable cause hearing).

People v. Pirwani (2004) 119 Cal. App. 4th 770, 14 Cal. Rptr. 3d 673 (trial court committed prejudicial error in admitting elderly decedent's hearsay statements in a criminal trial because *Evidence Code section 1380*, which creates a hearsay exception for statements made by elderly or dependent adults to law enforcement officials is unconstitutional on its face as it permits uncross-examined "testimonial" evidence from unavailable declarants in criminal cases).

People v. Sisavath (2004) 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753 , *review denied*, 2004 Cal. LEXIS 8716 (four of defendant's abuse convictions are reversed due to the admission of "testimonial" hearsay statements against a criminal defendant, including statements of victim during interview with a "forensic interview specialist" at a facility specially

designed and staffed for interviewing children suspected of being victims of abuse; Court of Appeals did not hold that all statements arising from such interviews are inadmissible, but here interview was held after formal prosecution of defendant had been initiated; such statements violate the *Confrontation Clause of the Sixth Amendment* if the declarant is unavailable to testify at trial and the defendant has no previous opportunity to cross-examine).

In re J. Clyde K. (1987) 192 Cal. App. 3d 710, 237 Cal. Rptr. 550 (defendant's right to exclude confessions obtained through coercion by law enforcement survives the adoption of Cal. Const. art. I, § 28(d)).



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DIVISION 10 HEARSAY EVIDENCE
CHAPTER 1 GENERAL PROVISIONS
SECTION 1205 No Repeal by Implication

1-1205 California Evidence Courtroom Manual 1205.syn

§ 1205.syn Synopsis to Chapter 1205: No Repeal by Implication

Scope No Repeal by Implication

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Scope No Repeal by Implication

§ 1205 reads as follows:

Rule 1205 No Repeal by Implication

Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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SECTION 1205 No Repeal by Implication

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1 ANALYSIS

This section prevents the hearsay rule and its exceptions from being used to argue that they supplant other statutes concerning hearsay.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart.



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1-1 California Evidence Courtroom Manual Scope

Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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1-1220 California Evidence Courtroom Manual 1220.syn

§ 1220.syn Synopsis to Chapter 1220: Statements Offered Against a Party-Declarant

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1-1220 California Evidence Courtroom Manual Scope

Scope Statements Offered Against a Party-Declarant

§ 1220 reads as follows:

Rule 1220 Statements Offered Against a Party-Declarant

Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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1 ANALYSIS

When is a hearsay declarant not a hearsay declarant? When he or she is also a party. The rationale of this exception is that it is unseemly for a party to suggest that he or she did not get the opportunity to cross-examine him or herself. If the party wishes, he or she can cross-examine the witness who testifies to the party's out-of-court statement or the party can take the stand and explain away the statement.

Contrary to common misconception, admissions do *not* have to be against the interest of the declarant. There is a separate hearsay exception for statements against interest. *See Section 1230*. As far as Section 1220 is concerned, as long as the statement is relevant (and, in a criminal case, voluntary so as not to offend the federal or California constitutions) anything can, and will, be admissible against the party-declarant, whether the statement is damning or seemingly innocuous. California courts used to draw a distinction between "admissions" and "confessions"; the distinction was important at one time because the erroneous admission of a confession was reversible error per se, while the erroneous admission of an admission was not reversible if the court could conclude beyond a reasonable doubt that the error did not contribute to the verdict. Now both types of error may be held harmless. *People v. Johnson (1993) 6 Cal. 4th 1, 859 P.2d 673*. However, one court has held that the distinction still exists for applying Section 1228, a narrow exception to the hearsay rule that applies in child sex abuse cases. *See discussion of Section 1228 below; Creutz v. Superior Court (1996) 49 Cal. App. 4th 822, 56 Cal. Rptr. 2d 870*.

Admissions *do* have to be offered against the party-declarant (so that a party-declarant cannot offer his or her own statement). Also, note that a statement that is offered pursuant to this section differs from a "judicial admission," which is generally made in a pleading or a stipulation. A judicial admission is binding on a party unless the court allows the party to withdraw or amend it, while an admission admitted pursuant to this exception may be challenged as lacking credibility. *See Smith v. Walter E. Heller & Co. (1978) 82 Cal. App. 3d 259, 147 Cal. Rptr. 1*. *See also Jogani v. Jogani (2006) 141 Cal. App. 4th 158, 45 Cal. Rptr. 3d 792* (regarding distinction between admission of a party and "judicial estoppel").



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2 COMPARISON TO FEDERAL RULE

This section is virtually identical to *Federal Rule of Evidence 801(d)(2)(A)*. The major difference is a definitional problem. For policy reasons, the federal rules exempt admissions from the definition of hearsay--a hearsay declarant who is also a party in the case presents no perception, memory, sincerity, or ambiguity of communication dangers to test on cross-examination (because, as explained above, the party can simply take the stand and cure these problems). Although this rationale may make sense when it comes to the personal admissions of a party, the subject of Section 1220, the rationale makes far less sense when the federal rules address vicarious admissions, such as those of an agent or co-conspirator, for such agents or co-conspirators may not be available for the party to call to the witness stand. Thus, the California Code treats these as exceptions to the prohibition on hearsay.



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3 ADDITIONAL AUTHORITY

Evidence Code section 1204; 7 Cal. L. Rev. Comm. Rep. 1 (1965) (In a criminal action, a defendant's statement is not admissible under this section unless it was made voluntarily.)



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4 SIGNIFICANT CASES

People v. Alvarez (2002) 27 Cal. 4th 1161, 119 Cal. Rptr. 2d 903, 46 P.3d 372 (Proposition 8, which added Section 28(d) to the California Constitution, eliminated the evidentiary objection to the admission of the defendant's out-of-court statements on the grounds that independent proof of the corpus delicti--independent prima facie proof that a criminal act was committed--is lacking; however, Section 28(d) did not eliminate the independent-proof rule prohibition of conviction based only on the defendant's own out-of-court statements).

People v. Mayfield (1997) 14 Cal. 4th 668, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (defendant's father's statement to police officer, describing what defendant had told him, was a party admission even though father's statement was a summary or paraphrase of what defendant said; father's own statement was admissible as a prior statement inconsistent with his testimony at trial).

People v. Arias (1996) 13 Cal. 4th 92, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (defendant's statement to victim of sexual assault that he was person who committed prior murder was admissible in his capital murder prosecution under hearsay exception for admissions by party).

Jogani v. Jogani (2006) 141 Cal. App. 4th 158, 45 Cal. Rptr. 3d 792 (holding that trial court erred in granting summary judgment based on judicial estoppel, where individual seeking to recover under an oral partnership agreement had testified that no such agreement existed at judgment debtor examinations in prior, unrelated litigation; the mere existence of party-admission under Section 1220 or prior inconsistent statements under Section 1235, without more, is not sufficient to apply judicial estoppel; the courts that ordered the judgment debtor examinations did not adopt or accept the truth of the testimony; hence, there was no threat to judicial integrity and judicial estoppel was inappropriate).

Rusheen v. Drews (2002) 99 Cal. App. 4th 279, 120 Cal. Rptr. 2d 769 (evidence of a plea of nolo contendere to a "wobbler"--an offense punishable as either a felony or misdemeanor--later reduced to a misdemeanor, is admissible as a party admission in a civil action growing out of the events upon which prosecution was based).

Rupf v. Yan (2000) 85 Cal. App. 4th 411, 102 Cal. Rptr. 2d 157 (observations regarding detainee that were reflected

in sheriff's deputy testimony and written report were either not hearsay or were admissible pursuant to the hearsay exceptions for official public records or admissions of a party).

People v. Mobley (1999) 72 Cal. App. 4th 761, 85 Cal. Rptr. 2d 474 (statements made by defendant, recorded in probation report from another state, were admissible under Section 1220); *disapproved in part in* **People v. Trujillo** (2006) 40 Cal. 4th 165, 181 n. 3, 51 Cal. Rptr. 3d 718, 146 P.3d 1259 .

People v. Epperson (1985) 168 Cal. App. 3d 856, 214 Cal. Rptr. 540 (in prosecution for receiving stolen property, trial court did not err in overruling defendant's objection to testimony of prosecution witnesses as to statements made by defendant on witness stand in civil suit brought by person to whom he had sold stolen car, as statement of defendant offered by prosecution was an admission).

People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 206 Cal. Rptr. 164 (fact that statements were required by law to be made does not prevent their admission as admissions by a party in a civil case, so long as the declarant is a party to the action).

Leasman v. Beech Aircraft Corp. (1975) 48 Cal. App. 3d 376, 121 Cal. Rptr. 768 (admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact).

In re D. L. (1975) 46 Cal. App. 3d 65, 120 Cal. Rptr. 276 (drawing of figure having a belt around its neck and a dagger protruding from its torso, posted by juvenile on bulletin board at juvenile hall, was admissible in jurisdictional proceeding as evidence of a statement proffered against the declarant in action to which he was a party).

People v. Alvarez (1968) 268 Cal. App. 2d 297, 73 Cal. Rptr. 753 (the rationale of this section is that the party's right to cross-examine declarant is not violated since the party himself made the statement).

Muth v. Urricelqui (1967) 251 Cal. App. 2d 901, 60 Cal. Rptr. 166 (civil pleadings may be admitted as evidentiary admissions in a subsequent civil case).



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Scope Adoptive Admission

§ 1221 reads as follows:

Rule 1221 Adoptive Admission

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Sometimes a party may not directly assert a proposition, but the party's reaction, given the specific context, may be tantamount to the assertion itself. If this is the case, then the policy reasons for excepting these statements from the ban on hearsay apply with just as much force as if the party had made an express statement. That is, if a party adopts someone else's assertion, the party cannot complain about the lack of cross-examination.

For an adoptive admission to be admissible, the witness must testify that he heard a declarant make an out-of-court statement in the presence of the party against whom the statement is offered. Further foundational testimony must show that the party comprehended the statement and that he either expressly acknowledged the truth of the statement or remained silent where a reasonable person would have denied the statement. The latter form of admission raises constitutional questions in criminal cases where an accused remains silent during custodial interrogation. Under these circumstances silence is inadmissible for constitutional reasons and the question of adoptive admission is not reached.

The admission by acquiescence or by adoption is a restricted doctrine arising only when the statement made by another could reasonably be considered the statement of the party opponent by virtue of his silence, given the circumstances under which it was made. The foundational requirements seek to assure the existence of such conditions from which that inference may be clearly drawn and the imputation should be made with considerable caution.

In a number of jurisdictions, this very limited principle has been misapplied and enlarged to create the erroneous notion that if a statement is made in the presence of the parties it is not hearsay, or at least is admissible hearsay by virtue of the parties' presence alone. Such is not the case and care should be taken that the foundation required to impute the words of another to a party opponent is satisfactorily established.



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2 COMPARISON TO FEDERAL RULE

Section 1221 is virtually identical to Federal Rule of *Evidence* 801(d)(2)(B).



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3 SIGNIFICANT CASES

People v. Mayfield (1997) 14 Cal. 4th 668, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (hostage's statements that defendant had shot him and was threatening him with a gun were admissible where there was a showing that defendant could hear both sides of the hostage's telephone conversation with police and that defendant had opportunity to reply to any untrue or unfair accusations against him).

People v. Fauber (1992) 2 Cal. 4th 792, 9 Cal. Rptr. 2d 24, 831 P.2d 249 (incriminating statements made during a conversation among defendant and friends were adoptive admissions and admissible hearsay to show in penalty phase of capital murder prosecution that defendant committed prior homicide, even though witness who had heard the conversation kept her eyes closed, ingested much cocaine the preceding night, and did not testify as to whether defendant actually heard the statements as long as witness testified that defendant participated in the conversation).

People v. Medina (1990) 51 Cal. 3d 870, 274 Cal. Rptr. 849, 799 P.2d 1282 (although use of adoptive admissions rule may be unwarranted in some situations, including custodial interrogations, there is no valid constitutional objection to its application in cases where defendant reasonably could be expected to respond to, and deny, accusatory statement).

People v. Silva (1988) 45 Cal. 3d 604, 247 Cal. Rptr. 573, 754 P.2d 1070 (testimony regarding accomplice's out-of-court statement implicating defendant in murder was admissible, as "adoptive admission," where statement was made in defendant's presence and defendant signified adoption thereof by smiling without protest).

People v. Robinson (1964) 61 Cal. 2d 373, 38 Cal. Rptr. 890, 392 P.2d 970 (to constitute adoptive admission, evidence must show that accusation was made under such circumstances that defendant heard and understood it and had opportunity to deny, and that, having such opportunity, he either failed to reply or made replies so equivocal as to be consistent with guilt).

People v. Mobley (1999) 72 Cal. App. 4th 761, 85 Cal. Rptr. 2d 474 (statements regarding prior offense by defendant included in probation report from another state along with notation "defendant agrees" were admissible under Section 1221 as adoptive admissions); *disapproved in part in* ***People v. Trujillo*** (2006) 40 Cal. 4th 165, 181 n. 3, 51 Cal. Rptr. 3d 718, 146 P.3d 1259 .



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§ 1222.syn Synopsis to Chapter 1222: Authorized Admission

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1-1222 California Evidence Courtroom Manual Scope

Scope Authorized Admission

§ 1222 reads as follows:

Rule 1222 Authorized Admission

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and
- (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

A common principle of agency law is that some parties, whether individuals, corporations, or partnerships, must bear legal responsibility for the actions of another. Section 1222 recognizes the evidentiary counterpart of this substantive principle and allows authorized statements of an agent to be admitted over a hearsay objection as an admission. The authority to speak on another's behalf may be express or implied and is determined under the substantive principles of agency law. 7 Cal. L. Rev. Comm. Rep. 1 (1965). Where there is no clear evidence of implied or express authority, but the liability of the party depends, in whole or in part, on the liability of the declarant, Section 1224 allows the statement to be admitted against the party. The policy behind Sections 1222 and 1224 is that if the party is legally responsible for the actions of another, the party cannot be heard to complain that the party did not have the chance to cross-examine the declarant, for surely the party could have compelled the attendance of the declarant so that the statement could be adequately explained.

While this reasoning may make sense in theory, the realities of modern commerce suggest otherwise. A party may be held responsible for the statements of an employee or agent who is not available (because of death, disappearance or other grounds). Moreover, this problem is compounded because California courts have construed Section 1222 as applying even when the declarant lacks personal knowledge of the facts embodied in the statement. *See* 1 Jefferson, California Evidence Benchbook § 3.4, at 186, citing *Levy-Zentner Co. v. Southern Pac. Transp. Co.* (1977) 74 Cal. App. 3d 762, 142 Cal. Rptr. 1. Thus, one could have the undesirable evidentiary situation where a party is held responsible for the statements of an agent with only minimally implied authority to speak for the principal and with no personal knowledge of the matters of which the agent speaks. The California section expressly provides that the judge merely looks to see whether there is sufficient evidence that a reasonable person could conclude that principal impliedly or expressly authorized the agent to speak on the principal's behalf.



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2 COMPARISON TO FEDERAL RULE

Section 1222 is the counterpart of *Federal Rule of Evidence 801(d)(2)(C)*, and to some extent, *Federal Rule of Evidence 801(d)(2)(D)*. Under *Federal Rule of Evidence 801(d)(2)(C)* a statement by a person which is authorized by a party will be attributed to that party as an admission. The statement is imputed to the party and considered to be his or her statement for the purposes of the hearsay rule. *Federal Rules of Evidence 801(d)(2)(C)* and *(D)* were amended in 1997 to provide that the content of the statement should be considered in determining the declarant's authority under subdivision (C) and the agency or employment relationship and scope thereof under subdivision (D), but that the statement is not alone sufficient to establish those issues. At least one California court has found the authority for an agent's statement implied in the context of the statement and the scope of the agent's employment or responsibilities. *W.T. Grant Co. v. Superior Court* (1972) 23 Cal. App. 3d 284, 100 Cal. Rptr. 179 (finding that since sales manager had the authority to set the terms of selling merchandise, the manager had the authority to make a statement that it was "company policy" to sell used TV sets as new). This approach is similar to *Federal Rule of Evidence 801(d)(2)(D)*, which authorizes the admission of a statement by a party's agent or servant concerning a matter within the scope of the agency or employment.



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3 SIGNIFICANT CASES

Thompson v. County of Los Angeles (2006) 142 Cal. App. 4th 154, 47 Cal. Rptr. 3d 702, reh'g denied, review denied (in civil rights case involving claim of excessive force, trial court did not err in excluding two reports; the first report was not an authorized admission under *Cal. Evid. Code* § 1222, because it was the product of an independent investigation of the practices and procedures of the sheriff's department, conducted by a retired judge who was hired as "special counsel" to review the facts and make recommendations, but who held no position in the county's hierarchy and was not authorized to speak on its behalf. The appellate court stressed that although the Federal Rules of Evidence would allow the admission of such a report as a public record under Fed. R. *Evid.* 803(C), California has no similar hearsay exception for the conclusions of an investigation. The trial court did not abuse its discretion under *Cal. Evid. Code*, § 352 in excluding the second report, which contained summaries of medical treatment provided to persons bitten by a police dog used by a particular handler, where those incidents were not at issue in this litigation and where the report was highly prejudicial).

Cruey v. Gannett Co. (1998) 64 Cal. App. 4th 356, 76 Cal. Rptr. 2d 670 (whether statement is authorized admission is to be determined under the substantive law of agency; high-ranking officer's statement could be authorized admission, but unidentified employee who reported communication to another could not).

O'Mary v. Mitsubishi Electronics America, Inc. (1997) 59 Cal. App. 4th 563, 69 Cal. Rptr. 2d 389 (in considering multiple layers of hearsay in a deposition offered as evidence, trial court erred in excluding statement made by vice-president; vice-president "occupied a particularly high place in the employer's hierarchy" such that statement came "within what an ordinary person would expect to be within the scope of [vice-president's] authority, thus qualifying under Section 1222).

Rochlis v. Walt Disney Co. (1993) 19 Cal. App. 4th 201, 23 Cal. Rptr. 2d 793 (hearsay testimony of plaintiff that someone at former employer had told him that employer's president had made allegedly defamatory statement was inadmissible as an authorized admission, where no proper foundation was laid as to declarant's authorization to speak on behalf of president).



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1-1223 California Evidence Courtroom Manual Scope

Scope Co-Conspirator Statements

§ 1223 reads as follows:

Rule 1223 Co-Conspirator Statements

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
- (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
- (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This section departs from the concept that admissions are exceptions to the hearsay rule because the party cannot be heard to complain about a lack of cross-examination. When a conspiracy is concerned, the party may be quite eager to impeach an alleged co-conspirator, but that person often may not be available or subject to the subpoena power of the court. Thus, the real rationale for admitting the statements of alleged co-conspirators is one of sheer responsibility and necessity, rather than reliability. Because conspiracies are so difficult to prove, once the minimal factual foundation has been provided (Section 1223(c)), the statements of an alleged co-conspirator can be considered by the jury as evidence against the party. The jury may be instructed that if they ultimately fail to find a preponderance of evidence of the existence of a conspiracy, they can refuse to use the statements as evidence.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of Evidence 801(d)(2)(E) also provides for vicarious admissions in the context of a statement by a co-conspirator of a party. The statement of a member of a conspiracy is attributed to the co-conspirator party against whom the statement is offered at trial. As with Section 1223, the proponent must establish that there was a conspiracy, that both the declarant and the party against whom the statement is offered were members of the conspiracy, and that the statement, in fact, furthered or advanced the conspiracy. For example, a confession to the police does not advance a conspiracy, although some courts have found that attempts to conceal a conspiracy after arrest do further the conspiracy.

The leading federal case on co-conspirator statements provides a basis for comparing the federal and California approaches. In *Bourjaily v. United States* (1987) 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144, the Supreme Court held that the foundational question of whether there is enough evidence of a conspiracy is to be decided by the judge under Federal Rule of Evidence 104(a). Under this standard, the proponent of the co-conspirator statement must have shown a preponderance of evidence of a conspiracy. Thus, the federal approach departs from the California approach. Section 1223(c) provides that the jury decides the question of whether there is enough proof of a conspiracy to use the statements as evidence; the trial judge determines only whether there is sufficient proof so that a reasonable person could find that a conspiracy existed.

Finally, the Supreme Court concluded that a trial court may consider the offered hearsay statement itself in making the preliminary factual determination of whether the conspiracy existed and whether the statement was made in furtherance of the conspiracy. At least one California court of appeals has rejected this approach, holding that the existence of a conspiracy must be determined independent of the hearsay statements offered into evidence under the co-conspirator exception. *People v. Longines* (1995) 34 Cal. App. 4th 621, 40 Cal. Rptr. 2d 356. Federal Rule of Evidence 801(d)(2)(E) was amended in 1997 to provide that the content of the statement should be considered in determining the existence of the conspiracy and the participation of the declarant and the party against whom the statement is offered, but is not alone sufficient to establish those issues. Thus, the federal rule, as amended, is more limited than the approach suggested in *Bourjaily* but is not as restrictive as California's requirement of independent evidence of a conspiracy.



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3 ADDITIONAL AUTHORITY

CALJIC No. 6.24 (2001 Rev.) (jury instruction on determining the admissibility of co-conspirator statements)



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Admissibility of Co-conspirator Statements

People v. Duran (2001) 94 Cal. App. 4th 923, 114 Cal. Rptr. 2d 595 (false statements made by defendant's codefendants to police were admissible as nonhearsay under Section 1200, as the statements were not admitted for their truth but rather tended to show that codefendants manifested a consciousness of guilt).

People v. Herrera (2000) 83 Cal. App. 4th 46, 98 Cal. Rptr. 2d 911 (existence of a conspiracy must be established, for purposes of determining the admissibility of a statement of a coconspirator, by evidence independent of the out-of-court statements; proponent of coconspirator's statement which would otherwise be hearsay must offer evidence sufficient for the trier of fact to determine that the preliminary fact, the conspiracy, is more likely than not to have existed).

People v. Longines (1995) 34 Cal. App. 4th 621, 40 Cal. Rptr. 2d 356 (existence of conspiracy, such as will permit admission of hearsay testimony under co-conspirator's exception to hearsay rule, must be proved by evidence independent of the hearsay statements).

People v. Longines (1995) 34 Cal. App. 4th 621, 40 Cal. Rptr. 2d 356 (prima facie evidence of conspiracy is sufficient to permit trial court to admit hearsay statements under co-conspirator's exception to the hearsay rule; fact of conspiracy need not be established beyond reasonable doubt or even by preponderance of the evidence).

People v. Perez (1978) 83 Cal. App. 3d 718, 148 Cal. Rptr. 90 (in the discretion of the trial court, evidence of a declarant's statements alleged to come within co-conspirator exception to hearsay rule may be admitted before receipt of the evidence that the declarant and the party were engaged in the conspiracy or subsequent to introduction of evidence to establish the preliminary fact).

People v. Morales (1968) 263 Cal. App. 2d 368, 69 Cal. Rptr. 402 (admissibility of declaration of co-conspirator is not affected by the fact that the indictment or information fails to charge a conspiracy).

Proof of Conspiracy Required

People v. Hardy (1992) 2 Cal. 4th 86, 5 Cal. Rptr. 2d 796, 825 P.2d 781 (whether statement is made in furtherance of conspiracy depends on an analysis of the totality of the facts and circumstances).

People v. Leach (1975) 15 Cal. 3d 419, 124 Cal. Rptr. 752, 541 P.2d 296 (evidence of statements made after the original objective of the conspiracy has been attained or abandoned are inadmissible unless there is sufficient independent evidence to establish prima facie that the conspiracy was in fact still in existence).

People v. Earnest (1975) 53 Cal. App. 3d 734, 126 Cal. Rptr. 107 (as used in the co-conspirator exception to the hearsay rule, the word "conspiracy" means an agreement between two or more persons (with specific intent) to achieve an unlawful objective, coupled with an overt act by one of the conspirators in furtherance thereof).

People v. Morales (1968) 263 Cal. App. 2d 368, 69 Cal. Rptr. 402 (confessions or admissions of co-conspirator made to officers after his apprehension and arrest are not in furtherance of the conspiracy and do not fall within exception to hearsay rule).

People v. Griffin (1950) 98 Cal. App. 2d 1, 219 P.2d 519 (a defendant accused of conspiracy is not required to have been a member of the conspiracy from its inception, and one who joins a conspiracy after it is formed and actively participates therein thereby adopts the previous acts and declarations of his fellow conspirators, and under such circumstances the previous acts and declarations of his fellow conspirators, although done or made before he joined the conspiracy, are admissible against him).



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§ 1224.syn Synopsis to Chapter 1224: Statement of Declarant Whose Liability, Obligation or Duty is in Issue

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Scope Statement of Declarant Whose Liability, Obligation or Duty is in Issue

§ 1224 reads as follows:

Rule 1224 Statement of Declarant Whose Liability, Obligation or Duty is in Issue

When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

On its face, Section 1224 appears to make statements admissible whenever respondeat superior liability is involved. However, shortly before the Evidence Code went into effect, the California Supreme Court stated that Section 1224 applies only where there is privity of interest in property involved, or the party has assumed responsibility for obligations of the declarant (guarantor, surety, insurer, shareholder). *Markley v. Beagle* (1967) 66 Cal. 2d 951, 59 Cal. Rptr. 809, 429 P.2d 129. Yet that result contradicts both the text of the statute and the understanding of the original drafters. See 6 Cal. L. Rev. Comm. Rep. (1964) (Section 1224 applies in respondeat superior cases). Thus, a subsequent Court of Appeal decision limited *Markley* to its facts (a statement made by the defendant's former employee over a year after the accident). *Labis v. Stopper* (1970) 11 Cal. App. 3d 1003, 89 Cal. Rptr. 926 (admitting the statement of a painter against the painting contractor in a personal injury action against the contractor).

Despite differences in phrasing, Section 1224 is similar to Federal Rule of Evidence 801(d)(2)(D), which authorizes the admission of a statement by a party's agent or servant concerning a matter within the scope of the agency or employment. Under the federal approach, the proponent of evidence must establish a foundation that the declarant was an employee or agent of the party against whom the statement is offered. Second, the statement must merely "concern" a matter within the scope of the agency or employment. No express or implied speaking authority need be given to the agent or employee. Finally, it must be established that the statement was made while the employment or the agency existed. Statements made after the employment or agency has terminated do not qualify as an admission under this exception (hence, the statement at issue in *Markley* would not have been admissible under the federal rule). The chief difference between Section 1224 and the federal rule, is that Section 1224 is limited to civil cases; there is no such limitation for Federal Rule of Evidence 801(d)(2)(D).



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2 SIGNIFICANT CASES

See also leading cases discussed in the Analysis.

Atlas Assur. Co. v. McCombs Corp. (1983) 146 Cal. App. 3d 135, 194 Cal. Rptr. 66 (inculpatory admissions to theft of tenants' property by employee of insureds, who operated self-service storage facility, would have been admissible as admissions of party in an action involving employee's liability for theft; therefore, his admissions were admissible against insureds to demonstrate that insurer was relieved of obligation to defend civil suit by tenants against insureds by reason of policy exclusion providing that there was no coverage for, inter alia, any dishonest or criminal act on part of insureds' employees or agents).

Brown v. Surety Co. of Pacific (1981) 122 Cal. App. 3d 614, 176 Cal. Rptr. 143 (statements, adopted by debtor, of workmen and architect on construction project to creditor were admissible in action by creditor against surety on debtor's contractor's bond under this section since this section applies in situations where a third party's obligation or duty is an essential operative fact).

Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 111 Cal. Rptr. 535 (in action to recover damages for wrongful death of welder allegedly caused by disintegration of grinding wheel being operated at excessive speed, accident report prepared by agent of insurer of grinding wheel's manufacturer which contained evidence favorable to plaintiff's theory concerning cause of over-speeding of wheel was not admissible under this section permitting admission in suits against an indemnitor of hearsay evidence which would be admissible in suit against indemnitee).



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§ 1225.syn Synopsis to Chapter 1225: Statement of Declarant Whose Right, Title or Interest in Property is in Issue

Scope Statement of Declarant Whose Right, Title or Interest in Property is in Issue

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Scope Statement of Declarant Whose Right, Title or Interest in Property is in Issue

§ 1225 reads as follows:

Rule 1225 Statement of Declarant Whose Right, Title or Interest in Property is in Issue

When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1225 permits the statement of a predecessor in interest of property rights to be admitted against the successor.



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2 COMPARISON TO FEDERAL RULE

There is no exact federal counterpart to Section 1225, although some of the statements admissible under this section might be admissible under *Federal Rules of Evidence* 803(14) (records of documents affecting an interest in property); 803(15) (statements in documents affecting an interest in property); 803(16) (statements in ancient documents); 803(20) (reputation concerning boundaries or general history); 803(23) (judgment as to personal, family, or general history, or boundaries); or 803(24) (residual exception).



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Estate of Huntington (1976) 58 Cal. App. 3d 197, 129 Cal. Rptr. 787 (life beneficiary's implied statement that her two adopted children were not descendants for purpose of testamentary trusts vesting remainder in life beneficiary's descendants was not admissible under this section in that adopted children were not successors in interest to interest which life beneficiary had in trust property and their interest or right to trust property derived from will and independent of life beneficiary's prior right to trust property).

Gordon v. D & G Escrow Corp. (1975) 48 Cal. App. 3d 616, 122 Cal. Rptr. 150 (this section allowing statements of a declarant, whose right or title is in issue, to be admitted against party claiming as successor of declarant was not applicable to divorced husband's testimony regarding wife's statements, sought to be introduced in husband's action against escrow company which allegedly distributed proceeds to wife to explain stipulation entered into by husband and wife, as escrow company was not a successor to divorced wife).

Stearns v. Los Angeles City Sch. Dist. (1966) 244 Cal. App. 2d 696, 53 Cal. Rptr. 482 (statements made by declarant before he acquires title are not admissible).



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§ 1226.syn Synopsis to Chapter 1226: Statement of a Child in Parent's Action for Child's Injury

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Scope Statement of a Child in Parent's Action for Child's Injury

§ 1226 reads as follows:

Rule 1226 Statement of a Child in Parent's Action for Child's Injury

Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under *Section 376 of the Code of Civil Procedure* for injury to such minor child.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Since an action for injuries to a minor would be brought in the parent or guardian's name, rather than the minor's name, this section makes clear that the minor's statements are as admissible against the parents as they would have been against the minor (had the action been brought by the minor).



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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Scope Statement of Deceased Declarant in a Wrongful Death Action

§ 1227 reads as follows:

Rule 1227 Statement of Deceased Declarant in a Wrongful Death Action

Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action for wrongful death brought under *Section 377 of the Code of Civil Procedure*.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Under California law, the plaintiff in a wrongful death action is not the deceased. This section makes clear that the statements of the deceased are as admissible against the plaintiff in a wrongful death action as they would have been against the deceased if the deceased had brought the action.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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**§ 1228.syn Synopsis to Chapter 1228: Use of Child's Statements to Establish Foundation for Admissibility of
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Scope Use of Child's Statements to Establish Foundation for Admissibility of Defendant's Statements in Sex Crimes Prosecution

§ 1228 reads as follows:

Rule 1228 Use of Child's Statements to Establish Foundation for Admissibility of Defendant's Statements in Sex Crimes Prosecution

Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of violating *Section 261, 264.1, 285, 286, 288, 288a, 289, or 647a of the Penal Code*, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following:

- (a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department.
- (b) The statement describes the minor child as a victim of sexual abuse.
- (c) The statement was made prior to the defendant's confession. The court shall view with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice.
- (d) There are no circumstances, such as significant inconsistencies between the confession and the statement concerning material facts establishing any element of the crime or the identification of the defendant, that would render the statement unreliable.
- (e) The minor child is found to be unavailable pursuant to paragraph (2) or (3) of subdivision (a) of Section 240 or refuses to testify.
- (f) The confession was memorialized in a trustworthy fashion by a law enforcement official.

If the prosecution intends to offer a statement of the complaining witness pursuant to this section, the prosecution

shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement. If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the statement is found to be admissible pursuant to this section, it shall be admitted out of the presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.

(Added by Stats. 1984, ch. 1421, § 1. Amended by Stats. 1985, ch. 1572, § 1, eff. Oct. 2, 1985)

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1 ANALYSIS

Section 1228, which applies to prosecutions of sex crimes against children, is directed at the *corpus delicti* rule, which requires the "body of the crime" to be proved by evidence independent of the defendant's statements. The defendant's statements cannot be introduced before the corpus delicti requirement is established. Thus, Section 1228 permits the trial judge, under the explicit circumstances and procedures stated, to use the out-of-court statements of a child in determining whether there is sufficient foundation for the introduction of the confession of the person accused of sexually abusing the minor. However, Section 1228 does not create a general hearsay exception for the statements of child sexual abuse victims. *See also* the discussion of Section 1200(b), which has been used to create an exception for the statements of child sexual abuse victims in dependency proceedings.



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2 COMPARISON TO FEDERAL RULE

There is no exact federal counterpart to this section, although some courts have admitted the statements of child abuse victims under Federal Rule of *Evidence* 803(4), where the statements were made for the purpose of medical diagnosis or treatment. See *United States v. George* (9th Cir. 1992) 960 F.2d 97 .



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Creutz v. Superior Court (1996) 49 Cal. App. 4th 822, 56 Cal. Rptr. 2d 870 (this provision establishes a narrow exception to the hearsay rule in certain cases involving specified sex crimes against children, permitting the trial judge to use the child's statements in determining the admissibility of the defendant's confession. This provision permits the trial judge to consider otherwise inadmissible evidence solely for the purpose of establishing the *corpus delicti* of the child sex crime).

Creutz v. Superior Court (1996) 49 Cal. App. 4th 822, 56 Cal. Rptr. 2d 870 (the statement of a minor is only admissible under this exception to the hearsay rule if the defendant has made a confession; this provision does not permit admission of inculpatory statements that do not constitute an actual confession).

Creutz v. Superior Court (1996) 49 Cal. App. 4th 822, 56 Cal. Rptr. 2d 870 (a "confession," as used in Section 1228, is "a declaration by a person that he is guilty of a crime. ... It differs from an admission of an accused in that the confession is an express and complete acknowledgment of guilt of the crime, while an admission may be either express or implied, and is merely an acknowledgment of some fact which tends to prove guilt").



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SECTION 1228.1 Child Welfare Services Case Plans

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§ 1228.1.syn Synopsis to Chapter 1228.1: Child Welfare Services Case Plans

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Scope Child Welfare Services Case Plans

§ 1228.1 reads as follows:

1228.1 Child Welfare Services Case Plans

(a) Except as provided in subdivision (b), neither the signature of any parent or legal guardian on a child welfare services case plan nor the acceptance of any services prescribed in the child welfare services case plan by any parent or legal guardian shall constitute an admission of guilt or be used as evidence against the parent or legal guardian in a court of law.

(b) A parent's or guardian's failure to cooperate, except for good cause, in the provision of services specified in the child welfare services case plan may be used as evidence, if relevant, in any hearing held pursuant to *Section 366.21, 366.22, or 388 of the Welfare and Institutions Code* and at any jurisdictional or dispositional hearing held on a petition filed pursuant to *Section 300, 342, or 387 of the Welfare and Institutions Code*.

(Added by Stats. 1995, ch. 540, § 1. Amended by Stats. 1997, ch. 793 (A.B. 1544), § 1)

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SECTION 1228.1 Child Welfare Services Case Plans

1-1228.1 California Evidence Courtroom Manual 1

1 ANALYSIS

Under the existing California law, parents and legal guardians have the opportunity to review, sign, and receive a copy of a child welfare services plan. This section prevents the use of the parent's or legal guardian's signature or acceptance of any of the services prescribed in the plan as evidence against them. However, Section 1228.1 also provides that, except for good cause, the failure to cooperate in the provision of services specified in the plan may be used as evidence in determining whether parental rights should be terminated.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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1-1 California Evidence Courtroom Manual Scope

Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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SECTION 1230 Declarations Against Interest in General

1-1230 California Evidence Courtroom Manual 1230.syn

§ 1230.syn Synopsis to Chapter 1230: Declarations Against Interest in General

Scope Declarations Against Interest in General

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Scope Declarations Against Interest in General

§ 1230 reads as follows:

Rule 1230 Declarations Against Interest in General

Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1230 encompasses the traditional exception for statements against the financial or proprietary interests of the declarant and statements which tend to subject the declarant to civil liability. However, it significantly expands the traditional exception, to include statements which tend to subject the declarant to criminal punishment, *i.e.*, statements against penal interest, and statements which tend to subject the declarant to hatred, ridicule or social disgrace in the community.

The foundational requirements for statements against interest under are as follows:

1. The declarant must be unavailable as defined in Section 240;
2. The declarant must have firsthand knowledge of the subject of the statement;
3. The nature of the statement must be such that a reasonable person would not have uttered it unless he or she believed it to be true; and
4. The statement must be contrary to the declarant's pecuniary, proprietary, penal or social interest at the time of its utterance.

It is critical to appreciate the distinction between declarations constituting statements against interest, identified in Section 1230, and those which are admissions of a party-opponent as defined in Section 1220. While it frequently occurs that an admission will be contrary to some interest of a party to the litigation, none of the foundational requirements of Section 1230 are required to be satisfied prior to the introduction of admissions. Admissions may be introduced without regard to: (1) whether the declarant is unavailable; (2) whether the statement was against any particular interest when made; (3) whether the party had any first-hand knowledge of the underlying events; or (4) whether any sort of reasonable person test is satisfied.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of Evidence 804(b)(3) codifies the historical exception to the hearsay rule for statements against interest, but differs from the California approach in two significant ways. First, the federal rule does not apply to statements against social interest; the statement must be against pecuniary, proprietary or penal interest. Second, under Rule 804(b)(3), statements against the declarant's penal interest offered to exculpate the accused must be "corroborated" prior to their admission. To the extent that an out-of-court statement exculpates the accused by embodying an admission to the perpetration of the crime with which the accused is charged, the corroboration requirement is derived from a longstanding recognition that third-party out-of-court confessions are inherently subject to fabrication and abuse.

Just what constitutes sufficient "corroborating circumstances" must be determined on a case-by-case basis. Where the facts contained in the declarant's statement are supported by proof outside the statement itself, the corroboration requirement should be satisfied. Where the statement exculpates someone other than the declarant, the statement must be corroborated.

In *Williamson v. United States* (1994) 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476, the Supreme Court of the United States addressed a distinct interpretational issue regarding the language of the statement against interest hearsay exception. The Court ruled that in interpreting Federal Rule of Evidence 804(b)(3), the principle behind the rule points to a narrow reading. Consequently, the Court held that only those remarks within a statement that are individually self-inculpatory are within the scope of the hearsay exception. Accordingly, the exception does not apply to parts of statements that are actually self-exculpatory or to collateral statements, even ones that are neutral as to interest. The California Supreme Court reached the same result years ago. See *People v. Leach* (1975) 15 Cal. 3d 419, 124 Cal. Rptr. 752, 541 P.2d 296 (statement against interest exception is not applicable to evidence of any statement or portion of a statement which is not itself specifically dis-serving to the interests of the declarant; extrajudicial statements of one of two conspirators could not be admitted against the nondeclarant conspirator in joint trial merely because the statements contained, in addition to evidence damaging to the nondeclarant, statements against the penal interest of the declarant).



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3 SIGNIFICANT CASES

People v. Duarte (2000) 24 Cal. 4th 603, 101 Cal. Rptr. 2d 701, 12 P.3d 1110 (only those portions of declarant's statements that were specifically dis-serving to his penal interests are admissible under Section 1230; court should have redacted any statement or portion of a statement that was not specifically dis-serving; a hearsay statement that is in part inculpatory and in part exculpatory does not meet the test of trustworthiness under Section 1230).

People v. Phillips (2000) 22 Cal. 4th 226, 92 Cal. Rptr. 2d 58, 991 P.2d 145 (out-of-court statement was not admissible under Section 1230; statement was against defendant's interest, but was not against declarant's interest).

People v. Lucas (1995) 12 Cal. 4th 415, 48 Cal. Rptr. 2d 525, 907 P.2d 373, cert. denied, (for evidence to be admitted under hearsay exception for statements against penal interest, proponent of evidence must show that declarant is unavailable, that declaration was against declarant's penal interest, and that declaration is sufficiently reliable to warrant admission despite its hearsay character).

People v. Cudjo (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (party who maintains out-of-court statement is admissible under statutory exception to hearsay rule as declaration against penal interest must show that declarant is unavailable, that declaration was against declarant's penal interest, and that declaration was sufficiently reliable to warrant admission despite its hearsay character).

People v. Cummings (1993) 4 Cal. 4th 1233, 18 Cal. Rptr. 2d 796, 850 P.2d 1, cert. denied, 511 U.S. 1046 (guilty plea falls within hearsay rule exception for declarations against penal interest).

People v. Frierson (1991) 53 Cal. 3d 730, 280 Cal. Rptr. 440, 808 P.2d 1197 (when determining whether a statement is truly against interest court may take into account not just words but circumstances under which they were uttered, possible motivation of declarant, and declarant's relationship to defendant).

People v. Duke (1999) 74 Cal. App. 4th 23, 87 Cal. Rptr. 2d 547 (inculpatory statements of a nontestifying codefendant were admissible against defendant under Section 1230 and did not violate *confrontation clause* due to the trustworthiness of the statements; codefendant had no apparent motive to lie, did not attempt to shift blame or deny

responsibility and made statements before he was a suspect).

People v. Greenberger (1997) 58 Cal. App. 4th 298, 68 Cal. Rptr. 2d 61 (admission of a statement as a declaration against interest does not violate the *confrontation clause* and may be admitted against a co-defendant in joint trial as long as it satisfies trustworthiness requirement; trial court properly examined the circumstances and context in which statements were made and did not abuse its discretion in admitting some of the statements).

Vorse v. Sarasy (1997) 53 Cal. App. 4th 998, 62 Cal. Rptr. 2d 164 (the court may not exclude a hearsay statement otherwise admissible under the declarations against interest exception because the court has doubts about the credibility of the in-court witness; the court may only evaluate the reliability of the hearsay declarant).

People v. Jackson (1991) 235 Cal. App. 3d 1670, 1 Cal. Rptr. 2d 778 (whether statement is one against penal interest is preliminary fact to be determined under statute governing determinations of foundational and other preliminary facts, and test imposed is an objective one--would statement subject its declarant to criminal liability such that reasonable person would not have made statement without believing it true).



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General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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1-1231 California Evidence Courtroom Manual 1231.syn

§ 1231.syn Synopsis to Chapter 1231: Prior Statements of Deceased Declarant

Scope Prior Statements of Deceased Declarant

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1-1231 California Evidence Courtroom Manual Scope

Scope Prior Statements of Deceased Declarant

§ 1231 reads as follows:

Rule 1231 Prior Statements of Deceased Declarant

Evidence of a prior statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is deceased and the proponent of introducing the statement establishes each of the following:

(a) The statement relates to acts or events relevant to a criminal prosecution under provisions of the California Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with *Section 186.20*) of *Title 7 of Part 1 of the Penal Code*).

(b) A verbatim transcript, copy, or record of the statement exists. A record may include a statement preserved by means of an audio or video recording or equivalent technology.

(c) The statement relates to acts or events within the personal knowledge of the declarant.

(d) The statement was made under oath or affirmation in an affidavit; or was made at a deposition, preliminary hearing, grand jury hearing, or other proceeding in compliance with law, and was made under penalty of perjury.

(e) The declarant died from other than natural causes.

(f) The statement was made under circumstances that would indicate its trustworthiness and render the declarant's statement particularly worthy of belief. For purposes of this subdivision, circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(Added by Stats. 1997, ch. 499 (S.B. 941), § 1)

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1 ANALYSIS

Section 1231 is a recent attempt to aid law enforcement officials in the fight against gang-generated crime. Unlike some efforts to curb crime, the drafters of Section 1231 attempted to qualify their efforts, stating that, while expanding the class of hearsay statements admissible in criminal trials, they wished to safeguard basic evidentiary and constitutional rights of defendants in criminal trials:

This act shall not affect other evidentiary requirements, including, but not limited to, *Sections 351 and 352 of the Evidence Code*, shall not impair a party's right to attack the credibility of the declarant pursuant to *Section 1202 of the Evidence Code*, shall not affect the defendant's right to discovery for purposes of producing rebuttal evidence attacking the declarant's credibility, and shall not be used in a manner inconsistent with the defendant's right to due process and to confront witnesses under the United States or California Constitution. [Stats. 1997, ch. 499 (S.B. 941), § 2.]

Such balanced efforts at legislation are unusual in modern times.



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2 COMPARISON TO FEDERAL RULE

There is no comparable federal rule, although some statements admissible under Section 1231 might also be admissible as statements against interest, Federal Rule of *Evidence* 804(b)(3), or under the residual exception of Federal Rule of *Evidence* 807.



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3 SIGNIFICANT CASES

There are no cases interpreting this recent statute. See *People v. Loeun* (1997) 17 Cal. 4th 1, 69 Cal. Rptr. 2d 776, 947 P.2d 1313, cert. denied, 523 U.S. 1129 and *People v. Gardeley* (1996) 14 Cal. 4th 605, 59 Cal. Rptr. 2d 356, 927 P.2d 713 for discussion of the Street Terrorism Enforcement and Prevention Act (STEP), enacted in 1988 for the purpose of eradicating criminal acts by street gangs.



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1-1231.1 California Evidence Courtroom Manual 1231.1.syn

§ 1231.1.syn Synopsis to Chapter 1231.1: Notice Requirement

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1-1231.1 California Evidence Courtroom Manual Scope

Scope Notice Requirement

§ 1231.1 reads as follows:

1231.1 Notice Requirement

A statement is admissible pursuant to Section 1231 only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

(Added by Stats. 1997, ch. 499 (S.B. 941), § 1)

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1 ANALYSIS

See Analysis of Section 1231.



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See Comparison to Section 1231.



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SECTION 1231.2 Administration of Oaths

1-1231.2 California Evidence Courtroom Manual 1231.2.syn

§ 1231.2.syn Synopsis to Chapter 1231.2: Administration of Oaths

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SECTION 1231.2 Administration of Oaths

1-1231.2 California Evidence Courtroom Manual Scope

Scope Administration of Oaths

§ 1231.2 reads as follows:

1231.2 Administration of Oaths

A peace officer may administer and certify oaths for purposes of this article.

(Added by Stats. 1997, ch. 499 (S.B. 941), § 1. Amended by Stats. 1998, ch. 606 (S.B. 1880), § 2)

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1 ANALYSIS

See Analysis of Section 1231. The 1998 amendment merely corrected a typographical error.



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SECTION 1231.3 Hearsay Testimony of Law Enforcement Official

1-1231.3 California Evidence Courtroom Manual 1231.3.syn

§ 1231.3.syn Synopsis to Chapter 1231.3: Hearsay Testimony of Law Enforcement Official

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1-1231.3 California Evidence Courtroom Manual Scope

Scope Hearsay Testimony of Law Enforcement Official

§ 1231.3 reads as follows:

1231.3 Hearsay Testimony of Law Enforcement Official

Any law enforcement officer testifying as to any hearsay statement pursuant to this article shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and testifying at preliminary hearings and trials.

(Added by Stats. 1997, ch. 499 (S.B. 941), § 1)

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SECTION 1231.4 Jury Instruction Regarding Cause of Death

1-1231.4 California Evidence Courtroom Manual 1231.4.syn

§ 1231.4.syn Synopsis to Chapter 1231.4: Jury Instruction Regarding Cause of Death

Scope Jury Instruction Regarding Cause of Death

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SECTION 1231.4 Jury Instruction Regarding Cause of Death

1-1231.4 California Evidence Courtroom Manual Scope

Scope Jury Instruction Regarding Cause of Death

§ 1231.4 reads as follows:

1231.4 Jury Instruction Regarding Cause of Death

If evidence of a prior statement is introduced pursuant to this article, the jury may not be told that the declarant died from other than natural causes, but shall merely be told that the declarant is unavailable.

(Added by Stats. 1997, ch. 499 (S.B. 941), § 1)

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1 ANALYSIS

See Analysis of Section 1231.



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DIVISION 10 HEARSAY EVIDENCE
CHAPTER 2 EXCEPTIONS TO THE HEARSAY RULE
ARTICLE 2.5 SWORN STATEMENTS REGARDING GANG-RELATED CRIMES
SECTION 1231.4 Jury Instruction Regarding Cause of Death

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2 COMPARISON TO FEDERAL RULE

See Comparison to Section 1231.



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1-1 California Evidence Courtroom Manual Scope

Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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§ 1235.syn Synopsis to Chapter 1235: Prior Inconsistent Statements

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1-1235 California Evidence Courtroom Manual Scope

Scope Prior Inconsistent Statements

§ 1235 reads as follows:

Rule 1235 Prior Inconsistent Statements

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1235 creates an exception for prior inconsistent statements, which are most commonly used in conjunction with the impeachment technique of self-contradiction. *See Sections 769 and 770.* Where the out-of-court statement is offered in a civil case or in a criminal case in which the declarant is not the defendant, and the statement is inconsistent with the witness's trial testimony, the prior statement may be considered for its truth as well as for the light it sheds on the witness's lack of credibility. The statement may be considered as substantive evidence, the jury may base its verdict upon it, and the opponent of the witness sought to be impeached is not entitled to a limiting instruction requiring the jury to consider the prior statement only for impeachment. Thus, the prior statement has a dual purpose; it may be considered for impeachment as well as substantive evidence. The substantive use of a prior inconsistent statement is limited, however, in the case of a criminal defendant. Where the prior statement was made after defendant's arrest and was made to a law enforcement officer or officers the statement may only be used for impeachment purposes. *See CALJIC No. 2.13.1; Miranda v. Arizona (1966) 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, reh'g denied, 385 U.S. 890, cert. denied, 396 U.S. 868.*

If the proponent of the prior inconsistent statement wants to introduce extrinsic evidence of the statement (such as in a document), the proponent must also comply with Section 770, giving the witness a chance to explain the inconsistency at some point, although not necessarily before confronting the witness with the prior inconsistent statement.



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2 COMPARISON TO FEDERAL RULE

The major difference between Section 1235 and Federal Rule of *Evidence 801(d)(1)(A)* is that, under the federal approach, the prior inconsistent statement must have been given under the penalty of perjury at a trial, hearing or like proceeding, or in a deposition to be used as substantive evidence (that is, to prove the truth of the matter asserted). If the prior inconsistent statement was not given under oath, the opponent of the witness sought to be impeached is entitled to a limiting instruction requiring the jury to consider the prior statement only for impeachment. A secondary difference between the California and federal approaches is one of terminology--under Federal Rule of *Evidence 801(d)(1)(A)*, a prior inconsistent statement is deemed not hearsay because the witness/declarant is on the stand and subject to cross-examination; under Section 1235, a prior inconsistent statement is an exception to the hearsay rule.

Federal Rule of Evidence 613(b), which concerns the use of extrinsic evidence of the prior inconsistent statement to impeach the witness, is virtually identical to Section 770.



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3 SIGNIFICANT CASES

In General

People v. Hawthorne (1992) 4 Cal. 4th 43, 14 Cal. Rptr. 2d 133, 841 P.2d 118 (prior inconsistent statements are admissible to prove their substance as well as to impeach declarant).

Jogani v. Jogani (2006) 141 Cal. App. 4th 158, 45 Cal. Rptr. 3d 792 (holding that trial court erred in granting summary judgment based on judicial estoppel, where individual seeking to recover under an oral partnership agreement had testified that no such agreement existed at judgment debtor examinations in prior, unrelated litigation; the mere existence of party-admission under Section 1220 or prior inconsistent statements under Section 1235, without more, is not sufficient to apply judicial estoppel; the courts that ordered the judgment debtor examinations did not did not adopt or accept the truth of the testimony; hence, there was no threat to judicial integrity and judicial estoppel was inappropriate).

People v. Manson (1977) 71 Cal. App. 3d 1, 139 Cal. Rptr. 275 (prior inconsistent testimony of witness was not inadmissible because it was given under grant of immunity).

People v. Douglas (1977) 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (defendant's testimony at a suppression hearing may be used for impeachment purposes if he takes the stand at his trial and testifies in a manner inconsistent with his pretrial testimony).

Le Grand v. Yellow Cab Co. (1970) 8 Cal. App. 3d 125, 87 Cal. Rptr. 292 (answers to interrogatories need not be under oath to be admissible as prior inconsistent or consistent statements).

Defining Inconsistency

--Denial of Prior Statement

People v. Arias (1996) 13 Cal. 4th 92, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (where a witness denies or avoids admitting a previous statement that is materially inconsistent with the witness's in-court testimony, such a statement may be admitted as a prior inconsistent statement and a police officer's disclosure of such statement was not subject to hearsay objection).

People v. Cooks (1983) 141 Cal. App. 3d 224, 190 Cal. Rptr. 211 (if witness denies his prior identification by composite drawing or sketch of suspect based on witness's description, or testifies contrary to it, prior identification or drawing is admissible as prior inconsistent statement).

--Forgetfulness

People v. Arias (1996) 13 Cal. 4th 92, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (when trial court concludes, on substantial evidence, that witness's professed lapses of memory are false, evasive devices to avoid truthful answers, it may admit, as "inconsistent," witness's prior statements describing events witness now claims to have forgotten).

People v. Gunder (2007) 151 Cal. App. 4th 412, 59 Cal. Rptr. 3d 817, review denied (in order to admit the prior extrajudicial statement of a forgetful witness as an inconsistent statement, the trial court must determine that the forgetfulness is feigned and will be affirmed if there is a reasonable basis in the record for its conclusion. Here, the appellate court found a reasonable basis for the trial court's implicit conclusion that the witness was feigning memory loss because (1) the witness had been a friend of defendant for decades; (2) the witness did not have any problems, when interviewed a few months after the incident at the casino, in recalling the details (the defendant dropped a gun, shooting himself in the leg, while in close proximity to the witness, which greatly upset the witness); (3) the trial court had the benefit of observing the demeanor of the witness and (4) the witness could recall a threatening message from one of the victims merely because he had written it down).

--Refusal to Answer

In re Deon D. (1989) 208 Cal. App. 3d 953, 256 Cal. Rptr. 490 (witness's in-court testimony and his refusal to answer some questions posed by prosecutor was materially inconsistent with witness's earlier statement to detective, rendering that earlier statement admissible as prior inconsistent statement regarding rape incident).

People v. Rios (1985) 163 Cal. App. 3d 852, 210 Cal. Rptr. 271 (earlier statements made to police by certain witnesses, who, after stating their names at trial, refused to answer any further questions, were not admissible, as an exception to the hearsay rule, as being inconsistent with matters to which they testified at trial, as there was no basis to support a finding of inconsistency).

--Ambiguous Answers

People v. Boyd (1990) 222 Cal. App. 3d 541, 271 Cal. Rptr. 738 (prior statement by witness during police interview that one perpetrator may have been drinking something on night of murder was not inconsistent with his unequivocal trial testimony that one assailant held clear glass bottle in his hand and drank from it when he approached victim and, thus, prior statement was not admissible; both statements reflected same recollection of events surrounding shooting).

McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 188 Cal. Rptr. 542 (statement made by passenger witness to federal aviation administration in which witness stated that they had experienced "downdrafts" and could not gain any altitude, was admissible to impeach as prior inconsistent testimony, where on direct examination she had testified that she was unaware of any significant "turbulence" involving the flight, because while "turbulence" and "downdrafts" may not mean same thing either term could reflect witness's perception of drop in altitude and therefore such statements could appear to be inconsistent to a jury).



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§ 1236.syn Synopsis to Chapter 1236: Prior Consistent Statements

Scope Prior Consistent Statements

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1-1236 California Evidence Courtroom Manual Scope

Scope Prior Consistent Statements

§ 1236 reads as follows:

Rule 1236 Prior Consistent Statements

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1236 Prior Consistent Statements

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1 ANALYSIS

Section 1236 applies to prior statements used to rehabilitate a witness. It must be read in conjunction with Section 791, dealing with rehabilitation of witnesses. No oath or cross-examination attending the prior statement is necessary for the prior consistent statement to be considered as substantive evidence. This section has very narrow application. Under Section 791, the exception is only triggered where the witness has been impeached with a prior inconsistent statement or where there has been an inference of fabrication, bias or improper motive of such a nature that a prior consistent statement would be probative to negate such an inference. These inferences may result from an express or implied charge, whether made in opening statements or in cross-examination. In Section 791, California follows the common law "pre-motive" timing requirement; the prior consistent statement has to have been made *before* the motive to fabricate arose or the improper motive existed. As described below, the United States Supreme Court reached the same result through statutory interpretation.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 801(d)(1)(B) is very similar to Section 1236, except for the difference in categorization--the federal approach defines prior consistent statements under Rule 801(d)(1)(B) as nonhearsay; California admits such statements under an exception to the hearsay rule. In *Tome v. United States* (1995) 513 U.S. 150, 115 S. Ct. 696, 130 L. Ed. 2d 574, the Supreme Court ruled that the party offering the prior consistent statement under Federal Rule of *Evidence* 801(d)(1)(B) must show that it was made before a motive to fabricate existed or improper influence was exercised over the declarant, rejecting the argument that the pre-motive requirement is a function of the relevancy rules, not the hearsay rules. The Court noted the absence of any indication in the legislative history or Advisory Committee Notes rejecting the prevailing common law rule that a prior consistent statement be made before the motive or improper influence arose. The Court's ruling thus brings the federal treatment of prior consistent statements in line with the California approach.



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3 SIGNIFICANT CASES

People v. Hayes (1990) 52 Cal. 3d 577, 276 Cal. Rptr. 874, 802 P.2d 376 (admission of witness's prior consistent statement under this section did not violate defendant's right of confrontation under *Sixth Amendment* and was proper where the statement was made before any of the witness's motives to fabricate arose where witness was alleged to have several such motives).

People v. Williams (2002) 102 Cal. App. 4th 995, 125 Cal. Rptr. 2d 884 (Videotaped interviews the police conducted with the victim and her son were admissible as prior consistent statements where defense counsel implied during cross-examination that both witnesses had fabricated portions of their trial testimony; "pre-motive" requirement, that the statement must have been made before an improper motive is alleged to have arisen, did not apply because defense counsel made charge of recent fabrication "by negative evidence"--suggesting that the witnesses did not talk about the matter before when it would have been natural to do so; the videotape rebuts this charge, showing that the witnesses did talk about the matter).

People v. Manson (1976) 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (recent fabrication may be inferred when it is shown that witness did not speak about important matter at a time when it would have been natural for him to do so and when that inference does arise, it is generally proper to permit rehabilitation by prior consistent statement).

People v. Gentry (1969) 270 Cal. App. 2d 462, 76 Cal. Rptr. 336 (prior statements consistent with testimony are, as an exception to the hearsay rule, admitted for the purpose of rehabilitation following an attempt to impeach the testimony).

People v. Gentry (1969) 270 Cal. App. 2d 462, 76 Cal. Rptr. 336 (when charge of recent fabrication is made by negative evidence that the witness did not speak of the matter at the time when it would have been natural to speak, use of prior consistent statement is proper to show witness did speak and told the same story).



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§ 1237.syn Synopsis to Chapter 1237: Past Recollection Recorded

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SECTION 1237 Past Recollection Recorded

1-1237 California Evidence Courtroom Manual Scope

Scope Past Recollection Recorded

§ 1237 reads as follows:

Rule 1237 Past Recollection Recorded

(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

- (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
- (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
- (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
- (4) Is offered after the writing is authenticated as an accurate record of the statement.

(b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1237 Past Recollection Recorded

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1 ANALYSIS

This section is a partial remedy for the problem of documents and the forgetful witness. There are three sources of a witness's testimony: the witness's clear memory (*see Section 768*, where witness is asked about a document but testifies from memory), the witness's memory after it has been refreshed (*see Section 771*), and a document that the witness had prepared sometime in the past, memorializing his or her recollections. When the witness essentially testifies on the basis of the contents of a document, the courts are presented with a hearsay problem, since the document was created out-of-court and was not subject to cross-examination. Thus, Section 1237 provides for the admission of a written document which contains a recorded recollection under a hearsay exception.

Section 1237 will only be successful where a document fails to revive the recollection of a witness. *See Section 771*. First, it must be established that the memorandum or record containing the witness's past recollection concerns a matter of which the witness once had personal knowledge. Second, the document must have been prepared when the matter was fresh in the memory of the witness, although, of course, at the time of trial the witness has no independent recollection of the matter. Third, the witness must testify that after reading the document, he has no independent recollection of the events preserved in that writing. According to Section 1237, the document will be admissible where the present recollection of the witness is insufficient to enable the witness to testify "fully and accurately." Consequently, it is not necessary for the witness to have forgotten all of the facts preserved in the writing. Of course, if the witness does have a complete and independent recollection of the event recorded in the document, the document is not admissible pursuant to this exception. The witness merely provides testimony as to his refreshed recollection (under Section 771).

If a writing qualifies as a past recollection recorded, it is read into evidence and is not received as an exhibit. The purpose of this limitation is to avoid elevating this type of declaration above testimonial evidence. It ought to be afforded no greater opportunity for scrutiny than is afforded testimonial evidence unless the party against whom the writing is offered desires that it be subjected to closer scrutiny.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 803(5) is identical to Section 1237. Federal Rule of Evidence 612 (Writing Used to Refresh Memory) is the counterpart of Section 771.



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3 SIGNIFICANT CASES

People v. Price (1991) 1 Cal. 4th 324, 3 Cal. Rptr. 2d 106, 821 P.2d 610 (when written statement is admissible as past recollection recorded, writing may be read into evidence, but writing itself may not be received in evidence unless offered by adverse party; however, there is no similar limitation on admission of documents containing inconsistent statements).

People v. Miller (1996) 46 Cal. App. 4th 412, 53 Cal. Rptr. 2d 773 (where the defendant had an adequate opportunity for cross-examination, the trial court was within its discretion to find that a statement recorded by a detective a few hours after taking the statement from a witness was admissible as a past recollection recorded).

People v. Cummings (1993) 4 Cal. 4th 1233, 18 Cal. Rptr. 2d 796, 850 P.2d 1, cert. denied, 511 U.S. 1046 (inculpatory statement made by defendant to jailhouse informant, which informant then relayed to police officer who made record of his conversation with informant, was admissible through police officer's record under past recollection recorded exception to hearsay rule, where informant testified that he had no recall of his conversations with either defendant or detective, had been undergoing detoxification and was sometimes delusional; record of statement was authenticated by detective who testified regarding its method of preparation and by informant who testified that, although he was unable to recall content of his conversation with defendant, he had truthfully reported it to detective while it was fresh in his mind).

People v. Gentry (1969) 270 Cal. App. 2d 462, 76 Cal. Rptr. 336 (Section 1237 does not violate the *Sixth Amendment* guarantee of confrontation).



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§ 1238.syn Synopsis to Chapter 1238: Prior Identification

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SECTION 1238 Prior Identification

1-1238 California Evidence Courtroom Manual Scope

Scope Prior Identification

§ 1238 reads as follows:

Rule 1238 Prior Identification

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

- (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;
- (b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and
- (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1238 Prior Identification

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1 ANALYSIS

Section 1238 does not apply in the context of impeachment or rehabilitation. Rather, it applies to the situation where a witness is present at trial and a prior out-of-court identification made by that witness is offered into evidence. This exception is available where a witness testifies to earlier statements made by him or her as to the identity of a particular person. The identification may have been a line-up identification, a street identification or even a photographic array identification. It is imperative, however, that the person who made the out-of-court identification be a witness at trial and be subject to cross-examination.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 801(d)(1)(C) differs from Section 1238 in that the federal rule considers prior identifications to be nonhearsay (since the declarant is on the stand, subject to cross-examination) and does not require foundation that the statement was made at a time when the crime or other occurrence was fresh in the witness's memory and that the statement was a true reflection of the witness's opinion at the time of identification.



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People v. Vanbuskirk (1976) 61 Cal. App. 3d 395, 132 Cal. Rptr. 30 (where it was avowed intent of prosecution to offer evidence of pretrial photographic identifications of defendant, prosecution also had burden to lay foundation by establishing, as fact, fundamental fairness of photographic identification procedures).

People v. Scoglio (1969) 3 Cal. App. 3d 1, 82 Cal. Rptr. 869 (where officer testified that victim identified defendant shortly after robbery and victim on cross-examination testified that he identified defendant then and at preliminary hearing, evidence of prior identifications was admissible as substantive evidence despite failure of victim to identify defendant at trial).



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ARTICLE 4 SPONTANEOUS, CONTEMPORANEOUS AND DYING DECLARATIONS

1-1 California Evidence Courtroom Manual Scope

Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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SECTION 1240 Spontaneous Statement

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§ 1240.syn Synopsis to Chapter 1240: Spontaneous Statement

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SECTION 1240 Spontaneous Statement

1-1240 California Evidence Courtroom Manual Scope

Scope Spontaneous Statement

§ 1240 reads as follows:

Rule 1240 Spontaneous Statement

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

- (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
- (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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1 ANALYSIS

Courts routinely profess that statements admitted under spontaneous declaration exception to hearsay rule are considered reliable because their spontaneity ensures that declarant has not had time to reflect and fabricate. *See, e.g., People v. Pensinger (1991) 52 Cal. 3d 1210, 278 Cal. Rptr. 640, 805 P.2d 899*. While this maxim may be true as to the hearsay danger of insincerity, it does not address the inaccuracies that may arise in perception, memory or communicative clarity due to stress or excitement.

In order for Section 1240 to apply, there must be an extremely startling or shocking event. Foundational evidence as to the existence of the event may be established through the out-of-court statement of the declarant. It must further be established as a foundation that the declarant had personal knowledge of the event, and that, as a subjective matter, the declarant was under extreme stress when he made the statement. Because stress can continue for a period of time after a startling event, the statement need not be made immediately after the startling event has occurred.

The statement must also "narrate, describe, or explain an act, condition, or event perceived by the declarant. For example, in *People v. Farmer (1989) 47 Cal. 3d 888, 254 Cal. Rptr. 508, 765 P.2d 940*, the court held that a shooting victim's statements that his assailant was acquainted with victim's roommate, that assailant had purchased drugs from roommate, and that assailant's name was on telephone list, did qualify as statements narrating, describing, or explaining the shooting as such statements helped describe event by identifying perpetrator. In *People v. Miron (1989) 210 Cal. App. 3d 580, 258 Cal. Rptr. 494*, the court held that declarant's statement that victim "was trying to kill us" was properly excluded. The court held that while declarant's observations as to what victim did prior to shooting were admissible as spontaneous statement, declarant's opinion as to what victim was trying to accomplish was inadmissible as a statement of opinion. *Id.*



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2 COMPARISON TO FEDERAL RULE

The major difference between the California and Federal Rule of *Evidence 803(1)* is that the federal rule provides that the statement "relate" to the startling event in question while the California rule applies only to statements that narrate, describe or explain what was seen.



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In General

People v. Smith (2007) 40 Cal. 4th 483, 54 Cal. Rptr. 3d 245, 150 P.3d 1224 , reh'g denied, cert. denied, 128 S. Ct. 488, 169 L. Ed. 2d 344 (2007) (trial court did not abuse its discretion in finding that a statement made 30 to 60 minutes after the incident occurred does not satisfy the conditions for the spontaneous statement hearsay exception).

People v. Phillips (2000) 22 Cal. 4th 226, 92 Cal. Rptr. 2d 58, 991 P.2d 145 (even if declarant's statement was spontaneous, it was not admissible under Section 1240 without a showing that the declarant had personal knowledge of the events in his statement).

People v. Roybal (1998) 19 Cal. 4th 481, 79 Cal. Rptr. 2d 487, 966 P.2d 521 (audiotapes of 911 call made by victim's husband and initial police interview with husband were admissible under Section 1240; crucial element in admissibility under this exception is not the nature of the statement but the mental state of the declarant).

People v. Hines (1997) 15 Cal. 4th 997, 64 Cal. Rptr. 2d 594, 938 P.2d 494 (trial court did not violate *confrontation clause* by admitting testimony of friend of murder victim regarding telephone conversation with victim just before murder, where friend asked victim who was with her, even if trial court concluded victim's statement was not spontaneous).

People v. Alvarez (1996) 14 Cal. 4th 155, 58 Cal. Rptr. 2d 385, 926 P.2d 365 (admission of homicide victim's statements under Section 1240 did not violate defendant's *Sixth Amendment* right of confrontation).

People v. Pedroza (2007) 147 Cal. App. 4th 784, 54 Cal. Rptr. 3d 636 (statements by victim that defendant threw gas on her and burned her were spontaneous statements even though provided in response to police questioning. Police questioning began minutes after the injuries had occurred and although one officer spoke with the victim for five minutes and asked questions, the officer did so because the victim was having trouble providing more than one word answers. Also, she was moaning in pain and shaking, asking the officer how she looked and asking the officer to hold her hand. The admission did not violate defendant's *Sixth Amendment* right to confrontation because the victim's

statements were neither testimonial nor the product of a formal police interrogation. The officers encountered the victim during an ongoing emergency, and their conversations with her were brief).

People v. Ramirez (2006) 143 Cal. App. 4th 1512, 50 Cal. Rptr. 3d 110, review denied (trial court erred in admitting victim's statements under the hearsay exception for spontaneous statements where the evidence showed that the victim not only had the opportunity to engage in a deliberative process during the time that elapsed between the startling event and the time the statements at issue were made, but that she actually did so; however, the admission of the statements was harmless error since victim's statements were cumulative of other evidence and there was a great deal of other physical evidence of rape).

People v. Smith (2006) 135 Cal. App. 4th 914, 38 Cal. Rptr. 3d 1 (defendant's statements were admissible against a co-defendant under the Section 1240's spontaneous statement exception; witness testified that defendant was very "distracted" and "very anxious" when he made the incriminating statements, which sufficiently established that he was speaking under the stress of excitement, even though three to six hours may have passed since the crime).

Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (appeal of consolidated civil actions against O. J. Simpson for wrongful deaths of Nicole Brown Simpson and Ronald Goldman; statements by defendant's ex-wife to police officers who responded in prior instances of alleged abuse were admissible under Section 1240, spontaneous statement hearsay exception; statements; ex-wife's statements which referred to defendant's past physical and verbal abuse and his threats to kill her were not hearsay because admitted for limited purpose of explaining victim's state of mind in terminating their relationship and allegedly provoking defendant to kill her; testimony given by police detective Mark Fuhrman in defendant's prior criminal trial was not admissible against plaintiffs under Section 1292, the former testimony exception to the hearsay rule, because plaintiffs had no opportunity to cross-examine Fuhrman--prosecution's direct examination of Fuhrman did not satisfy this requirement for admissibility of former testimony).

People v. Trimble (1992) 5 Cal. App. 4th 1225, 7 Cal. Rptr. 2d 450 (for Section 1240 to apply, there must be some occurrence startling enough to produce this nervous excitement and render utterance spontaneous and unreflecting, utterance must have been before there has been time to contrive and misrepresent, *i.e.*, while nervous excitement may be supposed still to dominate and reflective powers to be yet in abeyance, and utterance must relate to circumstance of occurrence preceding it).

People v. Anthony O. (1992) 5 Cal. App. 4th 428, 6 Cal. Rptr. 2d 794 (for evidence to be admissible under excited utterance exception to hearsay rule, it must be proven by preponderance of evidence that declarant perceived event described by statement; in making its factual determination, trial court exercises discretion).

People v. Anthony O. (1992) 5 Cal. App. 4th 428, 6 Cal. Rptr. 2d 794 (declarant need not be identified for statement to be admissible under excited utterance exception to hearsay rule).

Requirement of Spontaneity

People v. Arias (1996) 13 Cal. 4th 92, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (if hearsay statement meets requirements of spontaneity and lack of opportunity for reflection, it does not become inadmissible because declarant failed to mention, recall, or confirm it on later or calmer occasions).

People v. Raley (1992) 2 Cal. 4th 870, 8 Cal. Rptr. 2d 678, 830 P.2d 712 (fact that victim's statements occurred several hours after sexual assault did not preclude their admission as spontaneous utterances where the victim had been bleeding for 18 hours, had suffered traumatic head injury, was not far from death, may have been unconscious for part of the intervening period, and made the statements after hearing strangers express their view of the sexual nature of the attack on her).

People v. Farmer (1989) 47 Cal. 3d 888, 254 Cal. Rptr. 508, 765 P.2d 940 (detailed questioning is likely to deprive response of spontaneity required for statements to come within spontaneous statement exception to hearsay rule).

In re Daniel Z. (1992) 10 Cal. App. 4th 1009, 13 Cal. Rptr. 2d 139 (fact that statement was made in response to questioning does not render statement nonspontaneous, within meaning of exception to hearsay rule, if questioning was simple and nonsuggestive).

People v. Trimble (1992) 5 Cal. App. 4th 1225, 7 Cal. Rptr. 2d 450 (child's assertion that father had murdered mother was admissible under spontaneous declaration exception to hearsay rule--though made two days after alleged crime, child had been sequestered at home in the interim and became hysterical and commenced her frantic description of events to relative at first opportunity out of father's presence).

People v. Pearch (1991) 229 Cal. App. 3d 1282, 280 Cal. Rptr. 584 (murder victim's statements to brother over telephone that he was being hurt was not admissible under spontaneous declarations exception to hearsay rule; trial court was unable to identify event victim was describing or when it occurred, and while evidence indicated that victim may have been nervous, it did not show that he was still under influence of event at time of phone call).

People v. Francis (1982) 129 Cal. App. 3d 241, 180 Cal. Rptr. 873 (fact that declarations were made in a calm manner did not necessarily indicate a lack of spontaneity).



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1-1241 California Evidence Courtroom Manual Scope

Scope Contemporaneous Statement

§ 1241 reads as follows:

Rule 1241 Contemporaneous Statement

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

- (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and
- (b) Was made while the declarant was engaged in such conduct.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1240 (spontaneous statements) and Section 1241 (contemporaneous statements) both have their roots in the common law "res gestae" hearsay exception. The "res gestae" exception defies accurate explanation, as it was loosely used to admit many different kinds of statements explaining or describing an event or transaction.

Section 1241 excepts from the hearsay rule statements about the declarant's conduct while the declarant is engaged in that conduct. In contrast to Section 1240, where the reliability of the statement is based on the declarant's inability to be insincere while in a state of stress or excitement, Section 1241 permits statements because they are viewed as reliable if made contemporaneously with the conduct that is being qualified, explained or made comprehensible. Under Section 1241, the declarant may be quite calm and collected while making the statement.

Section 1241 should not be confused with the federal exception to the hearsay rule for present sense impressions. The California Law Revision Commission recommended that the Legislature adopt an exception for present sense impressions, but the Legislature did not do so. *See* 6 Cal. L. Rev. Comm. Rep. 471 (1964).

Section 1241 is intended to allow statements that would clarify the verbal acts of the declarant. For example, where the declarant announces while presenting another with a painting, "this is a gift," the declarant's statement may be used to prove that the painting was a gift and was not simply on loan to the recipient. However, such statements would not even be considered hearsay by many commentators, since they do not depend for their probative value on their truth or falsity; the words themselves have independent legal significance. However, at least one California court has treated Section 1241 as substantially similar to Federal Rule of *Evidence* 803(1), the present sense impression exception. *See People v. Marchialette* (1975) 45 Cal. App. 3d 974, 119 Cal. Rptr. 816 (statements overheard by witness during telephone conversation with victim that described conduct of declarant while declarant was engaged in that conduct).



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 803(1)* encompasses the exception for present sense impressions, which, as explained above, was not adopted by the California Legislature. Professor Miguel Mendez explains the distinction as follows: "the [California] Code looks inwardly, creating an exception for statements reflecting the declarant's state of mind regarding his own conduct. The [Federal] Rules focus outwardly, providing an exception for statements by the declarant describing external phenomena." Miguel Mendez, *Evidence: The California Code and the Federal Rules, A Problem Approach* § 9.06, at 196-197. He notes that Federal Rule of *Evidence 803(1)* is more analogous to Section 1240, the California exception for spontaneous declarations.

Nevertheless, statements that would be admissible under Section 1241 would also be admissible under Federal Rule of *Evidence 803(1)*, as those statements would be made while the conduct of the declarant was being perceived and would explain or describe the declarant's conduct.



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People v. Hines (1997) 15 Cal. 4th 997, 64 Cal. Rptr. 2d 594, 938 P.2d 494 (trial court did not violate *confrontation clause* by admitting testimony of friend of murder victim regarding telephone conversation with victim just before murder, where friend asked victim who was with her, even if trial court concluded victim's statement was not admissible under Section 1241; statement would be admissible as "present sense impression" under federal law and law of majority of states and is thus firmly rooted).

People v. Marchialette (1975) 45 Cal. App. 3d 974, 119 Cal. Rptr. 816 (statements overheard by witness during telephone conversation with victim at time of shooting constituted verbal acts which explain, qualify or make understandable the conduct of the declarant and were made while the declarant was engaged in such conduct and were admissible in murder prosecution).

People v. Cruz (1968) 264 Cal. App. 2d 350, 70 Cal. Rptr. 603 (for evidence to be admissible as part of a verbal act and therefore come within an exception to hearsay rule, words must accompany the conduct. Exculpatory taped interview made to police after victim had been found dead in defendant's apartment and after defendant had told his caretaker to call police did not accompany the conduct and was not admissible as part of a verbal act).



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1-1242 California Evidence Courtroom Manual Scope

Scope Dying Declaration

§ 1242 reads as follows:

Rule 1242 Dying Declaration

Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

The exception contained in Section 1242 is traditionally known as the "dying declaration." The exception for deathbed statements, which developed in the common law well before the development of the hearsay system, originally derived its assumed guarantee of trustworthiness from the religious belief that no person would purposefully meet his maker with a lie on his lips. In the more secular world, however, this rationale for the exception has largely been supplanted by the theory that the powerful psychological forces bearing on the declarant at the moment of death engender an impulse to speak truthfully.

Section 1242 provides that before a dying declaration may be admitted, foundational evidence must be established that the declarant possessed a subjective belief in the certainty of death. There is no standard rule here as to the adequacy of the foundation, and the requisite consciousness of death may be obtained from many sources, including: the declarant's own words; the opinions of the attending physicians; the nature and extent of the declarant's wounds or illness; the fact that the declarant received last rites; the statements made to the declarant about his or her condition, and any other similar circumstantial factual source.

Section 1242 requires that the statement concern the cause or circumstances of what the declarant believed to be impending death.



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2 COMPARISON TO FEDERAL RULE

The clearest difference between the federal and California approaches to dying declarations is that Federal Rule of *Evidence* 804(b)(2) is restricted in its use to criminal homicide cases and civil cases. In California, dying declarations may be used in any type of criminal or civil case. A second difference is less obvious. Federal Rule of *Evidence* 804(b)(2) requires that the declarant be unavailable under Rule 804(a). Death is the most likely ground of unavailability in this situation (Rule 804(a)(4)), but the declarant need not have died as long as the declarant was under a belief of impending death at the time the statement was made and is now unavailable under any of the grounds in 804(a). The California rule is unclear as to whether the declarant need be dead. The rule speaks of "a dying person" and "his death," suggesting that the individual is now dead. But the rule does not expressly require that the declarant be dead, or unavailable on any other grounds. The drafters of the California rule did impose the unavailability requirement in some cases. *See, e.g., Section 1230* (declarations against interest), *Section 1251* (statement of declarant's previously existing state of mind). In most cases, this issue will not present a problem, since the declarant will be dead. However, where the declarant is not dead or otherwise unavailable, the better view is to make the exception inapplicable, as the reliability rationale for the exception is quite suspect and the need for the statements (because of the declarant's unavailability) has been the primary ground for admitting them.



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People v. Sims (1993) 5 Cal. 4th 405, 20 Cal. Rptr. 2d 537, 853 P.2d 992 (chief condition and characteristic of dying declaration within exception to hearsay rule is sense of immediately impending death, which may be shown by declarant's own statements to that effect, or inferred from circumstances such as declarant's physical condition, extent of his injuries, his knowledge of his condition, and other statements).

People v. Mayo (2006) 140 Cal. App. 4th 535, 44 Cal. Rptr. 3d 497 (a declarant's knowledge of his or her impending death, for purposes of Section 1242's dying declaration exception, need not be established by direct evidence, but may be proved by all the circumstances, including the declarant's physical condition, the nature and seriousness of his or her wounds, the declarant's knowledge of his or her grave condition or other circumstances of the case; here, there was abundant circumstantial evidence to that effect that declarant realized his grave condition where declarant was shot multiple times from close range, suffering 11 gunshot wounds to his back, arms, legs, and hips, two of which proved fatal, and declarant asked whether he had been shot in the head).

People v. Adams (1990) 216 Cal. App. 3d 1431, 265 Cal. Rptr. 568 (fact that victim's statements implicating defendant in shooting were made after victim chose to die rather than accept life support treatment did not render declarations untrustworthy and thus did not violate defendant's right to confrontation; decision to reject life support was not product of state of mind unlikely to produce trustworthy declarations, and victim made statements with sense of impending death).

People v. Bagwell (1974) 38 Cal. App. 3d 127, 113 Cal. Rptr. 122 (whether declarations were made under sense of immediately impending death must be determined preliminarily by trial court and ruling will not be disturbed unless there has been apparent abuse of discretion).

People v. Taylor (1881) 59 Cal. 640 (deceased's declarations speculating as to motive for defendant to kill him are inadmissible opinion).



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Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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§ 1250.syn Synopsis to Chapter 1250: Statement of Declarant's Then Existing State of Mind

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SECTION 1250 Statement of Declarant's Then Existing State of Mind

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Scope Statement of Declarant's Then Existing State of Mind

§ 1250 reads as follows:

Rule 1250 Statement of Declarant's Then Existing State of Mind

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

- (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
- (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1250 Statement of Declarant's Then Existing State of Mind

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1 ANALYSIS

Sections 1250, 1251 and 1253 provide for the admissibility of certain statements made by the declarant concerning his or her state of mind. Each section must be read along with Section 1252, which expressly provides for exclusion of a statement of the declarant's state of mind where circumstances indicate untrustworthiness.

Section 1250 provides for the admissibility of statements of state of mind, emotions, sensations, or physical condition or the evidence is offered to prove or explain acts or conduct of the declarant. The out-of-court statement must refer to then existing subjective qualities of the declarant.

An out-of-court statement that looks forward to some act and expresses an intent or plan to do some act in the future is admissible under Section 1250. Intent is considered to be a mental condition under the exception; thus, the statement, "I intend to go to Boston," would be comprehended by the exception. The rule does not include statements of memory or belief when such statements are used to prove the fact believed. For example, the statement, "I felt ill yesterday," would not qualify under Section 1250.

Illustration

The following statements, if relevant, would generally satisfy Section 1250, depending upon the context in which the out-of-court statement is made:

I am ill.

I am tired.

I have a pain in my chest.

I feel dizzy.

I am afraid.

I like Norb.

I am depressed.

I am happy.

I plan to sell my house.

I don't plan to go on any trips this year.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 803(3)* is similar to Section 1250, but differs in two key respects. First, Federal Rule of *Evidence 803(3)* does not include language permitting statements of then existing state of mind offered to prove or explain acts or conduct of the declarant. Second, Federal Rule of *Evidence 803(3)* includes language that provides that out-of-court statements relating to the execution, revocation, identification, or terms of the declarant's will are admissible. Such statements of belief must be made by the testator in regard to his own will. This language, however, is comparable to California Section 1260, discussed below.



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3 SIGNIFICANT CASES

In General

People v. Jablonski (2006) 37 Cal. 4th 774, 38 Cal. Rptr. 3d 98, 126 P.3d 938 (victim's out-of-court statements expressing fear of defendant were not admissible to show victim's state of mind under Section 1250, because victim's fear was not in dispute and thus was irrelevant; victim's statements were admissible as nonhearsay to show effect on defendant--to help explain defendant's premeditation).

People v. Majors (1998) 18 Cal. 4th 385, 75 Cal. Rptr. 2d 684, 956 P.2d 1137 (exception to hearsay rule for statements of current state of mind is sufficiently well-recognized so that admission of statements does not violate the *Confrontation Clause*).

People v. Ortiz (1995) 38 Cal. App. 4th 377, 44 Cal. Rptr. 2d 914 (evidence admitted under "then existing state of mind, emotion, or physical sensation" rule is hearsay; it describes mental or physical condition, intent, plan, or motive and is received for truth of matter stated).

People v. Ortiz (1995) 38 Cal. App. 4th 377, 44 Cal. Rptr. 2d 914 (statement which does not directly declare then existing mental state, but is merely circumstantial evidence of that state of mind is not hearsay; it is not received for truth of matter stated, but rather, whether statement is true or not, fact that such statement was made is relevant to determination of declarant's state of mind).

People v. Sword (1994) 29 Cal. App. 4th 614, 34 Cal. Rptr. 2d 810, cert. denied (Section 1250 provided basis for admissibility of certain parts of hospital records).

In re Kailee B. (1993) 18 Cal. App. 4th 719, 22 Cal. Rptr. 2d 485 (child's statement to her aunt and pediatrician about vaginal soreness was admissible under Section 1250).

Examples of Statements Made Under State of Mind Exception --Attitude Toward a Party

People v. Cage (2007) 40 Cal. 4th 965, 56 Cal. Rptr. 3d 789, 155 P.3d 205, cert. denied, 128 S. Ct. 612, 169 L. Ed. 2d 395 (2007) (holding that to admit a rape victim's statement that she preferred African-American men as sexual partners was not error and was properly admitted under Cal. Evid. Code, § 1250, to show that she would not have consented to sexual relations with defendant, who was Caucasian).

People v. Melton (1988) 44 Cal. 3d 713, 244 Cal. Rptr. 867, 750 P.2d 741 (even if murder victim's notebook and calendar entries, showing appointment with defendant, were hearsay, they were admissible to show victim's state of mind, i.e., that victim knew defendant and expected visit from defendant on day he died).

People v. Ortiz (1995) 38 Cal. App. 4th 377, 44 Cal. Rptr. 2d 914 (evidence of victim's general fear or dislike of defendant is not relevant in murder prosecution unless victim's state of mind has been placed in issue).

People v. Peguese (1980) 102 Cal. App. 3d 415, 162 Cal. Rptr. 510 (statement made by defendant to a police officer a few hours before attack on rape victim, indicating frustration in defendant's repeated attempts to find female companionship, was not excludable as hearsay but was admissible as a statement of the then existing state of mind of the declarant to prove or explain acts or conduct of the declarant).

--Statement of Past Events

People v. Jackson (1989) 49 Cal. 3d 1170, 264 Cal. Rptr. 852, 783 P.2d 211, cert. denied, 498 U.S. 881 (statements which defendant made to detective on evening of killing and on noon of following day indicating his recall of shooting of police officer did not constitute inadmissible hearsay inasmuch as statements were not offered for truth of matter asserted but offered as circumstantial evidence of fact that defendant had memory of shooting).

People v. Lee (1990) 219 Cal. App. 3d 829, 268 Cal. Rptr. 595, review denied (testimony concerning content of ship's log was not admissible under state of mind exception to hearsay rule; log entry reflected witness's state of mind only in sense that any statement of past event is statement of declarant's then existing state of mind).

--Statements of Intent

People v. Majors (1998) 18 Cal. 4th 385, 75 Cal. Rptr. 2d 684, 956 P.2d 1137 (victim's statement, made the night he was murdered, that he was expecting to make a drug deal at his house with people from Arizona later that night was admissible under the state of mind exception to the hearsay rule; although statement did not specifically name defendant, a resident of Arizona, there were ample corroborating circumstances).

People v. Jones (1996) 13 Cal. 4th 535, 54 Cal. Rptr. 2d 42, 917 P.2d 1165 (murder victim's statement to her daughter that victim was going with defendant to another city).

People v. Sanders (1995) 11 Cal. 4th 475, 46 Cal. Rptr. 2d 751, 905 P.2d 420, cert. denied (evidence of accomplice's statement to witness in which she asked if he wanted to join in robbery of restaurant was admissible for nonhearsay purpose of establishing accomplice's state of mind and her intention to form a conspiracy to rob the restaurant, which was relevant to issue of whether she subsequently entered into conspiracy with defendant to commit robbery).

People v. Alcalde (1944) 24 Cal. 2d 177, 148 P.2d 627 (decendent's declaration of intent to do a particular thing, from which an inference that thing was done might fairly be drawn, where declaration possesses a high degree of trustworthiness, is admissible as an exception to hearsay rule to prove truth of its contents).

People v. Romero (2007) 149 Cal. App. 4th 29, 56 Cal. Rptr. 3d 678, modified and reh'g denied, 2007 Cal. App.

LEXIS 603 (April 18, 2007) , review denied (statements in which the victim accused the defendant of being jealous and threatening to kill the victim if appellant ever found the victim with another man, are admissible against the appellant if the statements were relevant for showing the victim's state of mind).

Smith v. Slifer (1969) 1 Cal. App. 3d 748, 81 Cal. Rptr. 871 (statement of declarant which shows intention to do act, if statement also shows reason for which declarant intended to do act, and reason is material to case, is admissible in support of inference that he did act for that reason).



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1-1251 California Evidence Courtroom Manual 1251.syn

§ 1251.syn Synopsis to Chapter 1251: Statement of Declarant's Previously Existing State of Mind

Scope Statement of Declarant's Previously Existing State of Mind

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1-1251 California Evidence Courtroom Manual Scope

Scope Statement of Declarant's Previously Existing State of Mind

§ 1251 reads as follows:

Rule 1251 Statement of Declarant's Previously Existing State of Mind

Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:

- (a) The declarant is unavailable as a witness; and
- (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1251 is a fairly narrow hearsay exception; to apply it liberally would be to undercut Section 1250's exclusion of statements of memory or belief when offered to prove the fact remembered or believed. "Backward-looking" statements raise all of the hearsay dangers--memory, perception, communicative ambiguity and insincerity; statements of present state of mind (including statements of intent) arguably raise only the danger of insincerity. Nevertheless, in a small number of cases, Section 1251 permits statements of past state of mind.

Section 1251 is limited in application in two ways. First, the declarant must be unavailable. Second, the past state of mind must be in issue under the substantive law. For example, if the law in a wrongful death action makes the feelings of the deceased spouse toward the living spouse an issue of consequence, the decedent's statement "I did not love my wife" would be admissible under Section 1251 because the state of mind of the declarant is in issue and the declarant is unavailable.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1251.



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3 SIGNIFICANT CASES

Kelly v. Bank of America Nat'l Trust & Savings Assn. (1952) 112 Cal. App. 2d 388, 246 P.2d 92 (where intent is a material element of disputed fact, declarations of decedent made after, as well as before, alleged act, which indicate intent with which decedent performed the act, are admissible in evidence as exception to hearsay rule, and it is immaterial that such declarations are self-serving).



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SECTION 1252 Restriction on Admissibility of Statement of Mental or Physical State

1-1252 California Evidence Courtroom Manual 1252.syn

§ 1252.syn Synopsis to Chapter 1252: Restriction on Admissibility of Statement of Mental or Physical State

Scope Restriction on Admissibility of Statement of Mental or Physical State

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1-1252 California Evidence Courtroom Manual Scope

Scope Restriction on Admissibility of Statement of Mental or Physical State

§ 1252 reads as follows:

Rule 1252 Restriction on Admissibility of Statement of Mental or Physical State

Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1252 provides express recognition of the slim reliability rationale for statements of the declarant's state of mind. While such statements are undoubtedly necessary in many cases, the presence of virtually all of the hearsay dangers makes them suspect. Section 1252 provides a specific basis for excluding the statements (rather than relying on the more general provision of Section 352) when the surrounding circumstances suggest the statements' lack of trustworthiness.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1252.



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3 SIGNIFICANT CASES

People v. Jones (1996) 13 Cal. 4th 535, 54 Cal. Rptr. 2d 42, 917 P.2d 1165 (although defendant contended that declarant's statement was not trustworthy because she was a prostitute who went out at night and did inform her daughters of her whereabouts, the trial court properly found that her statements were trustworthy where they were made in a natural manner and not under circumstances of suspicion).

People v. Karis (1988) 46 Cal. 3d 612, 250 Cal. Rptr. 659, 758 P.2d 1189 (defendant's statement to witness, that he would not hesitate to eliminate witnesses if he committed a crime, was not made under circumstances suggesting that statement was untrustworthy, for purposes of exception to hearsay rule; statement was made during conversation with friend whom he often visited, in home of the friend on occasion of purely social visit).

People v. Thompson (1988) 45 Cal. 3d 86, 246 Cal. Rptr. 245, 753 P.2d 37 (victim's statement concerning her fear that defendant might kill her was not made under circumstances suggesting motive to fabricate, such that statement would remain inadmissible despite hearsay exception for statement of mental or physical condition; victim's statements did not purport to narrate past conduct and there was no obvious reason for her to manufacture expression of fear she did not feel).

People v. Romero (2007) 149 Cal. App. 4th 29, 56 Cal. Rptr. 3d 678, modified and reh'g denied, 2007 Cal. App. LEXIS 603 (April 18, 2007), review denied (statements that are entirely spontaneous and made in the company of someone whom the speaker trusts and is comfortable with, appear to be trustworthy).



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SECTION 1253 Statements for Medical Diagnosis or Treatment of Child Abuse

1-1253 California Evidence Courtroom Manual 1253.syn

§ 1253.syn Synopsis to Chapter 1253: Statements for Medical Diagnosis or Treatment of Child Abuse

Scope Statements for Medical Diagnosis or Treatment of Child Abuse

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Scope Statements for Medical Diagnosis or Treatment of Child Abuse

§ 1253 reads as follows:

Rule 1253 Statements for Medical Diagnosis or Treatment of Child Abuse

Subject to Section 1252, evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. This section applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect. "Child abuse" and "child neglect," for purposes of this section, have the meanings provided in subdivision (c) of Section 1360. In addition, "child abuse" means any act proscribed by Chapter 5 (commencing with *Section 281*) of *Title 9 of Part 1 of the Penal Code* committed against a minor.

(Added by Stats. 1995, ch. 87 (A.B. 355), § 2)

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SECTION 1253 Statements for Medical Diagnosis or Treatment of Child Abuse

*1-1253 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 1253 is an effort to permit some statements made by children admissible in child abuse cases, in which proof problems abound. Section 1253 provides for the admissibility of certain statements made in subjective contemplation of medical treatment or diagnosis in certain child abuse or neglect cases. For the section to apply, the statement must have been made by a child who was under the age of 12 at the time the statement was made and is still a minor at the time of the proceedings regarding the child abuse or neglect.

The statement usually will be made to a physician, but the out-of-court statement may be made to someone other than a physician where the out-of-court declarant subjectively believes that he or she is making the statement in contemplation of receiving treatment or diagnosis. For example, the statement could be made to a nurse or to a member of the declarant's family. The subjective contemplation of treatment or diagnosis is the significant foundational requirement which must be established to utilize the exception.

Section 1253 conditions admissibility of statements upon the objective standard that such hearsay declarations must be "reasonably pertinent" to the treatment or diagnosis sought. The exception consequently operates as a vehicle for the admission of statements of medical history, past and present symptoms and conditions, past and present pain or sensations, the inception or cause of the medical condition or illness and the external source, if any, of the medical condition, injury or illness. The fact that a doctor solicited or took the information should be sufficient evidence that the statement is reasonably pertinent to diagnosis or treatment. Nevertheless, the requirement of pertinency to diagnosis and treatment does, of course, impose a real limitation in certain cases. Statements concerning fault or guilt are not reasonably pertinent to diagnosis or treatment.

Constitutional Considerations

In *White v. Illinois* (1992) 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848, the United States Supreme Court held that the *Confrontation Clause* does not require, before a trial court admits testimony under the medical diagnosis exception to the hearsay rule, that the prosecution must produce the declarant at trial or show that the declarant is unavailable. The Court reasoned that while *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597, 17 Ohio Op. 3d 240, contains language that seems to suggest that the *Confrontation Clause* creates a general requirement that a declarant be produced at trial or be

found unavailable before his or her out-of-court statements may be introduced into evidence, such an expansive reading of *Roberts* is precluded by the United States Supreme Court decision in *United States v. Inadi* (1986) 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 .

The distinction between declarations by the patient for purposes of treatment or for purposes of diagnosis has been abandoned. This exception may be invoked even as to statements made for purposes of medical evaluation in preparation for trial.



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2 COMPARISON TO FEDERAL RULE

Section 1253 is patterned after the more general provision of Federal Rule of *Evidence 803(4)*. However, Federal Rule of *Evidence 803(4)* is not limited to cases of child abuse or neglect, where the victim is a minor at the time of the proceedings, and the victim was under the age of 12 at the time the statement was made.



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3 SIGNIFICANT CASES

People v. Sisavath (2004) 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753 , *reh'g denied*, *review denied* (four of defendant's abuse convictions are reversed due to the admission of "testimonial" hearsay statements against a criminal defendant, including statements of victim during interview with a "forensic interview specialist" at a facility specially designed and staffed for interviewing children suspected of being victims of abuse; Court of Appeals did not hold that all statements arising from such interviews are inadmissible, but here interview was held after formal prosecution of defendant had been initiated; such statements violate the *Confrontation Clause* of the *Sixth Amendment* if the declarant is unavailable to testify at trial and the defendant has no previous opportunity to cross-examine).



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1-1 California Evidence Courtroom Manual Scope

Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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SECTION 1260 Statement Regarding Declarant's Will

1-1260 California Evidence Courtroom Manual 1260.syn

§ 1260.syn Synopsis to Chapter 1260: Statement Regarding Declarant's Will

Scope Statement Regarding Declarant's Will

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SECTION 1260 Statement Regarding Declarant's Will

1-1260 California Evidence Courtroom Manual Scope

Scope Statement Regarding Declarant's Will

§ 1260 reads as follows:

Rule 1260 Statement Regarding Declarant's Will

(a) Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1260 Statement Regarding Declarant's Will

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1 ANALYSIS

Section 1260 is a necessity-driven exception to the hearsay rule. Where wills are concerned, the declarant is undoubtedly unavailable by death, since a will only becomes legally significant upon the testator/declarant's death. Section 1260 contains its own exclusionary provision where the circumstances surrounding the making of the statement suggest its untrustworthiness.



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SECTION 1260 Statement Regarding Declarant's Will

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2 COMPARISON TO FEDERAL RULE

Section 1260 is comparable to last sentence of 803(3), which provides that out-of-court statements relating to the execution, revocation, identification, or terms of the declarant's will are admissible. Such statements of belief must be made by the testator in regard to his own will. Federal Rule of *Evidence* 803(3) does not expressly require unavailability while Section 1260 does; however, it is difficult to imagine how statements pertaining to a declarant's will could be relevant if the declarant were not unavailable through death.



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3 SIGNIFICANT CASES

Estate of Thompson (1941) 44 Cal. App. 2d 774, 112 P.2d 937 (in proceeding for probate of lost or destroyed will, testatrix' declarations were admissible on the issue of revocation).



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CHAPTER 2 EXCEPTIONS TO THE HEARSAY RULE
ARTICLE 6 STATEMENTS RELATING TO WILLS AND TO CLAIMS AGAINST ESTATES
SECTION 1261 Statement of Decedent in Action Against Declarant's Estate

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§ 1261.syn Synopsis to Chapter 1261: Statement of Decedent in Action Against Declarant's Estate

Scope Statement of Decedent in Action Against Declarant's Estate

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1-1261 California Evidence Courtroom Manual Scope

Scope Statement of Decedent in Action Against Declarant's Estate

§ 1261 reads as follows:

Rule 1261 Statement of Decedent in Action Against Declarant's Estate

(a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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1 ANALYSIS

Section 1261 is a necessity-driven exception to the hearsay rule. Where there is a claim against the decedent's estate, it seems only fair that the decedent, who in all likelihood (and as a requirement of the exception) had knowledge of the matter, be allowed to defend him or herself through out-of-court statements.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1261.



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3 SIGNIFICANT CASES

In re Estate of Luke (1987) 194 Cal. App. 3d 1006, 240 Cal. Rptr. 84 (affidavit of intestate surviving spouse in which intestate claimed savings bonds and time certificates were his separate property traceable to funds he received 40 years ago from sale of business he owned prior to marrying his predeceased spouse lacked safeguard that it be made at time when matter had recently been perceived by declarant, and while his recollection was clear, and thus statement was inadmissible under hearsay rule).

People v. Witt (1975) 53 Cal. App. 3d 154, 125 Cal. Rptr. 653 (witness's testimony as to telephone conversation wherein testatrix, prior to her death, stated that she "thought a lot" of defendant who was named beneficiary and who was charged with conspiracy to defraud her estate and that defendant had rendered her services went to prove truth of matters stated therein and was inadmissible hearsay).

Manti v. Gunari (1970) 5 Cal. App. 3d 442, 85 Cal. Rptr. 366 (under this section relating to admissibility of evidence of statement offered in an action upon claim or demand against estate of declarant, decedent's statement that he wanted name of another on his bank account because decedent was soon going to die and wanted to give money to such other person was properly received in action by heir at law, legatee and executor against such other person named on account).



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Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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§ 1270.syn Synopsis to Chapter 1270: Definition of a Business

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Scope Definition of a Business

§ 1270 reads as follows:

Rule 1270 Definition of a Business

As used in this article, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1270 adopted and built upon the approach of the Uniform Business Records as Evidence Act, liberally defining a "business" for purposes of excepting business records from the prohibition on hearsay. The definition encompasses not only business entities, but also associations, clubs, or other organizations, whether for profit or not for profit. Such a broad definition promotes the purpose of the exception, to streamline the admission of documents that are otherwise reliable and authenticated.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 803(6) defines a "business" as broadly as Section 1270.



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3 SIGNIFICANT CASES

Nichols v. McCoy (1952) 38 Cal. 2d 447, 240 P.2d 569 (coroner's office records were admissible under the Uniform Business Records as Evidence Act).

Fox v. San Francisco Unified Sch. Dist. (1952) 111 Cal. App. 2d 885, 245 P.2d 603 (government reports were admissible under the Uniform Business Records as Evidence Act when other elements of the statutes were shown).



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Scope Admissible Writings

§ 1271 reads as follows:

Rule 1271 Admissible Writings

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of a business;
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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*1-1271 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 1271 provides for the admissibility of "business" records over a hearsay objection, a "business" being defined under Section 1270. The rationale for this exception is two-fold. First, records that a business makes and relies upon are likely to be reliable in that the business would suffer if such documents were inaccurate. The true rationale, however, is one of necessity; this exception avoids the problem of bringing in to court all the individuals who have contributed to the making of a routine business document.

Laying the Foundation for Business Records

In order for an out-of-court statement to be admitted under this exception, there must be a writing. As a general proposition, an oral business record does not qualify under this exception. In order to establish the proper foundation for the admission of a business record, an appropriate foundation witness must be used. Generally, the foundation witness is a custodian or records librarian, but any witness with the requisite firsthand knowledge of the business's record-keeping procedures may qualify. Note that Sections 1560-1562 provide a method whereby a custodian's in-court testimony may be rendered unnecessary; this procedure applies where the business responds to a subpoena duces tecum, the custodian provides a sufficient affidavit under Section 1561, and the business is neither a party nor the place where a cause of action is alleged to have arisen.

Where a custodian or other qualified witness's testimony is necessary, the foundation witness testifies that the record in question was prepared by an employee of the business in question who had a duty to report the information. The foundation witness further testifies that the person preparing the record or contributing information to the record had personal knowledge of the facts or events reported. Although Section 1271 does not specifically require this "first-hand" knowledge, prudent counsel will provide such foundation as courts have excluded evidence under Section 1271(d) when the source appeared to lack personal knowledge of the information transmitted. 1 Jefferson, California Evidence Benchbook § 4.1, at 211-12. The foundation witness must also testify that the report was prepared at or near the time of the event that is recorded. Finally, the proponent should make some effort to show that the sources and method of preparation were such as to indicate the document's trustworthiness. Counsel should elicit information from the custodian about the business's own reliance on this type of record, and, if it can be shown, the routine quality of the document--that it was not generated specifically for this litigation.

It is important to recognize that the preparer of the document must have had a business duty to report the information, and must have relied upon reports made to the preparer by persons who also have a business duty to report the information. A business document which records information that is not within the personal knowledge of individuals with a business duty to report the information is not admissible under this exception as to the information provided by third persons.

Application Problems

Business records commonly present problems of multiple hearsay. Quite frequently, business records contain statements of persons who are not employees of the business which keeps the record and who do not have a business duty to report accurately to that business. Such third party statements recorded in business records are not covered by this particular exception, whereas all statements of persons who have a business duty to report to the business which keeps the records are encompassed by the exception. Statements in a business record are admissible where they satisfy the multiple hearsay requirements of Section 1201. Under Section 1201, each out-of-court statement must have an independent basis of admissibility, whether a non-hearsay argument, a hearsay exception or some other statutory or constitutional basis.

A "non-doctrine" of evidence on occasion has been invoked with respect to business records known as "self-serving declarations." What is usually involved in such cases is that the record contains multiple hearsay components, some of which do not comply with the requisite of any hearsay exception. It is well established that a statement of account may constitute a valid "business record" exception even though it is "self-serving" to the side offering it. However, an opponent of a business record may seek to exclude the record because it was a document prepared in contemplation of litigation. The operative language in Section 1271 is the foundational requirement that "The sources of information and method and time of preparation were such as to indicate its trustworthiness." Even though complying with all the parameters of the business records exception, documents prepared for use in litigation are excludable within the discretion of the trial judge. The case of *Palmer v. Hoffman* (1943) 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645, held that such litigation-oriented documents are not prepared in the "regular course of business."



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 803(6)* differs from California Section 1271 in several key respects. First, the rules differ in basic thrust: the Federal Rule treats business records as presumptively reliable, unless shown to be untrustworthy; in contrast, Section 1271 requires the proponent to provide a showing of trustworthiness as part of the foundation for admitting a business record. Second, under the Federal Rule, the foundation witness must have first-hand knowledge of the method by which the business in question prepares, stores and maintains its records. This requirement is absent from Section 1271, although prudent counsel will seek a foundation witness who does have such first-hand knowledge, as a witness with first-hand knowledge tends to be more credible, and thus, the proponent may have an easier time establishing the other foundational requirements, including the trustworthiness of the document. Federal Rule of *Evidence 803(6)* was amended, effective December 1, 2000, to permit the foundation to be provided by a qualified witness or by certification under new 902(11) or 902(12) or a statute permitting certification. Third, statements of opinions or diagnoses are admissible under Federal Rule of *Evidence 803(6)*, but are not admissible under Section 1271; California courts are likely only to admit the results of the most routine tests. 1 Jefferson, California Evidence Benchbook § 4.2, at 233-34. Finally, while the Federal Rule requires a showing that "it is the regular practice or custom of the business in question to make and retain the type of record involved," Section 1271 does not explicitly require that the document be created on a regular basis--theoretically, even a document created only once can qualify for the exception. However, a showing of regularity will help to show the trustworthiness of the document, required under Section 1271; prudent counsel will provide such foundation where possible.



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3 SIGNIFICANT CASES

In General

People v. Beeler (1995) 9 Cal. 4th 953, 39 Cal. Rptr. 2d 607, 891 P.2d 153, cert. denied, 516 U.S. 1053 (proponent of admission of evidence as business record has burden of establishing trustworthiness).

People v. Beeler (1995) 9 Cal. 4th 953, 39 Cal. Rptr. 2d 607, 891 P.2d 153, cert. denied, 516 U.S. 1053 (the business records exception to the hearsay rule is a firmly rooted exception, the use of which does not violate a defendant's constitutional right of confrontation).

People v. Diaz (1992) 3 Cal. 4th 495, 11 Cal. Rptr. 2d 353, 834 P.2d 1171 (despite deficiency in patients' medical records, records were sufficiently trustworthy to be admissible under business exception to hearsay rule; care facility's administrator testified that missing items from files did not impair accuracy of items which remained).

Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 52 Cal. Rptr. 561, 416 P.2d 793 (business records are not admissible under Uniform Business Records as Evidence Act (Section 1270 et seq.) when they are not based upon report of informant having business duty to observe and report).

Zanone v. City of Whittier (2008) 162 Cal. App. 4th 174, 75 Cal. Rptr. 3d 439 (neither exit interview questionnaires nor summaries of exit interview questionnaires qualify for business records exception to hearsay rule; although the Police Department may have conducted exit interviews and summarized them as part of the ordinary course of business, the interviewees--the departing officers--were neither employees acting on behalf of the department nor employees acting in the ordinary course of their own business when they completed their exit questionnaires, an infrequent event; because the two officers in this case were leaving to join other police departments, their exit questionnaires were not inherently trustworthy because they could have easily believed any complaints they may have made about sex discrimination--or anything less--would be communicated to their new employers and cause them to suffer adverse treatment as a result; because exit interview questionnaires did not qualify for hearsay exception, summaries of those questionnaires were equally deficient).

People v. Ayers (2005) 125 Cal. App. 4th 988, 23 Cal. Rptr. 3d 242 , review denied (evidence of reports from battered women's advocacy group regarding victim's telephone call to hotline and her intake interview, which contained multiple hearsay, did not come within Section 1271, business records exception to hearsay rule).

Remington Investments, Inc. v. Hamedani (1997) 55 Cal. App. 4th 1033, 64 Cal. Rptr. 2d 376 (affirming trial court's decision to sustain defendant's hearsay and foundation objections to unauthenticated, handwritten ledger contained in failed bank's records as supporting material for plaintiff's motion for summary judgment; plaintiff's vice-president filed declaration that he had found ledger among bank's records received from FDIC when plaintiff purchased bank's assets from FDIC and laid foundation concerning the preparation and maintenance of plaintiff's books and records, but plaintiff presented no evidence of failed bank's record keeping practices and no evidence of the origin of the ledger or the manner in which it was prepared; plaintiff presented no authority "requiring the admission of documents offered as business records without proof that the documents in fact qualify as business records (i.e., the foundational elements required by Evidence Code section 1271)").

Taggart v. Super Seer Corp. (1995) 33 Cal. App. 4th 1697, 40 Cal. Rptr. 2d 56 (declaration of custodian of test results performed on motorcycle helmet by testing firm did not satisfy requirements of business records exception to hearsay rule, and results were not admissible in products liability action against manufacturer of helmet, where declaration contained no evidence as to what results were, how they were prepared, or what sources of information results were based on and offered no evidence that results were trustworthy, even though declaration conformed meticulously to requirements for response to subpoena duces tecum of business records).

Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (computer records of lottery transactions compiled by private firm under contract to provide and operate state lottery's computer system qualified for admission under business records exception to hearsay rule, even though records were not printed at or near time of transactions; it was entry of computer data that was required to be made at or near time of event, not retrieval of that data, and data entries on magnetic tapes were made contemporaneously with lottery transactions at issue).

People v. Crosslin (1967) 251 Cal. App. 2d 968, 60 Cal. Rptr. 309 (object of Section 1270 et seq. is to eliminate necessity of calling each witness and to substitute the record of the transaction instead).

Gee v. Timineri (1967) 248 Cal. App. 2d 139, 56 Cal. Rptr. 211 (financial statement prepared in anticipation of lawsuit held inadmissible).

Custodians and Qualified Witnesses

People v. Champion (1995) 9 Cal. 4th 879, 39 Cal. Rptr. 2d 547, 891 P.2d 93 (fingerprint expert could testify as to contents of report of laboratory employee regarding preservation of fingerprints where expert testified that the report was prepared on a form completed in the ordinary course of business by the person performing acts and expert knew that laboratory employee was required to fill out such a form at or near the time that she was performing the acts; fingerprint expert's testimony regarding police officer's report was error, where expert did not testify that the report of police officer was prepared at or near the time that the officer brought the items to the laboratory).

Taggart v. Super Seer Corp. (1995) 33 Cal. App. 4th 1697, 40 Cal. Rptr. 2d 56 , review denied (expert witness testifying for motorcyclist who brought products liability action against helmet manufacturer was not competent to provide business records foundation under exception to hearsay rule as that would allow admission of results of tests performed by testing firm where expert had no personal knowledge of how firm's testing was conducted or how reports were prepared and expert's testimony was based on reports themselves).

Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (director of private firm under contract to provide and operate state lottery's computer system was qualified to provide foundational basis for

admission of computer printouts of lottery transactions under business records exception to hearsay rule).

Rodwin Metals, Inc. v. Western Non-Ferrous Metals, Inc. (1970) 10 Cal. App. 3d 219, 88 Cal. Rptr. 778 (piece of paper purporting to be on letterhead of, and signed by, chemist with respect to assay of exact weight of metallic content of lead fume to be delivered by seller to buyer was objectionable as hearsay where seller, who offered paper in evidence, was not familiar with chemist's signature and none of seller's representatives were present at time when sample was taken).

Opinions and Conclusions Not Admissible

People v. Beeler (1995) 9 Cal. 4th 953, 39 Cal. Rptr. 2d 607, 891 P.2d 153, cert. denied, (defendant waived objection that autopsy report was inadmissible as it contained pathologist's medical opinions; defendant did not raise that objection at trial, but, rather, objected to admission of report on ground that it was not subject to business record exception to hearsay rule).

People v. Reyes (1974) 12 Cal. 3d 486, 116 Cal. Rptr. 217, 526 P.2d 225 (for a record to be competent evidence under the business records act, it must be a record of an act, condition or event; a conclusion does not satisfy such criteria).

Dahl-Beck Elec. Co. v. Rogge (1969) 275 Cal. App. 2d 893, 80 Cal. Rptr. 440 (reports on accident which were prepared by plaintiff contractor's project foreman, who was not on the scene at the time, and which were based on statements of participants and bystanders and measurements, deductions and conclusions of the foreman were properly excluded from evidence).



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Scope Absence of Entry in Business Records

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Scope Absence of Entry in Business Records

§ 1272 reads as follows:

Rule 1272 Absence of Entry in Business Records

Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if:

- (a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and
- (b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1272 serves the purpose of permitting a fact to be proven by the absence of an entry in the same manner and under the same conditions as Section 1271 permits facts to be proven by the existence of an entry. Of course, where an entry is absent, evidence to that effect may not represent hearsay at all, since the preparer of the record (the declarant) may intend to make no assertion about matters not mentioned. Where no assertion is subjectively intended, there can be no out-of-court statement and, consequently, no hearsay.

The foundational requirements for evidence offered pursuant to Section 1272 are, with obvious adjustments, substantially similar to those for evidence offered under Section 1271. Instead of demonstrating that a record is of the type routinely kept by a business, the proponent of evidence under Section 1272 must demonstrate that such a business routinely kept records of matters like the entry not made. In similar fashion, instead of showing a contemporaneous recording, the proponent must be prepared to demonstrate that the matter not mentioned was of such a nature that had it occurred, it would have alerted the record-keeper and been promptly recorded.

Proof that payments have not been made as indicated by the absence of notations on account ledger, or proof that the patient has not reported a claimed injury to his doctor by reference to absence of notation on the medical chart, could be established by use of this exception. In such cases, special attention should be given in qualifying the record to establish that it would be customary for those responsible to make such notations had information been provided to them.



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2 COMPARISON TO FEDERAL RULE

Section 1272 is substantially identical to Federal Rule of *Evidence* 803(7).



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People v. Hawkins (2002) 98 Cal. App. 4th 1428, 121 Cal. Rptr. 2d 627 (where computer printout at issue contains information generated by computer itself, such as a record of its internal operations, printout is not hearsay because it is not made by a "person" under Section 175; the admissibility of such evidence is controlled by Section 1552, which establishes a rebuttable presumption that the document was printed reliably and by the requirement that that the proponent of the computer evidence provides foundation that the computer was operating properly; it was not error to admit computer printouts where prosecution offered foundation that computer's clock was operating accurately and where computer expert explained to jury that printout of access times could be altered in many ways and could not say how, why or by whom).

People v. Torres (1962) 201 Cal. App. 2d 290, 20 Cal. Rptr. 315 (trial court properly permitted automobile dealer to testify that his business receipt book did not show a receipt issued to defendant, charged with grand theft in connection with taking of automobile, as proof that automobile was not paid for).



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Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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1-1280 California Evidence Courtroom Manual Scope

Scope Record Made by Public Employee

§ 1280 reads as follows:

Rule 1280 Record Made by Public Employee

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

- (a) The writing was made by and within the scope of duty of a public employee;
- (b) The writing was made at or near the time of the act, condition, or event; and
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1996, ch. 642 (A.B. 1387), § 4)

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1 ANALYSIS

Section 1280 provides an exception to the hearsay rule for records and reports prepared and maintained by public officers and agencies. This exception operates on the rationales that such records are reliable (since they are produced pursuant to a legal duty) and are necessary forms of proof (since to produce every declarant who contributed to public records would be a huge waste of judicial resources). The foundational conditions for evidence introduced pursuant to Section 1280 are minimal. Unlike the business records exception of Section 1271, the official records exception does not require the testimony of a custodian or other qualified witness as a precondition to admissibility. *See also Section 1450 et seq.*, which create a presumption of authenticity for official records, and Section 1530, which creates a presumption that some copies may be treated as originals of official records for purposes of the best evidence rule.

Examples of evidence admissible as public records include records relating to the internal functioning of public agencies, such as: accounting records of governmental agencies; documents and journal entries of courts, legislative bodies and administrative tribunals; certificates of title, registry, death and birth; records of licensing agencies; and records of deeds and conveyances. Public records can also include reports regarding external matters, which are made by a person with a legal duty to make such reports. *See People v. Reed (1996) 13 Cal. 4th 217, 52 Cal. Rptr. 2d 106, 914 P.2d 184, cert. denied, 519 U.S. 873* (certified copy of transcript of court proceedings); *People v. Clark (1992) 3 Cal. 4th 41, 10 Cal. Rptr. 2d 554, 833 P.2d 561* (autopsy reports and coroner records).

The foundational requirements for the admission of official records pursuant to Section 1280 are three-fold. First, the maker of the record had to be under a legal duty to do so as a public employee. All persons making out-of-court statements that are covered by the public records exception must be under a legal duty to make such statements. Thus, a bystander's statements to a police officer, recorded in a police report, are not admissible under the public records exception (although they may be admissible under a different hearsay exception, such as Section 1240--spontaneous declaration). Second, the writing has to be shown to be made at or near the time of the act, condition or event recorded in the writing. Finally, there must be a showing that the sources of the information and its recording are trustworthy. Although there is no express requirement of first-hand knowledge of the subject of the reports, a central element of trustworthiness is that the original source of the information must have personal knowledge of the event or condition described in the report, even if the maker of the public record does not.

Like business records, public records can present multiple hearsay problems; each layer of hearsay must meet the

foundational elements of the public record exception or another hearsay exception, or the writing is inadmissible.

The 1996 amendments to the Evidence Code made computer-generated evidence of criminal convictions easily admissible to carry out the sentencing enhancements required under California "Three Strikes" legislation. Section 1280 was amended to apply to all civil and criminal actions and proceedings, and together with Section 452.5, creates a hearsay exception for this type of official record if it is being used to prove "the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record." Section 452.5. Moreover, Section 452.5 allows the criminal conviction to be proved by judicial notice, dispensing with formal proof of the conviction and exempts these official documents from best evidence objections if certified under Section 1530(a).

However, the 1996 amendment to Section 1280 appears to have made Section 1300, which creates a hearsay exception for felony judgments when offered in civil cases, superfluous. Such documents could now be offered simply under Section 1280.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 803(8)* differs from Section 1280 in several respects. The Federal Rule bans the use of statements of matters observed by police officers and other law enforcement personnel in criminal cases, for the drafters of the rule were concerned about the *Confrontation Clause* problem of criminal trials by affidavit. Federal Rule of *Evidence 803(8)*, Advisory Committee Note. Section 1280 contains no such limitation and expressly applies to official records offered in criminal cases. However, while the Federal Rule presumes that public records are trustworthy unless an issue is raised as to its untrustworthiness, the proponent of a public record under Section 1280 bears the burden of proving the document's trustworthiness. Thus, in California, the proponent of a public record made by law enforcement personnel carries the burden of showing that the document is trustworthy.

In addition, Section 1280 contains no counterpart to Federal Rule of *Evidence 803(8)(C)*, which provides an exception for reports containing "factual findings resulting from an investigation made pursuant to authority granted by law." In *Beech Aircraft Corp. v. Rainey*, *Beech Aircraft Corp. v. Rainey* (1988) 488 U.S. 153, the Supreme Court held that certain portions of an investigative report prepared by the Navy after a fatal plane crash were admissible under Federal Rule of *Evidence 803(8)(C)*. The Court noted that the report contained opinions and the author's statement concerning the probable cause of the crash, but found that the Federal Rule does not create a distinction between fact and opinion. Although Section 1280 does not contain the language construed in *Beech Aircraft*, at least one California Court of Appeal has held that public records or reports that contain conclusions or opinions are not per se inadmissible; the central inquiry is whether the record is trustworthy. *People v. Flaxman* (1977) 141 Cal. Rptr. 799.



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3 SIGNIFICANT CASES

In General

People v. Martinez (2000) 22 Cal. 4th 106, 91 Cal. Rptr. 2d 687, 990 P.2d 563 (provided it satisfies applicable rules of admissibility, evidence other than record of conviction and certified prison records is admissible to establish fact that defendant served prison terms for prior felony convictions; presumption of regular performance of official acts applied to determination of admissibility of computer-generated California Law Enforcement Telecommunications System (CLETS) printout of defendant's criminal history information as official record in connection with habitual offender allegations, where reporting obligations of law enforcement officials in connection with CLETS system were established by statutes of which court could have taken judicial notice and party against whom presumption of regular performance of official duties operates has the burden of proof as to nonexistence of the presumed fact; admission of computer-generated CLETS printout of defendant's criminal history information as official record was not abuse of discretion; admission as official record of printout generated by computer system of Los Angeles County Sheriff's Department concerning defendant's criminal history information was not abuse of discretion).

Lake v. Reed (1997) 16 Cal. 4th 448, 65 Cal. Rptr. 2d 860, 940 P.2d 311 (in administrative proceeding regarding suspension of driver's license for DUI, police officer's unsworn report regarding incident was admissible as a public record, and admission of driver that he was the one driving the car was admissible as a party admission under Section 1220).

People v. Reed (1996) 13 Cal. 4th 217, 52 Cal. Rptr. 2d 106, 914 P.2d 184 (certified preliminary hearing transcript was admissible to prove proceedings at preliminary hearing under public record exceptions).

Christian Research Institute v. Alnor (2007) 148 Cal. App. 4th 71, 55 Cal. Rptr. 3d 600 (held that an official record is subject to exclusion where it contains information that was not directly observable by the investigator who prepared the report, and where the investigator identifies no independent sources).

Rupf v. Yan (2000) 85 Cal. App. 4th 411, 102 Cal. Rptr. 2d 157 (observations regarding detainee that were reflected in sheriff deputy's testimony and written report were either not hearsay or were admissible pursuant to the hearsay

exceptions for official public records or admissions of a party).

Shea v. Department of Motor Vehicles (1998) 62 Cal. App. 4th 1057, 72 Cal. Rptr. 2d 896 (blood alcohol report signed by unsupervised forensic laboratory trainees did not satisfy Section 1280's requirement of an "official duty" since unqualified trainees had no such duty to report test results).

McNary v. Department of Motor Vehicles (1996) 45 Cal. App. 4th 688, 53 Cal. Rptr. 2d 55 (rationale of public records hearsay exception is to eliminate calling of each witness involved in preparation of record and substitute record of transaction instead; accordingly, for exception to apply, it is not necessary that person making entry have personal knowledge of transaction).

Gananian v. Zolin (1995) 33 Cal. App. 4th 634, 39 Cal. Rptr. 2d 384 (public employee making the record need not have personal knowledge of the transaction so long as the report is based on observations by public employees with a duty to report).

People v. George (1994) 30 Cal. App. 4th 262, 35 Cal. Rptr. 2d 750 (unlike business records exception to hearsay rule, official records exception permits court to admit official record or report without necessarily requiring witness to testify as to its identity and mode of preparation, if court takes judicial notice or if sufficient independent evidence shows that record or report was prepared in such manner as to assure its trustworthiness).

People v. Baeske (1976) 58 Cal. App. 3d 775, 130 Cal. Rptr. 35 (copy of a police report of a telephone call received by police from a neighbor of victim shortly after robbery was not admissible under official record exception to hearsay rule, where requirement of trustworthiness was not established in that source of information was not a public employee with any duty either to observe facts correctly or to report her observations accurately to police department).

Admissibility of Law Enforcement Records

Glatman v. Valverde (2006) 146 Cal. App. 4th 700, 53 Cal. Rptr. 3d 319 (trial court did not err in ruling that motorist's blood alcohol concentration test results could not be used to support suspension of driver's license because test results were not recorded at or near time of analysis).

Furman v. Department of Motor Vehicles (2002) 100 Cal. App. 4th 416, 122 Cal. Rptr. 2d 520 (DMV failed to establish basic fact that a forensic alcohol analysis document had been prepared by a person with an official duty, thus DMV could not take advantage of presumption of Section 664, that an official duty has been regularly performed; without evidence that the declarant was under an official duty to make the document, the document would have been inadmissible in a civil action under hearsay exception for public records, and was incompetent evidence to support suspension of a license).

Shea v. Department of Motor Vehicles (1998) 62 Cal. App. 4th 1057, 72 Cal. Rptr. 2d 896 (blood alcohol report signed by unsupervised forensic laboratory trainees did not satisfy Section 1280's requirement of an "official duty" since unqualified trainees had no such duty to report test results).

Poland v. Department of Motor Vehicles (1995) 34 Cal. App. 4th 1128, 40 Cal. Rptr. 2d 693 (documents submitted by arresting officer were admissible under official records exception to hearsay rule at driver's license revocation hearing for motorist arrested for driving while under influence where documents purported to be signed by arresting officer and requirement that sources of information indicated its trustworthiness was satisfied by presumption that arresting officer regularly performed his duty to properly perform breath tests and accurately observe records and results).

Jackson v. Department of Motor Vehicles (1994) 22 Cal. App. 4th 730, 27 Cal. Rptr. 2d 712 (police officers' sworn

statements are admissible as public records to extent they report officers' firsthand observations).

People v. Dunlap (1993) 18 Cal. App. 4th 1468, 23 Cal. Rptr. 2d 204 (official records exception to hearsay rule applied to California Law Enforcement Telecommunications System computer printout of defendant's criminal information history used as evidence that defendant served two prior prison terms for which sentence in present prosecution could be enhanced; presumption that official duty was regularly performed satisfied foundational requirements that writing was made within scope of duty of public employee, recorded at or near time of recorded event, and that sources of information were trustworthy).



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1-1281 California Evidence Courtroom Manual Scope

Scope Vital Statistics

§ 1281 reads as follows:

Rule 1281 Vital Statistics

Evidence of a writing made as a record of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1281 creates a hearsay exception for public records relating to births, fetal deaths, deaths, and marriages. It allows the contents of such records to be introduced as substantive evidence, thereby facilitating the proof of a wide variety of information contained in such records.



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2 COMPARISON TO FEDERAL RULE

Section 1281 is substantially similar to Federal Rule of *Evidence* 803(9).



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3 SIGNIFICANT CASES

Morris v. Noguchi (1983) 141 Cal. App. 3d 520, 190 Cal. Rptr. 347 (death certificate constitutes only prima facie evidence of facts therein stated and is subject to rebuttal and to explanation; thus, although a coroner's inquest verdict is not admissible in evidence, evidence may be introduced to contradict the opinion as to cause of death contained on death certificate).

Pilcher v. New York Life Ins. Co. (1972) 25 Cal. App. 3d 717, 102 Cal. Rptr. 82 (death certificate, including conclusion contained therein that death was "accidental," was, subject to provisions of *Health and Safety Code* section 10577 requiring that certificate be properly certified by local registrar, properly admissible, in suit for accidental death benefits under life policy, to provide prima facie evidence of facts set forth).



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1-1282 California Evidence Courtroom Manual Scope

Scope Finding of Presumed Death

§ 1282 reads as follows:

Rule 1282 Finding of Presumed Death

A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (56 Stats. 143, 1092, and P.L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. 1001-1016), as enacted or as heretofore or hereafter amended, shall be received in any court, office, or other place in this state as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1282 provides an additional exception to the hearsay rule, since a public official may have no personal knowledge of the death of an individual, but may make such a finding based on an investigation pursuant to legal duty. This section makes that finding admissible as a public record.



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2 COMPARISON TO FEDERAL RULE

The closest federal parallel to Section 1282 is Federal Rule of *Evidence* 803(8)(C), which provides for the admissibility of factual findings made pursuant to an investigation authorized by law.



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1-1283 California Evidence Courtroom Manual Scope

Scope Finding of Missing Person

§ 1283 reads as follows:

Rule 1283 Finding of Missing Person

An official written report or record that a person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive, made by an employee of the United States authorized by any law of the United States to make such report or record shall be received in any court, office, or other place in this state as evidence that such person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1283 provides an additional exception to the hearsay rule, since a public official may have no personal knowledge of the missing status of an individual, but may make such a finding based on an investigation pursuant to legal duty. This section makes that finding admissible as a public record.



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2 COMPARISON TO FEDERAL RULE

The closest federal parallel to Section 1283 is Federal Rule of *Evidence* 803(8)(C), which provides for the admissibility of factual findings made pursuant to an investigation authorized by law.



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Scope Statement of Absence of Public Record

§ 1284 reads as follows:

Rule 1284 Statement of Absence of Public Record

Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1284 admits evidence of the absence of a public record or entry in order to prove either the absence of certain documents or the nonexistence or nonoccurrence of a matter regarding which there would normally be a public record. The rule is similar in effect to the provisions of Section 1272, which governs proof of the absence of an entry in the records of a regularly conducted business activity.



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2 COMPARISON TO FEDERAL RULE

Section 1284 is substantially identical to Federal Rule of *Evidence 803(10)*.



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Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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Scope Former Testimony in General

§ 1290 reads as follows:

Rule 1290 Former Testimony in General

As used in this article, "former testimony" means testimony given under oath in:

- (a) Another action or in a former hearing or trial of the same action;
- (b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States;
- (c) A deposition taken in compliance with law in another action; or
- (d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1290 Former Testimony in General

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1 ANALYSIS

Section 1290 defines the types of out-of-court statements that will be considered for the former testimony exception. Former testimony is undoubtedly one of the most reliable forms of hearsay, as it is taken under oath, memorialized in writing almost immediately after being made, and is generally subject to cross-examination. Section 1290 thus covers testimony given in a prior court proceeding, administrative proceeding, arbitration proceeding or deposition in another case. Where a party seeks to admit deposition testimony taken in the proceeding at hand, the controlling provisions are *Code of Civil Procedure* section 2025 and *Penal Code* sections 1345 and 1362.



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2 COMPARISON TO FEDERAL RULE

Section 1290 differs from Federal Rule of *Evidence 804(b)(1)* in that the federal rule does not expressly cover administrative or arbitration proceedings. In addition, Federal Rule of *Evidence 804(b)(1)* applies to all depositions--those taken for the pending action as well as for previous actions--whereas Section 1290(c) applies only to depositions taken in another action.



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3 SIGNIFICANT CASES

Simmons v. United States (1968) 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (defendant's testimony at suppression hearing cannot be used at subsequent trial).

People v. Coleman (1975) 13 Cal. 3d 867, 120 Cal. Rptr. 384, 533 P.2d 1024 (defendant's testimony at probation revocation hearing may not be used against defendant at subsequent trial of charges arising from the same transaction).

Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (in action for breach of contract to provide disability benefits and "bad faith" denial of benefits, insured's former testimony in workers' compensation appeals board proceeding was admissible, since there was interest and motive on part of workers' compensation judge to inquire into insured's claims she could not earn income).



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Scope Former Testimony Offered Against Party to Former Proceeding

§ 1291 reads as follows:

Rule 1291 Former Testimony Offered Against Party to Former Proceeding

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:

(1) Objections to the form of the question which were not made at the time the former testimony was given.

(2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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*1-1291 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 1291 creates a hearsay exception for statements made by a now unavailable declarant while the declarant was testifying as a witness in a prior proceeding, as defined in Section 1290 and: (1) the party against whom the statement now is offered, or a predecessor in interest in a civil case, offered the testimony into evidence in the prior proceeding or (2) where the testimony was offered against a party in a prior proceeding, the party had the right and opportunity as well as interest and similar motive to develop the declarant's testimony by direct, re-direct, or cross-examination as the party would have in the current proceeding.

Several qualifications of this exception should be noted. First, Section 1291 is not the only basis for the admission of a transcript or a deposition. A transcript or a deposition could conceivably satisfy numerous other hearsay exceptions. Second, Section 1291 does not dictate the manner in which the former testimony must be proved at trial. Customarily, however, when evidence is admitted pursuant to this hearsay exception, the transcript is merely read into the record in the presence of the trier of fact. If a transcript is unavailable, however, anyone with personal knowledge of the prior testimony can testify as to what was said. Finally, where only a portion of the former testimony or deposition is introduced, the adverse party is entitled to introduce other portions that should in fairness be construed by the trier of fact. *See Section 356.*

The application of Section 1291 focuses on the party against whom the hearsay, *i.e.*, the transcript, is offered. Focusing on the party against whom the hearsay is offered facilitates the fairness rationale which underpins this exception--the exception applies only where it would be fair to deprive the party the opportunity to cross-examine the declarant in the pending action. Section 1291 deems that where a party, or the party's successor in interest in a civil case, had offered the testimony in evidence on the party's own behalf in a prior proceeding, it is fair to permit that testimony to be used against the party in a subsequent action. A more difficult case is where the testimony was offered against a party in the prior proceeding and is offered again in the pending action. The "right and opportunity" language of Section 1291 provides that the party against whom the hearsay is offered must have had an opportunity to examine the declarant at the former hearing. The party against whom the hearsay is offered, must have effectively been present at the former hearing and had an opportunity to conduct some type of examination of that declarant when he or she provided testimony at the former hearing. Only an opportunity is necessary. No actual examination need have taken place. The examination in question could be a cross-examination, a direct examination, or a re-direct examination.

Under the "interest and similar motive" language of Section 1291, the party against whom the hearsay is offered must have had a motive at the former proceeding in examining the declarant that is similar to the motive this party would have in examining the declarant if the declarant were now available at the instant trial. The motive need not be identical, only similar in view of the practical considerations the party confronts.

Illustration

Assume that D is charged with two distinct crimes of murder and robbery involving one occurrence, and further that the crimes are the subject of two distinct trials. The murder case is tried first and at this trial an occurrence witness, X, who was present at the scene testifies to all the pertinent facts on behalf of the prosecution. The occurrence witness, X, dies before the trial of the second case, the robbery case, and is, consequently, unavailable. At the robbery trial, the prosecution may seek to introduce the transcript of X's testimony given at the murder trial. The transcript may be admissible under the prior testimony exception to the hearsay rule because D, the defendant, had the opportunity at the earlier trial to cross-examine the occurrence witness, and also, the defendant presumably had a motive at the earlier trial in cross-examining the occurrence witness that is similar to the motive he would have if the witness were available for testimony at the instant robbery trial.



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2 COMPARISON TO FEDERAL RULE

Section 1291 differs from Federal Rule of *Evidence* 804(b)(1) in two respects. First, the federal rule does not provide that some objections are waived by the failure to make them at the original proceeding, whereas Section 1291(b) sets this forth explicitly. However, *Federal Rule of Civil Procedure* 32 does contain such waiver language where depositions are offered at trial. A second significant difference between the California and federal approaches to former testimony would have produced a very different outcome in a recent United States Supreme Court case, had the California approach applied. Under Section 1291(a)(1), if a party has previously offered testimony into evidence on that party's behalf, the former testimony is admissible against the same party in a subsequent action, without examination of whether the party had an opportunity and similar motive to examine the witness. There is no counterpart to Section 1291(a)(1) in the federal rule. Thus, in *United States v. Salerno* (1992) 505 U.S. 317, 112 S. Ct. 2503, 120 L. Ed. 2d 255, the United States Supreme Court held that exculpatory former testimony of witnesses before a grand jury was inadmissible in the face of the prosecution's objection in the defendants' subsequent criminal trial. The witnesses refused to testify in the criminal trial since the prosecution refused to immunize them as it had for the grand jury proceeding. The Supreme Court held that the former testimony was inadmissible without a showing that the prosecution had a similar motive in examining the grand jury witnesses as it would in the criminal trial. Had this case arisen under Section 1291, the former testimony would have been admissible without an inquiry into the existence of a similar motive, as the prosecution had presented the testimony to the grand jury.

Current Trends and New Developments

The exact purport of the "successor in interest" language in Section 1291 and "predecessor in interest" in Federal Rule of *Evidence* 804(b)(1) is less than clear. This language permits former testimony to be offered against someone who, while technically a non-party, is considered a "successor" (California) or "predecessor" (federal) in interest, as long as the other requirements are satisfied. Section 1291(a)(1) only permits the use of former testimony where the successor in interest had offered the testimony in evidence; this provision appears to rest on an affirmative reliance theory of admissibility. A party cannot be heard to object to such former testimony if the party, or the party's successor in interest, has offered it to the trier of fact. But the same problem is presented by both the California and federal language--does "predecessor" or "successor" in interest refer to the common law notion of privity or something broader? The apparent "reliance" theory underpinning to the California approach minimizes the importance of this

inquiry, as the rationale would apply equally to either a narrow or broad interpretation of the language. The problem under the federal rule is more difficult. While an expansive reading of this language would appear to reduce the opportunity requirement to a nullity, some federal courts have read the language broadly to include virtually anyone who would satisfy the similar motive requirement. See *Lloyd v. American Export Lines, Inc.* (3d Cir. 1978) 580 F.2d 1179, cert. denied sub nom., *Alvarez v. American Export Lines, Inc.*, 439 U.S. 969, 99 S. Ct. 461, 58 L. Ed. 2d 428. In contrast, the same language in the federal rule has been subjected to strict application, and it has been held that only a predecessor in privity in the property sense will qualify under the Rule. See *In re IBM Peripheral EDP Devices Antitrust Litigation* (N.D. Cal. 1978) 444 F. Supp. 110. While reliability and fairness may not be sacrificed by the broader interpretation of the predecessor in interest requirement, the stricter reading more logically comports with the customary meaning of the term "predecessor in interest," and moreover, it preserves the obvious intent of the federal rule to require more than simply a similarity in motive as between the party developing the testimony at the prior proceeding and the party against whom it is offered at the instant proceeding.



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3 SIGNIFICANT CASES

In General

People v. Zapien (1993) 4 Cal. 4th 929, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (admission of former testimony of unavailable witness does not offend California and federal *confrontation clauses* not because opportunity to cross-examine witness at preliminary hearing is considered exact substitute for right of cross-examination at trial but because interests of justice are deemed served by balancing of defendant's right to effective cross-examination against public's interest in effective prosecution).

Unavailability Requirement

People v. Cromer (2001) 24 Cal. 4th 889, 103 Cal. Rptr. 2d 23, 15 P.3d 243 , (appellate courts should independently review a trial court's determination that the prosecution's failure to locate an absent witness are sufficient to justify an exception to the defendant's right of confrontation; prosecution did not exercise reasonable diligence to secure witness's attendance at defendant's trial).

People v. Reed (1996) 13 Cal. 4th 217, 52 Cal. Rptr. 2d 106, 914 P.2d 184 (unavailability requirement of Section 1291 is not to be construed strictly as referring exclusively to the kinds of legal unavailability expressly listed in Evidence Code section dealing with unavailability of witnesses).

People v. Mitcham (1992) 1 Cal. 4th 1027, 5 Cal. Rptr. 2d 230, 824 P.2d 1277 (trial court had no obligation to pursue alternative solutions to problem of witness's unavailability, in lieu of allowing her preliminary hearing testimony from another criminal proceeding to be read to jury during sentencing phase of capital murder prosecution).

People v. Sandoval (2001) 87 Cal. App. 4th 1425, 105 Cal. Rptr. 2d 504 (state violated defendant's right of confrontation by using eyewitness's preliminary hearing testimony under Section 1291; prosecution failed to make reasonable good-faith effort to obtain eyewitness's testimony at trial).

People v. Walton (1996) 42 Cal. App. 4th 1004, 49 Cal. Rptr. 2d 917 , review denied (whether due diligence exists is

a question of fact and the ruling of the trial judge will not be disturbed unless there has been an abuse of discretion).

People v. Guiterrez (1991) 232 Cal. App. 3d 1624, 284 Cal. Rptr. 230 (prosecution need not exhaust every potential avenue of investigation to satisfy its obligation to use "due diligence" to secure witness's presence at trial, and to introduce transcript of witness's prior testimony on ground that witness is "unavailable" within meaning of hearsay exception).

People v. Sul (1981) 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (trial court erred in finding that witness who was afraid to testify was "unavailable" and, thus, admission of preliminary hearing testimony, admitted pursuant to this section which testimony was critical to prosecution's case, was reversible error).

Opportunity for Cross-Examination During Former Testimony

People v. Zapien (1993) 4 Cal. 4th 929, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (as long as defendant was given opportunity for effective cross-examination of witness at preliminary hearing, statutory requirements for admissibility of unavailable witness's preliminary hearing testimony are satisfied; admissibility does not depend on whether defendant availed himself fully of that opportunity).

People v. Brock (1985) 38 Cal. 3d 180, 211 Cal. Rptr. 122, 695 P.2d 209 (former testimony may be admitted under former testimony exception to hearsay rule only when the defendant had a meaningful opportunity to cross-examine the witness in the former proceeding).

People v. Jones (1998) 66 Cal. App. 4th 760, 78 Cal. Rptr. 2d 265 (to demonstrate that admission of the former testimony violated either Section 1291 or the *confrontation clause*, it must be shown that the violation actually interfered with an effective cross-examination; although defendant claimed he would have cross-examined witnesses differently if he had been permitted to represent himself at the first hearing, he never explained what deficiency he saw in the cross-examination actually conducted or what he would have done differently).

Similar Motive for Examination Required

People v. Samayoa (1997) 15 Cal. 4th 795, 64 Cal. Rptr. 2d 400, 938 P.2d 2, cert. denied, 522 U.S. 1125, cert. denied, (defendant's motive and interest in cross-examining witness at preliminary hearing were closely similar to defendant's objectives at penalty phase of capital murder trial, "namely--to attempt to discredit the witness's account of the crime and establish that the witness could not identify the person or persons who committed the crimes"; defendant failed to suggest evidence that might have been elicited from witness at trial that was not elicited at the preliminary hearing and "that would have placed defendant's conduct (raping and sodomizing a known multiple sclerosis victim) in a less aggravating light").

People v. Zapien (1993) 4 Cal. 4th 929, 17 Cal. Rptr. 2d 122, 846 P.2d 704 (for preliminary hearing testimony of unavailable witness to be admissible at trial, defendant's motives in cross-examining witness at preliminary hearing and at trial do not have to be identical but only "similar").

People v. Ogen (1985) 168 Cal. App. 3d 611, 215 Cal. Rptr. 16 (defendant's interest and motive in cross-examination of victim was similar in both murder trial and in earlier prosecution for kidnapping and rape, regardless of specific defense involved, where victim's testimony, in both cases, was adverse to defendant's claim of innocence, and defendant's primary motive was to undermine victim's credibility and to exploit weaknesses in her testimony bearing on his culpability, and thus, defendant had a meaningful opportunity to completely and adequately cross-examine victim at preliminary hearing held in connection with earlier prosecution and such testimony was properly admitted in murder prosecution under former testimony exception to the hearsay rule).



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§ 1292.syn Synopsis to Chapter 1292: Former Testimony Offered Against Person Not a Party to Former Proceeding

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1-1292 California Evidence Courtroom Manual Scope

Scope Former Testimony Offered Against Person Not a Party to Former Proceeding

§ 1292 reads as follows:

Rule 1292 Former Testimony Offered Against Person Not a Party to Former Proceeding

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

- (1) The declarant is unavailable as a witness;
- (2) The former testimony is offered in a civil action; and
- (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections based on competency or privilege which did not exist at the time the former testimony was given.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1292 allows former testimony to be admitted in some cases against parties who were not participants in the first proceeding. Section 1292 is thus limited to civil cases, for to use such evidence against a non-party in a criminal case would be to violate the state and federal constitutional right to confrontation.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 804(b)(1) is similar, but restricts the use of former testimony to cases where the former testimony concerned a "predecessor in interest." See the comparative *discussion under Section 1291*, which does permit the use of former testimony in civil cases against a successor in interest where the predecessor has affirmatively offered the testimony into evidence. Section 1292 does not use the troublesome "successor in interest" language, but merely phrases the issue as whether the non-party had the "right and opportunity" and "interest and similar motive" to examine the declarant in the prior proceeding.



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3 SIGNIFICANT CASES

O'Neill v. Novartis Consumer Health, Inc. (2007) 147 Cal. App. 4th 1388, 55 Cal. Rptr.3d 551 (expert testimony from unrelated case is inadmissible in products liability action where the plaintiffs failed to show that the experts were unavailable and that the defendant had a similar interest and motive in examining the experts in the other case; nor were these statements authorized admissions under Section 1222 simply because experts were retained by opposing party; in theory, experts are supposed to testify impartially and their testimony is not under the control of the party retaining them).

Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (appeal of consolidated civil actions against O. J. Simpson for wrongful deaths of Nicole Brown Simpson and Ronald Goldman; statements by defendant's ex-wife to police officers who responded in prior instances of alleged abuse were admissible under Section 1240, spontaneous statement hearsay exception; statements; ex-wife's statements which referred to defendant's past physical and verbal abuse and his threats to kill her were not hearsay because admitted for limited purpose of explaining victim's state of mind in terminating their relationship and allegedly provoking defendant to kill her; testimony given by police detective Mark Fuhrman in defendant's prior criminal trial was not admissible against plaintiffs under Section 1292, the former testimony exception to the hearsay rule, because plaintiffs had no opportunity to cross-examine Fuhrman--prosecution's direct examination of Fuhrman did not satisfy this requirement for admissibility of former testimony).

L & B Real Estate v. Superior Court (1998) 67 Cal. App. 4th 1342, 79 Cal. Rptr. 2d 759 (party could not use testimony from earlier criminal trial to support a summary judgment and avoid requirements of former testimony exception simply by recharacterizing it as a declaration).

Gatton v. A.P. Green Services, Inc. (1998) 64 Cal. App. 4th 688, 75 Cal. Rptr. 2d 523 (deposition testimony by a plaintiff in a prior asbestos exposure action against a company that was not a party to the prior action was not admissible as former testimony; plaintiff failed to show that any party in prior actions had an interest and motive to cross-examine similar to that of defendant in current action; it is not enough that all asbestos defendants would have a shared interest and motive of establishing that plaintiff was not exposed to asbestos; similarity of interest must be determined on practical considerations--defendants in prior action would have little or no interest in defending against the presence of materials furnished or installed by current defendant; plaintiff could not avoid problems presented by

former testimony exception by recharacterizing deposition testimony as a declaration).

Wahlgren v. Coleco Industries, Inc. (1984) 151 Cal. App. 3d 543, 198 Cal. Rptr. 715 (depositions taken in prior unrelated action of swimming pool manufacturer's officers were properly excluded from personal injury action with respect to manufacturer of free-standing slide, as pool manufacturer did not have slide manufacturer's interest and motive in establishing safety of slide nor in refuting inference that failure to comply with pool warning policy made slide defective).



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Scope Former Testimony by Child Witness at Preliminary Examination

§ 1293 reads as follows:

Rule 1293 Former Testimony by Child Witness at Preliminary Examination

(a) Evidence of former testimony made at a preliminary examination by a minor child who was the complaining witness is not made inadmissible by the hearsay rule if:

(1) The former testimony is offered in a proceeding to declare the minor a dependent child of the court pursuant to *Section 300 of the Welfare and Institutions Code*.

(2) The issues are such that a defendant in the preliminary examination in which the former testimony was given had the right and opportunity to cross-examine the minor child with an interest and motive similar to that which the parent or guardian against whom the testimony is offered has at the proceeding to declare the minor a dependent child of the court.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the minor child were testifying at the proceeding to declare him or her a dependent child of the court.

(c) The attorney for the parent or guardian against whom the former testimony is offered or, if none, the parent or guardian may make a motion to challenge the admissibility of the former testimony upon a showing that new substantially different issues are present in the proceeding to declare the minor a dependent child than were present in the preliminary examination.

(d) As used in this section, "complaining witness" means the alleged victim of the crime for which a preliminary examination was held.

(e) This section shall apply only to testimony made at a preliminary examination on and after January 1, 1990.

(Added by Stats. 1989, ch. 322, § 1)

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1 ANALYSIS

Section 1293 is one of a series of evidentiary provisions aimed at dealing with the difficult problem of child testimony where physical or sexual child abuse is at issue. *See also Penal Code sections 1346* (allowing videotaped preliminary hearing testimony to be used at a subsequent trial where there is a finding that the child would suffer such emotional trauma as to be considered unavailable) and 1347 (allowing a child to testify via closed-circuit television where there is a finding that the child would suffer such trauma as to be considered unavailable). Section 1293 allows for the substitution of the prior testimony of the child at a preliminary hearing for live testimony at a juvenile dependency proceeding.



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2 COMPARISON TO FEDERAL RULE

There is no direct federal counterpart to Section 1293.



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In re Elizabeth T. (1992) 9 Cal. App. 4th 636, 12 Cal. Rptr. 2d 10 (Section 1293 authorizing use in juvenile dependency proceeding of transcript of minor's testimony at preliminary hearing on child molestation charge did not violate father's due process rights, though statute did not require any showing as to child's unavailability as witness).



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Scope Former Testimony by Unavailable Witness

§ 1294 reads as follows:

Rule 1294 Former Testimony by Unavailable Witness

(a) The following evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter pursuant to Section 1235 is not made inadmissible by the hearsay rule if the witness is unavailable and former testimony of the witness is admitted pursuant to Section 1291:

- (1) A videotaped statement introduced at a preliminary hearing or prior proceeding concerning the same criminal matter.
- (2) A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter.

(b) The party against whom the prior inconsistent statements are offered, as his or her option, may examine or cross-examine any person who testified at the preliminary hearing or prior proceeding as to the prior statements of the witness.

(Added by Stats. 1996, ch. 560 (A.B. 2483), § 1)

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SECTION 1294 Former Testimony by Unavailable Witness

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1 ANALYSIS

This provision essentially permits the use of double hearsay, where the former testimony of the unavailable declarant at a prior proceeding is admissible under Section 1291 and any prior inconsistent statements of the declarant offered during the same proceeding are admissible under Section 1235.



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1294 in the federal rules.



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1-1 California Evidence Courtroom Manual Scope

Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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1-1300 California Evidence Courtroom Manual 1300.syn

§ 1300.syn Synopsis to Chapter 1300: Use of Felony Judgment in Civil Action

Scope Use of Felony Judgment in Civil Action

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1-1300 California Evidence Courtroom Manual Scope

Scope Use of Felony Judgment in Civil Action

§ 1300 reads as follows:

Rule 1300 Use of Felony Judgment in Civil Action

Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1982, ch. 390, § 2)

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1 ANALYSIS

Section 1300 authorizes the admission of felony convictions in subsequent civil actions in order to prove any fact essential to the previous criminal judgment. The evidence offered must be that of a final judgment, entered after a trial, guilty plea, or a nolo contendere plea. The evidence offered pursuant to Section 1300 is merely probative, rather than conclusive, of the fact sought to be proved. In other words, it merely serves as evidence as to the consequential fact sought to be proven; the judgment has no automatic res judicata or collateral estoppel effect.

Subject to the limitations of the Rule, this hearsay exception admits evidence of previous convictions in civil actions as proof of any fact essential to sustain the conviction. Consequently, the proponent must establish not only the conviction itself through, for example, introduction of a certified record, but he or she must also establish that the fact sought to be proved was essential to sustain the prior judgment. Accordingly, the trial judge must determine that issue as a preliminary matter, based upon an examination of the entire record of the prior case, if necessary. Admissibility of a prior conviction to prove a fact essential to that determination also depends upon its relevancy in the litigation in which it is offered. In this respect the proponent may not run afoul of the forbidden character evidence inference of Rule 1101(b). *See* Analysis of Rule 1101(b).

The 1996 amendments to Sections 452.5 and 1280, which provide for the judicial notice of computer-generated official records of criminal convictions and create a hearsay exception under the official records provisions of Section 1280 in all civil and criminal actions, limit the need for Section 1300. An advocate may simply offer either a civil or criminal judgment under Section 1280.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 803(22) differs from Section 1300 in several respects. Under the federal rule, a felony conviction can be used in criminal cases as well as civil cases; Section 1300 restricts the use of felony judgments to civil cases. This difference has been made insignificant, however, by the 1996 amendment to Section 1280, which creates a hearsay exception for official records in civil and criminal proceedings. Another difference between Section 1300 and Federal Rule of *Evidence* 803(22) is that under the federal approach a conviction cannot rest on a nolo contendere plea; under the California approach, the conviction may rest on a plea of nolo contendere. Finally, the Federal Rule contains additional limitations that Section 1300 lacks: that the previous conviction must relate to a crime punishable by death or imprisonment in excess of one year and that in a criminal prosecution, the prosecution may not utilize the prior conviction of persons other than the accused for a purpose other than impeachment. The federal restrictions become even more significant in light of the broad expansion of the California official records hearsay exception in Section 1280.



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3 SIGNIFICANT CASES

People v. Ray (1996) 13 Cal. 4th 313, 52 Cal. Rptr. 2d 296, 914 P.2d 846 , appeal granted, 519 U.S. 967 , cert. denied (prior felony conviction is admissible under Section 1300 when offered in a civil action to prove that the defendant actually engaged in the underlying conduct; although hearsay, a felony conviction is reliable because the seriousness of the crime ensures its full litigation).

People v. Griffin (1967) 66 Cal. 2d 459, 58 Cal. Rptr. 107, 426 P.2d 507 (properly authenticated acquittal is admissible to rebut prosecution evidence of guilt of another crime; acquittal is not objectionable as hearsay opinion of another fact-finder based on evidence presented to another time and place).

Principal Life Ins. Co. v. Peterson (2007) 156 Cal. App. 4th 676, 67 Cal. Rptr. 3d 584 (in a life insurer's interpleader action, the appellate court affirmed an award of summary judgment to the administrator of murder victim Laci Peterson's estate, awarding her life insurance policy proceeds to the estate; a felony conviction on appeal is admissible as "a final judgment adjudging a person guilty of a crime" within the meaning of *Cal. Evid. Code § 1300* and, in the absence of evidence to the contrary, it was sufficient to establish, by a preponderance of the evidence, that the named insured, Scott Peterson, did feloniously and intentionally murder his wife making him ineligible, under *Cal. Prob. Code § 254*, to collect the benefits of her life insurance policy).

County of Los Angeles v. Civil Service Comm'n (1995) 39 Cal. App. 4th 620, 46 Cal. Rptr. 2d 256 (nolo contendere plea necessarily implies bargain and is seen as agreement between prosecution and defendant, for limited purpose of particular case, and no other purpose; thus, court in any subsequent civil proceeding must independently examine facts in order to determine whether defendant actually committed offense alleged for purposes of particular civil proceeding).

In re L.S. (1987), 189 Cal. App. 3d 407, 234 Cal. Rptr. 508 (a felony conviction must be final for the purposes of Section 1300; use of father's conviction of child molestation which was still on appeal was improper); *disapproved in* ***Principal Life Ins. Co. v. Peterson*** (2007) 156 Cal. App. 4th 676, 694, 67 Cal. Rptr. 3d 584 (court in *In re L.S.* incorrectly interpreted meaning of "final judgment" in *Evid. Code § 1300*).

Mueller v. J.C. Penney Co. (1985) 173 Cal. App. 3d 713, 219 Cal. Rptr. 272 (Section 1300 did not apply to preclude

use of misdemeanor conviction for collateral estoppel in civil case, as the Evidence Code dealt only with the evidentiary use of judgments in cases in which the substance of law did not require that the judgments be given conclusive effect).

Rousseau v. West Coast House Movers (1967) 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (general prohibition against hearsay evidence applied to record of misdemeanor convictions for drunk driving).



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SECTION 1301 Judgment Against Person Entitled to Indemnity

1-1301 California Evidence Courtroom Manual 1301.syn

§ 1301.syn Synopsis to Chapter 1301: Judgment Against Person Entitled to Indemnity

Scope Judgment Against Person Entitled to Indemnity

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Scope Judgment Against Person Entitled to Indemnity

§ 1301 reads as follows:

Rule 1301 Judgment Against Person Entitled to Indemnity

Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:

- (a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;
- (b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or
- (c) Recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1301 allows a judgment debtor to use a final judgment to prove any fact essential to that judgment in certain actions to recover sums due where a third party has a duty to indemnify the judgment debtor. Thus, Section 1301 aims at providing an easier route to proof where the facts have been fully litigated previously. However, Section 1301, like Section 1300, should be distinguished from the doctrines of res judicata and collateral estoppel. The hearsay exception permits the use of judgments as evidence. Nevertheless, such evidence is not conclusive and may be rebutted in the same fashion as any other evidence. This use of a judgment is distinct from the concept of res judicata, in which a judgment operates as a bar to further litigation between the same parties concerning the same subject matter. It is also distinguishable from collateral estoppel, which operates as a bar to relitigation of facts previously litigated between the same parties. A judgment offered under Section 1300 or 1301, then, is merely probative of the fact to which it is relevant.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1301.



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SECTION 1302 Judgment Determining Liability of Third Person

1-1302 California Evidence Courtroom Manual 1302.syn

§ 1302.syn Synopsis to Chapter 1302: Judgment Determining Liability of Third Person

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SECTION 1302 Judgment Determining Liability of Third Person

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Scope Judgment Determining Liability of Third Person

§ 1302 reads as follows:

Rule 1302 Judgment Determining Liability of Third Person

When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1302 allows a final judgment against a third party, although hearsay, to be used as proof of that person's liability, obligation or duty, where any of those issues are of consequence in a civil action.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1302.



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3 SIGNIFICANT CASES

Gravert v. De Luse (1970) 6 Cal. App. 3d 576, 86 Cal. Rptr. 93 (because of confidential nature of juvenile court records, trial court in paternity action properly rejected defendant's offer of juvenile court order declaring plaintiff a dependent child of juvenile court and naming one other than defendant as father of plaintiff).



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Scope

General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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1-1310 California Evidence Courtroom Manual 1310.syn

§ 1310.syn Synopsis to Chapter 1310: Statement Concerning Declarant's Family History

Scope Statement Concerning Declarant's Family History

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SECTION 1310 Statement Concerning Declarant's Family History

1-1310 California Evidence Courtroom Manual Scope

Scope Statement Concerning Declarant's Family History

§ 1310 reads as follows:

Rule 1310 Statement Concerning Declarant's Family History

(a) Subject to subdivision (b), evidence of a statement by a declarant who is unavailable as a witness concerning his own birth, marriage, divorce, a parent and child relationship, relationship by blood or marriage, race, ancestry, or other similar fact of his family history is not made inadmissible by the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 1244, § 15)

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1 ANALYSIS

Section 1310 admits statements concerning an unavailable declarant's own personal or family history, even though the declarant has no personal knowledge of the fact stated. Section 1310(b), however, provides for exclusion of such statements where the circumstances under which a statement suggest it is untrustworthy.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 804(b)(4)(A)* is similar in excepting statements made by an unavailable declarant relating to the declarant's own personal or family history. Although the list of personal or family history topics varies somewhat, both the federal rule and Section 1310 are sufficiently broad to cover the same kind of statements. For example, while Federal Rule of *Evidence 804(b)(4)(A)* expressly covers statements relating to adoption and Section 1310 does not, the catch-all language of Section 1310 ("or other similar fact of [the declarant's] family history") would appear to cover adoption. Federal Rule of *Evidence 804(b)(4)(A)* does differ from Section 1310 in that it does not contain the "untrustworthiness" safeguard of Section 1310(b). Federal Rule of *Evidence 804(b)(4)(A)* also covers statements made regarding the personal or family history of another, which are covered by Section 1311.



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People v. Riley (1996) 46 Cal. App. 4th 402, 52 Cal. Rptr. 2d 670 (even assuming that a "fetus" is not a "child" for purposes of family history exception to hearsay rule, one victim's pregnancy calendar chronicling significant events of her pregnancy in her own handwriting was sufficiently trustworthy to be admissible under family history exception to hearsay rule in prosecution for murder and murder of the fetus).



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§ 1311.syn Synopsis to Chapter 1311: Statement Concerning Family History of Another

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Scope Statement Concerning Family History of Another

§ 1311 reads as follows:

Rule 1311 Statement Concerning Family History of Another

(a) Subject to subdivision (b), evidence of a statement concerning the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The declarant was related to the other by blood or marriage; or

(2) The declarant was otherwise so intimately associated with the other's family as to be likely to have had accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 1244, § 16)

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1 ANALYSIS

Section 1311 recognizes that proof of personal or family history is likely to come from a declarant speaking about someone else. The rule imposes several limitations on this hearsay exception:

1. The declarant must be unavailable (*see Section 240*);
2. The statement must relate to the personal or family history of another;
3. The declarant was related by blood or marriage to the person whose history is at issue; or
4. The declarant was so closely connected to that person's family as to be likely to have accurate information and made the statement on the basis of information directly from the person or from someone related by blood or marriage to the person or on the basis of reputation in the person's family.

Like Section 1310, Section 1311 provides the trial judge with the discretion to exclude the statement where the circumstances surrounding the making of the statement indicate it is untrustworthy.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 804(b)(4)(A) admits declarations concerning the family or personal history of another person if the unavailable declarant was related by blood, adoption, or marriage, or "was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared." While Section 1311 is somewhat more detailed in identifying the proper bases of the declarant's knowledge of the other's personal or family history, the two rules are likely to be applied similarly. However, as noted with Section 1310, Federal Rule of *Evidence* 804(b)(4)(A) does not contain the "untrustworthiness" safeguard of Section 1311(b).



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§ 1312.syn Synopsis to Chapter 1312: Entries in Family Records and the Like

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Scope Entries in Family Records and the Like

§ 1312 reads as follows:

Rule 1312 Entries in Family Records and the Like

Evidence of entries in family Bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 1244, § 17)

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1 ANALYSIS

Section 1312 concerns proof of births, marriages, divorces, deaths, legitimacy, relationships and ancestry contained in various family records. The circumstantial guarantee of trustworthiness of such records and certificates lies in the lack of motivation to fabricate inherent in the information recording process and in the opportunity for scrutiny of the information by others who may be in a position to verify or protest the data recorded. However, Section 1312 operates only to overcome a hearsay objection. The evidence must still be authenticated under Section 1400 et seq.



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2 COMPARISON TO FEDERAL RULE

Section 1312 is substantially similar to Federal Rule of *Evidence 803(13)*.



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1-1313 California Evidence Courtroom Manual 1313.syn

§ 1313.syn Synopsis to Chapter 1313: Reputation in Family Concerning Family History

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1-1313 California Evidence Courtroom Manual Scope

Scope Reputation in Family Concerning Family History

§ 1313 reads as follows:

Rule 1313 Reputation in Family Concerning Family History

Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 1244, § 18)

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1 ANALYSIS

Section 1313 provides an easy route to proof of family history because of the inherent difficulty of obtaining such proof, especially where it relates to older history. Note that this rule imposes fewer requirements than where a declarant makes a specific statement regarding the personal or family history of him or herself or of another person. This apparent inconsistency can be explained; the jury is more likely to understand the credibility problems with reputation evidence than with specific statements of fact.



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2 COMPARISON TO FEDERAL RULE

Section 1313 is substantially similar to Federal Rule of *Evidence* 803(19), which covers evidence of reputation regarding family history whether from within the family or within the community.



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§ 1314.syn Synopsis to Chapter 1314: Reputation in Community Concerning Family History

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1-1314 California Evidence Courtroom Manual Scope

Scope Reputation in Community Concerning Family History

§ 1314 reads as follows:

Rule 1314 Reputation in Community Concerning Family History

Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

See Analysis of Section 1313.



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2 COMPARISON TO FEDERAL RULE

Section 1314 is substantially similar to Federal Rule of *Evidence* 803(19), which covers evidence of reputation regarding family history whether from within the family or within the community.



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1-1315 California Evidence Courtroom Manual 1315.syn

§ 1315.syn Synopsis to Chapter 1315: Church Records Concerning Family History

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1-1315 California Evidence Courtroom Manual Scope

Scope Church Records Concerning Family History

§ 1315 reads as follows:

Rule 1315 Church Records Concerning Family History

Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history which is contained in a writing made as a record of a church, religious denomination, or religious society is not made inadmissible by the hearsay rule if:

- (a) The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under Section 1271; and
- (b) The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 1244, § 9)

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1 ANALYSIS

Section 1315 concerns proof of births, marriages, divorces, deaths, legitimacy, relationships and ancestry contained in various religious records. The circumstantial guarantee of trustworthiness of such records and certificates lies in the lack of motivation to fabricate inherent in the information recording process and in the opportunity for scrutiny of the information by others who may be in a position to verify or protest the data recorded. However, Section 1315 operates only to overcome a hearsay objection. The evidence must still be authenticated under Section 1400 et seq.



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2 COMPARISON TO FEDERAL RULE

Section 1315 is substantially similar to Federal Rule of *Evidence 803(11)*.



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SECTION 1316 Marriage, Baptismal and Similar Certificates

1-1316 California Evidence Courtroom Manual 1316.syn

§ 1316.syn Synopsis to Chapter 1316: Marriage, Baptismal and Similar Certificates

Scope Marriage, Baptismal and Similar Certificates

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1-1316 California Evidence Courtroom Manual Scope

Scope Marriage, Baptismal and Similar Certificates

§ 1316 reads as follows:

Rule 1316 Marriage, Baptismal and Similar Certificates

Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

- (a) The maker was a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and
- (b) The certificate was issued by the maker at the time and place of the ceremony or sacrament or within a reasonable time thereafter.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1975, ch. 1244, § 20)

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1 ANALYSIS

Section 1316 concerns proof of births, marriages, divorces, deaths, legitimacy, relationships and ancestry contained in various religious certificates, such as marriage or baptismal certificates. The circumstantial guarantee of trustworthiness of such certificates lies in the lack of motivation to fabricate inherent in the information recording process and in the opportunity for scrutiny of the information by others who may be in a position to verify or protest the data recorded. However, Section 1316 operates only to overcome a hearsay objection. The evidence must still be authenticated under Section 1400 et seq.



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2 COMPARISON TO FEDERAL RULE

Section 1316 is substantially similar to Federal Rule of *Evidence* 803(12).



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General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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SECTION 1320 Reputation Concerning Community History

1-1320 California Evidence Courtroom Manual 1320.syn

§ 1320.syn Synopsis to Chapter 1320: Reputation Concerning Community History

Scope Reputation Concerning Community History

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1-1320 California Evidence Courtroom Manual Scope

Scope Reputation Concerning Community History

§ 1320 reads as follows:

Rule 1320 Reputation Concerning Community History

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1320 provides a hearsay exception for evidence of reputation regarding an event of historical or societal significance. While such hearsay may not be as reliable as other types, this section is driven by necessity as "oral history" may be the only evidence available and the jury can appreciate the problems with the credibility of such evidence.



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2 COMPARISON TO FEDERAL RULE

Section 1320 is similar to Federal Rule of *Evidence* 803(20), although the federal rule adopts the common law approach, requiring that the reputation exist before the controversy in which it is offered arose.



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3 SIGNIFICANT CASES

Jordan v. Worthen (1977) 68 Cal. App. 3d 310, 137 Cal. Rptr. 282 (hearsay testimony about history and community reputation of private road was not admissible under this section and Section 1322 permitting admission of hearsay as to reputation in community and customs affecting land in community).



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SECTION 1321 Reputation Concerning Public Interest in Property

1-1321 California Evidence Courtroom Manual 1321.syn

§ 1321.syn Synopsis to Chapter 1321: Reputation Concerning Public Interest in Property

Scope Reputation Concerning Public Interest in Property

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SECTION 1321 Reputation Concerning Public Interest in Property

1-1321 California Evidence Courtroom Manual Scope

Scope Reputation Concerning Public Interest in Property

§ 1321 reads as follows:

Rule 1321 Reputation Concerning Public Interest in Property

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns the interest of the public in property in the community and the reputation arose before controversy.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

See Analysis of Section 1320.



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SECTION 1321 Reputation Concerning Public Interest in Property

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2 COMPARISON TO FEDERAL RULE

Section 1321 is substantially similar to Federal Rule of *Evidence* 803(20), even adopting the common law requirement that the reputation existed before the controversy at stake arose.



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SECTION 1322 Reputation Concerning Boundary or Custom Affecting Land

1-1322 California Evidence Courtroom Manual 1322.syn

§ 1322.syn Synopsis to Chapter 1322: Reputation Concerning Boundary or Custom Affecting Land

Scope Reputation Concerning Boundary or Custom Affecting Land

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SECTION 1322 Reputation Concerning Boundary or Custom Affecting Land

1-1322 California Evidence Courtroom Manual Scope

Scope Reputation Concerning Boundary or Custom Affecting Land

§ 1322 reads as follows:

Rule 1322 Reputation Concerning Boundary or Custom Affecting Land

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

See Analysis of Section 1320.



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SECTION 1322 Reputation Concerning Boundary or Custom Affecting Land

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2 COMPARISON TO FEDERAL RULE

Section 1322 is substantially similar to Federal Rule of *Evidence* 803(20), even adopting the common law requirement that the reputation existed before the controversy at stake arose.



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3 SIGNIFICANT CASES

Jordan v. Worthen (1977) 68 Cal. App. 3d 310, 137 Cal. Rptr. 282 (hearsay testimony about history and community reputation of private road was not admissible under this section and Section 1322 permitting admission of hearsay as to reputation in community and customs affecting land in community).



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SECTION 1323 Statement Concerning Boundary

1-1323 California Evidence Courtroom Manual 1323.syn

§ 1323.syn Synopsis to Chapter 1323: Statement Concerning Boundary

Scope Statement Concerning Boundary

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SECTION 1323 Statement Concerning Boundary

1-1323 California Evidence Courtroom Manual Scope

Scope Statement Concerning Boundary

§ 1323 reads as follows:

Rule 1323 Statement Concerning Boundary

Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1323 Statement Concerning Boundary

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1 ANALYSIS

Section 1323 creates a hearsay exception for statements made by an unavailable declarant with sufficient knowledge regarding the boundary of land. The rule provides the judge with the discretion to exclude such statements where they appear to be untrustworthy.



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2 COMPARISON TO FEDERAL RULE

There is no exact federal counterpart to Section 1323. Federal Rule of *Evidence 803(14)* recognizes a hearsay exception for all statements contained in a properly recorded deed establishing the interest in the property. Federal Rule of *Evidence 803(15)* creates a similar exception for statements relevant to the property interest so long as the dealings with respect to the property since execution of the document are consonant with the statement. Some of the statements covered by these federal rules might also be admissible under Section 1323.



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SECTION 1324 Reputation Concerning Character

1-1324 California Evidence Courtroom Manual 1324.syn

§ 1324.syn Synopsis to Chapter 1324: Reputation Concerning Character

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SECTION 1324 Reputation Concerning Character

1-1324 California Evidence Courtroom Manual Scope

Scope Reputation Concerning Character

§ 1324 reads as follows:

Rule 1324 Reputation Concerning Character

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.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Reputation is simply the composite of a large number of out-of-court declarations evincing belief in a particular fact or set of facts. When offered for the truth of the matter asserted, such reputation evidence is hearsay, but it is admissible under Section 1324.

Section 1324 operates along with other provisions which allow the introduction of reputation testimony in specific situations. For example, under Section 1102, an accused in a criminal trial may authorize evidence of his or her character and if the accused does so, the prosecution may offer character evidence in rebuttal. In addition, under Section 1103, the accused and the prosecution may, under certain circumstances, offer evidence relating to the character of the victim. In these instances, and also in situations where character itself is "in issue," Section 1100 permits proof of character to be established by testimony as to reputation. The function of Section 1324 is to insure that where reputation evidence is admissible, it may be received for the truth of the matter asserted. The only prerequisite to use of the exception is a showing that the person characterized is sufficiently known in the group in question to have permitted others to have become acquainted with him or her such that a reputation has developed.



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2 COMPARISON TO FEDERAL RULE

Section 1324 is substantially similar to Federal Rule of *Evidence* 803(21).



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General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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Scope Recitals in Writings Affecting Property

§ 1330 reads as follows:

Rule 1330 Recitals in Writings Affecting Property

Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

- (a) The matter stated was relevant to the purpose of the writing;
- (b) The matter stated would be relevant to an issue as to an interest in the property; and
- (c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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1 ANALYSIS

Section 1330 makes certain statements regarding property interests admissible over a hearsay objection, largely because of the necessity in proving issues using such unexamined statements. The reliability of this exception is provided only on the requirement that the dealings regarding the property have been consistent with the statements being admitted into evidence.



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2 COMPARISON TO FEDERAL RULE

There is no exact federal counterpart to Section 1323. Federal Rule of *Evidence 803(14)* recognizes a hearsay exception for all statements contained in a properly recorded deed establishing the interest in the property. Federal Rule of *Evidence 803(15)* creates a similar exception for statements relevant to the property interest so long as the dealings with respect to the property since execution of the document are consonant with the statement.



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Scope Recitals in Ancient Writings

§ 1331 reads as follows:

Rule 1331 Recitals in Ancient Writings

Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1331 Recitals in Ancient Writings

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1 ANALYSIS

Section 1331 adopts the common law "ancient document" hearsay exception, which applies to documents which are more than 30 years old. The ancient document hearsay exception applies only to writings, but it contains no restriction as to the type of writing that will qualify. Consequently, Section 1331 may be applied to documents of formal nature, such as wills and deeds as well as other types of writings, such as letters, leases, powers of attorney, receipts, maps and public surveys.

However, the age of a document alone is not a sufficient guarantee of the trustworthiness of a statement contained therein to justify admitting a statement into evidence. Thus, under Section 1331, the statement itself must have been generally acted upon as true for at least 30 years by persons having an interest in the matter.



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2 COMPARISON TO FEDERAL RULE

Under the Federal Rules of Evidence, the common-law and California 30-year age requirement is reduced to 20 years. Moreover, Federal Rule of *Evidence 803(16)* does not require that the writing must have been relied upon.

Both the Federal and California rules have related provisions dealing with authentication of ancient documents. Section 1419 provides for authentication of a writing more than 30 years old by comparing such a writing with exemplars. The Federal version of the ancient document hearsay exception, Federal Rule of *Evidence 803(16)*, directly complements Federal Rule of *Evidence 901(b)(8)*, which provides for the authentication of a document that is in excess of 20 years old, which is found in its proper repository, and which manifests no indications of suspicion as to the document's authenticity. Consequently, utilizing the ancient document authentication technique will simultaneously satisfy the hearsay exception.



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General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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Scope Publications Relied Upon in the Course of Business

§ 1340 reads as follows:

Rule 1340 Publications Relied Upon in the Course of Business

Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1340 authorizes the admission of certain books and reports as substantive proof of the information contained in such sources. The exception applies to market quotations, tabulations, lists, directories, or other published compilations. These reports and publications are admissible where the proponent by way of foundation shows that the publication is one that is both generally used and generally relied upon either by the public or by persons in particular occupations. Data that is admissible under this exception should include:

1. Weather data, either in the meteorological reports or even in the almanac.
2. Stock market reports as evidence of value of securities on a given day.
3. Telephone directories to prove telephone numbers (e.g., as part of evidence of authentication of a telephone conversation).
4. Mail order catalogues to establish value.
5. City directories to establish addresses.
6. Blue or red books to prove automobile values.
7. Membership lists to prove enrollment or membership in institutions or organizations.

Many of the writings falling within this exception would be easily authenticated under Sections 1452-1454 (public records) or Section 1419 (writings more than 30 years old).



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2 COMPARISON TO FEDERAL RULE

Section 1340 is substantially similar to Federal Rule of *Evidence* 803(17).



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In re Michael G. (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (product label including hazardous substance was admissible in juvenile proceeding under compilation exception to hearsay rule; court could take judicial notice that public relied on dangers and antidotes listed on label as matter of common knowledge, and could conclude that label was generally used and relied on as accurate in course of business).



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Scope Publications Concerning Facts of General Notoriety and Interests

§ 1341 reads as follows:

Rule 1341 Publications Concerning Facts of General Notoriety and Interests

Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1341, as interpreted by California courts, is a fairly narrow hearsay exception, limited to situations where a judge would feel comfortable taking judicial notice of a fact (one of "general notoriety and interest"). This provision, read in connection with Section 721(b), essentially adopts the common law approach to "learned treatises," allowing such authoritative texts only where the statement would be admissible for its truth under principles of judicial notice or to impeach an expert who used the treatise in forming his or her opinion. In addition, several commentators have noted that California courts are far more likely to apply this Section 1341 to matters of natural science, such as chemistry, physics or mathematics than to matters of social science or art, despite the language of the section. See Edwin Heafey, California Trial Objections § 19.26, at 163 (2d ed. 1984); Bernard Jefferson, Synopsis of California Evidence Law § 18.7, at 222 (1985).



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 803(18)* is the counterpart to Section 1341, but is somewhat more generous in its treatment of hearsay. Federal Rule of *Evidence 803(18)* creates a hearsay exception for statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art established as a reliable authority to the extent that such statements are called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination. The reliability of the authority may be established by the testimony or admission of the witness, by other expert testimony, or by judicial notice. Once the authority is established as reliable, statements contained in treatises and the like which are addressed on direct or cross-examination may be considered as substantive evidence. To prevent the possibility of misuse of the evidence by the jury, however, statements contained in books and articles may not be offered as substantive evidence independent of expert testimony. Nonetheless, the federal approach is far more generous in the admission of hearsay than California Section 1341, where the hearsay statement must essentially be subject to the rigorous standards of judicial notice.



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3 SIGNIFICANT CASES

Finn v. G.D. Searle & Co. (1984) 35 Cal. 3d 691, 200 Cal. Rptr. 870, 677 P.2d 1147 (exclusion of two relevant articles from medical journals in medical malpractice action against dermatologist, permitting plaintiff to read certain passages from documents and to question witnesses concerning them without receiving documents themselves into evidence, was not error where articles, though relevant, were hearsay and plaintiff had not asserted that they were offered to prove facts of general notoriety and interest).



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General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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Scope Forfeiture of Hearsay Objection Due to Defendant's Misconduct

§ 1350 reads as follows:

Rule 1350 Forfeiture of Hearsay Objection Due to Defendant's Misconduct

(a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:

- (1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.
- (2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.
- (3) The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.
- (4) The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.
- (5) The statement is relevant to the issues to be tried.
- (6) The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances

thereof.

(b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial.

(c) If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

(d) As used in this section, "serious felony" means any of the felonies listed in subdivision (c) of *Section 1192.7 of the Penal Code* or any violation of *Section 11351, 11352, 11378, or 11379 of the Health and Safety Code*.

(e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.

(Added by Stats. 1985, ch. 783, § 1. Amended by Stats. 2001, ch. 854 (S.B. 205), § 5)

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1 ANALYSIS

Section 1350 provides a hearsay exception that, for once, is based on the unusual grounds of common sense. If there is clear and convincing evidence that a criminal defendant, charged with a serious felony, is responsible for the unavailability of a hearsay declarant, the statement has been memorialized, the statement is trustworthy and corroborated and the procedural protections of Section 1350 are afforded to the defendant, the defendant cannot complain about his or her inability to cross-examine the declarant. The declarant's out-of-court statements will be admissible to prove the truth of what is asserted. However, if the declarant's statement contains multiple layers of hearsay, the layers of hearsay not attributable to the unavailable declarant must be admissible pursuant to another hearsay exception.



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2 COMPARISON TO FEDERAL RULE

Section 1350 embodies the principle of forfeiture of evidentiary objection by misconduct, which is also embodied in Federal Rule of *Evidence* 804(b)(6), as amended in 1997. However, there are several important distinctions between the California and federal approaches, with the California rule emerging as the far superior of the two. The principle of forfeiture by misconduct incorporates an assumption that a party has engaged in misconduct. This assumption raises serious due process problems and, in criminal proceedings, *confrontation clause* problems. Thus, the California rule incorporates several limitations and procedural safeguards that are lacking in the federal version.

Both rules require that the declarant be "unavailable" for the exception to apply, but there the similarity between the two provisions ends. Section 1350(a)(1) suggests that its application is limited to situations where the declarant is unavailable because the declarant has been murdered or kidnapped. The federal rule requires only that the declarant be unavailable as defined by Federal Rule of *Evidence* 804(a). Section 1350(a) limits the use of this exception to those criminal proceedings in which a "serious felony" is charged. Federal Rule of *Evidence* 804(b)(6) applies in any criminal proceeding and even in civil actions.

The California and federal versions require significantly different levels of wrongdoing by the party against whom the statement is offered and significantly different degrees of proof of that wrongdoing. Section 1350(a) requires "that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party." Federal Rule of *Evidence* 804(b)(6) requires only that the party "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant." Section 1350(a) requires "clear and convincing evidence" of the defendant's misconduct. Federal Rule of *Evidence* 804(b)(6) requires merely that the party offering the statement convince the trial judge of the opposing party's misconduct by "a preponderance of the evidence" under Federal Rule of Evidence 104(a). Federal Rule of *Evidence* 804(b)(6) 1997 Advisory Committee Note.

The California rule has several additional safeguards that are completely absent from the federal version. Under Section 1350, there must be no evidence that the party offering the statement helped to cause, aide, solicit or procure the unavailability of the declarant. The statement must have been memorialized by a law enforcement official. The statement must have been made under circumstances indicating its trustworthiness. There must be corroborating evidence of the crime with which the defendant is charged. The prosecution must give pretrial notice that it intends to

use the statement. If the statement is offered at trial, it must be offered outside the presence of the jury. While one might criticize the California rule for being too limited, it is far more sensible than the vague and wide-ranging federal provision.



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General Practice Tip on Hearsay Exceptions

If you study the practice tip on defining hearsay and this practice tip on the hearsay exceptions, the hearsay rule should rarely prevent you from getting your evidence admitted. On the flip side, understanding the dangers presented by hearsay and the rationales for the exceptions will help you educate and persuade a judge as to why a piece of evidence should be excluded (generally this is the harder task, as exclusion of evidence may be more likely to result in reversal than admission of evidence).

To help you remember the variety of different hearsay exceptions, focus on the twin elements of reliability and necessity. Virtually all hearsay exceptions have a colorable reliability rationale to them (with the exception of party admissions, as discussed below). *See, e.g., People v. Cudjo* (1993) 6 Cal. 4th 585, 25 Cal. Rptr. 2d 390, 863 P.2d 635 (focus of exceptions to hearsay rule is on reliability of out-of-court declaration; thus, hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for absence of oath, cross-examination, and jury observation). Study the reliability rationale of each exception; some of these (such as spontaneous utterances) are quite dubious even in the abstract. You may be able to convince a trial judge that, given your facts, the reliability rationale of the exception does not apply here and the evidence should be excluded.

On the flip side, when trying to get hearsay admitted under an exception, remember that many of the hearsay exceptions, especially those with weaker reliability rationales, have an element of necessity to them. *See, e.g., In re Michael G.* (1993) 19 Cal. App. 4th 1674, 24 Cal. Rptr. 2d 260 (reasoning behind exceptions to the hearsay rule is that experience has shown that there are situations where it is impossible or impractical to present actual witness, yet proffered necessary evidence is inherently trustworthy under the circumstances). For example, many exceptions apply only when the declarant is unavailable to testify at trial. If you are concerned about the strength of your argument that an exception applies, do not hesitate to argue the necessity of this evidence in determining the truth in this case.



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§ 1360 reads as follows:

Rule 1360 In General

(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

(1) The statement is not otherwise admissible by statute or court rule.

(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

(3) The child either.

(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

(c) For purposes of this section, "child abuse" means an act proscribed by *Section 273a, 273d, or 288.5 of the Penal Code*, or any of the acts described in *Section 11165.1 of the Penal Code*, and "child neglect" means any of the acts described in *Section 11165.2 of the Penal Code*.

(Added by Stats. 1995, ch. 87 (A.B. 355), § 3)

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1 ANALYSIS

Section 1360 deals with the difficult issue of child testimony in cases of child abuse or neglect. Section 1360 attempts to ensure the reliability of the out-of-court statement by requiring indicia of reliability as well as corroboration where the child is unavailable. In addition, the accused must be provided with sufficient notice to ensure "a fair opportunity to prepare to meet the statement."

However, the United States Supreme Court's ruling in *Crawford v. Washington (2004)* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 raises serious questions about whether some statements that could be offered under Section 1360 violate the federal *Confrontation Clause*. In *Crawford*, the Court held that "testimonial" hearsay statements are no longer admissible against the accused in a criminal prosecution if the declarant does not testify at trial, unless (1) the witness is shown to be unavailable and (2) the accused had an earlier opportunity to confront and cross-examine the witness. Unless those two requirements are satisfied, it no longer matters whether the statements are deemed reliable by the trial judge (whether because they fit a firmly rooted hearsay exception or because they bear specific "indicia of reliability"), thus explicitly overruling *Ohio v. Roberts (1980)* 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, 17 Ohio Op. 3d 240. Section 1360(a)(2) was structured to incorporate the reliability test of *Ohio v. Roberts*, but since *Crawford* overrules that decision, the central issue for California courts now will be whether a statement by a child is "testimonial" because it was in response or in conjunction with involvement by law enforcement officials.

The problem is that the *Crawford* Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 124 S. Ct. at 1374. The Court explained that "the principal evil at which the *Confrontation Clause* was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." *Id.* at 1363.

It is unclear how far the term "testimonial" may go--would it, for example, apply to a statement made to a nurse, physician, paramedic, or an interviewer who specializes in cases of child abuse? In *People v. Sisavath (2004)* 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753, the Court of Appeals reversed four of defendant's abuse convictions due to the admission of "testimonial" hearsay statements against a criminal defendant, including statements of a child victim made during interview with a "forensic interview specialist" at a facility specially designed and staffed for interviewing

children suspected of being victims of abuse. The Court of Appeals did not hold that all statements arising from such interviews are inadmissible, but here the interview with the child was held after formal prosecution of defendant had been initiated. The court thus concluded that such statements violate the *Confrontation Clause of the Sixth Amendment* if the declarant is unavailable to testify at trial and the defendant has no previous opportunity to cross-examine.

Other courts have turned for guidance to the *Crawford* Court's citation of a standard offered by one of the amicus curiae, defining as "testimonial" those " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' " *Crawford*, 124 S. Ct. at 1364 (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3). Under this standard, it is certainly possible that some statements under Section 1360 could be "testimonial," even if the statements were made to someone other than a law enforcement official, such as a physician, nurse, or paramedic.

A final problem is that the *Crawford* Court also left undecided whether the *Confrontation Clause* would ever exclude nontestimonial hearsay; it acknowledged that it had once held that the Clause applies to those forms of hearsay as well, but added ominously that "our analysis in this case casts doubt on that holding." *Id.* at 1370 ; see also *id.* at 1374 ("Where *nontestimonial* hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether"). Thus, even if statements made under Section 1360 can be construed as "nontestimonial," such statements may or may not face a challenge under the federal constitution and may also face a challenge under the California Constitution. See *Cal. Const. art. I, § 15; Evidence Code section 711*). In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 2244 (2006) , the Supreme Court attempted to clarify the application of *Crawford* in two common settings--911 calls and police investigations in the field, as opposed to the station-house interrogation at issue in *Crawford*. The Court held that "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency... . They are testimonial when the circumstances indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 126 S. Ct. at 2273-2274 . *Davis* appears to have narrowed the reach of *Crawford* somewhat, so that some statements that would be admissible under Section 1360 may not violate the federal *confrontation clause* if "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." However, the courts are likely to experience far more confusion as they struggle to determine when the *Davis* standard is satisfied.

For a more detailed discussion, see the discussion under *Cal. Evid. Code § 711*.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1360.



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3 SIGNIFICANT CASES

In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340 (*Evidence Code* section 1360 does provide an exception to the hearsay rule in the case of criminal prosecutions for certain forms of child abuse or neglect," but does not directly apply to noncriminal cases such as dependency proceedings; the language of *Evidence Code* section 1200, read in light of *Evidence Code* section 160 and the comments thereon, makes clear that one source of exceptions to the hearsay rule is from judicial decisions; court recognizes child dependency hearsay exception allowing admission of statements by alleged victim of child sexual abuse in dependency hearings where there is sufficient indicia of reliability, such as the child is available for cross-examination or there is corroborating evidence of sexual abuse and other parties have notice, adopting safeguards of Section 1360; incompetence to testify at trial is not categorical bar to admission of hearsay statements under child dependency exception).

People v. Sisavath (2004) 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753 (four of defendant's abuse convictions are reversed due to the admission of "testimonial" hearsay statements against a criminal defendant, including statements of victim during interview with a "forensic interview specialist" at a facility specially designed and staffed for interviewing children suspected of being victims of abuse; Court of Appeals did not hold that all statements arising from such interviews are inadmissible, but here interview was held after formal prosecution of defendant had been initiated; such statements violate the *Confrontation Clause of the Sixth Amendment* if the declarant is unavailable to testify at trial and the defendant has no previous opportunity to cross-examine).

People v. Roberto V. (2001) 93 Cal. App. 4th 1350, 113 Cal. Rptr. 2d 804 (statements offered under Section 1360 did not have sufficient trustworthiness to satisfy *confrontation clause*; state provided insufficient advance notice of its intent to introduce statements under Section 1360).

People v. Eccleston (2001) 89 Cal. App. 4th 436, 107 Cal. Rptr. 2d 440 (admission of statements by unavailable child witness under Section 1360 satisfied the *confrontation clause* in this case, where trial court made specific findings of the reliability of the out-of-court statement, supported by independent appellate review of the record: (1) the declarant could differentiate truth and falsity; (2) the statements were spontaneously made and consistently repeated; (3) although declarant appeared puzzled and uneasy at times, declarant demonstrated comprehension and independence; (4) declarant

demonstrated a degree of sexual knowledge that is far beyond what would be expected of a child of similar age; (5) declarant had no motive to fabricate; (6) the statements were made in a non-suggestive, nonthreatening interview context).



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General Practice Tip on Hearsay Exceptions

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Scope In General

§ 1370 reads as follows:

Rule 1370 In General

(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:

- (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
- (2) The declarant is unavailable as a witness pursuant to Section 240.
- (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
- (4) The statement was made under circumstances that would indicate its trustworthiness.
- (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

- (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

(Added by Stats. 1996, ch. 416 (A.B. 2068), eff. Sept. 4, 1996. Amended by Stats. 2000, ch. 1001 (S.B. 1944), § 2)

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1 ANALYSIS

Section 1370 will always be known as the O. J. Simpson exception to the hearsay rule. The legislature passed this provision, which became effective immediately upon the signature of the governor, to allow for the admission of statements made by Simpson's ex-wife Nicole Brown Simpson, at the civil trial for her wrongful death and that of Ron Goldman. The 2000 amendment expanded the class of persons to whom the narration, description or explanation of infliction or threat of injury upon declarant may be made. This class now includes physicians, nurses and paramedics as well as law enforcement officials.

This amendment potentially preserves the constitutionality of Section 1370, at least in some cases. The U.S. Supreme Court's ruling in *Crawford v. Washington* (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 raises serious questions about whether some statements that could be offered under Section 1370 will violate the federal *Confrontation Clause*. In *Crawford*, the Court held that "testimonial" hearsay statements are no longer admissible against the accused in a criminal prosecution if the declarant does not testify at trial, unless (1) the witness is shown to be unavailable and (2) the accused had an earlier opportunity to confront and cross-examine the witness. Unless those two requirements are satisfied, it no longer matters whether the statements are deemed reliable by the trial judge (whether because they fit a firmly rooted hearsay exception or because they bear specific "indicia of reliability"), thus explicitly overruling *Ohio v. Roberts* (1980) 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, 17 Ohio Op. 3d 240. Section 1370(a)(4) and subsection (b) were structured to incorporate the reliability test of *Ohio v. Roberts*, but since *Crawford* overrules that decision, the central issue for California courts now will be whether a statement offered under Section 1370 is "testimonial."

Unfortunately, the Court in *Crawford* left "for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 124 S. Ct. at 1374. The Court explained that "the principal evil at which the *Confrontation Clause* was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." *Id.* at 1363. Thus, it seems unlikely that a court would consider a statement made to a physician, nurse or paramedic to be testimonial, since these are not typically the kind of ex parte examinations by law enforcement personnel that were the historical concern of the *Confrontation Clause*. See *id.* Other courts have turned for guidance to the *Crawford* Court's citation of a standard offered by one of the amicus curiae, defining as "testimonial" those "statements that were made under circumstances

which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' " *Crawford*, 124 S. Ct. at 1364 (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3). Under this standard, it is certainly possible that some statements under Section 1370 could be "testimonial," even if the statements were made to someone other than a law enforcement official, such as a physician, nurse, or paramedic.

A final problem is that the *Crawford* Court also left undecided whether the *Confrontation Clause* would ever exclude nontestimonial hearsay; it acknowledged that it had once held that the Clause applies to those forms of hearsay as well, but added ominously that "our analysis in this case casts doubt on that holding." *Id.* at 1370 ; see also *id.* at 1374 ("Where *nontestimonial* hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether"). Thus, even if statements made under Section 1370 can be construed as "nontestimonial," such statements may or may not face a challenge under the federal constitution and may also face a challenge under the California Constitution. See *Cal. Const. art. I, § 15; Evidence Code section 711*). In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 2244 (2006) , the Supreme Court attempted to clarify the application of *Crawford* in two common settings--911 calls and police investigations in the field, as opposed to the station-house interrogation at issue in *Crawford*. The Court held that "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency... . They are testimonial when the circumstances indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 126 S. Ct. at 2273-2274 . *Davis* appears to have narrowed the reach of *Crawford* somewhat, so that some statements that would be admissible under Section 1370 may not violate the federal *confrontation clause* if "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." However, the courts are likely to experience far more confusion as they struggle to determine when the *Davis* standard is satisfied.

For a more detailed discussion of the *Confrontation Clause*, see the discussion under *Cal. Evid. Code § 711*.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1370.



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3 SIGNIFICANT CASES

People v. Quitiquit (2007) 155 Cal. App. 4th 1, 65 Cal. Rptr. 3d 674 (wife's statement to physician that husband twisted her neck, made seven weeks after neck injury, was not made "at or near" time of infliction or threat of injury; Section 1370's language explicitly requires that the statement be made at a time close to the infliction of the injury, which in most circumstances will be within hours or days, rather than weeks or months; wife's similar statement to police officer was not made under circumstances showing trustworthiness as required by Section 1370).

People v. Pantoja (2004) 122 Cal. App. 4th 1, 18 Cal. Rptr. 3d 492 (trial court erred in admitting prior threat to kill victim contained in an application for a restraining order; declaration failed to meet statutory requirements of Section 1370, the hearsay exception for statements of unavailable declarant describing infliction or threat of physical injury, that it be made under circumstances that would guarantee trustworthiness; prosecutor failed to provide information regarding time, place and circumstances under which declaration was prepared, it was unclear if victim even wrote the declaration because she spoke almost no English but the declaration was written in English, and, finally, victim had potential bias and a motive to stretch the truth in providing a declaration to support an application for a restraining order; error was prejudicial requiring reversal of conviction).

People v. Murphy (2003) 107 Cal. App. 4th 1150, 132 Cal. Rptr. 2d 688 (trial court erred in permitting witness to testify using a one-way mirrored glass, to prevent the witness from seeing a defendant, without holding an evidentiary hearing to determine whether, and to what degree, the testifying victim's apparent anxiety was due to the defendant's presence; a court may not dispense with complete face-to-face confrontation merely upon a prosecutor's unsworn representation that defendant's presence was part of a distraught adult witness's problem; error was not harmless beyond a reasonable doubt, especially since the pivotal issue was the alleged victim's credibility).

People v. Williams (2002) 102 Cal. App. 4th 995, 125 Cal. Rptr. 2d 884 (trial court's decision to allow an adult witness with physical and mental disabilities to testify for the prosecution by prior videotape recording did not deny defendant the right to confront witnesses, to be present at trial, or due process, where the tape was recorded while the witness was in the courtroom and cross-examined, and while appellant was in a detention cell wired so he could hear the witness and communicate with counsel).

People v. Hernandez (1999) 71 Cal. App. 4th 417, 83 Cal. Rptr. 2d 747 (Section 1370 does not violate the due process or *confrontation clauses of the constitution*; statements made by a domestic assault victim to police shortly after an assault were admissible under Section 1370).



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§ 1380.syn Synopsis to Chapter 1380: Statements Made by Elderly and Dependent Adults

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SECTION 1380 Statements Made by Elderly and Dependent Adults

1-1380 California Evidence Courtroom Manual Scope

Scope Statements Made by Elderly and Dependent Adults

§ 1380 reads as follows:

Rule 1380 Statements Made by Elderly and Dependent Adults

(a) In a criminal proceeding charging a violation, or attempted violation, of *Section 368 of the Penal Code*, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, as defined in subdivisions (a) and (b) of Section 240, and all of the following are true:

(1) The party offering the statement has made a showing of particularized guarantees of trustworthiness regarding the statement, the statement was made under circumstances which indicate its trustworthiness, and the statement was not the result of promise, inducement, threat, or coercion. In making its determination, the court may consider only the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.

(2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.

(3) The entire statement has been memorialized in a videotape recording made by a law enforcement official, prior to the death or disabling of the declarant.

(4) The statement was made by the victim of the alleged violation.

(5) The statement is supported by corroborative evidence.

(6) The victim of the alleged violation is an individual who meets both of the following requirements:

(A) Was 65 years of age or older or was a dependent adult when the alleged violation or attempted violation occurred.

(B) At the time of any criminal proceeding, including, but not limited to, a preliminary hearing or trial, regarding the alleged violation or attempted violation, is either deceased or suffers from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

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SECTION 1380 Statements Made by Elderly and Dependent Adults

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1 ANALYSIS

The United States Supreme Court issued a landmark ruling in *Crawford v. Washington (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177*. The Court held that "testimonial" hearsay statements are no longer admissible against the accused in a criminal prosecution if the declarant does not testify at trial, unless (1) the witness is shown to be unavailable and (2) the accused had an earlier opportunity to confront and cross-examine the witness. Unless those two requirements are satisfied, it no longer matters whether the statements are deemed reliable by the trial judge (whether because they fit a firmly rooted hearsay exception or because they bear specific "indicia of reliability"), thus explicitly overruling *Ohio v. Roberts (1980) 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, 17 Ohio Op. 3d 240*.

Section 1380 was designed to allow prosecutors to use certain out-of-court statements made by particularly vulnerable persons, such as the elderly and dependent adults. The statute was explicitly drafted to incorporate the reliability test of *Ohio v. Roberts (1980) 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, 17 Ohio Op. 3d 240* (see Section 1380(a)(1)) and to provide the additional safeguard of videotaping the statement. However, in light of *Crawford*, there is a serious concern that Section 1380 is unconstitutional on its face. One Court of Appeals has already so held: *People v. Pirwani (2004) 119 Cal. App. 4th 770, 14 Cal. Rptr. 3d 673*. The *Pirwani* court held that Section 1380 is unconstitutional on its face as it permits uncross-examined "testimonial" evidence from unavailable declarants in criminal cases. *Id.*, 119 Cal. App. 4th at 786. But see *People v. Cooper (2007) 148 Cal. App. 4th 731, 56 Cal. Rptr. 3d 6* (video of victim's living conditions is not testimonial).

The central problem is that, in addition to its other requirements, Section 1380 requires that the "entire statement [be] memorialized in a videotape recording made by a law enforcement official, prior to the death or disabling of the declarant." Section 1380(a)(3). The question is whether the involvement of law enforcement officials, at least in videotaping the statement, makes all statements under Section 1380 inherently "testimonial." Unfortunately, the Court in *Crawford* left "for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 124 S. Ct. at 1374. The Court explained that "the principal evil at which the *Confrontation Clause* was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." *Id.* at 1363.

It is unclear whether the involvement of law enforcement officials, without more, makes all statements under Section

1380 "testimonial" under this standard. The *Crawford* Court made clear that "interrogation" does not have to mean a formal questioning process, but it is unclear exactly what kind of involvement by law enforcement officials is sufficient to invoke the protection of the *Confrontation Clause*. See *Crawford*, 124 S. Ct. at 1365 n. 4 ("We use the term 'interrogation' in its colloquial, rather than any technical legal, sense. [Citation omitted.] Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case. [The declarant's] recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition"). Some courts have also turned for guidance to the *Crawford* Court's citation of a standard offered by one of the amicus curiae, defining as "testimonial" those "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *Crawford*, 124 S. Ct. at 1364 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3).

However, even if a statement made under Section 1380 is testimonial, it is possible that the statement could be admitted in the perhaps unusual instance where the statement was previously subjected to cross-examination by the defendant (in a previous trial or preliminary hearing, for example), the declarant made a statement in compliance with Section 1380 but is now unavailable. The *Crawford* Court also left undecided whether the *Confrontation Clause* would ever exclude nontestimonial hearsay (such as a statement admitted under the hearsay exception for business records); it acknowledged that it had once held that the Clause applies to those forms of hearsay as well, but added ominously that "our analysis in this case casts doubt on that holding." *Id.* at 1370 ; see also *id.* at 1374 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether"). Thus, even if statements made under Section 1380 can ever be construed as "nontestimonial," such statements may or may not face a challenge under the federal constitution and may also face a challenge under the California constitution. See *Cal. Const. art. I, § 15; Evidence Code section 711*). For an approach to the federal and state rights of confrontation that balances the reliability, procedural, and societal functions of confrontation, see Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 *Minn. L. Rev.* 623 (1992).



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2 COMPARISON TO FEDERAL RULE

There is no counterpart to Section 1380 in the Federal Rules of Evidence.



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3 SIGNIFICANT CASES

People v. Cooper (2007) 148 Cal. App. 4th 731, 56 Cal. Rptr.3d 6 (trial court erred in excluding video footage depicting the condition of a home as admissible because it is demonstrative, non-testimonial evidence in which there is no statement from a witness who could possibly be cross-examined and by automatically excluding taped interviews with victim and an expert regarding the victim's mental state without analyzing whether those videos in fact contained testimonial statements in violation of the *Confrontation Clause*; holding that the interview with the victim did evolve into testimonial questioning and that the interview of the expert was testimonial, its primary purpose being to gather information to prosecute defendant).

People v. Pirwani (2004) 119 Cal. App. 4th 770, 14 Cal. Rptr. 3d 673 (trial court committed prejudicial error in admitting elderly decedent's hearsay statements in a criminal trial because *Evidence Code section 1380*, which creates a hearsay exception for statements made by elderly or dependent adults to law enforcement officials is unconstitutional on its face as it permits uncross-examined "testimonial" evidence from unavailable declarants in criminal cases).



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SECTION 1400 Authentication

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§ 1400.syn Synopsis to Chapter 1400: Authentication

Scope Authentication

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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SECTION 1400 Authentication

1-1400 California Evidence Courtroom Manual Scope

Scope Authentication

§ 1400 reads as follows:

Rule 1400 Authentication

Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1400 Authentication

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1 ANALYSIS

Before a piece of evidence can be admitted, the advocate must make a showing that the evidence is what the advocate says it is; in other words, the advocate must show that the evidence is authentic. However, the showing of authenticity the advocate must make to the judge is minimal--the advocate must simply produce enough evidence that a reasonable person could find that the evidence is authentic. *See Section 403.* The judge may not make determinations of credibility. The jury has the final decision on whether the evidence is what it purports to be. The jury will be instructed (if the instruction is requested) that if they find that the evidence is authentic, they may use it as a basis for the decision. If they do not believe it is authentic, they must ignore the evidence.

This chapter deals with the authenticity of writings. The definition of a "writing" is very broad. Section 250 includes as writings not only handwritten or printed documents, but also "photostating, photographing and every other means of recording upon any tangible thing any form of communication or representation." This definition includes videotapes, tape recordings, photographs and drawings.

While not expressly stated in the California Evidence Code, a showing of authenticity is required for all types of evidence, including "real evidence," such as a murder weapon or the defective product that caused an injury. Even testimony as to conversations, whether in person or over the telephone, require foundation as to the identification of the participants. Section 403, along with the basic relevancy provisions of Sections 210, 350 and 351, control the admissibility of such evidence, since the evidence cannot help to prove an issue in dispute if it is not genuine.



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2 COMPARISON TO FEDERAL RULE

This section is the counterpart of Federal Rule of *Evidence* 901(a). In addition, the definition of a "writing" in Section 250 is virtually identical to the definition in Federal Rule of *Evidence* 1001.



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3 SIGNIFICANT CASES

Ashford v. Culver City Unified Sch. Dist. (2005) 130 Cal. App. 4th 344, 29 Cal. Rptr. 3d 728 (trial court, in an administrative mandamus proceeding, had no legal basis for its order remanding the matter back to the Board of Education so as to give the school district another opportunity to present foundational evidence at a second administrative hearing to authenticate a videotape that was basis of district's decision to fire employee; foundational facts necessary to authenticate the videotape were not "new evidence" that would provide a basis for a second hearing; without proper foundation, the videotape was inadmissible irrelevant and hearsay; although procedures at administrative hearings are relaxed, "evidence must be produced at the hearing by witnesses personally present, or by *authenticated* documents, maps or photographs; and ordinarily, hearsay evidence standing alone can have no weight").

Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (a document is not presumed to be what it purports to be, and it must be authenticated in some fashion before it is introduced into evidence).



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SECTION 1401 Authentication Required

1-1401 California Evidence Courtroom Manual 1401.syn

§ 1401.syn Synopsis to Chapter 1401: Authentication Required

Scope Authentication Required

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1-1401 California Evidence Courtroom Manual Scope

Scope Authentication Required

§ 1401 reads as follows:

Rule 1401 Authentication Required

- (a) Authentication of a writing is required before it may be received in evidence.
- (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This section makes clear that a writing, whether the original or secondary proof of a writing is acceptable under Section 1520 et seq., must be authenticated by the proponent of the writing.



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SECTION 1401 Authentication Required

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2 COMPARISON TO FEDERAL RULE

This section is similar to Federal Rules of *Evidence* 901(a) and 1008 (which requires authentication of a duplicate under the best evidence rule).



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3 SIGNIFICANT CASES

People v. Williams (1997) 16 Cal. 4th 635, cert. denied, 523 U.S. 1027, 140 L. Ed. 2d 478, 118 S. Ct. 1314 (detective laid foundation for authenticity of tape by testifying that tape was a record of his conversation with defendant; citing *People v. Mayfield* (1997) 14 Cal. 4th 668, 60 Cal. Rptr. 2d 1, 928 P.2d 485 (a recording is authenticated by evidence that it "accurately depicts what it purports to show"))).

Interinsurance Exchange of Auto. Club of Southern California v. Velji (1975) 44 Cal. App. 3d 310, 118 Cal. Rptr. 596 (an objection to the authentication of a document under this section does not go to truth of contents of the document, but to the introduction of evidence sufficient to sustain a finding that it is the writing proponent claims it to be).



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SECTION 1402 Authentication of Altered Writings

1-1402 California Evidence Courtroom Manual 1402.syn

§ 1402.syn Synopsis to Chapter 1402: Authentication of Altered Writings

Scope Authentication of Altered Writings

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SECTION 1402 Authentication of Altered Writings

1-1402 California Evidence Courtroom Manual Scope

Scope Authentication of Altered Writings

§ 1402 reads as follows:

Rule 1402 Authentication of Altered Writings

The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1402 Authentication of Altered Writings

1-1402 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 1402 makes clear that if an opponent points to what appears to be an alteration in a writing, the proponent must carry the burden of proving that the writing is authentic. *See also Penal Code section 132* (offering forged or altered documents into evidence).



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2 COMPARISON TO FEDERAL RULE

Section 1402 merely restates the authentication burden on the proponent of evidence that is contained in Federal Rule of Evidence 901(a).



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1-1402 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Estate of Nielson (1980) 105 Cal. App. 3d 796, 165 Cal. Rptr. 319 (in contest of validity of will which contained alterations allegedly written by testator, trial court erroneously concluded there was no evidence presented as to authorship of alterations since trier of fact could have determined the authorship by comparison of questioned writing with "genuine" or admitted handwriting of testator).

Consolidated Loan Co. v. Harman (1957) 150 Cal. App. 2d 488, 310 P.2d 450 (1957) (test of materiality of an alteration of a written instrument is whether it changes the rights and duties of the parties, or either of them).



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1-1410 California Evidence Courtroom Manual 1410.syn

§ 1410.syn Synopsis to Chapter 1410: Article Not Exclusive

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1-1410 California Evidence Courtroom Manual Scope

Scope Article Not Exclusive

§ 1410 reads as follows:

Rule 1410 Article Not Exclusive

Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1410, in essence, states that the proponent may use any means possible to prove the authenticity of a writing. Sections 1411 to 1421 describe several nonexclusive methods for authenticating evidence, including testimony of a witness with personal knowledge of a matter, handwriting identification, unique circumstances or content, and the age of the document.

In addition, Sections 170 and 702 suggest that any person who has first-hand knowledge that a matter is what its proponent claims may testify to such facts and establish the foundation for connective relevancy. For example, custody authentication falls within the category of authentication through testimony. Under this technique the authenticating witness or witnesses account for the precise whereabouts of an object from the time it was found in connection with the relevant facts of the case until the moment it is offered into evidence. Where more than one person has had custody of an item, a chain of custody may be accounted for. The use of chain of custody authentication is usually required in the discretion of the trial judge where identification of an object would be difficult because of a lack of distinctive characteristics such as a serial number or signature.

The authentication of a photograph may also be established through the testimony of a witness. The foundational witness testifies that the photograph being offered at trial is a faithful and accurate representation of the object or scene depicted. The authenticating witness, through his or her testimony, connects the photograph offered at trial with the relevant facts of the case where the relevant facts are related to the scene, event or object depicted.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 901(b) is identical to Section 1410 in declaring that the examples of methods of authentication listed in the rule are not exclusive. Like Sections 1411 to 1421, the federal rule contains a series of examples of authentication or identification but notes that they are merely illustrative. Some of these illustrations are identical to those expressly listed in the California Code (testimony of a witness with knowledge, nonexpert opinion on handwriting, comparison by trier or expert witness, distinctive characteristics and ancient documents), while other illustrations are unique to 901(b)--voice identification, telephone conversations, process or system, and methods provided by statute or rule. Because Section 1410 states that the means of authentication are not exclusive, these methods are also available in California to authenticate or identify evidence.

Voice Identifications

Just as the authentication of a document involves attributing authorship to a particular individual, the authentication of an oral statement involves identifying the individual who made the statement. Federal Rule of *Evidence* 901(b)(5) and (6) illustrate methods by which oral statements may be attributed to a particular speaker where the identification of the speaker is relevant in a case.

Voice identification is established by opinion evidence, that is, by testimony of a witness that, based upon his or her familiarity with a speaker's voice, it is the witness's belief that the voice sought to be identified or authenticated is that of the specific speaker. It is clear from the provisions of Federal Rule of *Evidence* 901(b)(5) that anyone who has heard the voice of the alleged speaker, at any time, may offer opinion testimony sufficient to identify the voice. Such a witness need not offer conclusive proof on the issue of identity, but must merely offer testimony sufficient to establish a finding of identity.

The proponent of voice identification testimony must establish by way of foundation that the witness has some familiarity with the alleged speaker's voice. Pursuant to the Federal Rule of *Evidence* 901(b)(5), this foundation may be established by showing that the witness has heard the voice sought to be identified under circumstances connecting it with the alleged speaker. Accordingly, the requisite familiarity may arise from exposure to the alleged speaker's voice prior to or subsequent to the conversation or communication sought to be authenticated. In the typical situation, however, a witness offering an opinion on voice identification will do so based upon his prior familiarity with the voice

in question.

Telephone Conversations

Federal Rule of *Evidence* 901(b)(6) provides for authentication of telephone conversations. The rule is designed to apply specifically to calls initiated by the person who offers the foundational evidence. In other words, it pertains to outgoing calls. Federal Rule of *Evidence* 901(b)(6) applies to telephone calls to both individuals and business establishments, and a slightly different foundational requirement is indicated for each. The rule provides a method for attributing oral statements to a particular speaker or to a person who speaks for a particular business establishment where the identity of the speaker is relevant to an issue in the case.

In order to utilize this provision, there must be evidence that a call was placed to a number assigned at the time by the telephone company to a particular person or business. This evidence may consist of testimony or other proof such as, for example, telephone company records. In regard to an individual, there must be circumstantial evidence that identifies the person who answered the call as the one who was intended to be called. This requirement may be satisfied by testimony that the recipient identified himself or herself, or by other circumstances that are probative of identity. In regard to a call to a business, the foundation must include evidence that the call was made to a place of business and that the conversation related to business reasonably transacted over the phone. If the answering person has purported to speak for the business, it is not necessary that his or her individual identity be established, as long as the conversation is circumstantially probative of the identity of the place of business.

Process or Systems

Federal Rule of *Evidence* 901(b)(9) provides a method for authenticating the resulting product of a process or system. Authentication under this rule is established by foundational evidence which describes the process or system and which shows that the process or system produces an accurate result.

While the method of establishing authenticity provided by Federal Rule of *Evidence* 901(b)(9) may be utilized in connection with any process or system, the rule will frequently be used to authenticate computer results. It should be noted that there is no requirement under Federal Rule of *Evidence* 901(b)(9) that printouts have been produced in the regular course of business, although this factor may be significant if Federal Rule of *Evidence* 803(6) is used as a basis for satisfying the hearsay system. Federal Rule of *Evidence* 901(b)(9) will, of course, be utilized for authenticating results from processes or systems other than computer systems, such as: X-ray films, motion pictures, audio recordings, police radar systems, medical tests such as electrocardiograms, and certain out-of-court experiments, polls and surveys.

Methods Provided by Statute or Rule

Federal Rule of *Evidence* 901(b)(10) is in effect a clarifying provision, and the rule preserves methods of authentication or identification provided by certain legislative provisions and by rules promulgated by the Supreme Court. For example, the Federal Business Records Act provides a simplified method for authentication of numerous types of documents. The Act exempts certain public documents and private writings which were made in the regular course of business if the keeping of such records was in fact a regular procedure of that business. *See also* Federal Rules of *Evidence* 902(11) and 902(12), effective December 1, 2000, permitting authentication by certification of business records.



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3 ADDITIONAL AUTHORITY

Edward J. Imwinkelried, Richard C. Wydick & James E. Hogan, California Evidentiary Foundations (1988 & 1991 Supp.)



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4 SIGNIFICANT CASES

Authentication of Documents

People v. Gibson (2001) 90 Cal. App. 4th 371, 108 Cal. Rptr. 2d 809 (in a prostitution case against an alleged madam, manuscripts describing the operation of the prostitution business were properly authenticated and admissible where they were found in defendant's residence and listed defendant's business alias as author).

People v. Olguin (1994) 31 Cal. App. 4th 1355, 37 Cal. Rptr. 2d 596 (rap lyrics found in search of defendant's home three weeks after murder were adequately authenticated and admissible against defendant on issue of his culpability in gang-related murder, even though authentication was not accomplished through statutorily created means).

Fraijo v. Hartland Hosp. (1979) 99 Cal. App. 3d 331, 160 Cal. Rptr. 246 (brochure which manufacturer of Demerol included in the drug's package was inadmissible where plaintiffs failed to authenticate the brochure; plaintiffs produced no evidence to establish that the brochure had accompanied the drug and had been distributed to customers purchasing it).

Authentication of Videotapes, Audiotapes, Photographs and Drawings

People v. Mayfield (1997) 14 Cal. 4th 668, 60 Cal. Rptr. 2d 1 (videotape is authenticated by testimony or other evidence that it actually depicts what it purports to show; videotape properly authenticated where, although tape was made during the day and crime occurred at night and tape was made almost 18 months after the crime, the tape was admitted only to show height and location of walls and fences that could be seen by looking over them at certain locations, making lighting irrelevant, and prosecution provided evidence that walls and fences had not changed since the crime).

Jones v. City of Los Angeles (1993) 20 Cal. App. 4th 436, 24 Cal. Rptr. 2d 528 (nurse's testimony that she was present during filming of "day in the life" video depicting plaintiff's daily activities following automobile accident, and that she had been to nursing home prior to filming and was aware of plaintiff's daily routine, was sufficient to authenticate video).

People v. Garcia (1988) 201 Cal. App. 3d 324, 247 Cal. Rptr. 94 (testimony of eyewitness that he gave description of the suspect to the police, that he met with a police artist to make a drawing of the suspect, and that the copy being offered into evidence was similar to or the same as the sketch which he had the artist draw was adequate foundation for admission of photographic copy of artist sketch of suspect).

People v. Patton (1976) 63 Cal. App. 3d 211, 133 Cal. Rptr. 533 (testimony of witness that tape recording of telephone conversation in which defendant allegedly encouraged her to become a prostitute was accurate and complete, except for initial gap, constituted sufficient authentication of tape recording, which was additionally identified by officer who operated recording machine).

People v. Jones (1970) 7 Cal. App. 3d 48, 86 Cal. Rptr. 717 (where witness, who followed robbery suspect's car for several blocks after robbery, identified People's exhibit as photograph of rear portion of car he followed, and police officer testified that he arrested defendant in vehicle depicted in photograph, photograph was sufficiently authenticated to be received in evidence).



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SECTION 1410.5 Graffiti Constitutes a Writing

1-1410.5 California Evidence Courtroom Manual 1410.5.syn

§ 1410.5.syn Synopsis to Chapter 1410.5: Graffiti Constitutes a Writing

Scope Graffiti Constitutes a Writing

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1-1410.5 California Evidence Courtroom Manual Scope

Scope Graffiti Constitutes a Writing

§ 1410.5 reads as follows:

1410.5 Graffiti Constitutes a Writing

(a) For purposes of this chapter, a writing shall include any graffiti consisting of written words, insignia, symbols, or any other markings which convey a particular meaning.

(b) Any writing described in subdivision (a), or any photograph thereof, may be admitted into evidence in an action for vandalism, for the purpose of proving that the writing was made by the defendant.

(c) The admissibility of any fact offered to prove that the writing was made by the defendant shall, upon motion of the defendant, be ruled upon outside the presence of the jury, and is subject to the requirements of Sections 1416, 1417, and 1418.

(Stats. 1989, ch. 660, § 1)

* * * * *



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1 ANALYSIS

This section elaborates on Section 250 (definition of a writing), making symbols that may be construed as graffiti subject to the requirement of authentication.



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2 COMPARISON TO FEDERAL RULE

The definition of a writing in Federal Rule of *Evidence 1001* would encompass the evidence contemplated by this section.



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Estate of Wong (1995) 40 Cal. App. 4th 1198, 47 Cal. Rptr. 2d 707 (arrow in alleged holographic will was symbol with no fixed meaning, and could not be used in place of donative words or used to supply any meaning to words around it).



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SECTION 1411 Subscribing Witness's Testimony Unnecessary

1-1411 California Evidence Courtroom Manual 1411.syn

§ 1411.syn Synopsis to Chapter 1411: Subscribing Witness's Testimony Unnecessary

Scope Subscribing Witness's Testimony Unnecessary

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1-1411 California Evidence Courtroom Manual Scope

Scope Subscribing Witness's Testimony Unnecessary

§ 1411 reads as follows:

Rule 1411 Subscribing Witness's Testimony Unnecessary

Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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1 ANALYSIS

See Analysis of Section 1412.



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2 COMPARISON TO FEDERAL RULE

This section is virtually identical to Federal Rule of *Evidence* 903.



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See Section 1412.



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SECTION 1412 Use of Other Evidence When Subscribing Witness's Testimony Required

1-1412 California Evidence Courtroom Manual 1412.syn

§ 1412.syn Synopsis to Chapter 1412: Use of Other Evidence When Subscribing Witness's Testimony Required

Scope Use of Other Evidence When Subscribing Witness's Testimony Required

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SECTION 1412 Use of Other Evidence When Subscribing Witness's Testimony Required

1-1412 California Evidence Courtroom Manual Scope

Scope Use of Other Evidence When Subscribing Witness's Testimony Required

§ 1412 reads as follows:

Rule 1412 Use of Other Evidence When Subscribing Witness's Testimony Required

If the testimony of a subscribing witness is required by statute to authenticate a writing and the subscribing witness denies or does not recollect the execution of the writing, the writing may be authenticated by other evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

* * * * *



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SECTION 1412 Use of Other Evidence When Subscribing Witness's Testimony Required

1-1412 California Evidence Courtroom Manual 1

1 ANALYSIS

This section and Section 1411 relate primarily to the need to authenticate wills.

Thus, these sections should be read along with *Probate Code sections 8220-8222, 8253* (subscribing witness's testimony); *Civil Code sections 1195* (methods of proving execution), 1196 (identifying subscribing witness), 1197 (matters to be proved by subscribing witness), 870 (opinion testimony of subscribing witness as to sanity of testator), 771, 1237 (refreshing memory of subscribing witness).

If the subscribing witness is simply unavailable or has no recollection of the writing, the general provisions of Sections 1400-1401 and 1410 apply, and authentication may be made by any of the means *discussed under Section 1410*.



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Unavailability of Subscribing Witness

Adams v. Norris (1859) 64 U.S. 353 (where all the witnesses to a will offered in evidence were dead, evidence of their signatures and of that of the testator, and also a declaration by the testator that he had made a similar will, was admissible in support of the fact of its execution).

Hilborn v. Alford (1863) 22 Cal. 482 (in action upon a promissory note signed with an "X" or mark, its execution may be proved by admissions of the maker, in the absence of any attesting witness).



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SECTION 1413 Witness to the Execution of a Writing

1-1413 California Evidence Courtroom Manual 1413.syn

§ 1413.syn Synopsis to Chapter 1413: Witness to the Execution of a Writing

Scope Witness to the Execution of a Writing

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1-1413 California Evidence Courtroom Manual Scope

Scope Witness to the Execution of a Writing

§ 1413 reads as follows:

Rule 1413 Witness to the Execution of a Writing

A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1-1413 California Evidence Courtroom Manual 1

1 ANALYSIS

Where the relevancy of a writing requires attributing authorship or execution to a particular individual, a person who has had first-hand knowledge (as defined by Sections 170 and 702) of the execution may testify that the document offered at trial is the same one executed by a particular individual. Such foundational testimony connects the document offered at trial with the actual execution by a particular person.

Illustration

Counsel:

Did you have occasion on February 12, 1990 to meet with the defendant and Mr. Johnstone?

Witness:

Yes I did.

Counsel:

Please describe the nature of that occasion.

Witness:

I happened to attend a meeting at Mr. Johnstone's office which involved the review and execution of certain documents.

Counsel:

I hand you now what has been marked as plaintiff's Exhibit No. 3 and ask you if you recognize that document.

Witness:

Yes, it was one of the documents that was reviewed on that date.

Counsel:

I direct your attention to the signature at the bottom of the page. Were you present at the time that signature was executed?

Witness:

Yes, I actually saw the defendant execute that document at the meeting. That is the signature I saw the defendant put at the bottom of the page.

Counsel:

Your Honor, we now would like to offer this exhibit into evidence based on the authentication provided by this witness.

Judge:

Is there an objection?

Opposing Counsel:

No, Your Honor.

Judge:

Then it will be received into evidence and it may be published to the jury.



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2 COMPARISON TO FEDERAL RULE

Section 1413 is virtually identical to Federal Rule of *Evidence* 901(b)(1).



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See Section 1410.



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SECTION 1414 Admission of Authenticity

1-1414 California Evidence Courtroom Manual 1414.syn

§ 1414.syn Synopsis to Chapter 1414: Admission of Authenticity

Scope Admission of Authenticity

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SECTION 1414 Admission of Authenticity

1-1414 California Evidence Courtroom Manual Scope

Scope Admission of Authenticity

§ 1414 reads as follows:

Rule 1414 Admission of Authenticity

A writing may be authenticated by evidence that:

- (a) The party against whom it is offered has at any time admitted its authenticity; or
- (b) The writing has been acted upon as authentic by the party against whom it is offered.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

A party may be able to authenticate a writing during discovery by sending the opponent a request for admission of the authenticity of the writing under *Code of Civil Procedure section 2033*. Moreover, Section 1414(b) allows a party to argue that the opponent has admitted the authenticity of a writing by relying on it in any way.



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2 COMPARISON TO FEDERAL RULE

While there is no federal rule directly on point, the circumstances contemplated by Section 1414 would probably be covered by *Federal Rule of Evidence 901(b)(1)* (testimony of witness with first-hand knowledge) or 901(b)(10) (methods provided by rule or statute) in combination with *Federal Rule of Civil Procedure 36*--Request for Admissions. Federal Rule of *Evidence 901(b)(4)* (distinctive characteristics and the like) might cover the situation where a person has relied on the document in such a way as to establish its authenticity.



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SECTION 1414 Admission of Authenticity

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Ambriz v. Kelegian (2007) 146 Cal. App. 4th 1519, 53 Cal. Rptr. 3d 700 , modified and reh'g denied, 2007 Cal. App. LEXIS 203 (Feb. 15, 2007) , review denied (trial court in malpractice action committed reversible error in excluding substantial part of plaintiff's evidence in opposition to law firm's motion for summary judgment. Trial court erred in excluding an excerpt of a deposition transcript because it did not have the reporter's certification where the defendants relied on the same deposition transcript in moving for summary judgment and authentication on this ground is permitted under Section 1414 unless defendants could show that deposition excerpt came from different deposition, which they did not; in addition, plaintiff's attorney attested, under penalty of perjury, that the copies of the documents lodged constituted "true and correct copies of what they purport to be.").

People v. Lynn (1984) 159 Cal. App. 3d 715, 206 Cal. Rptr. 181 (it is not necessary for purposes of authentication of a writing that the writing be physically created by the author's hand).



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SECTION 1415 Authentication by Handwriting Evidence

1-1415 California Evidence Courtroom Manual 1415.syn

§ 1415.syn Synopsis to Chapter 1415: Authentication by Handwriting Evidence

Scope Authentication by Handwriting Evidence

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SECTION 1415 Authentication by Handwriting Evidence

1-1415 California Evidence Courtroom Manual Scope

Scope Authentication by Handwriting Evidence

§ 1415 reads as follows:

Rule 1415 Authentication by Handwriting Evidence

A writing may be authenticated by evidence of the genuineness of the handwriting of the maker.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1415 Authentication by Handwriting Evidence

1-1415 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 1415 concerns the situation where a document is being connected to a particular individual who authored it and where such execution or authorship is a relevant fact of the case. The burden is on the proponent of the document to provide sufficient evidence of the genuineness of the handwriting of the maker. This requirement could be met by testimony of a person with knowledge, expert testimony or an admission of genuineness.



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2 COMPARISON TO FEDERAL RULE

This section is comparable to Federal Rule of *Evidence* 901(b)(1)-(b)(3).



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See Sections 1416-1418.



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SECTION 1416 Proof of Handwriting by Person Familiar Therewith

1-1416 California Evidence Courtroom Manual 1416.syn

§ 1416.syn Synopsis to Chapter 1416: Proof of Handwriting by Person Familiar Therewith

Scope Proof of Handwriting by Person Familiar Therewith

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1-1416 California Evidence Courtroom Manual Scope

Scope Proof of Handwriting by Person Familiar Therewith

§ 1416 reads as follows:

Rule 1416 Proof of Handwriting by Person Familiar Therewith

A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:

- (a) Having seen the supposed writer write;
- (b) Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;
- (c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or
- (d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1416 Proof of Handwriting by Person Familiar Therewith

1-1416 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 1416 provides that the authenticity of a document may be established through non-expert opinion on handwriting. Section 1416 codifies the principle that non-expert foundational opinion may be used to attribute the handwriting on an offered exhibit to a particular individual. Under this technique of authentication, a person familiar with the handwriting of an individual provides foundational testimony that, based on his or her knowledge of the individual's handwriting, the document was written by the individual in question. Obviously, the authenticating witness must have sufficient familiarity with the handwriting of the document's author to render a valuable opinion as to authorship. The burden is on the proponent of the document to establish, as part of the foundation, that the authenticating witness has the requisite familiarity.

Illustration

Q:

Mr. Johnson, how do you know the plaintiff, Mr. Murphy?

A:

I have been his business partner for five years. We operate a car rental agency.

Q:

During those five years, have you had an opportunity to observe Mr. Murphy sign his name?

A:

Yes, I see him sign his name several times a day.

Q:

Would you know his signature if you were to see it?

A:

I am certain I would.

Q:

I hand you now what has been marked as Plaintiff's Exhibit Number 16. Please look at the signature at the bottom of page 3. Do you recognize that signature?

A:

Yes.

Q:

Whose signature is it?

A:

Mr. Murphy's.



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2 COMPARISON TO FEDERAL RULE

This section is essentially identical to Federal Rule of *Evidence* 901(b)(1)-(b)(2).



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3 SIGNIFICANT CASES

Chaplin v. Sullivan (1945) 67 Cal. App. 2d 728, 155 P.2d 368 (writing was authenticated where signature was identified by witness who had correspondence with writer and knew signature from letters received and endorsement on checks sent).

Gibson v. Mailhebuau (1929) 96 Cal. App. 455, 274 P. 566 (opinion of bank teller as to genuineness of signature claimed to be that of deceased was competent, where witness had quite often paid out money on deceased's signature).



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SECTION 1417 Comparison of Handwriting by Trier of Fact

1-1417 California Evidence Courtroom Manual 1417.syn

§ 1417.syn Synopsis to Chapter 1417: Comparison of Handwriting by Trier of Fact

Scope Comparison of Handwriting by Trier of Fact

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SECTION 1417 Comparison of Handwriting by Trier of Fact

1-1417 California Evidence Courtroom Manual Scope

Scope Comparison of Handwriting by Trier of Fact

§ 1417 reads as follows:

Rule 1417 Comparison of Handwriting by Trier of Fact

The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1417 Comparison of Handwriting by Trier of Fact

1-1417 California Evidence Courtroom Manual 1

1 ANALYSIS

Under Section 1417, the trier of fact compares the writing being offered into evidence with authenticated exemplars or specimens of the alleged writer's handwriting.

In order to avoid confusion, it is helpful to use a specimen or exemplar which is unquestionably authentic, for example, a signature card from a bank. Alternatively, a party may seek a stipulation that a specimen or exemplar is genuine. It should be noted that a lay witness is not qualified to render an opinion as to the similarity between the specimen and the handwriting on the document being offered. Only opinion testimony from an expert is appropriate. When no expert is utilized for the purpose of rendering an opinion as to authenticity, the exemplar and the document being offered are both tendered to the trier of fact to determine whether the offered document is authentic or not.



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1-1417 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

This section is comparable to *Federal Rule of Evidence 901(b)(3)*. However, under Section 1417, the trial judge determines whether the exemplar is genuine. Under Federal Rule of *Evidence 901(b)(3)* the authenticity of both the questioned writing and the exemplars are treated as a question of conditional relevancy under Federal Rule of Evidence 104(b).



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3 SIGNIFICANT CASES

Gilbert v. California (1967) 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (a handwriting or voice specimen of a defendant in a criminal case may be obtained by compulsion without violating the defendant's *Fifth* or *Sixth Amendment* rights).

People v. Rodriguez (2005) 133 Cal. App. 4th 545, 34 Cal. Rptr. 3d 886 (under this section jury, was entitled to compare an authenticated exemplar of a defendant's handwriting with handwriting on disputed documents the signatures and, based on that comparison, reasonably could have concluded, beyond a reasonable doubt, and without the benefit of testimony from a handwriting expert, that the questioned signatures were made by defendant in prosecution for presenting fraudulent insurance claims).

Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974) (order compelling defendant to produce handwriting exemplars was lawful order).



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SECTION 1418 Comparison of Writing by Expert Witness

1-1418 California Evidence Courtroom Manual 1418.syn

§ 1418.syn Synopsis to Chapter 1418: Comparison of Writing by Expert Witness

Scope Comparison of Writing by Expert Witness

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY

4 SIGNIFICANT CASES



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SECTION 1418 Comparison of Writing by Expert Witness

1-1418 California Evidence Courtroom Manual Scope

Scope Comparison of Writing by Expert Witness

§ 1418 reads as follows:

Rule 1418 Comparison of Writing by Expert Witness

The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1-1418 California Evidence Courtroom Manual 1

1 ANALYSIS

As under Section 1417, Section 1418 provides authentication or identification of a document may be established through the device of comparison of an offered document with specimens or exemplars which have been authenticated. The difference between the two sections is who makes the comparison. Under Section 1418, the trier of fact is provided with an expert opinion regarding the comparison. Where an expert makes the comparison between the offered exhibits and the authenticated specimen, the expert must be qualified. *See Section 720*. Even where an expert is utilized, the specimen used for the basis of comparison must be authenticated through the normal authentication process. In order to avoid confusion, it is helpful to use a specimen or exemplar which is unquestionably authentic, such as a signature card from a bank. The other possibility is to obtain a stipulation from the opposing side that the specimen is genuine.



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SECTION 1418 Comparison of Writing by Expert Witness

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2 COMPARISON TO FEDERAL RULE

This section is comparable to Federal Rule of *Evidence* 901(b)(3). However, under Section 1418, the trial judge determines whether the exemplar is genuine. Under Federal Rule of *Evidence* 901(b)(3) both the questioned writing and the exemplars are treated as a question of conditional relevancy under Federal Rule of Evidence 104(b).



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3 ADDITIONAL AUTHORITY

7 Cal. Law Rev. Comm. Rep. 1 (1965) (Section 1418 applies to any form of writing, not just handwriting. This is in recognition of the fact that experts can now compare typewriting specimens and other forms of writing as accurately as they could compare handwriting specimens in 1872.)

D. Michael Risinger, Mark P. Denbeaux & Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification*, 137 U. Pa. L. Rev. 731 (1989) (criticizing methodology and validity of research of handwriting experts)



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1-1418 California Evidence Courtroom Manual 4

4 SIGNIFICANT CASES

People v. Driggs (1910) 14 Cal. App. 507, 112 P. 577 (where court was satisfied that exemplars offered were genuine, it was proper to submit same to expert witness for comparison with signature in question).



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SECTION 1419 Exemplars When Writing Is More Than 30 Years Old

1-1419 California Evidence Courtroom Manual 1419.syn

§ 1419.syn Synopsis to Chapter 1419: Exemplars When Writing Is More Than 30 Years Old

Scope Exemplars When Writing Is More Than 30 Years Old

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1-1419 California Evidence Courtroom Manual Scope

Scope Exemplars When Writing Is More Than 30 Years Old

§ 1419 reads as follows:

Rule 1419 Exemplars When Writing is More Than 30 Years Old

Where a writing whose genuineness is sought to be proved is more than 30 years old, the comparison under Section 1417 or 1418 may be made with writing purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing whether it is genuine.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1419 Exemplars When Writing Is More Than 30 Years Old

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1 ANALYSIS

Section 1419 provides a more liberal method for authenticating a writing on the combined bases of age and corroborating circumstances as to genuineness. Where the writing being offered into evidence is more than 30 years old, the trier of fact or an expert may compare the old writing with an exemplar that the trial court finds appears to be genuine, respected and acted upon as such by interested parties. This makes sense, since it may not be feasible to obtain a stipulation or admittedly genuine exemplar or specimen, which may be as old as the document being offered into evidence.

Authentication of an ancient document under Section 1419 simultaneously satisfies the hearsay requirements of Section 1331. Nevertheless, the proponent may need to provide an original or adequate secondary evidence of a document pursuant to Section 1520 et seq. and must address general relevancy principles in order to insure the admissibility of the document or data compilation.



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2 COMPARISON TO FEDERAL RULE

Section 1419 bears some resemblance to Federal Rule of *Evidence 901(b)(8)*. However, under the federal approach, the age of the document plus a lack of circumstances suggesting untrustworthiness will constitute sufficient authentication. Under Section 1419, the trier of fact or expert still must compare the 30-plus-year-old writing with one or more exemplars that the trial court deems reasonably reliable rather than certainly authentic. In addition, California adopts the longer common-law period of 30 years, while Federal Rule of *Evidence 901(b)(8)* reduces the period to 20 years. The drafters of the federal rule concluded that a 20-year period sufficiently guarantees that the document or data compilation was prepared prior to the inception of the controversy which forms the basis for the litigation.



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3 ADDITIONAL AUTHORITY

7 Cal. L. Rev. Comm. Rep. 1 (1965) (Section 1419 restates and supersedes the provisions of *Code of Civil Procedure* section 1945. The apparent purpose is to permit the judge to be satisfied with a lesser degree of proof of the authenticity of an exemplar when the writing offered in evidence is more than 30 years old.)



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4 SIGNIFICANT CASES

Devereaux v. Frazier Mountain Park & Fisheries Co. (1967) 248 Cal. App. 2d 323, 56 Cal. Rptr. 345 (a guarantee of title, a letter of transmittal, and a certificate for two shares of capital stock of a subdivider of certain land were admissible where each document was over 30 years old at time of trial, custody of documents was explained to satisfaction of trial court, nothing cast doubt on authenticity of the documents which were in hands of one likely to have them if authentic, and signature on a certificate of corporate grantor corresponded to signature upon guarantee of title issued by corporate guarantor).



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SECTION 1420 Authentication by Evidence of Reply

1-1420 California Evidence Courtroom Manual 1420.syn

§ 1420.syn Synopsis to Chapter 1420: Authentication by Evidence of Reply

Scope Authentication by Evidence of Reply

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1-1420 California Evidence Courtroom Manual Scope

Scope Authentication by Evidence of Reply

§ 1420 reads as follows:

Rule 1420 Authentication by Evidence of Reply

A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

Section 1420 illustrates a well-established basis of identification, occasionally referred to as the reply doctrine technique, where the unique information revealed in the letter indicates that the author is replying to prior correspondence.



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SECTION 1420 Authentication by Evidence of Reply

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2 COMPARISON TO FEDERAL RULE

This section is comparable to Federal Rule of *Evidence* 901(b)(4) (authentication by distinctive characteristics), although the federal approach is broader, looking not only to signs of a response, but also at the uniqueness of the information of a document--whether it is possible that anyone else could be the author. In this sense, the federal approach is really the sum of Sections 1420 and 1421.



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3 SIGNIFICANT CASES

See Section 1410.



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SECTION 1421 Authentication by Content

1-1421 California Evidence Courtroom Manual 1421.syn

§ 1421.syn Synopsis to Chapter 1421: Authentication by Content

Scope Authentication by Content

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SECTION 1421 Authentication by Content

1-1421 California Evidence Courtroom Manual Scope

Scope Authentication by Content

§ 1421 reads as follows:

Rule 1421 Authentication by Content

A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1421 Authentication by Content

*1-1421 California Evidence Courtroom Manual 1***1 ANALYSIS**

Distinctive contents of a document may be the basis for authentication under Section 1421. For example, a letter might be authenticated and attributed to a particular author where the letter reveals knowledge that only one individual would possess.

Many documents may be authenticated by virtue of their custody. Custody, considered in conjunction with appearance, contents, and substance may be used to authenticate a business record under Section 1421. In addition to requiring the foundation to satisfy the hearsay rule, business records must also be authenticated. Custodial authentication is established by a foundation witness who testifies that he or she has personal knowledge of the business's system of maintaining records. *See* Sections 170, 702. The foundational witness further provides testimony that the record or writing being offered at trial was removed from the business's files prior to trial and brought to the courtroom by the witness. Alternatively, the witness may testify that he recognizes the document offered at trial as one which was removed from the business's files by virtue of its distinctive characteristics or contents. Usually, a witness qualified to establish the foundation for the hearsay exception in Section 1271 will also be qualified to establish the foundation for authentication of the business record.

A similar technique can be used for public records and reports (such as judicial records, legislative records, records of administrative agencies, records of correctional institutions and law enforcement agencies, coroner's records and reports, tax returns, selective service files, weather reports, patent office reports, military records, and any other official records from an office of any level of government, domestic as well as foreign) where the public record or report is not certified, and thus ineligible for the presumptions of Sections 1450-1454. Public records may be authenticated based upon a preliminary showing that the records are from a public office where records of that type are kept. Accordingly, a party may authenticate public records by foundational evidence that, prior to the trial, such records were in the custody of an appropriate public office.



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2 COMPARISON TO FEDERAL RULE

This section is comparable to *Federal Rule of Evidence 901(b)(4)* (authentication by distinctive characteristics). Federal Rule 901(b)(4) is, in essence, the sum of Sections 1420 and 1421.



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3 SIGNIFICANT CASES

See also Section 1410.

People v. Babbitt (1988) 45 Cal. 3d 660, 248 Cal. Rptr. 69, 755 P.2d 253 (history of defendant's marine company in Vietnam was not admissible under Section 1421, as it did not refer to matters likely to be known only to the author of the document).

People v. Estrada (1979) 93 Cal. App. 3d 76, 155 Cal. Rptr. 731 (taped conversation proved itself since it referred to matters which were not known to anyone other than person claimed to be its author).



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SECTION 1450 Classification of Presumptions in Article

1-1450 California Evidence Courtroom Manual 1450.syn

§ 1450.syn Synopsis to Chapter 1450: Classification of Presumptions in Article

Scope Classification of Presumptions in Article

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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SECTION 1450 Classification of Presumptions in Article

1-1450 California Evidence Courtroom Manual Scope

Scope Classification of Presumptions in Article

§ 1450 reads as follows:

Rule 1450 Classification of Presumptions in Article

The presumptions established by this article are presumptions affecting the burden of producing evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1450 Classification of Presumptions in Article

1-1450 California Evidence Courtroom Manual 1

1 ANALYSIS

The theory of self-authentication is that certain documents are self-evidently genuine on their face, and consequently, the proponent of the document is relieved of the obligation of meeting the threshold test, or production burden, of proving that the document is what it is purported to be. In considering self-authenticating documents, two factors should not be overlooked. First, while self-authentication does relieve the proponent of the document from submitting foundational testimony as to authenticity, it does not guarantee admissibility of the document. Other issues, such as best evidence and hearsay, must be addressed in considering the admissibility of the document. Second, it is important to recognize that a self-authenticating document is not conclusively genuine. While self-authentication does relieve the proponent of submitting authentication evidence, the jury may still determine in rendering its final decision that the document is not genuine, *i.e.*, it is not what its proponent claims it to be.

In short, while Sections 1451 to 1454 relieve the proponent of his or her production burden, the proponent of such evidence still bears the burden of persuading the trier of fact that the writing is what it is said to be.



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SECTION 1450 Classification of Presumptions in Article

1-1450 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence 902* is similar to Sections 1450 to 1454, in that Federal Rule of *Evidence 902* contains a list of documents that are (or can be) self-authenticating, but is more expansive, including domestic public documents under seal, domestic public documents not under seal, foreign public documents, certified copies of public records, official publications, newspapers and periodicals, trade inscriptions and the like, acknowledged documents, commercial paper and related documents and documents presumed to be authentic under an Act of Congress.



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SECTION 1451 Acknowledged Writings

1-1451 California Evidence Courtroom Manual 1451.syn

§ 1451.syn Synopsis to Chapter 1451: Acknowledged Writings

Scope Acknowledged Writings

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2 COMPARISON TO FEDERAL RULE



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SECTION 1451 Acknowledged Writings

1-1451 California Evidence Courtroom Manual Scope

Scope Acknowledged Writings

§ 1451 reads as follows:

Rule 1451 Acknowledged Writings

A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with *Section 1180*) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1451 Acknowledged Writings

1-1451 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 1451 provides that documents accompanied by a certificate of acknowledgment are self-authenticating and, consequently, do not require an extrinsic foundation. The certificate of acknowledgment serves as sufficient evidence that the document is what it purports to be. The acknowledgment required is a certificate executed by a notary public or other authorized officer and otherwise complies with the requirements of California law.



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SECTION 1451 Acknowledged Writings

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2 COMPARISON TO FEDERAL RULE

Section 1451 was the inspiration for Federal Rule of *Evidence* 902(8), which is substantially similar.



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SECTION 1452 Official Seals

1-1452 California Evidence Courtroom Manual 1452.syn

§ 1452.syn Synopsis to Chapter 1452: Official Seals

Scope Official Seals

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SECTION 1452 Official Seals

1-1452 California Evidence Courtroom Manual Scope

Scope Official Seals

§ 1452 reads as follows:

Rule 1452 Official Seals

A seal is presumed to be genuine and its use authorized if it purports to be the seal of:

- (a) The United States or a department, agency, or public employee of the United States.
- (b) A public entity in the United States or a department, agency, or public employee of such public entity.
- (c) A nation recognized by the executive power of the United States or a department, agency, or officer of such nation.
- (d) A public entity in a nation recognized by the executive power of the United States or a department, agency, or officer of such public entity.
- (e) A court of admiralty or maritime jurisdiction.
- (f) A notary public within any state of the United States.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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ARTICLE 3 PRESUMPTIONS AFFECTING ACKNOWLEDGED WRITINGS AND OFFICIAL WRITINGS

SECTION 1452 Official Seals

1-1452 California Evidence Courtroom Manual 1

1 ANALYSIS

This section endows the seals of various public entities and foreign nations with a presumption of authenticity.



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SECTION 1452 Official Seals

1-1452 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 1452 treats foreign seals with as much deference as domestic seals. Federal Rule of *Evidence* 902(3) is more demanding in extending a presumption of authenticity to foreign documents.



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3 ADDITIONAL AUTHORITY

7 Cal. L. Rev. Comm. Rep. 1 (1965) (Sections 1452 and 1453 provide that the official seals and signatures mentioned shall be presumed genuine and authorized until evidence is introduced sufficient to sustain a finding that they are not genuine or authorized. When there is such evidence disputing the authenticity of an official seal or signature, the trier of fact is required to determine the question of authenticity without regard to any presumption created by this section. This procedure will dispense with the necessity for proof of authenticity when there is no real dispute as to such authenticity, but it will assure the parties the right to contest the authenticity of official writings when there is a real dispute as to such authenticity.)



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4 SIGNIFICANT CASES

People v. Cuevas (1967) 250 Cal. App. 2d 901, 59 Cal. Rptr. 6 (judgment which purported to show prior conviction of defendant but which was not certified under seal was not properly authenticated and was inadmissible).



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SECTION 1453 Domestic Official Signatures

1-1453 California Evidence Courtroom Manual 1453.syn

§ 1453.syn Synopsis to Chapter 1453: Domestic Official Signatures

Scope Domestic Official Signatures

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

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SECTION 1453 Domestic Official Signatures

1-1453 California Evidence Courtroom Manual Scope

Scope Domestic Official Signatures

§ 1453 reads as follows:

Rule 1453 Domestic Official Signatures

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of:

- (a) A public employee of the United States.
- (b) A public employee of any public entity in the United States.
- (c) A notary public within any state of the United States.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This section endows signatures of public entities within the United States with the presumption of authenticity.



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2 COMPARISON TO FEDERAL RULE

This section, like Section 1453, is the counterpart of Federal Rules of *Evidence* 902(1), 902(2), 902(3), and 902(4). Sections 1452 and 1453 are more liberal than these federal rules. Under the federal approach, a signature is insufficient unless accompanied by a seal (Federal Rule of *Evidence* 902(1)) or a certificate of authority to attest to the genuineness of the writing (Federal Rule 902(2) and 902(3)). Federal Rule 902(4) makes these requirements applicable to copies of public domestic documents.



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3 SIGNIFICANT CASES

Poland v. Department of Motor Vehicles (1995) 34 Cal. App. 4th 1128, 40 Cal. Rptr. 2d 693 (provision of Evidence Code which states that signature is presumed to be genuine and authorized if it purports to be signature affixed in official capacity of public employee of any public entity reflects implicit policy decision that if document purports to be signed by public employee acting in official capacity, likelihood of its authenticity is sufficiently high that in absence of evidence to contrary document should be presumed authentic).

Poland v. Department of Motor Vehicles (1995) 34 Cal. App. 4th 1128, 40 Cal. Rptr. 2d 693 (documents relied upon by hearing officer at driver's license suspension hearing were properly authenticated as Department of Motor Vehicle forms prepared by arresting officer where documents bore apparent signature of state highway patrol officer and there was no evidence supporting contrary finding).



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SECTION 1454 Foreign Official Signatures

1-1454 California Evidence Courtroom Manual 1454.syn

§ 1454.syn Synopsis to Chapter 1454: Foreign Official Signatures

Scope Foreign Official Signatures

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3 ADDITIONAL AUTHORITY

4 SIGNIFICANT CASES



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SECTION 1454 Foreign Official Signatures

1-1454 California Evidence Courtroom Manual Scope

Scope Foreign Official Signatures

§ 1454 reads as follows:

Rule 1454 Foreign Official Signatures

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of an officer, or deputy of an officer, of a nation or public entity in a nation recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a final statement certifying the genuineness of the signature and the official position of (a) the person who executed the writing or (b) any foreign official who has certified either the genuineness of the signature and official position of the person executing the writing or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person executing the writing. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation, authenticated by the seal of his office.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This section sets forth the circumstances under which a foreign official signature may be self-authenticating.



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SECTION 1454 Foreign Official Signatures

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2 COMPARISON TO FEDERAL RULE

Section 1454 is substantially similar to Federal Rule of *Evidence* 902(3). Federal Rule 902(3) applies the concept of self-authentication to foreign public documents that bear two indicia of genuineness. First, the document must purport to be executed or attested by a person, in his or her official capacity, who is authorized by the laws of a foreign country to make the execution or attestation. Second, there must be a certification that attests, directly or indirectly, to the genuineness of the signature and the official position of the executing or attesting person. Federal Rule 902(3) requires a final certification on foreign documents made by a United States official or by a foreign official assigned or accredited to the United States. The federal rule, in essence, provides a procedure by which a signature of a foreign official, certified as genuine, either directly or through a chain of certificates, by an appropriate United States or foreign official, is sufficient to render the document self-authenticating.



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3 ADDITIONAL AUTHORITY

7 Cal. L. Rev. Comm. Rep. 1 (1965) (The procedure set forth in Section 1454 is necessary for the reason that a United States foreign service officer may not be able to certify to the official position and signature of a particular foreign official. Accordingly, this section permits the original signature to be certified by a higher foreign official, whose signature can in turn be certified by a still higher official, and such certifications can be continued in a chain until a foreign official is reached as to whom the United States foreign service officer has adequate information upon which to base his final certification.)



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1-1454 California Evidence Courtroom Manual 4

4 SIGNIFICANT CASES

Estate of Chichernea (1967) 66 Cal. 2d 83, 57 Cal. Rptr. 135, 424 P.2d 687 (documents executed by authorities on Rumanian law were sufficiently authenticated where acknowledged before a notary public, whose signature and authority were established by president of High Court of capital of Rumania, whose signature was in turn authenticated by Rumanian ministry of justice, that signature being authenticated by ministry of foreign affairs, and authenticity of latter's signature was certified by American vice consul, even though vice consul did not directly acknowledge notary's signature and High Court did not appear to be court of record).

County of Los Angeles v. American Contractors Indemnity Co. (2007) 152 Cal. App. 4th 661, 61 Cal. Rptr. 3d 367 (reversing trial court's summary judgment for the County and order denying the surety's motion to vacate the forfeiture and exonerate bail; trial court erred in rejecting Mexican official and bail agent's affidavits. Mexican official's declaration was not hearsay under Cal. Evid. Code § 1200 because it was not offered for the truth of its contents, but only to support the surety's motion to exonerate bail. Moreover, the declaration did not have to be taken before or authenticated by a United States foreign service officer in Mexico under Cal. Evid. Code § 1454. County's interpretation of Cal. Penal Code § 1305(g) is highly impractical and would frustrate the legislative intent to provide for efficient and global means of exonerating a bond, providing protection not to the sureties or to the accused, but to the family and friends of the accused who often offer their own homes or other resources as security for the bond).



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DIVISION 11 WRITINGS
CHAPTER 2 SECONDARY EVIDENCE OF WRITINGS
ARTICLE 1 PROOF OF THE CONTENT OF A WRITING
SECTION 1520 Best Evidence Rule

1-1520 California Evidence Courtroom Manual 1520.syn

§ 1520.syn Synopsis to Chapter 1520: Best Evidence Rule

Scope Best Evidence Rule

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1-1520 California Evidence Courtroom Manual Scope

Scope Best Evidence Rule

§ 1520 reads as follows:

Rule 1520 Best Evidence Rule

The content of a writing may be proved by an otherwise admissible original.

(Added by Stats. 1998, ch. 100 (S.B. 177), § 2, eff. Jan. 1, 1998)

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SECTION 1520 Best Evidence Rule

1-1520 California Evidence Courtroom Manual 1

1 ANALYSIS

The "best evidence rule" is undoubtedly the "worst named evidence rule" for two reasons. First, it does not apply to all types of evidence, but only to "writings," (although this term is broadly defined under Section 250 as explained below). Second, the rule does not require that the proponent produce the most accurate or persuasive version of the writing; the rule merely regulates when the proponent needs to offer the original or a duplicate of the original of a writing or an excuse for not having it. The best evidence rule is designed to minimize the possibilities of misinterpretation of writings by encouraging the production of the original writings themselves, if available.

There are essentially two issues to consider in applying the best evidence rule:

First, is the evidence being offered a "writing" as defined in Section 250? This definition is quite broad, including "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof." Thus, the best evidence rule can apply to x-ray films, audiotape, videotape and motion pictures, or even objects inscribed with symbols.

Second, if the evidence is considered a writing, is the evidence being offered to prove the content of the writing? In other words, is the issue what the writing or recording says or what the photograph depicts? For example, if a party is seeking to establish the terms of a dispositive document, such as a contract, lease, will or trust, then the best evidence rule applies. If the proponent is trying to establish some point about a writing other than its content, such as its delivery, the best evidence rule does not apply.

The California version of the best evidence rule underwent major revision in 1998; Article 1 was repealed and completely reenacted. The rule was streamlined to simplify the introduction of documents. Formerly, California law manifested a strong preference for originals. Where the original was available, former Section 1505 expressed a preference for a copy of the original before any other type of secondary evidence could be used. The revisions soften that emphasis, suggesting that an original is preferable, but is not necessarily required. The revisions suggest that where the original is not available, any kind of secondary evidence is acceptable, although Section 1523 imposes some restrictions on the use of oral testimony as a type of secondary evidence. Of course, the proponent must overcome authenticity or other evidentiary objections. The revisions took effect on January 1, 1999, and are applicable in all

proceedings, whether they were commenced before, on or after that date. Evidentiary decisions ruling that evidence is inadmissible pursuant to the provisions of former Article 1 are left intact; however, those rulings may, before entry of judgment in the action or proceeding, be the subject of a new request for admission of the evidence on the basis of this act. Stats. 1998, ch. 100 (S.B. 177), § 9.



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SECTION 1520 Best Evidence Rule

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2 COMPARISON TO FEDERAL RULE

Section 1520 is more liberal than Federal Rule of *Evidence 1002*; the revised California rule suggests that an original may to be used to prove the content of a writing but is not necessarily required.



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1-1520 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

In re Kirk (1999) 74 Cal. App. 4th 1066, 88 Cal. Rptr. 2d 648 (the enactment of "the secondary evidence rule," Section 1520 et seq., did not undercut the certification requirements of Sections 1530 and 1531; these provisions apply to probable cause hearings under the Sexually Violent Predator Act; thus, the trial court could not find probable cause to hold an inmate for trial based on psychological evaluations that were not certified as proof of the required mental disorder).



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SECTION 1521 Secondary Evidence Rule

1-1521 California Evidence Courtroom Manual 1521.syn

§ 1521.syn Synopsis to Chapter 1521: Secondary Evidence Rule

Scope Secondary Evidence Rule

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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SECTION 1521 Secondary Evidence Rule

1-1521 California Evidence Courtroom Manual Scope

Scope Secondary Evidence Rule

§ 1521 reads as follows:

Rule 1521 Secondary Evidence Rule

(a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:

- (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.
- (2) Admission of the secondary evidence would be unfair.

(b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).

(c) Nothing in this section excuses compliance with Section 1401 (authentication).

(d) This section shall be known as the "Secondary Evidence Rule."

(Added by Stats. 1998, ch. 100 (S.B. 177), § 2, eff. Jan. 1, 1998)

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1 ANALYSIS

This is a new section. *See discussion under Section 1520.* This section makes admissible any kind of otherwise admissible secondary evidence. It alters existing California law (former Section 1505) by eliminating the requirement that a copy of the original be used as evidence, if available, before allowing any sort of secondary evidence. For example, this new section might have reversed the outcome of *Osswald v. Anderson* (1996) 49 Cal. App. 4th 812, 57 Cal. Rptr. 2d 23, in which the court held that the best evidence rule prohibits copy of a deed from satisfying the statute of frauds where the proponent provided no evidence of a search for the original deed, either at the recorder's office (where it was allegedly sent), or in the personal papers of the parties who allegedly executed the deed.



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1-1521 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 1521 is consistent with Federal Rule of *Evidence* 1003, which is liberal in permitting "duplicates" of an original, unless there is good reason to require the original.



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1-1521 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Pajaro Valley Water Management Agency v. McGrath (2005) 128 Cal. App. 4th 1093, 27 Cal. Rptr. 3d 741, reh'g denied (Section 1521 makes a secondary evidence of invoices admissible to establish the contents of those documents only if the invoices are otherwise admissible; here the contents of the bills were hearsay and there was no showing that an exception applied; thus, summary calculation of damages attached to a declaration cannot support a motion for summary judgment).



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CHAPTER 2 SECONDARY EVIDENCE OF WRITINGS

ARTICLE 1 PROOF OF THE CONTENT OF A WRITING

SECTION 1522 Reasons to Exclude Secondary Evidence

1-1522 California Evidence Courtroom Manual 1522.syn

§ 1522.syn Synopsis to Chapter 1522: Reasons to Exclude Secondary Evidence

Scope Reasons to Exclude Secondary Evidence

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SECTION 1522 Reasons to Exclude Secondary Evidence

1-1522 California Evidence Courtroom Manual Scope

Scope Reasons to Exclude Secondary Evidence

§ 1522 reads as follows:

Rule 1522 Reasons to Exclude Secondary Evidence

(a) In addition to the grounds for exclusion authorized by Section 1521, in a criminal action the court shall exclude secondary evidence of the content of a writing if the court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial. This section does not apply to any of the following:

- (1) A duplicate as defined in Section 260.
- (2) A writing that is not closely related to the controlling issues in the action.
- (3) A copy of a writing in the custody of a public entity.
- (4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

(b) In a criminal action, a request to exclude secondary evidence of the content of a writing, under this section or any other law, shall not be made in the presence of the jury.

(Added by Stats. 1998, ch. 100 (A.B. 177), § 2, eff. Jan. 1, 1998)

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1 ANALYSIS

See discussion of Section 1520.



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SECTION 1522 Reasons to Exclude Secondary Evidence

1-1522 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 1522 is similar to Federal Rules of *Evidence 1004* and *1005* (public records), which state the circumstances under which "other evidence of contents" may be used as proof.



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SECTION 1523 Oral Testimony as Secondary Evidence

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§ 1523.syn Synopsis to Chapter 1523: Oral Testimony as Secondary Evidence

Scope Oral Testimony as Secondary Evidence

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SECTION 1523 Oral Testimony as Secondary Evidence

1-1523 California Evidence Courtroom Manual Scope

Scope Oral Testimony as Secondary Evidence

§ 1523 reads as follows:

Rule 1523 Oral Testimony as Secondary Evidence

(a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

(Added by Stats. 1998, ch. 100 (S.B. 177), § 2, eff. Jan. 1, 1998)

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SECTION 1523 Oral Testimony as Secondary Evidence

1-1523 California Evidence Courtroom Manual 1

1 ANALYSIS

See discussion of Section 1520. Section 1523 sets out the limitations imposed on one form of secondary evidence, oral testimony. This section attempts to set some controls on this least reliable form of secondary evidence of the content of a writing.



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SECTION 1523 Oral Testimony as Secondary Evidence

1-1523 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 1523 is similar to Federal Rules of *Evidence 1004* and *1006* (summaries) in setting forth the circumstances under which oral testimony, one type of "other" or "secondary" evidence may be used to prove the content of a writing.



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CHAPTER 2 SECONDARY EVIDENCE OF WRITINGS
ARTICLE 2 OFFICIAL WRITINGS AND RECORDED WRITINGS
SECTION 1530 Copy of Writing in Official Custody

1-1530 California Evidence Courtroom Manual 1530.syn

§ 1530.syn Synopsis to Chapter 1530: Copy of Writing in Official Custody

Scope Copy of Writing in Official Custody

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SECTION 1530 Copy of Writing in Official Custody

1-1530 California Evidence Courtroom Manual Scope

Scope Copy of Writing in Official Custody

§ 1530 reads as follows:

Rule 1530 Copy of Writing in Official Custody

(a) A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if:

- (1) The copy purports to be published by the authority of the nation or state, or public entity therein in which the writing is kept;
- (2) The office in which the writing is kept is within the United States or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or
- (3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. Except as provided in the next sentence, the final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. Prior to January 1, 1971, the final statement may also be made by a secretary of an embassy or legation, consul

general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without the final statement or (ii) permit the writing or entry in foreign custody to be evidenced by an attested summary with or without a final statement.

(b) The presumptions established by this section are presumptions affecting the burden of producing evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1970, ch. 41, § 1, eff. April 3, 1970)

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SECTION 1530 Copy of Writing in Official Custody

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1 ANALYSIS

Sections 1530 and 1532 work together to allow a proponent to satisfy authentication and best evidence rule concerns. This section establishes a presumption that assists the proponent in overcoming an authentication objection. Section 1532 establishes a presumption that assists the proponent in overcoming a best evidence rule objection.

Section 1530 establishes a uniform rule that can be applied to all writings in official custody within the United States and another rule applicable to all writings in official custody outside the United States. Subdivision (a)(1) provides that an official writing may be proved by a copy purporting to be published by official authority. This will facilitate the proof of many official documents the authenticity of which is presumed and is seldom subject to question. Subdivision (a)(2) and (a)(3) set forth the rules for proving the content of writings in official custody by attested or certified copies. Section 1530 eliminates the requirement of a seal by the use of the word "attested." However, Section 1530 retains, in addition, the word "certified" because it is the more familiar term. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965).

Subdivision (a)(3) requires that the copy of the foreign official record be attested as a correct copy by "a person having authority to make the attestation." Under the section as it formerly read, it was necessary to have a certificate of a United States foreign service officer stationed in the nation in which the writing was kept. Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate; peculiarities may exist or arise hereafter in the law or practice of a foreign country. Therefore the final sentence of subdivision (a)(3) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary. *See* 10 Cal. L. Rev. Comm. Rep. 1022 (1970).



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2 COMPARISON TO FEDERAL RULE

Section 1530(a)(1) is the counterpart of Federal Rule of *Evidence* 902(5) (self-authentication of official publications).

Section 1530(a)(2) is the counterpart of Federal Rule of *Evidence* 902(1) (self-authentication of domestic publication of documents under seal), 902(2) (self-authentication of domestic public documents not under seal) and 902(4) (certified copies of public records). The California rule is a bit more liberal than the federal approach. Section 1530(a)(2) requires only that the document be attested or certified, while the federal rules require either a seal (Federal Rules of *Evidence* 902(1) and 902(4)) or a chain of certificates (Federal Rules of *Evidence* 902(2) and 902(4)) for the copy.

Section 1530(a)(3) is substantially similar to Federal Rule of *Evidence* 902(3) (self-authentication of foreign public documents) and 902(4) (self-authentication of certified copies of public records).



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3 SIGNIFICANT CASES

Ambriz v. Kelegian (2007) 146 Cal. App. 4th 1519, 53 Cal. Rptr. 3d 700 , modified and reh'g denied, 2007 Cal. App. LEXIS 203 (Feb. 15, 2007) , review denied (trial court abused its discretion in excluding evidence of copies of official records properly authenticated by a city official as being true and correct copies of official documents; no seal is required to satisfy this section, which creates a rebuttable presumption of authenticity; defendants made no effort to overcome that presumption).

In re Marriage of Davis (1983) 141 Cal. App. 3d 71, 190 Cal. Rptr. 104 (in proceeding by former wife for increase in spousal support, trial court erred in refusing to admit into evidence certified copy of United States department of labor, bureau of labor statistics, consumer price index for San Francisco--Oakland area, on ground that no proper foundation had been laid, where former wife offered exhibit in support of request that court take judicial notice of impact of inflation on former wife).

People v. Abelson (1980) 164 Cal. Rptr. 369 (where document, a copy of a speed survey, purported to be a copy of an official record, appeared from its face to be published by a public entity, and was certified as "a true copy," rules relating to secondary evidence of official records were satisfied).



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SECTION 1531 Certification of Copy for Evidence

1-1531 California Evidence Courtroom Manual 1531.syn

§ 1531.syn Synopsis to Chapter 1531: Certification of Copy for Evidence

Scope Certification of Copy for Evidence

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2 COMPARISON TO FEDERAL RULE

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SECTION 1531 Certification of Copy for Evidence

1-1531 California Evidence Courtroom Manual Scope

Scope Certification of Copy for Evidence

§ 1531 reads as follows:

Rule 1531 Certification of Copy for Evidence

For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1 ANALYSIS

This section explains what is required for "attestation" or "certification" of a copy.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1531.



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SECTION 1531 Certification of Copy for Evidence

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3 SIGNIFICANT CASES

In re Smith (1949) 33 Cal. 2d 797, 205 P.2d 662 (generally, recognized meanings of "attest," as that word is used on a copy of a document intended to be placed in evidence, include to certify to the verity of a copy of a public document formally by signature; to affirm to be true or genuine; and word is appropriately used for affirmation of persons in their official capacity to test truth of a writing, and it is a technical word by which certifying officer gives assurance to verity of a copy).

Ambriz v. Kelegian (2007) 146 Cal. App. 4th 1519, 53 Cal. Rptr. 3d 700, modified and reh'g denied, 2007 Cal. App. LEXIS 203 (Feb. 15, 2007), review denied (trial court in malpractice action committed reversible error in excluding substantial part of plaintiff's evidence in opposition to law firm's motion for summary judgment. Trial court erred in excluding an excerpt of a deposition transcript because it did not have the reporter's certification where the defendants relied on the same deposition transcript in moving for summary judgment and authentication on this ground is permitted under Section 1414 unless defendants could show that deposition excerpt came from different deposition, which they did not; in addition, plaintiff's attorney attested, under penalty of perjury, that the copies of the documents lodged constituted "true and correct copies of what they purport to be.").

People v. Abelson (1980) 164 Cal. Rptr. 369 (where document purported to be a copy of an official record, appeared from its face to be published by a public entity, and was certified as "a true copy," rules relating to secondary evidence of official records were satisfied).



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SECTION 1532 Official Record of Recorded Writing

1-1532 California Evidence Courtroom Manual 1532.syn

§ 1532.syn Synopsis to Chapter 1532: Official Record of Recorded Writing

Scope Official Record of Recorded Writing

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY



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SECTION 1532 Official Record of Recorded Writing

1-1532 California Evidence Courtroom Manual Scope

Scope Official Record of Recorded Writing

§ 1532 reads as follows:

Rule 1532 Official Record of Recorded Writing

(a) The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if:

- (1) The record is in fact a record of an office of a public entity; and
- (2) A statute authorized such a writing to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of producing evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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SECTION 1532 Official Record of Recorded Writing

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1 ANALYSIS

Sections 1532 and 1530 work together to allow a proponent to satisfy best evidence rule and authentication concerns. This section establishes a presumption that assists the proponent in overcoming a best evidence rule objection. Section 1530 establishes a presumption that assists the proponent in overcoming an authentication objection.



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2 COMPARISON TO FEDERAL RULE

Section 1532 is the counterpart of Federal Rule of *Evidence 1005*.



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3 ADDITIONAL AUTHORITY

See 7 Cal. L. Rev. Comm. Rep. 1 (1965) (Section 1532 permits the official record to be used to prove the content of the original recorded writing. However, under the provisions of Section 1401, the original recorded writing must be authenticated before the copy can be introduced. If the writing was executed by a public official, or if a certificate of acknowledgment or proof was attached to the writing, the original writing is presumed to be authentic and no further evidence of authenticity is required.)



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ARTICLE 3 PHOTOGRAPHIC COPIES AND PRINTED REPRESENTATIONS OF WRITINGS

SECTION 1550 Photographic Copies Made as Business Records

1-1550 California Evidence Courtroom Manual 1550.syn

§ 1550.syn Synopsis to Chapter 1550: Photographic Copies Made as Business Records

Scope Photographic Copies Made as Business Records

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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1-1550 California Evidence Courtroom Manual Scope

Scope Photographic Copies Made as Business Records

§ 1550 reads as follows:

Rule 1550 Photographic Copies Made as Business Records

A nonerasable optical image reproduction provided that additions, deletions, or changes to the original document are not permitted by the technology, a photostatic, microfilm, microcard, miniature photographic, or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if the copy or reproduction was made and preserved as a part of the records of a business (as defined by Section 1270) in the regular course of that business. The introduction of the copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence. A court may require the introduction of a hard copy printout of the document.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1992, ch. 876 (A.B. 3296), § 10)

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SECTION 1550 Photographic Copies Made as Business Records

*1-1550 California Evidence Courtroom Manual 1***1 ANALYSIS**

Section 1550 makes photographic copies that are made and kept in the regular course of business admissible over the best evidence rule objection. This section continues in effect those provisions of the Uniform Photographic Copies of Business and Public Records as Evidence Act that are now found in *Code of Civil Procedure section 1953i*, but omits the requirement that the original writing be a business record. As long as the original writing is admissible under any exception to the hearsay rule, its trustworthiness is sufficiently assured; and the requirement that the photographic copy be made in the regular course of business sufficiently assures the trustworthiness of the copy. If the original is admissible not as an exception to the hearsay rule but as evidence of an ultimate fact in the case (*e.g.*, a will or a contract), a photographic copy, the trustworthiness of which is sufficiently assured by the fact that it was made in the regular course of business, should be as admissible as the original. *See* 7 Cal. L. Rev. Comm. Rep. 1 (1965).

Section 1550 was amended by Stats. 2002, ch. 124 (A.B. 2033), § 1, to expand the category of evidence to include any other reproduction of a public record by a trusted system as specified by the Secretary of State and makes other technical, nonsubstantive changes. However, this amendment becomes operative only on the date the Secretary of State adopts specified standards, pursuant to *Government Code section 12168.7*, regarding the storage of documents in electronic media. As amended, the statute will then read:

- (a) If made and preserved as a part of the records of a business, as defined in Section 1270, in the regular course of that business, the following types of evidence of a writing are as admissible as the writing itself:
 - (1) A nonerasable optical image reproduction or any other reproduction of a public record by a trusted system, as defined in *Section 12168.7 of the Government Code*, if additions, deletions, or changes to the original document are not permitted by the technology.
 - (2) A photostatic copy or reproduction.
 - (3) A microfilm, microcard, or miniature photographic copy, reprint, or enlargement.
 - (4) Any other photographic copy or reproduction, or an enlargement thereof.

(b) The introduction of evidence of a writing pursuant to subdivision (a) does not preclude admission of the original writing if it is still in existence. A court may require the introduction of a hard copy printout of the document.



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2 COMPARISON TO FEDERAL RULE

This section has the same effect of Federal Rule of *Evidence 1004(3)*. A photographic copy would qualify as a duplicate under Federal Rule of *Evidence 1004(3)*, which is admissible to the same degree as an original under Federal Rule of *Evidence 1003*.



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3 SIGNIFICANT CASES

Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (computer printouts are admissible and are presumed to be accurate representation of data in computer, but if offered for their truth, they must qualify under some hearsay exception).

Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal. App. 3d 811, 116 Cal. Rptr. 412 (copies of business invoices did not come within exception to best evidence rule for photostatic copies made in regular course of business where such copies are themselves preserved as part of records of business, in absence of showing that copies were not made merely for litigation purposes).



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SECTION 1550.1 Secondary Evidence

1-1550.1 California Evidence Courtroom Manual 1550.1.syn

§ 1550.1.syn Synopsis to Chapter 1550.1: Secondary Evidence

Scope Secondary Evidence

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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SECTION 1550.1 Secondary Evidence

1-1550.1 California Evidence Courtroom Manual Scope

Scope Secondary Evidence

§ 1550.1 reads as follows:

1550.1 Secondary Evidence

Reproductions of files, records, writings, photographs, fingerprints or other instruments in the official custody of a criminal justice agency that were microphotographed or otherwise reproduced in a manner that conforms with the provisions of *Section 11106.1, 11106.2, or 11106.3 of the Penal Code* shall be admissible to the same extent and under the same circumstances as the original file, record, writing or other instrument would be admissible.

(Added by Stats. 2004, ch. 65 (A.B. 883), § 1)

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SECTION 1550.1 Secondary Evidence

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1 ANALYSIS

Under existing law, if made in the regular course of business, as specified, a nonerasable optical image reproduction of a writing may be introduced in court as proof of a writing, provided that additions, deletions, or changes to the original document are not permitted by that technology. A recent amendment to Section 1550 expanded that category of admissible evidence to include any other reproduction of a public record by a trusted system, as specified, contingent on the adoption of specified standards regarding the storage of documents in electronic media by the Secretary of State. Section 1550.1 expands the potential modes of reproduction of files, records, writings, photographs, fingerprints or other instruments in the official custody of a criminal justice agency, as long as the reproduction is a manner that conforms with provisions that authorize record maintenance procedures for the Department of Justice and criminal justice agencies and provides that these reproductions shall be admissible to the same extent and under the same circumstances as the original file, record, writing or other instrument would be admissible.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1550.1, however, given the broad definition of a "duplicate" in Federal Rule of *Evidence 1001(4)*, which is admissible to the same degree as an original under Federal Rule of *Evidence 1003*, federal courts would likely reach the same result.



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SECTION 1551 Photographic Copies Where Original Destroyed or Lost

1-1551 California Evidence Courtroom Manual 1551.syn

§ 1551.syn Synopsis to Chapter 1551: Photographic Copies Where Original Destroyed or Lost

Scope Photographic Copies Where Original Destroyed or Lost

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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SECTION 1551 Photographic Copies Where Original Destroyed or Lost

1-1551 California Evidence Courtroom Manual Scope

Scope Photographic Copies Where Original Destroyed or Lost

§ 1551 reads as follows:

Rule 1551 Photographic Copies Where Original Destroyed or Lost

A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken or a reproduction from an electronic recording of video images on magnetic surfaces is admissible as the original writing itself if, at the time of the taking of such film or electronic recording, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film or electronic recording, a certification complying with the provisions of Section 1531 and stating the date on which, and the fact that, it was so taken under his direction and control.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1969, ch. 646, § 1)

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SECTION 1551 Photographic Copies Where Original Destroyed or Lost

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1 ANALYSIS

This section provides for the admissibility of a print where the original film has been lost or destroyed if the proper certification is provided.



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SECTION 1551 Photographic Copies Where Original Destroyed or Lost

1-1551 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

Section 1551 is comparable to Federal Rule of *Evidence 1001(3)*, which deems "any print" from a photograph an "original." However, the federal rule does not contain the certification requirement of Section 1551.



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SECTION 1552 Printed Representation of Computer Information

1-1552 California Evidence Courtroom Manual 1552.syn

§ 1552.syn Synopsis to Chapter 1552: Printed Representation of Computer Information

Scope Printed Representation of Computer Information

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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SECTION 1552 Printed Representation of Computer Information

1-1552 California Evidence Courtroom Manual Scope

Scope Printed Representation of Computer Information

§ 1552 reads as follows:

Rule 1552 Printed Representation of Computer Information

(a) A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

(b) Subdivision (a) shall not apply to computer-generated official records certified in accordance with Section 452.5 or 1530.

(Added by Stats. 1998, ch. 100 (S.B. 177), § 4, eff. Jan. 1, 1998)

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SECTION 1552 Printed Representation of Computer Information

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1 ANALYSIS

This section provides for the admissibility of printed representations of computer programs or information. It is intended to make the process of admitting the representation easier where there is no real reason to suspect that the representation of the information or program is inaccurate or unreliable.



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ARTICLE 3 PHOTOGRAPHIC COPIES AND PRINTED REPRESENTATIONS OF WRITINGS

SECTION 1552 Printed Representation of Computer Information

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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 1001(4), which is a very broad definition of "duplicate," would presumably cover the representations covered by Section 1552.



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3 SIGNIFICANT CASES

People v. Hawkins (2002) 98 Cal. App. 4th 1428, 121 Cal. Rptr. 2d 627 (where computer printout at issue contains information generated by computer itself, such as a record of its internal operations, printout is not hearsay because it is not made by a "person" under Section 175; the admissibility of such evidence is controlled by Section 1552, which establishes a rebuttable presumption that the document was printed reliably and by the requirement that that the proponent of the computer evidence provides foundation that the computer was operating properly; it was not error to admit computer printouts where prosecution offered foundation that computer's clock was operating accurately and where computer expert explained to jury that printout of access times could be altered in many ways and could not say how, why or by whom.



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SECTION 1553 Printed Representation of Video or Digital Images

1-1553 California Evidence Courtroom Manual 1553.syn

§ 1553.syn Synopsis to Chapter 1553: Printed Representation of Video or Digital Images

Scope Printed Representation of Video or Digital Images

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1-1553 California Evidence Courtroom Manual Scope

Scope Printed Representation of Video or Digital Images

§ 1553 reads as follows:

Rule 1553 Printed Representation of Video or Digital Images

A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

(Added by Stats. 1998, ch. 100 (S.B. 177), § 5, eff. Jan. 1, 1998)

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1 ANALYSIS

This section provides for the admissibility of printed representations of video or digital information. It is intended to make the process of admitting the representation easier where there is no real reason to suspect that the representation is inaccurate or unreliable.



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2 COMPARISON TO FEDERAL RULE

Federal Rule of *Evidence* 1001(4), which is a very broad definition of "duplicate," would presumably cover the representations covered by Section 1553.



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SECTION 1560 Compliance with Subpoena Duces Tecum for Business Records

1-1560 California Evidence Courtroom Manual 1560.syn

§ 1560.syn Synopsis to Chapter 1560: Compliance with Subpoena Duces Tecum for Business Records

Scope Compliance with Subpoena Duces Tecum for Business Records

1 ANALYSIS

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1-1560 California Evidence Courtroom Manual Scope

Scope Compliance with Subpoena Duces Tecum for Business Records

§ 1560 reads as follows:

Rule 1560 Compliance with Subpoena Duces Tecum for Business Records

(a) As used in this article:

- (1) "Business" includes every kind of business described in Section 1270.
- (2) "Record" includes every kind of record maintained by such a business.

(b) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or other qualified delivers by mail or otherwise a true, legible, and durable copy of all of the records described in the subpoena to the clerk of the court or to another person described in *subdivision (d) of Section 2026.010 of the Code of Civil Procedure*, together with the affidavit described in Section 1561, within one of the following time periods:

- (1) In any criminal action, five days after the receipt of the subpoena.
- (2) In any civil action, within 15 days after the receipt of the subpoena.
- (3) Within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness.

(c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and directed as follows:

- (1) If the subpoena directs attendance in court, to the clerk of the court.
- (2) If the subpoena directs attendance at a deposition, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business.
- (3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records that are original documents and that are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received. Records that are copies may be destroyed.

(e) As an alternative to the procedures described in subdivisions (b), (c), and (d), the subpoenaing party in a civil action may direct the witness to make the records available for inspection or copying by the party's attorney, the attorney's representative, or deposition officer as described in *Section 2020.420 of the Code of Civil Procedure*, at the witness' business address under reasonable conditions during normal business hours. Normal business hours, as used in this subdivision, means those hours that the business of the witness is normally open for business to the public. When provided with at least five business days' advance notice by the party's attorney, attorney's representative, or deposition officer, the witness shall designate a time period of not less than six continuous hours on a date certain for copying of records subject to the subpoena by the party's attorney, attorney's representative, or deposition officer. It shall be the responsibility of the attorney's representative to deliver any copy of the records as directed in the subpoena. Disobedience to the deposition subpoena issued pursuant to this subdivision is punishable as provided in *Section 2020.240 of the Code of Civil Procedure*.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1969, ch. 199, § 2; Stats. 1982, ch. 452, § 2.5; Stats. 1984, ch. 481, § 2; Stats. 1986, ch. 603, § 6; Stats. 1991, ch. 1090 (A.B. 1484), § 14; Stats. 1997, ch. 442 (A.B. 758), § 16; Stats. 1999, ch. 444 (A.B. 794), § 4; Stats. 2000, ch. 287 (S.B. 1955), § 1; Stats. 2004, ch. 182 (A.B. 3081), § 32; Stats. 2004, ch. 162 (A.B. 1249), § 1; Stats. 2005, ch. 294 (A.B. 333), § 18, Stats. 2006, ch. 538 (S.B. 1852), § 4)

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1 ANALYSIS

Sections 1560 to 1566 set forth a streamlined procedure for production and authentication of business records. However, these provisions do not preclude other objections to business records, such as hearsay or relevancy. The 1996 amendments to Section 1561, which added the requirements that the affidavit include the identity of the records and a description of the mode of preparation of the records, and which allow the affidavit to be admissible if completed by a qualified witness, may make it easier to qualify the records for the business records exception to the hearsay rule. The 2000 amendment was clarifying and nonsubstantive.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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3 SIGNIFICANT CASES

Cooley v. Superior Court (2006) 140 Cal. App. 4th 1039, 45 Cal. Rptr. 3d 183 (granting petition for extraordinary relief from an order granting a party's motion to enforce a deposition subpoena *duces tecum* served on nonparty-petitioner, seeking the production of business records that were generated by entities other than petitioner where petitioner and its personnel were not in a position to make the attestations that must accompany subpoenaed business records under the Evidence Code, including that the subpoenaed records had been prepared in the ordinary course of business at or near the time of the event; the custodian of records or other qualified witness contemplated by *Evidence Code section 1561* must also be able to attest to various attributes of the records relevant to their authenticity and trustworthiness. As such, execution of a section 1561 affidavit is more than simply a clerical task).

Taggart v. Super Seer Corp. (1995) 33 Cal. App. 4th 1697, 40 Cal. Rptr. 2d 56 (declaration of custodian of records may state all matters required to establish that business records supplied in response to subpoena *duces tecum* are authentic, yet fail to provide sufficient foundation for admission of records under business records exception to hearsay rule. Declaration of custodian of test results performed on motorcycle helmet by testing firm did not satisfy requirements of business records exception to hearsay rule, where declaration contained no evidence as to what results were, how they were prepared, or what sources of information results were based on and offered no evidence that results were trustworthy, even though declaration conformed meticulously to requirements for response to subpoena *duces tecum* of business records).

People v. Dickinson (1976) 59 Cal. App. 3d 314, 130 Cal. Rptr. 561 (notwithstanding this section permitting admission by affidavit of foundational facts supporting admission of business record, *Sixth Amendment* right of confrontation precluded proof, by affidavit, of absence of entry in record).



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SECTION 1561 Affidavit Accompanying Records

1-1561 California Evidence Courtroom Manual 1561.syn

§ 1561.syn Synopsis to Chapter 1561: Affidavit Accompanying Records

Scope Affidavit Accompanying Records

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SECTION 1561 Affidavit Accompanying Records

1-1561 California Evidence Courtroom Manual Scope

Scope Affidavit Accompanying Records

§ 1561 reads as follows:

Rule 1561 Affidavit Accompanying Records

(a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

- (1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.
- (2) The copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to subdivision (e) of Section 1560 the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be.
- (3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.
- (4) The identity of the records.
- (5) A description of the mode of preparation of the records.

(b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560.

(c) Where the records described in the subpoena were delivered to the attorney or his or her representative or deposition officer for copying at the custodian's or witness' place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her representative or deposition officer stating that the copy is a true copy of all the records delivered to the attorney or his or her representative or deposition officer for copying.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1969, ch. 199, § 3; Stats. 1986, ch. 603, § 7; Stats. 1987, ch. 19, § 2; Stats. 1996, ch. 146 (A.B. 3001), § 1; Stats. 1999, ch. 444 (A.B. 794), § 5)

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1 ANALYSIS

See Analysis of Section 1560.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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1-1561 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Cooley v. Superior Court (2006) 140 Cal. App. 4th 1039, 45 Cal. Rptr. 3d 183 (granting petition for extraordinary relief from an order granting a party's motion to enforce a deposition subpoena *duces tecum* served on nonparty-petitioner, seeking the production of business records that were generated by entities other than petitioner where petitioner and its personnel were not in a position to make the attestations that must accompany subpoenaed business records under the Evidence Code, including that the subpoenaed records had been prepared in the ordinary course of business at or near the time of the event; the custodian of records or other qualified witness contemplated by *Evidence Code section 1561* must also be able to attest to various attributes of the records relevant to their authenticity and trustworthiness. As such, execution of a section 1561 affidavit is more than simply a clerical task).



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SECTION 1562 Copy of Records

1-1562 California Evidence Courtroom Manual 1562.syn

§ 1562.syn Synopsis to Chapter 1562: Copy of Records

Scope Copy of Records

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1-1562 California Evidence Courtroom Manual Scope

Scope Copy of Records

§ 1562 reads as follows:

Rule 1562 Copy of Records

If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of producing evidence.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1989, ch. 1416, § 31; Stats. 1996, ch. 146 (A.B. 3001), § 2)

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1 ANALYSIS

Section 1562 makes clear that the affidavit authorized by Section 1561 will serve to authenticate business records, but the hearsay exception of Section 1271 may require additional foundation.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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3 SIGNIFICANT CASES

See cases under Section 1560.



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§ 1563.syn Synopsis to Chapter 1563: One Witness and Mileage Fee

Scope One Witness and Mileage Fee

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SECTION 1563 One Witness and Mileage Fee

1-1563 California Evidence Courtroom Manual Scope

Scope One Witness and Mileage Fee

§ 1563 reads as follows:

Rule 1563 One Witness and Mileage Fee

(a) This article shall not be interpreted to require tender or payment of more than one witness fee and one mileage fee or other charge, to a witness or witness' business, unless there is an agreement to the contrary between the witness and the requesting party.

(b) All reasonable costs incurred in a civil proceeding by any witness which is not a party with respect to the production of all or any part of business records the production of which is requested pursuant to a subpoena duces tecum may be charged against the party serving the subpoena duces tecum.

(1) "Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents (\$0.10) per page for standard reproduction of documents of a size 8 1/2 by 14 inches or less; twenty cents (\$0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to a subpoena; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of twenty-four dollars (\$24) per hour per person, computed on the basis of six dollars (\$6) per quarter hour or fraction thereof; actual postage charges; and the actual cost, if any, charged to the witness by a third person for the retrieval and return of records held offsite by that third person.

(2) The requesting party, or the requesting party's deposition officer, shall not be required to pay those costs or any estimate thereof prior to the time the records are available for delivery pursuant to the subpoena, but the witness may demand payment of costs pursuant to this section simultaneous with actual delivery of the subpoenaed records, and until payment is made, is under no obligation to deliver

the records.

(3) The witness shall submit an itemized statement for the costs to the requesting party, or the requesting party's deposition officer, setting forth the reproduction and clerical costs incurred by the witness. Should the costs exceed those authorized in paragraph (1), or the witness refuses to produce an itemized statement of costs as required by paragraph (3), upon demand by the requesting party, or the requesting party's deposition officer, the witness shall furnish a statement setting forth the actions taken by the witness in justification of the costs.

(4) The requesting party may petition the court in which the action is pending to recover from the witness all or a part of the costs paid to the witness, or to reduce all or a part of the costs charged by the witness, pursuant to this subdivision, on the grounds that those costs were excessive. Upon the filing of the petition the court shall issue an order to show cause and from the time the order is served on the witness the court has jurisdiction over the witness. The court may hear testimony on the order to show cause and if it finds that the costs demanded and collected, or charged but not collected, exceed the amount authorized by this subdivision, it shall order the witness to remit to the requesting party, or reduce its charge to the requesting party by an amount equal to, the amount of the excess. In the event that the court finds the costs excessive and charged in bad faith by the witness, the court shall order the witness to remit the full amount of the costs demanded and collected, or excuse the requesting party from any payment of costs charged but not collected, and the court shall also order the witness to pay the requesting party the amount of the reasonable expenses incurred in obtaining the order including attorney's fees. If the court finds the costs were not excessive, the court shall order the requesting party to pay the witness the amount of the reasonable expenses incurred in defending the petition, including attorney's fees.

(5) If a subpoena is served to compel the production of business records and is subsequently withdrawn, or is quashed, modified or limited on a motion made other than by the witness, the witness shall be entitled to reimbursement pursuant to paragraph (1) for all costs incurred in compliance with the subpoena to the time that the requesting party has notified the witness that the subpoena has been withdrawn or quashed, modified or limited. In the event the subpoena is withdrawn or quashed, if those costs are not paid within 30 days after demand therefor, the witness may file a motion in the court in which the action is pending for an order requiring payment, and the court shall award the payment of expenses and attorney's fees in the manner set forth in paragraph (4).

(6) Where the records are delivered to the attorney, the attorney's representative, or the deposition officer for inspection or photocopying at the witness' place of business, the only fee for complying with the subpoena shall not exceed fifteen dollars (\$15), plus the actual cost, if any, charged to the witness by a third person for retrieval and return of records held offsite by that third person. If the records are retrieved from microfilm, the reasonable cost, as defined in paragraph (1), shall also apply.

(c) When the personal attendance of the custodian of a record or other qualified witness is required pursuant to Section 1564, in a civil proceeding, he or she shall be entitled to the same witness fees and mileage permitted in a case where the subpoena requires the witness to attend and testify before a court in which the action or proceeding is pending and to any additional costs incurred as provided by subdivision (b).

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended by Stats. 1972, ch. 396, § 1; Stats. 1981, ch. 1014, § 2; Stats. 1982, ch. 452, § 3; Stats. 1986, ch. 603, § 8; Stats. 1987, ch. 19, § 3, eff. May 12, 1987. Amended by Stats. 1997, ch. 442 (A.B. 758), § 17; Stats. 1999, ch. 444 (A.B. 794), § 6)

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1 ANALYSIS

See Analysis under Section 1560.



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2 COMPARISON TO FEDERAL RULE

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1-1563 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

In re Marriage of Stephens (1984) 156 Cal. App. 3d 909, 203 Cal. Rptr. 331 (language of this section which provides for nonparty witness's reimbursement for costs incurred in civil proceeding that "Reasonable costs as used in this section, shall mean" is language of definition rather than limitation or qualification, and shows that categories mentioned in subsection define term "reasonable costs," and this section does not allow nonparty witness to recover all reasonable costs of compliance with subpoena duces tecum in addition to those specified in subsection).



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SECTION 1564 Personal Attendance of Custodian and Production of Original Records

1-1564 California Evidence Courtroom Manual 1564.syn

§ 1564.syn Synopsis to Chapter 1564: Personal Attendance of Custodian and Production of Original Records

Scope Personal Attendance of Custodian and Production of Original Records

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1-1564 California Evidence Courtroom Manual Scope

Scope Personal Attendance of Custodian and Production of Original Records

§ 1564 reads as follows:

Rule 1564 Personal Attendance of Custodian and Production of Original Records

The personal attendance of the custodian or other qualified witness and the production of the original records is not required unless, at the discretion of the requesting party, the subpoena duces tecum contains a clause which reads:

"The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to subdivision (b) of Section 1560, and *Sections 1561 and 1562, of the Evidence Code* will not be deemed sufficient compliance with this subpoena."

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1984, ch. 603, § 2; Stats. 1986, ch. 603, § 9; Stats. 1987, ch. 19, § 4, eff. May 12, 1987)

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CHAPTER 2 SECONDARY EVIDENCE OF WRITINGS

ARTICLE 4 PRODUCTION OF BUSINESS RECORDS

SECTION 1564 Personal Attendance of Custodian and Production of Original Records

1-1564 California Evidence Courtroom Manual 1

1 ANALYSIS

Be careful to include the language of Section 1564 in the subpoena duces tecum where it will be necessary to use the custodian of records or other qualified witness to provide the necessary foundation for the business records hearsay exception of Section 1271.



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1-1564 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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1-1564 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

See cases under Section 1560.



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CHAPTER 2 SECONDARY EVIDENCE OF WRITINGS
ARTICLE 4 PRODUCTION OF BUSINESS RECORDS
SECTION 1565 Service of More than One Subpoena Duces Tecum

1-1565 California Evidence Courtroom Manual 1565.syn

§ 1565.syn Synopsis to Chapter 1565: Service of More than One Subpoena Duces Tecum

Scope Service of More than One Subpoena Duces Tecum

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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SECTION 1565 Service of More than One Subpoena Duces Tecum

1-1565 California Evidence Courtroom Manual Scope

Scope Service of More than One Subpoena Duces Tecum

§ 1565 reads as follows:

Rule 1565 Service of More than One Subpoena Duces Tecum

If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1969, ch. 199, § 4)

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1-1565 California Evidence Courtroom Manual 1

1 ANALYSIS

See Analysis under Section 1560.



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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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3 SIGNIFICANT CASES

See cases under Section 1560.



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DIVISION 11 WRITINGS
CHAPTER 2 SECONDARY EVIDENCE OF WRITINGS
ARTICLE 4 PRODUCTION OF BUSINESS RECORDS
SECTION 1566 Applicability of Article

1-1566 California Evidence Courtroom Manual 1566.syn

§ 1566.syn Synopsis to Chapter 1566: Applicability of Article

Scope Applicability of Article

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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CHAPTER 2 SECONDARY EVIDENCE OF WRITINGS
ARTICLE 4 PRODUCTION OF BUSINESS RECORDS
SECTION 1566 Applicability of Article

1-1566 California Evidence Courtroom Manual Scope

Scope Applicability of Article

§ 1566 reads as follows:

Rule 1566 Applicability of Article

This article applies in any proceeding in which testimony can be compelled.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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CHAPTER 2 SECONDARY EVIDENCE OF WRITINGS
ARTICLE 4 PRODUCTION OF BUSINESS RECORDS
SECTION 1566 Applicability of Article

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1 ANALYSIS

See Analysis under Sections 1560 and 1564.



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SECTION 1566 Applicability of Article

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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DIVISION 11 WRITINGS
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SECTION 1566 Applicability of Article

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3 SIGNIFICANT CASES

See cases under Section 1560.



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DIVISION 11 WRITINGS
CHAPTER 2 SECONDARY EVIDENCE OF WRITINGS
ARTICLE 4 PRODUCTION OF BUSINESS RECORDS
SECTION 1567 Employee Income and Benefit Information

1-1567 California Evidence Courtroom Manual 1567.syn

§ 1567.syn Synopsis to Chapter 1567: Employee Income and Benefit Information

Scope Employee Income and Benefit Information

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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ARTICLE 4 PRODUCTION OF BUSINESS RECORDS
SECTION 1567 Employee Income and Benefit Information

1-1567 California Evidence Courtroom Manual Scope

Scope Employee Income and Benefit Information

§ 1567 reads as follows:

Rule 1567 Employee Income and Benefit Information

A completed form described in *Section 3664 of the Family Code* for income and benefit information provided by the employer may be admissible in a proceeding for modification or termination of an order for child, family, or spousal support if both of the following requirements are met:

(a) The completed form complies with Sections 1561 and 1562.

(b) A copy of the completed form and notice was served on the employee named therein pursuant to *Section 3664 of the Family Code*.

(Stats. 1995, ch. 506 (A.B. 413), § 1)

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ARTICLE 4 PRODUCTION OF BUSINESS RECORDS
SECTION 1567 Employee Income and Benefit Information

1-1567 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 1567 extends the streamlined authentication procedures of Sections 1561 and 1562 to the forms used in proceedings related to child, family or spousal support.



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ARTICLE 4 PRODUCTION OF BUSINESS RECORDS
SECTION 1567 Employee Income and Benefit Information

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2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section.



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DIVISION 11 WRITINGS

CHAPTER 3 OFFICIAL WRITINGS AFFECTING PROPERTY

SECTION 1600 Record of Document Affecting Property Interest

1-1600 California Evidence Courtroom Manual 1600.syn

§ 1600.syn Synopsis to Chapter 1600: Record of Document Affecting Property Interest

Scope Record of Document Affecting Property Interest

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 ADDITIONAL AUTHORITY



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DIVISION 11 WRITINGS
CHAPTER 3 OFFICIAL WRITINGS AFFECTING PROPERTY
SECTION 1600 Record of Document Affecting Property Interest

1-1600 California Evidence Courtroom Manual Scope

Scope Record of Document Affecting Property Interest

§ 1600 reads as follows:

Rule 1600 Record of Document Affecting Property Interest

(a) The record of an instrument or other document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

- (1) The record is in fact a record of an office of a public entity; and
- (2) A statute authorized such a document to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of proof.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1967, ch. 650, § 9)

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DIVISION 11 WRITINGS

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SECTION 1600 Record of Document Affecting Property Interest

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1 ANALYSIS

Section 1600(a) establishes a presumption of the authenticity and contents of a document affecting a property interest. According to Section 1600(b), this presumption allows the proponent to meet both the burden of producing evidence and the burden of persuasion on these issues. (See Section 115 defining "burden of proof.") Thus, if the proponent shows that the record is one of an office of a public entity and there is a statute authorizing the document to be recorded, the document is presumed authentic and may be used to prove its contents. The presumption is rebuttable, but the burden of persuasion shifts to the opponent to show that the document is not what it purports to be.



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1-1600 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no direct federal counterpart, although Section 1600 resembles Federal Rule of *Evidence 1005* (public records). However, Federal Rule of *Evidence 1005* concerns all types of public records, not just those affecting property interests, and does not establish the kind of presumption created by Section 1600. Federal Rule of *Evidence 1005* provides that a copy of the public record may be used to prove contents of the original where the copy is certified as correct in accordance with Federal Rule of *Evidence 902* or authenticated as correct by testimony from a witness who has compared the copy with the original. The federal rule also provides that if a copy cannot be obtained by the exercise of reasonable diligence, "other evidence of the contents may be given." In California, lost or destroyed records affecting property are dealt with by the specific provisions of Section 1601.

In addition, Section 1600 creates a rebuttable presumption that affects the burden of persuasion. Federal Rule of Evidence 301 states that, unless otherwise stated by federal law, presumptions in civil cases only affect the production burden of the proponent of the evidence. The persuasion burden never shifts away from the proponent. Federal Rule of Evidence 302 states that where state law provides the rule for decision in a civil proceeding, the effect of a presumption should be determined under state law. Thus, it is possible that Section 1600 would become relevant in federal court.



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SECTION 1600 Record of Document Affecting Property Interest

1-1600 California Evidence Courtroom Manual 3

3 ADDITIONAL AUTHORITY

See 7 Cal. L. Rev. Comm. Rep. 1 (1965) (The sections in this chapter all relate to official writings affecting property. The provisions of some sections provide hearsay exceptions; other sections provide exceptions to the best evidence rule; still others provide authentication procedures.)

See 8 Cal. L. Rev. Comm. Rep. 1 (1965) (One effect of making the official record "prima facie evidence" is to create a rebuttable presumption. Such a classification tends to support the record title to property by requiring that the record title be sustained unless the party attacking it can actually prove its invalidity.)



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DIVISION 11 WRITINGS

CHAPTER 3 OFFICIAL WRITINGS AFFECTING PROPERTY

SECTION 1601 Proof of Content of Lost Official Record Affecting Property

1-1601 California Evidence Courtroom Manual 1601.syn

§ 1601.syn Synopsis to Chapter 1601: Proof of Content of Lost Official Record Affecting Property

Scope Proof of Content of Lost Official Record Affecting Property

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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1-1601 California Evidence Courtroom Manual Scope

Scope Proof of Content of Lost Official Record Affecting Property

§ 1601 reads as follows:

Rule 1601 Proof of Content of Lost Official Record Affecting Property

(a) Subject to subdivisions (b) and (c), when in any action it is desired to prove the contents of the official record of any writing lost or destroyed by conflagration or other public calamity, after proof of such loss or destruction, the following may, without further proof, be admitted in evidence to prove the contents of such record:

(1) Any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person engaged in the business of preparing and making abstracts of title prior to such loss or destruction; or

(2) Any abstract of title, or of any instrument affecting title, made, issued, and certified as correct by any person engaged in the business of insuring titles or issuing abstracts of title to real estate, whether the same was made, issued, or certified before or after such loss or destruction and whether the same was made from the original records or from abstract and notes, or either, taken from such records in the preparation and upkeeping of its plant in the ordinary course of its business.

(b) No proof of the loss of the original writing is required other than the fact that the original is not known to the party desiring to prove its contents to be in existence.

(c) Any party desiring to use evidence admissible under this section shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use such evidence at the trial of the action, and shall give all such other parties a reasonable opportunity to inspect the evidence, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967)

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1-1601 California Evidence Courtroom Manual 1

1 ANALYSIS

This statute provides for several ways of proving the contents of a document affecting property interests where the original has been destroyed or lost by conflagration or other public calamity.



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SECTION 1601 Proof of Content of Lost Official Record Affecting Property

1-1601 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no clear federal counterpart. Federal Rule of *Evidence 1005* provides that a copy of the public record may be used to prove contents of the original where the copy is certified as correct in accordance with Federal Rule of *Evidence 902* (self-authentication) or authenticated as correct by testimony from a witness who has compared the copy with the original. The federal rule also provides that if a copy cannot be obtained by the exercise of reasonable diligence, "other evidence of the contents may be given."



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DIVISION 11 WRITINGS
CHAPTER 3 OFFICIAL WRITINGS AFFECTING PROPERTY
SECTION 1603 Deed by Officer in Pursuance of Court Process

1-1603 California Evidence Courtroom Manual 1603.syn

§ 1603.syn Synopsis to Chapter 1603: Deed by Officer in Pursuance of Court Process

Scope Deed by Officer in Pursuance of Court Process

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE



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SECTION 1603 Deed by Officer in Pursuance of Court Process

1-1603 California Evidence Courtroom Manual Scope

Scope Deed by Officer in Pursuance of Court Process

§ 1603 reads as follows:

Rule 1603 Deed by Officer in Pursuance of Court Process

A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed. The presumption established by this section is a presumption affecting the burden of proof.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1967, ch. 650, § 11)

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1-1603 California Evidence Courtroom Manual 1

1 ANALYSIS

This section establishes a rebuttable presumption that a deed of conveyance of real property (or record of the deed or certified copy of the record) executed by a proper official and properly recorded properly conveyed the property interest to the named grantee. However, this presumption shifts the burden of persuasion that the conveyance was improper to the opponent of the presumption.



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1-1603 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to this section. Federal Rule of Evidence 301 states that unless otherwise stated by federal law, presumptions in civil cases only affect the production burden of the proponent of the evidence. The persuasion burden never shifts away from the proponent. Federal Rule of Evidence 302 states that where state law provides the rule for decision in a civil proceeding, the effect of a presumption should be determined under state law. Thus, it is possible that Section 1603 would become relevant in federal court.



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SECTION 1604 Certificate of Purchase or of Location of Lands

1-1604 California Evidence Courtroom Manual 1604.syn

§ 1604.syn Synopsis to Chapter 1604: Certificate of Purchase or of Location of Lands

Scope Certificate of Purchase or of Location of Lands

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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1-1604 California Evidence Courtroom Manual Scope

Scope Certificate of Purchase or of Location of Lands

§ 1604 reads as follows:

Rule 1604 Certificate of Purchase or of Location of Lands

A certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

(Stats. 1965, ch. 299 § 2, eff. Jan. 1, 1967)

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1-1604 California Evidence Courtroom Manual 1

1 ANALYSIS

Section 1604 creates a rebuttable presumption of ownership for the holder or assignee of a certificate of purchase of lands, whether issued by the United States or California. However, this presumption appears to satisfy only the production burden of the proponent; the presumption does not appear to shift the persuasion burden to the opponent.



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SECTION 1604 Certificate of Purchase or of Location of Lands

1-1604 California Evidence Courtroom Manual 2

2 COMPARISON TO FEDERAL RULE

There is no federal counterpart to Section 1604. However, Federal Rule of Evidence 302 states that where state law provides the rule for decision in a civil proceeding, the effect of a presumption should be determined under state law. Thus, it is possible that Section 1604 would become relevant in federal court.



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SECTION 1604 Certificate of Purchase or of Location of Lands

1-1604 California Evidence Courtroom Manual 3

3 SIGNIFICANT CASES

Sacre v. Chalupnik (1922) 188 Cal. 386, 205 P. 449 (United States receiver's certificate showing payment for land was prima facie evidence of ownership, and was a "certificate of purchase" within the meaning of *Code of Civil Procedure* section 1925 (repealed), and the one receiving it was in a position to initiate and maintain an action in ejectment).



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SECTION 1605 Authenticated Spanish Title Records

1-1605 California Evidence Courtroom Manual 1605.syn

§ 1605.syn Synopsis to Chapter 1605: Authenticated Spanish Title Records

Scope Authenticated Spanish Title Records

1 ANALYSIS

2 COMPARISON TO FEDERAL RULE

3 SIGNIFICANT CASES



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SECTION 1605 Authenticated Spanish Title Records

1-1605 California Evidence Courtroom Manual Scope

Scope Authenticated Spanish Title Records

§ 1605 reads as follows:

Rule 1605 Authenticated Spanish Title Records

Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this state, derived from the Spanish or Mexican governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-66, are admissible as evidence with like force and effect as the originals and without proving the execution of such originals.

(Stats. 1965, ch. 299, § 2, eff. Jan. 1, 1967. Amended Stats. 1967, ch. 650, § 12)

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1 ANALYSIS

This section allows a party to overcome the best evidence rule objection by providing a duplicate or authenticated translation of Spanish title papers to property in California where the copy and authenticated translation are prepared and filed by the proper authorities.



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2 COMPARISON TO FEDERAL RULE

There is no true federal counterpart, although Federal Rule of *Evidence 1003* provides that, in general, a duplicate is admissible to the same degree as an original.



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3 SIGNIFICANT CASES

Smith v. California Portland Cement Co. (1933) 134 Cal. App. 630, 25 P.2d 1013 (record of deed written in Spanish containing purported translation was inadmissible in suit to quiet title, where deed failed to sufficiently describe property, translation was not shown to be correct, and no title in grantor was shown).



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CALIFORNIA EVIDENCE CODE

1-1 California Evidence Courtroom Manual 1

§ 1 1: CALIFORNIA EVIDENCE CODE

§ 1 Title

§ 2 Construction of Evidence Code

§ 3 Severability

§ 4 Application of Preliminary Provisions

§ 5 Construction of Headings

§ 6 References to Statutes

§ 7 Definitions

§ 8 Construction of Tenses

§ 9 Construction of Gender References

§ 10 Construction of Singular and Plural

§ 11 "Shall" and "May"

§ 12 Effective Date of Code

§ 100 Application of Definitions

§ 105 Action

§ 110 Burden of Producing Evidence

§ 120 Civil Action

§ 125 Conduct

§ 130 Criminal Action

§ 140 Evidence

§ 145 The Hearing

§ 150 Hearsay Evidence

§ 160 Law

§ 165 Oath

§ 175 Person

§ 177 Dependent Person

§ 180 Personal Property

§ 185 Property

§ 190 Proof

§ 195 Public Employee

§ 200 Public Entity

§ 205 Real Property

§ 210 Relevant Evidence

§ 220 State

§ 225 Statement

§ 230 Statute

§ 235 Trier of Fact

§ 240 Unavailability as a Witness

§ 250 Writing

§ 255 Original

§ 260 Duplicate

§ 300 Applicability of Evidence Code

§ 310 Questions of Law for the Court

§ 311 Applicability of Foreign Law

§ 312 Questions of Fact for the Jury

§ 320 Order of Proof

§ 350 Only Relevant Evidence Admissible

- § 351 Admissibility of Relevant Evidence
 - § 351.1 Exclusion of Evidence Related to Polygraph Examinations
- § 352 The Court's Discretion to Exclude Evidence
 - § 352.1 Complainant's Address and Telephone Number in Criminal Sex Act Prosecution
- § 353 Effect of Erroneous Admission of Evidence
- § 354 Effect of Erroneous Exclusion of Evidence
- § 355 Instruction on Limited Admissibility
- § 356 Admissibility of the Whole Evidence to Provide Context for Part Offered
- § 400 Definition of "Preliminary Fact"
- § 401 Definition of "Proffered Evidence"
- § 402 Procedure for Establishing Existence of Preliminary Fact
- § 403 Burden of Proof on Preliminary Facts Regarding Relevance, Personal Knowledge, Authenticity, Statement or Conduct of a Person
- § 404 Application of Privilege Against Self-Incrimination
- § 405 Burden of Proof on Preliminary Facts in Other Instances
- § 406 Evidence Regarding Weight or Credibility of Evidence
- § 410 Definition of "Direct Evidence"
- § 411 Sufficiency of Direct Evidence
- § 412 Effect of Weak Evidence
- § 413 Adverse Inferences Regarding Evidence
- § 450 Judicial Notice in General
- § 451 Mandatory Judicial Notice
- § 452 Permissive Judicial Notice
- § 452.5 Computer-Generated Records of Criminal Convictions
- § 453 Requests Making Judicial Notice Mandatory
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California Evidence Courtroom Manual

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CALIFORNIA EVIDENCE CODE

*1-1 California Evidence Courtroom Manual Scope***Scope**COMPARISON OF CALIFORNIA EVIDENCE CODE
WITH FEDERAL RULES OF EVIDENCE

Evid C §	Similar	Similar in Part	Significant Substantive Difference	No Counter-part	Controlled by Federal Case Law
1	FRE 1103				
2	FRE 102				
3				X	
4				X	
5				X	
6				X	
7				X	
8				X	
9				X	
10				X	
11				X	
12				X	
100				X	
105	FRE 1101(b)				
110		FRE 301			
115				X	
120				X	
125		FRE 801(a)(2)			
130				X	
135	FRE 801(b)				
140				X	
145				X	

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150		FRE 801(a)-(c)	
160			X
165	FRE 603		
170	FRE 602		
175		FRE 801(b)	
177			X
180			X
185			X
190			X
195		FRE 902(a)	
200			X
205			X
210	FRE 401		
220			X
225	FRE 801(a)		
230			X
235			X
240		FRE 804(a)	
250	FRE 1001(1)-(2)		
255	FRE 1001(3)		
260	FRE 1001(4)		
300		FRE 1101	
310		FRE 104(a)	
311			X
312			X
320		FRE 611	
350	FRE 402		
351		FRE 402	
351.1			X
352	FRE 403		
352.1			X
353		FRE 103	
354		FRE 103	
355	FRE 105		
356		FRE 106	
400		FRE 104	
401		FRE 104	

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402(b)	FRE 104(c)	
402(a), (c)		X
403	FRE 104(b)	
404		X
405	FRE 104(a)	
406		X
410		X
411		X
412		X
413		X
450	FRE 201	
451	FRE 201(d)	
452(a)-(f)		X
452(g)-(h)	FRE 201(b)	
452.5		X
453	FRE 201	
454		X
455	FRE 201(e)	
456		X
457	FRE 201(g)	
458		X
459	FRE 201(f)	
460	FRE 706	
500		X
501		X
502		X
520		X
521		X
522		X
523		X
550		X
600		X
601		X
602		X
603	FRE 301	
604	FRE 301	
605		X
606		X

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607		FRE 301	
620			X
622			X
623			X
624			X
630	FRE 301		
631			X
632			X
633			X
634			X
635			X
636			X
637			X
638			X
639			X
640			X
641			X
642			X
643		FRE 901(b)(8)	
644	FRE 902(5)		
645		FRE 902(5)	
645.1		FRE 902(6)	
646			X
647			X
660		FRE 301, 302	
662			X
663			X
664			X
665			X
666			X
667			X
668			X
669			X
669.1			X
669.5			X
700	FRE 601		
701	FRE 601		

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702	FRE 602		
703		FRE 605	
703.5		FRE 605	
704		FRE 606(a)	
710	FRE 603		
711			X
712			X
720	FRE 702		
721		FRE 401, 803(18)	
722		FRE 706(c)	
723			X
730	FRE 706(a)		
731	FRE 706(b)		
732	FRE 706(a)		
733	FRE 706(d)		
750		FRE 604	
751		FRE 604	
752		FRE 604	
753		FRE 604	
754			X
754.5			X
755			X
755.5			X
760		FRE 611	
761		FRE 611(b)	
762		FRE 611	
763		FRE 611	
764	FRE 611(c)		
765		FRE 611(a)	
766			X
767		FRE 611(c)	
768		FRE 613(a)	
769		FRE 613	
770	FRE 613(b)		
771		FRE 612	
772		FRE 611	
773		FRE 611(b)	

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774	FRE 611	
775		FRE 614
776	FRE 611(c)	
777	FRE 615	
778	FRE 611	
780	FRE 608, 609, 613	
782	FRE 412(c)	
783	FRE 412	
785	FRE 607	
786	FRE 608(a)	
787		FRE 608(b)
788		FRE 609
789	FRE 610	
790	FRE 608(a)(2)	
791	FRE 608(a)(2)	
795		X
800		FRE 701
801(a)		FRE 702
801(b)		FRE 703
802		FRE 703, 705
803		FRE 703
804		X
805	FRE 704(a)	
810		X
811		X
812		X
813		X
814		X
815		X
816		X
817		X
818		X
819		X
820		X
821		X
822		X
823		X

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824		X	
870	FRE 701, 702, 704		
900		X	
901	FRE 104, 1101		
902		X	
903		X	
905	FRE 1101(c)		
910	FRE 104, 1101		
911	FRE 501		
912			FRE 501
913			FRE 501
914			FRE 501
915	FRE 501		FRE 501
916		X	
917			FRE 501
918			FRE 501
919			FRE 501
920			FRE 501
930			FRE 501
940			FRE 501
950			FRE 501
951			FRE 501
952			FRE 501
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981		FRE 501
982	X	
983	X	
984	X	
985		FRE 501
986	X	
987		FRE 501
990		FRE 501
992		FRE 501
993		FRE 501
994		FRE 501
995		FRE 501
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1034	FRE 501
1035	FRE 501
1035.2	FRE 501
1035.4	FRE 501
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1035.8	FRE 501
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1106			FRE 412	
1107				X
1108		FRE 413-415		
1109				X
1115				X
1116				X
1117				X
1118				X
1119				X
1120				X
1121				X
1122				X
1123				X
1124				X
1125				X
1126				X
1127				X
1128				X
1150		FRE 606(b)		

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1151		FRE 407	
1152(a)		FRE 408	
1153	FRE 410		
1153.5		FRE 408	
1154		FRE 408	
1155	FRE 411		
1156			X
1156.1			X
1157			FRE 501
1157.5			X
1157.6			X
1157.7			X
1158			X
1159			X
1160			X
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1201	FRE 805		
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1203	FRE 806		
1203.1	FRE 1101(d)(3)		
1204	FRE 402		
1205			X
1220	FRE 801(d)(2)(A)		
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1222	FRE 801(d)(2)(C)	FRE 801(d)(2)(D)	
1223		FRE 801(d)(2)(E)	
1224			X
1225		FRE 803(14)-(16), (20), (23)-(24)	
1226			X
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1228.1			X

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1235		FRE 801(d)(1)(A)	
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1240		FRE 803(1)	
1241		FRE 803(1)	
1242		FRE 804(b)(2)	
1250		FRE 803(3)	
1251			X
1252			X
1253		FRE 803(4)	
1260		FRE 803(3)	
1261			X
1270	FRE 803(6)		
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1272	FRE 803(7)		
1280		FRE 803(8)	
1281	FRE 803(9)		
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1284	FRE 803(10)		
1290		FRE 804(b)(1)	
1291		FRE 804(b)(1)	
1292		FRE 804(b)(1)	
1293			X
1294			X

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1300		FRE 803(22)	
1301			X
1302			X
1310		FRE 804(b)(4)(A)	
1310(b)		FRE 804(b)(4)(A)	
1311		FRE 804(b)(4)(A)	
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1316	FRE 803(12)		
1320		FRE 803(20)	
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1331		FRE 803(16)	
1340	FRE 803(17)		
1341		FRE 803(18)	
1350		FRE 804(b)(6)	
1360			X
1370			X
1380			X
1400	FRE 901(a)		
1401	FRE 901(a), 1008		
1402	FRE 901(a)		
1410	FRE 901(b)		
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1413	FRE 901(b)(1)		
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1417	FRE 901(b)(3)		
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1450	FRE 902		
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1522		FRE 1004- 1005	
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1530(a)(2)	FRE 902(1), (2), (4)		
1530(a)(3)	FRE 902(3)		
1531			X
1532	FRE 1005		
1550		FRE 1004(3)	
1551		FRE 1001(3)	
1552		FRE 1001(4)	
1553		FRE 1001(4)	
1560			X
1561			X
1562			X
1563			X
1564			X
1565			X
1566			X
1567			X
1600		FRE 1005	

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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 1

§ 1 Title

This code shall be known as the Evidence Code.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 2

§ 2 Construction of Evidence Code

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. This code establishes the law of this state respecting the subject to which it relates, and its provisions are to be liberally construed with a view to effecting its objects and promoting justice.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 3

§ 3 Severability

If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 4

§ 4 Application of Preliminary Provisions

Unless the provision or context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this code.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 5

§ 5 Construction of Headings

Division, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 6

§ 6 References to Statutes

Whenever any reference is made to any portion of this code or of any other statute, such reference shall apply to all amendments and additions heretofore or hereafter made.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 7

§ 7 Definitions

Unless otherwise expressly stated:

- (a) "Division" means a division of this code.
- (b) "Chapter" means a chapter of the division in which that term occurs.
- (c) "Article" means an article of the chapter in which that term occurs.
- (d) "Section" means a section of this code.
- (e) "Subdivision" means a subdivision of the section in which that term occurs.
- (f) "Paragraph" means a paragraph of the subdivision in which that term occurs.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 8

§ 8 Construction of Tenses

The present tense includes the past and future tenses; and the future, the present.



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DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 9

§ 9 Construction of Gender References

The masculine gender includes the feminine and neuter.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 10

§ 10 Construction of Singular and Plural

The singular number includes the plural; and the plural, the singular.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 11

§ 11 "Shall" and "May"

"Shall" is mandatory and "may" is permissive.



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CALIFORNIA EVIDENCE CODE
DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

-1 California Evidence Courtroom Manual § 12

§ 12 Effective Date of Code

(a) This code shall become effective on January 1, 1967, and shall govern proceedings in actions brought on or after that date and, except as provided in subdivision (b), further proceedings in actions pending on that date.

(b) Subject to subdivision (c), a trial commenced before January 1, 1967, shall not be governed by this code. For the purpose of this subdivision:

(1) A trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence and is terminated when the issue upon which such evidence is received is submitted to the trier of fact. A new trial, or a separate trial of a different issue, commenced on or after January 1, 1967, shall be governed by this code.

(2) If an appeal is taken from a ruling made at a trial commenced before January 1, 1967, the appellate court shall apply the law applicable at the time of the commencement of the trial.

(c) The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 100

§ 100 Application of Definitions

Unless the provision or context otherwise requires, these definitions govern the construction of this code.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 105

§ 105 Action

"Action" includes a civil action and a criminal action.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 110

§ 110 Burden of Producing Evidence

"Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.



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-1 California Evidence Courtroom Manual § 120

§ 120 Civil Action

"Civil action" includes civil proceedings.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 125

§ 125 Conduct

"Conduct" includes all active and passive behavior, both verbal and nonverbal.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 130

§ 130 Criminal Action

"Criminal action" includes criminal proceedings.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 140

§ 140 Evidence

"Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 145

§ 145 The Hearing

"The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing.



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DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 150

§ 150 Hearsay Evidence

"Hearsay evidence" is defined in Section 1200.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 160

§ 160 Law

"Law" includes constitutional, statutory, and decisional law.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 165

§ 165 Oath

"Oath" includes affirmation or declaration under penalty of perjury.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 175

§ 175 Person

"Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.



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DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 177

§ 177 Dependent Person

"Dependent person" means any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. "Dependent person" includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in *Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code*.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 180

§ 180 Personal Property

"Personal property" includes money, goods, chattels, things in action, and evidences of debt.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 185

§ 185 Property

"Property" includes both real and personal property.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 190

§ 190 Proof

"Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.



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DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 195

§ 195 Public Employee

"Public employee" means an officer, agent, or employee of a public entity.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 200

§ 200 Public Entity

"Public entity" includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic.



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-1 California Evidence Courtroom Manual § 205

§ 205 Real Property

"Real property" includes lands, tenements, and hereditaments.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 210

§ 210 Relevant Evidence

"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.



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DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 220

§ 220 State

"State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 225

§ 225 Statement

"Statement" means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.



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DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 230

§ 230 Statute

"Statute" includes a treaty and a constitutional provision.



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DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 235

§ 235 Trier of Fact

"Trier of fact" includes (a) the jury and (b) the court when the court is trying an issue of fact other than one relating to the admissibility of evidence.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 240

§ 240 Unavailability as a Witness

(a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

- (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
- (2) Disqualified from testifying to the matter.
- (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.
- (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
- (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described

by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.



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CALIFORNIA EVIDENCE CODE
DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 250

§ 250 Writing

"Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.



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DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 255

§ 255 Original

"Original" means the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."



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DIVISION 2. WORDS AND PHRASES DEFINED

-1 California Evidence Courtroom Manual § 260

§ 260 Duplicate

A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.



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CALIFORNIA EVIDENCE CODE
DIVISION 3. GENERAL PROVISIONS
CHAPTER 1. APPLICABILITY OF CODE

-1 California Evidence Courtroom Manual § 300

§ 300 Applicability of Evidence Code

Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a court of appeal or superior court, including proceedings in such actions conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.



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CALIFORNIA EVIDENCE CODE
DIVISION 3. GENERAL PROVISIONS
CHAPTER 2. PROVINCE OF COURT AND JURY

-1 California Evidence Courtroom Manual § 310

§ 310 Questions of Law for the Court

(a) All questions of law (including but not limited to questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence) are to be decided by the court. Determination of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article 2 (commencing with Section 400) of Chapter 4.

(b) Determination of the law of an organization of nations or of the law of a foreign nation or a public entity in a foreign nation is a question of law to be determined in the manner provided in Division 4 (commencing with Section 450).



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CALIFORNIA EVIDENCE CODE
DIVISION 3. GENERAL PROVISIONS
CHAPTER 2. PROVINCE OF COURT AND JURY

-1 California Evidence Courtroom Manual § 311

§ 311 Applicability of Foreign Law

If the law of an organization of nations, a foreign nation or a state other than this state, or a public entity in a foreign nation or a state other than this state, is applicable and such law cannot be determined, the court may, as the ends of justice require, either:

- (a) Apply the law of this state if the court can do so consistently with the Constitution of the United States and the Constitution of this state; or
- (b) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.



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-1 California Evidence Courtroom Manual § 312

§ 312 Questions of Fact for the Jury

Except as otherwise provided by law, where the trial is by jury:

- (a) All questions of fact are to be decided by the jury.
- (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.



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-1 California Evidence Courtroom Manual § 320

§ 320 Order of Proof

Except as otherwise provided by law, the court in its discretion shall regulate the order of proof.



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-1 California Evidence Courtroom Manual § 350

§ 350 Only Relevant Evidence Admissible

No evidence is admissible except relevant evidence.



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-1 California Evidence Courtroom Manual § 351

§ 351 Admissibility of Relevant Evidence

Except as otherwise provided by statute, all relevant evidence is admissible.



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-1 California Evidence Courtroom Manual § 351.1

§ 351.1 Exclusion of Evidence Related to Polygraph Examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.



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-1 California Evidence Courtroom Manual § 352

§ 352 The Court's Discretion to Exclude Evidence

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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-1 California Evidence Courtroom Manual § 352.1

§ 352.1 Complainant's Address and Telephone Number in Criminal Sex Act Prosecution

In any criminal proceeding under Section 261, Section 264.1, subdivision (d) of Section 286, or *subdivision (d) of Section 288a of the Penal Code*, or in any criminal proceeding under subdivision (c) of Section 286 or *subdivision (c) of Section 288a of the Penal Code* in which the defendant is alleged to have compelled the participation of the victim by force, violence, duress, menace, or threat of great bodily harm, the district attorney may, upon written motion with notice to the defendant or the defendant's attorney, if he or she is represented by an attorney, within a reasonable time prior to any hearing, move to exclude from evidence the current address and telephone number of any victim at such hearing.

The court may order that evidence of the victim's current address and telephone number be excluded from any hearings conducted pursuant to such criminal proceeding if the court finds that the probative value of such evidence is outweighed by the creation of substantial danger to the victim.

Nothing in this section shall abridge or limit the defendant's right to discover or investigate such information.



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-1 California Evidence Courtroom Manual § 353

§ 353 Effect of Erroneous Admission of Evidence

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

- (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
- (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.



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-1 California Evidence Courtroom Manual § 354

§ 354 Effect of Erroneous Exclusion of Evidence

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

- (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
- (b) The rulings of the court made compliance with subdivision (a) futile; or
- (c) The evidence was sought by questions asked during cross-examination or recross-examination.



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-1 California Evidence Courtroom Manual § 355

§ 355 Instruction on Limited Admissibility

When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.



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-1 California Evidence Courtroom Manual § 356

§ 356 Admissibility of the Whole Evidence to Provide Context for Part Offered

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.



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-1 California Evidence Courtroom Manual § 400

§ 400 Definition of "Preliminary Fact"

As used in this article, "preliminary fact" means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence. The phrase "the admissibility or inadmissibility of evidence" includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege.



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-1 California Evidence Courtroom Manual § 401

§ 401 Definition of "Proffered Evidence"

As used in this article, "proffered evidence" means evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.



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-1 California Evidence Courtroom Manual § 402

§ 402 Procedure for Establishing Existence of Preliminary Fact

(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.



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-1 California Evidence Courtroom Manual § 403

§ 403 Burden of Proof on Preliminary Facts Regarding Relevance, Personal Knowledge, Authenticity, Statement or Conduct of a Person

(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

- (1) the relevance of the proffered evidence depends on the existence of the preliminary fact;
- (2) the preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;
- (3) the preliminary fact is the authenticity of a writing; or
- (4) the proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

(c) If the court admits the proffered evidence under this section, the court:

- (1) may, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.



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-1 California Evidence Courtroom Manual § 404

§ 404 Application of Privilege Against Self-Incrimination

Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.



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-1 California Evidence Courtroom Manual § 405

§ 405 Burden of Proof on Preliminary Facts in Other Instances

With respect to preliminary fact determinations not governed by Section 403 or 404:

(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

(b) If a preliminary fact is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.



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-1 California Evidence Courtroom Manual § 406

§ 406 Evidence Regarding Weight or Credibility of Evidence

This article does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.



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-1 California Evidence Courtroom Manual § 410

§ 410 Definition of "Direct Evidence"

As used in this chapter, "direct evidence" means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.



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-1 California Evidence Courtroom Manual § 411

§ 411 Sufficiency of Direct Evidence

Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.



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-1 California Evidence Courtroom Manual § 412

§ 412 Effect of Weak Evidence

If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.



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-1 California Evidence Courtroom Manual § 413

§ 413 Adverse Inferences Regarding Evidence

In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.



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-1 California Evidence Courtroom Manual § 450

§ 450 Judicial Notice in General

Judicial notice may not be taken of any matter unless authorized or required by law.



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-1 California Evidence Courtroom Manual § 451

§ 451 Mandatory Judicial Notice

Judicial notice shall be taken of the following:

- (a) The decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in section 3, 4, or 5 of Article XI of the California Constitution.
- (b) Any matter made a subject of judicial notice by *section 11343.6, 11344.6, or 18576 of the Government Code* or by *section 1507 of Title 44 of the United States Code*.
- (c) Rules of professional conduct for members of the bar adopted pursuant to *section 6076 of the Business and Professions Code* and rules of practice and procedure for the courts of this state adopted by the Judicial Council.
- (d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.
- (e) The true signification of all English words and phrases and of all legal expressions.
- (f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.



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-1 California Evidence Courtroom Manual § 452

§ 452 Permissive Judicial Notice

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

- (a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.
- (b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.
- (c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.
- (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.
- (f) The law of an organization of nations and of foreign nations and public entities in foreign nations.
- (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.
- (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.



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-1 California Evidence Courtroom Manual § 452.5

§ 452.5 Computer-Generated Records of Criminal Convictions

(a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to *Section 69844.5 of the Government Code* at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.



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-1 California Evidence Courtroom Manual § 453

§ 453 Requests Making Judicial Notice Mandatory

The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

- (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and
- (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.



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-1 California Evidence Courtroom Manual § 454

§ 454 Determining Whether Judicial Notice is Appropriate

(a) In determining the propriety of taking judicial notice of a matter, or the tenor thereof:

- (1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.
- (2) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

(b) Where the subject of judicial notice is the law of an organization of nations, a foreign nation, or a public entity in a foreign nation and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, shall be in writing.



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-1 California Evidence Courtroom Manual § 455

§ 455 Opportunity to Respond

With respect to any matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action:

- (a) If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.
- (b) If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.



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-1 California Evidence Courtroom Manual § 456

§ 456 Denial of Request to Take Judicial Notice

If the trial court denies a request to take judicial notice of any matter, the court shall at the earliest practicable time so advise the parties and indicate for the record that it has denied the request.



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-1 California Evidence Courtroom Manual § 457

§ 457 Instructing the Jury on Matter Judicially Noticed

If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the trial court may, and upon request shall, instruct the jury to accept as a fact the matter so noticed.



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-1 California Evidence Courtroom Manual § 458

§ 458 Judicial Notice in Subsequent Proceedings

The failure or refusal of the trial court to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the trial court in subsequent proceedings in the action from taking judicial notice of the matter in accordance with the procedure specified in this division.



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-1 California Evidence Courtroom Manual § 459

§ 459 Judicial Notice by Appellate Court

(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

(b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454.

(c) When taking judicial notice under this Section of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.



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-1 California Evidence Courtroom Manual § 460

§ 460 Court's Appointment of Experts

Where the advice of persons learned in the subject matter is required in order to enable the court to take judicial notice of a matter, the court on its own motion or on motion of any party may appoint one or more such persons to provide such advice. If the court determines to appoint such a person, he shall be appointed and compensated in the manner provided in Article 2 (commencing with Section 730) of Chapter 3 of Division 6.



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-1 California Evidence Courtroom Manual § 500

§ 500 Allocation in General

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.



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-1 California Evidence Courtroom Manual § 501

§ 501 Allocation of Burden of Proof in Criminal Cases

Insofar as any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to *Penal Code section 1096*.



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-1 California Evidence Courtroom Manual § 502

§ 502 Instructing the Jury on the Burden of Proof

The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.



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-1 California Evidence Courtroom Manual § 520

§ 520 Claim of Crime or Wrongdoing

The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.



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-1 California Evidence Courtroom Manual § 521

§ 521 Claim of Failure to Use Due Care

The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.



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-1 California Evidence Courtroom Manual § 522

§ 522 Claim of Insanity

The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.



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ARTICLE 2. BURDEN OF PROOF ON SPECIFIC MATTERS

-1 California Evidence Courtroom Manual § 523

§ 523 Claim Regarding Land Patented or Granted by State

In any action where the state is a party, regardless of who is the moving party, where (a) the boundary of land patented or otherwise granted by the state is in dispute, or (b) the validity of any state patent or grant dated prior to 1950 is in dispute, the state shall have the burden of proof on all issues relating to the historic locations of rivers, streams, and other water bodies and the authority of the state in issuing the patent or grant.

This section is not intended to nor shall it be construed to supersede existing statutes governing disputes where the state is a party and regarding title to real property.



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-1 California Evidence Courtroom Manual § 550

§ 550 Party Who Bears the Burden of Producing Evidence

(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on the fact would be required in the absence of further evidence.

(b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.



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-1 California Evidence Courtroom Manual § 600

§ 600 Presumption and Inference Defined

(a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

(b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.



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-1 California Evidence Courtroom Manual § 601

§ 601 Classification of Presumptions

A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.



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-1 California Evidence Courtroom Manual § 602

§ 602 Statute Making One Fact Prima Facie Evidence of Another Fact

A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.



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-1 California Evidence Courtroom Manual § 603

§ 603 Presumption Affecting the Burden of Producing Evidence Defined

A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.



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-1 California Evidence Courtroom Manual § 604

§ 604 Effect of Presumption Affecting Burden of Producing Evidence

The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.



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-1 California Evidence Courtroom Manual § 605

§ 605 Presumption Affecting the Burden of Proof Defined

A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.



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-1 California Evidence Courtroom Manual § 606

§ 606 Effect of Presumption Affecting Burden of Proof

The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.



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-1 California Evidence Courtroom Manual § 607

§ 607 Effect of Certain Presumption in a Criminal Action

When a presumption affecting the burden of proof operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt, and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.



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ARTICLE 2. CONCLUSIVE PRESUMPTIONS

-1 California Evidence Courtroom Manual § 620

§ 620 Conclusive Presumptions

The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions.



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-1 California Evidence Courtroom Manual § 622

§ 622 Facts Recited in Written Instrument

The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.



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-1 California Evidence Courtroom Manual § 623

§ 623 Estoppel by Own Statement or Conduct

Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.



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-1 California Evidence Courtroom Manual § 624

§ 624 Estoppel of Tenant to Deny Title of Landlord

A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.



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-1 California Evidence Courtroom Manual § 630

§ 630 Presumption Affecting the Burden of Producing Evidence

The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 603, are presumptions affecting the burden of producing evidence.



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-1 California Evidence Courtroom Manual § 631

§ 631 Money Delivered by One to Another

Money delivered by one to another is presumed to have been due to the latter.



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-1 California Evidence Courtroom Manual § 632

§ 632 Thing Delivered by One to Another

A thing delivered by one to another is presumed to have belonged to the latter.



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-1 California Evidence Courtroom Manual § 633

§ 633 Obligation Delivered Up to the Debtor

An obligation delivered up to the debtor is presumed to have been paid.



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-1 California Evidence Courtroom Manual § 634

§ 634 Person in Possession of Order on Himself

A person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly.



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-1 California Evidence Courtroom Manual § 635

§ 635 Obligation Possessed by Creditor

An obligation possessed by the creditor is presumed not to have been paid.



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-1 California Evidence Courtroom Manual § 636

§ 636 Payment of Earlier Rent or Installments

The payment of earlier rent or installments is presumed from a receipt for later rent or installments.



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-1 California Evidence Courtroom Manual § 637

§ 637 Ownership of Things Possessed

The things which a person possesses are presumed to be owned by him.



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-1 California Evidence Courtroom Manual § 638

§ 638 Ownership of Property by Person Who Exercises Acts of Ownership

A person who exercises acts of ownership over property is presumed to be the owner of it.



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-1 California Evidence Courtroom Manual § 639

§ 639 Judgment Correctly Determines Rights of Parties

A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined.



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-1 California Evidence Courtroom Manual § 640

§ 640 Writing Truly Dated

A writing is presumed to have been truly dated.



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-1 California Evidence Courtroom Manual § 641

§ 641 Letter Received in Ordinary Course of Mail

A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.



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-1 California Evidence Courtroom Manual § 642

§ 642 Conveyance by Person Having Duty to Convey Real Property

A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest.



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-1 California Evidence Courtroom Manual § 643

§ 643 Authenticity of Ancient Document

A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it:

- (a) Is at least 30 years old;
- (b) Is in such condition as to create no suspicion concerning its authenticity;
- (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and
- (d) Has been generally acted upon as authentic by persons having an interest in the matter.



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-1 California Evidence Courtroom Manual § 644

§ 644 Book Purporting to be Published by Public Authority

A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.



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-1 California Evidence Courtroom Manual § 645

§ 645 Books Purporting to Contain Reports of Cases

A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of such cases.



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-1 California Evidence Courtroom Manual § 645.1

§ 645.1 Printed Materials Purporting to be Particular Newspaper or Periodical

Printed materials, purporting to be a particular newspaper or periodical, are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months.



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-1 California Evidence Courtroom Manual § 646

§ 646 Res Ipsa Loquitur

- (a) As used in this section, "defendant" includes any party against whom the res ipsa loquitur presumption operates.
- (b) The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence.
- (c) If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:
 - (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and
 - (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.



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-1 California Evidence Courtroom Manual § 647

§ 647 Return of Registered Process Server

The return of a process server registered pursuant to chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code upon process or notice establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return.



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-1 California Evidence Courtroom Manual § 660

§ 660 Presumptions Affecting the Burden of Proof

The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 605, are presumptions affecting the burden of proof.



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-1 California Evidence Courtroom Manual § 662

§ 662 Owner of Legal Title to Property Is Owner of Beneficial Title

The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.



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-1 California Evidence Courtroom Manual § 663

§ 663 Ceremonial Marriage

A ceremonial marriage is presumed to be valid.



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-1 California Evidence Courtroom Manual § 664

§ 664 Official Duty Regularly Performed

It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.



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-1 California Evidence Courtroom Manual § 665

§ 665 Ordinary Consequences of Voluntary Act

A person is presumed to intend the ordinary consequences of his voluntary act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.



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-1 California Evidence Courtroom Manual § 666

§ 666 Judicial Action Lawful Exercise of Jurisdiction

Any court of this state or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.



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-1 California Evidence Courtroom Manual § 667

§ 667 Death of Person Not Heard From in Five Years

A person not heard from in five years is presumed to be dead.



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-1 California Evidence Courtroom Manual § 668

§ 668 Unlawful Intent

An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.



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-1 California Evidence Courtroom Manual § 669

§ 669 Failure to Exercise Due Care

(a) The failure of a person to exercise due care is presumed if:

- (1) He violated a statute, ordinance, or regulation of a public entity;
- (2) The violation proximately caused death or injury to person or property;
- (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that:

- (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or
- (2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.



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-1 California Evidence Courtroom Manual § 669.1

§ 669.1 Governmental Rule or Guideline for Standards of Conduct for Public Employees

A rule, policy, manual, or guideline of state or local government setting forth standards of conduct or guidelines for its employees in the conduct of their public employment shall not be considered a statute, ordinance, or regulation of that public entity within the meaning of Section 669, unless the rule, manual, policy, or guideline has been formally adopted as a statute, as an ordinance of a local governmental entity in this state empowered to adopt ordinances, or as a regulation by an agency of the state pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code), or by an agency of the United States government pursuant to the federal Administrative Procedure Act (Chapter 5 (commencing with Section 5001) of Title 5 of the United States Code). This section affects only the presumption set forth in Section 669, and is not otherwise intended to affect the admissibility or inadmissibility of the rule, policy, manual, or guideline under other provisions of law.



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-1 California Evidence Courtroom Manual § 669.5

§ 669.5 Effect of Ordinance on Supply of Residential Units

(a) Any ordinance enacted by the governing body of a city, county, or city and county which (1) directly limits, by number, the building permits that may be issued for residential construction or the buildable lots which may be developed for residential purposes, or (2) changes the standards of residential development on vacant land so that the governing body's zoning is rendered in violation of *Section 65913.1 of the Government Code* is presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of the city, county, or city and county.

(b) With respect to any action which challenges the validity of an ordinance specified in subdivision (a) the city, county, or city and county enacting the ordinance shall bear the burden of proof that the ordinance is necessary for the protection of the public health, safety, or welfare of the population of the city, county, or city and county.

(c) This section does not apply to state and federal building code requirements or local ordinances which (1) impose a moratorium, to protect the public health and safety, on residential construction for a specified period of time, if, under the terms of the ordinance, the moratorium will cease when the public health or safety is no longer jeopardized by the construction, (2) create agricultural preserves under Chapter 7 (commencing with Section 51200) or Part 1 of Division 1 of Title 5 of the Government Code, or (3) restrict the number of buildable parcels or designate lands within a zone for nonresidential uses in order to protect agricultural uses as defined in subdivision (b) or *Section 51201 of the Government Code* or open-space land as defined in *subdivision (b) of Section 65560 of the Government Code*.

(d) This section shall not apply to a voter approved ordinance adopted by referendum or initiative prior to the effective date of this section which (1) requires the city, county, or city and county to establish a population growth limit which represents its fair share of each year's statewide population growth, or (2) which sets a growth rate of no more than the average population growth rate experienced by the state as a whole. Paragraph (2) of subdivision (a) does not apply to a voter-approved ordinance adopted by referendum or initiative which exempts housing affordable to persons and families of low or moderate income, as defined in *Section 50093 of the Health and Safety Code*, or which otherwise provides low- and moderate-income housing sites equivalent to such an exemption.



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-1 California Evidence Courtroom Manual § 670

§ 670 Payment by Check

(a) In any dispute concerning payment by means of a check, a copy of the check produced in accordance with *Section 1550 of the Evidence Code*, together with the original bank statement that reflects payment of the check by the bank on which it was drawn or a copy thereof produced in the same manner, creates a presumption that the check has been paid.

(b) As used in this section:

(1) "Bank" means any person engaged in the business of banking and includes, in addition to a commercial bank, a savings and loan association, savings bank, or credit union.

(2) "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank, even though it is described by another term, such as "share draft" or "negotiable order of withdrawal."



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-1 California Evidence Courtroom Manual § 700

§ 700 Competency

Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.



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-1 California Evidence Courtroom Manual § 701

§ 701 Disqualification of Witness

(a) A person is disqualified to be a witness if he or she is:

- (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or
- (2) Incapable of understanding the duty of a witness to tell the truth.

(b) In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness.



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-1 California Evidence Courtroom Manual § 702

§ 702 Personal Knowledge of Witness

(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.



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-1 California Evidence Courtroom Manual § 703

§ 703 Judge as Witness

(a) Before the judge presiding at the trial of an action may be called to testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, the judge shall declare a mistrial and order the action assigned for trial before another judge.

(c) The calling of the judge presiding at a trial to testify in that trial as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a judge shall be deemed a motion for mistrial.

(d) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.



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-1 California Evidence Courtroom Manual 703.5

703.5 Judges, Arbitrators or Mediators as Witnesses in a Subsequent Civil Proceeding

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of *subdivision (a) of Section 170.1 of the Code of Civil Procedure*. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.



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-1 California Evidence Courtroom Manual § 704

§ 704 Juror as Witness

(a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

(b) Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, the court shall declare a mistrial and order the action assigned for trial before another jury.

(c) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness.



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-1 California Evidence Courtroom Manual § 710

§ 710 Oath Required

Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law, except that a child under the age of 10 or a dependent person with a substantial cognitive impairment, in the court's discretion, may be required only to promise to tell the truth.



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-1 California Evidence Courtroom Manual § 711

§ 711 Confrontation

At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.



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-1 California Evidence Courtroom Manual § 712

§ 712 Affidavits Regarding Blood Samples

Notwithstanding Sections 711 and 1200, at the trial of a criminal action, evidence of the technique used in taking blood samples may be given by a registered nurse, licensed vocational nurse, or licensed clinical laboratory technologist or clinical laboratory bioanalyst, by means of an affidavit. The affidavit shall be admissible, provided the party offering the affidavit as evidence has served all other parties to the action, or their counsel, with a copy of the affidavit no less than 10 days prior to trial. Nothing in this section shall preclude any party or his counsel from objecting to the introduction of the affidavit at any time, and requiring the attendance of the affiant, or compelling attendance by subpoena.



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-1 California Evidence Courtroom Manual § 720

§ 720 Qualification as an Expert Witness

(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.



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-1 California Evidence Courtroom Manual § 721

§ 721 Cross-Examination of Expert Witness

(a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

(b) If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs:

- (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion.
- (2) The publication has been admitted in evidence.
- (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits.



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-1 California Evidence Courtroom Manual § 722

§ 722 Credibility of Expert Witness

- (a)** The fact of the appointment of an expert witness by the court may be revealed to the trier of fact.

- (b)** The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony.



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-1 California Evidence Courtroom Manual § 723

§ 723 Limit on Number of Expert Witnesses

The court may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party.



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-1 California Evidence Courtroom Manual § 730

§ 730 Appointment of Expert by Court

When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.

Nothing in this section shall be construed to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act.



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-1 California Evidence Courtroom Manual § 731

§ 731 Payment of Court-Appointed Expert

(a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730 shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court.

(b) In any county in which the board of supervisors so provides, the compensation fixed under Section 730 for medical experts in civil actions in such county shall be a charge against and paid out of the treasury of such county on order of the court.

(c) Except as otherwise provided in this section, in all civil actions, the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs.



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-1 California Evidence Courtroom Manual § 732

§ 732 Calling and Examining Court-Appointed Expert

Any expert appointed by the court under Section 730 may be called and examined by the court or by any party to the action. When such witness is called and examined by the court, the parties have the same right as is expressed in Section 775 to cross-examine the witness and to object to the questions asked and the evidence adduced.



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-1 California Evidence Courtroom Manual § 733

§ 733 Right to Produce Other Expert Evidence

Nothing contained in this article shall be deemed or construed to prevent any party to any action from producing other expert evidence on the same fact or matter mentioned in Section 730; but, where other expert witnesses are called by a party to the action, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action.



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-1 California Evidence Courtroom Manual § 750

§ 750 Rules Relating to Witnesses Apply to Interpreters and Translators

A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses.



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-1 California Evidence Courtroom Manual § 751

§ 751 Oath Required of Interpreters and Translators

(a) An interpreter shall take an oath that he or she will make a true interpretation to the witness in a language that the witness understands and that he or she will make a true interpretation of the witness' answers to questions to counsel, court, or jury, in the English language, with his or her best skill and judgment.

(b) In any proceeding in which a deaf or hard-of-hearing person is testifying under oath, the interpreter certified pursuant to subdivision (f) of Section 754 shall advise the court whenever he or she is unable to comply with his or her oath taken pursuant to subdivision (a).

(c) A translator shall take an oath that he or she will make a true translation in the English language of any writing he or she is to decipher or translate.

(d) An interpreter regularly employed by the court and certified or registered in accordance with Article 4 (commencing with Section 68560) of Chapter 2 of Title 8 of the Government Code, or a translator regularly employed by the court, may file an oath as prescribed by this section with the clerk of the court. The filed oath shall serve for all subsequent court proceedings until the appointment is revoked by the court.



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-1 California Evidence Courtroom Manual § 752

§ 752 Interpreters for Witnesses

(a) When a witness is incapable of understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he or she can understand and who can understand him or her shall be sworn to interpret for him or her.

(b) The record shall identify the interpreter who may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.



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-1 California Evidence Courtroom Manual § 753

§ 753 Translators of Writings

(a) When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing.

(b) The record shall identify the translator who may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.



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-1 California Evidence Courtroom Manual § 754

§ 754 Interpreters for Deaf or Hearing Impaired Persons

(a) As used in this section, "individual who is deaf or hearing impaired" means an individual with a hearing loss so great as to prevent his or her understanding language spoken in a normal tone, but does not include an individual who is hearing impaired provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment provided pursuant to *Section 54.8 of the Civil Code*.

(b) In any civil or criminal action, including, but not limited to, any action involving a traffic or other infraction, any small claims court proceeding, any juvenile court proceeding, any family court proceeding or service, or any proceeding to determine the mental competency of a person, in any court-ordered or court-provided alternative dispute resolution, including mediation and arbitration, or any administrative hearing, where a party or witness is an individual who is deaf or hearing impaired and the individual who is deaf or hearing impaired is present and participating, the proceedings shall be interpreted in a language that the individual who is deaf or hearing impaired understands by a qualified interpreter appointed by the court or other appointing authority, or as agreed upon.

(c) For purposes of this section, "appointing authority" means a court, department, board, commission, agency, licensing or legislative body, or other body for proceedings requiring a qualified interpreter.

(d) For the purposes of this section, "interpreter" includes, but is not limited to, an oral interpreter, a sign language interpreter, or a deaf-blind interpreter, depending upon the needs of the individual who is deaf or hearing impaired.

(e) For purposes of this section, "intermediary interpreter" means an individual who is deaf or hearing impaired, or a hearing individual who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language or between American Sign Language and other foreign languages by acting as an intermediary between the individual who is deaf or hearing impaired and the qualified interpreter.

(f) For purposes of this section, "qualified interpreter" means an interpreter who has been certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired.

(g) In the event that the appointed interpreter is not familiar with the use of particular signs by the individual who is deaf or hearing impaired or his or her particular variant of sign language, the court or other appointing authority shall, in consultation with the individual who is deaf or hearing impaired or his or her representative, appoint an intermediary interpreter.

(h) Prior to July 1, 1992, the Judicial Council shall conduct a study to establish the guidelines pursuant to which it shall determine which testing organizations, agencies, or educational institutions will be approved to administer tests for certification of court interpreters for individuals who are deaf or hearing impaired. It is the intent of the Legislature that the study obtain the widest possible input from the public, including, but not limited to, educational institutions, the judiciary, linguists, members of the State Bar, court interpreters, members of professional interpreting organizations, and members of the deaf and hearing-impaired communities. After obtaining public comment and completing its study, the Judicial Council shall publish these guidelines. By January 1, 1997, the Judicial Council shall approve one or more entities to administer testing for court interpreters for individuals who are deaf or hearing impaired. Testing entities may include educational institutions, testing organizations, joint powers agencies, or public agencies.

Commencing July 1, 1997, court interpreters for individuals who are deaf or hearing impaired shall meet the qualifications specified in subdivision (f).

(i) Persons appointed to serve as interpreters under this section shall be paid, in addition to actual travel costs, the prevailing rate paid to persons employed by the court to provide other interpreter services unless such service is considered to be a part of the person's regular duties as an employee of the state, county, or other political subdivision of the state. Payment of the interpreter's fee shall be a charge against the county, or other political subdivision of the state, in which that action is pending. Payment of the interpreter's fee in administrative proceedings shall be a charge against the appointing board or authority.

(j) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of an interpreter shall be made, without any unnecessary delay unless either the individual who is deaf or hearing impaired affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336)ⁿ¹ and federal regulations adopted thereunder.

(k) No statement, written or oral, made by an individual who the court finds is deaf or hearing impaired in reply to a question of a peace officer, or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding, may be used against that individual who is deaf or hearing impaired unless the question was accurately interpreted and the statement was made knowingly, voluntarily, and intelligently and was accurately interpreted, or the court makes special findings that either the individual could not have used an interpreter or an interpreter was not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder and that the statement was made knowingly, voluntarily, and intelligently.

(l) In obtaining services of an interpreter for purposes of subdivision (j) or (k), priority shall be given to first obtaining a qualified interpreter.

(m) Nothing in subdivision (j) or (k) shall be deemed to supersede the requirement of subdivision (b) for use of a qualified interpreter for individuals who are deaf or hearing impaired participating as parties or witnesses in a trial or hearing.

(n) In any action or proceeding in which an individual who is deaf or hearing impaired is a participant, the appointing authority shall not commence proceedings until the appointed interpreter is in full view of and spatially situated to assure proper communication with the participating individual who is deaf or hearing impaired.

(o) Each superior court shall maintain a current roster of qualified interpreters certified pursuant to subdivision (f).

FOOTNOTES:

(n1)Footnote 1. *42 U.S.C.A. § 12101 et seq.*



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-1 California Evidence Courtroom Manual § 754.5

§ 754.5 Privileged Statements of Deaf or Hearing Impaired Persons Using Interpreter

Whenever an otherwise valid privilege exists between an individual who is deaf or hearing impaired and another person, that privilege is not waived merely because an interpreter was used to facilitate their communication.



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-1 California Evidence Courtroom Manual § 755

§ 755 Interpreters for Hearings or Proceedings Related to Domestic Violence

(a) In any action or proceeding under Division 10 (commencing with Section 6200) of the Family Code, and in any action or proceeding under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code) or for dissolution or nullity of marriage or legal separation of the parties in which a protective order has been granted or is being sought pursuant to *Section 6221 of the Family Code*, in which a party does not proficiently speak or understand the English language, and that party is present, an interpreter, as provided in this section, shall be present to interpret the proceedings in a language that the party understands, and to assist communication between the party and his or her attorney. Notwithstanding this requirement, a court may issue an ex parte order pursuant to Sections 2045 and 7710 of [sic], and Article 1 (commencing with Section 6320) of Chapter 2 of Part 4 of Division 10 of the Family Code, without the presence of an interpreter. The interpreter selected shall be certified pursuant to Article 4 (commencing with Section 68560) of Chapter 2 of Title 8 of the Government Code, unless the court in its discretion appoints an interpreter who is not certified.

(b) The fees of interpreters utilized under this section shall be paid as provided in *subdivision (b) of Section 68092 of the Government Code*. However, the fees of an interpreter shall be waived for a party who needs an interpreter and appears in forma pauperis pursuant to *Section 68511.3 of the Government Code*. The Judicial Council shall amend subdivision (i) of California Rule of Court 985 and revise its forms accordingly by July 1, 1996.

(c) In any civil action in which an interpreter is required under this section, the court shall not commence proceedings until the appointed interpreter is present and situated near the party and his or her attorney. However, this section shall not prohibit the court from doing any of the following:

- (1) Issuing an order when the necessity for the order outweighs the necessity for an interpreter.

(2) Extending the duration of a previously issued temporary order if an interpreter is not readily available.

(3) Issuing a permanent order where a party who requires an interpreter fails to make appropriate arrangements for an interpreter after receiving proper notice of the hearing with information about obtaining an interpreter.

(d) This section does not prohibit the presence of any other person to assist a party.

(e) A local public entity may, and the Judicial Council shall, apply to the appropriate state agency that receives federal funds authorized pursuant to the federal Violence Against Women Act (P.L. 103-322) for these federal funds or for funds from sources other than the state to implement this section. A local public entity and the Judicial Council shall comply with the requirements of this section only to the extent that any of these funds are made available.

(f) The Judicial Council shall draft rules and modify forms necessary to implement this section, including those for the petition for a temporary restraining order and related forms, to inform both parties of their right to an interpreter pursuant to this section.



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-1 California Evidence Courtroom Manual § 755.5

§ 755.5 Interpreters for Medical Examinations

(a) During any medical examination, requested by an insurer or by the defendant, of a person who is a party to a civil action and who does not proficiently speak or understand the English language, conducted for the purpose of determining damages in a civil action, an interpreter shall be present to interpret the examination in a language that the person understands. Commencing January 1, 1994, the interpreter shall be certified pursuant to *Section 11513 of the Government Code*.

(b) The fees of interpreters utilized under subdivision (a) shall be paid by the insurer or defendant requesting the medical examination.

(c) The record of, or testimony concerning, any medical examination conducted in violation of subdivision (a) shall be inadmissible in the civil action for which it was conducted or any other civil action.

(d) This section does not prohibit the presence of any other person to assist a party.

(e) In the event that interpreters certified pursuant to *Section 11513 of the Government Code* cannot be present at the medical examination, upon stipulation of the parties the requester specified in subdivision (a) shall have the discretionary authority to provisionally qualify and utilize other interpreters.



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-1 California Evidence Courtroom Manual § 760

§ 760 Direct Examination

"Direct examination" is the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness.



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-1 California Evidence Courtroom Manual § 761

§ 761 Cross-Examination

"Cross-examination" is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.



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-1 California Evidence Courtroom Manual § 762

§ 762 Redirect Examination

"Redirect examination" is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness.



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-1 California Evidence Courtroom Manual § 763

§ 763 Recross-Examination

"Recross-examination" is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness.



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-1 California Evidence Courtroom Manual § 764

§ 764 Leading Question

A "leading question" is a question that suggests to the witness the answer that the examining party desires.



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-1 California Evidence Courtroom Manual § 765

§ 765 Court to Control Mode of Interrogation

(a) The court shall exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment.

(b) With a witness under the age of 14 or a dependent person with a substantial cognitive impairment, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to ensure that questions are stated in a form which is appropriate to the age or cognitive level of the witness. The court may, in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness.



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-1 California Evidence Courtroom Manual § 766

§ 766 Nonresponsive Answers

A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.



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-1 California Evidence Courtroom Manual § 767

§ 767 Leading Questions

(a) Except under special circumstances where the interests of justice otherwise require:

- (1) A leading question may not be asked of a witness on direct or redirect examination.
- (2) A leading question may be asked of a witness on cross-examination or recross-examination.

(b) The court may, in the interests of justice permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment in a case involving a prosecution under Section 273a, 273d, 288.5, 368, or any of the acts described in *Section 11165.1 or 11165.2 of the Penal Code*.



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-1 California Evidence Courtroom Manual § 768

§ 768 Writings

(a) In examining a witness concerning a writing, it is not necessary to show, read, or disclose to him any part of the writing.

(b) If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.



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-1 California Evidence Courtroom Manual § 769

§ 769 Inconsistent Statement or Conduct

In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct.



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-1 California Evidence Courtroom Manual § 770

§ 770 Extrinsic Evidence of Prior Inconsistent Statement

Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

- (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
- (b) The witness has not been excused from giving further testimony in the action.



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-1 California Evidence Courtroom Manual § 771

§ 771 Production of Writing Used to Refresh Memory

(a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness.

(c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing:

- (1) Is not in the possession or control of the witness or the party who produced his testimony concerning the matter; and
- (2) Was not reasonably procurable by such party through the use of the court's process or other available means.



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-1 California Evidence Courtroom Manual § 772

§ 772 Order of Examination

(a) The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination.

(b) Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.

(c) Subject to subdivision (d), a party may, in the discretion of the court, interrupt his cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness upon a matter not within the scope of a previous examination of the witness.

(d) If the witness is the defendant in a criminal action, the witness may not, without his consent, be examined under direct examination by another party.



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-1 California Evidence Courtroom Manual § 773

§ 773 Cross-Examination

(a) A witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each other party to the action in such order as the court directs.

(b) The cross-examination of a witness by any party whose interest is not adverse to the party calling him is subject to the same rules that are applicable to the direct examination.



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-1 California Evidence Courtroom Manual § 774

§ 774 Re-Examination

A witness once examined cannot be reexamined as to the same matter without leave of the court, but he may be reexamined as to any new matter upon which he has been examined by another party to the action. Leave may be granted or withheld in the court's discretion.



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-1 California Evidence Courtroom Manual § 775

§ 775 Court May Call Witnesses

The court, on its own motion or on the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs.



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-1 California Evidence Courtroom Manual § 776

§ 776 Examination of Adverse Party or Person Identified with Adverse Party

(a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but, subject to subdivision (e), the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.

(4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.

(e) Paragraph (2) of subdivision (b) does not require counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified to examine the witness as if under redirect examination if the party who called the witness for examination under this section:

(1) Is also a person identified with the same party with whom the witness is identified.

(2) Is the personal representative, heir, successor, or assignee of a person identified with the same party with whom the witness is identified.



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-1 California Evidence Courtroom Manual § 777

§ 777 Exclusion of Witness

(a) Subject to subdivisions (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.

(b) A party to the action cannot be excluded under this section.

(c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.



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-1 California Evidence Courtroom Manual § 778

§ 778 Recall of Witness

After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion.



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-1 California Evidence Courtroom Manual § 780

§ 780 Proof of Truthfulness

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness 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:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- (i) The existence or nonexistence of any fact testified to by him.
- (j) His attitude toward the action in which he testifies or toward the giving of testimony.
- (k) His admission of untruthfulness.



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-1 California Evidence Courtroom Manual § 782

§ 782 Procedure for Admissibility of Evidence of Sexual Conduct of Complaining Witness

(a) In any of the circumstances described in subdivision (c), if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court.

(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(5) An affidavit resealed by the court pursuant to paragraph (2) shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed

document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding.

(b) As used in this section, "complaining witness" means:

- (1) The alleged victim of the crime charged, the prosecution of which is subject to this section, pursuant to paragraph (1) of subdivision (c).
- (2) An alleged victim offering testimony pursuant to paragraph (2) or (3) of subdivision (c).

(c) The procedure provided by subdivision (a) shall apply in any of the following circumstances:

- (1) In a prosecution under *Section 261, 262, 264.1, 286, 288, 288a, 288.5, or 289 of the Penal Code*, or for assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in any of those sections, except if the crime is alleged to have occurred in a local detention facility, as defined in *Section 6031.4 of the Penal Code*, or in the state prison, as defined in *Section 4504*.
- (2) When an alleged victim testifies pursuant to subdivision (b) of *Section 1101* as a victim of a crime listed in *Section 243.4, 261, 261.5, 269, 285, 286, 288, 288a, 288.5, 289, 314, or 647.6 of the Penal Code*, except if the crime is alleged to have occurred in a local detention facility, as defined in *Section 6031.4 of the Penal Code*, or in the state prison, as defined in *Section 4504 of the Penal Code*.
- (3) When an alleged victim of a sexual offense testifies pursuant to *Section 1108*, except if the crime is alleged to have occurred in a local detention facility, as defined in *Section 6031.4 of the Penal Code*, or in the state prison, as defined in *Section 4504 of the Penal Code*.



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-1 California Evidence Courtroom Manual § 783

§ 783 Admissibility of Evidence of Plaintiff's Sexual Conduct in Civil Cases

In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780, the following procedures shall be followed:

- (a) A written motion shall be made by the defendant to the court and the plaintiff's attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented.
- (b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.
- (c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant.
- (d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.



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-1 California Evidence Courtroom Manual § 785

§ 785 Parties May Attack or Support Credibility

The credibility of a witness may be attacked or supported by any party, including the party calling him.



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-1 California Evidence Courtroom Manual § 786

§ 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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-1 California Evidence Courtroom Manual § 787

§ 787 Specific Instances of Conduct

Subject to Section 788, 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 a witness.



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-1 California Evidence Courtroom Manual § 788

§ 788 Prior Felony Conviction

For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

- (a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.
- (b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.
- (c) The accusatory pleading against the witness has been dismissed under the provisions of *Penal Code Section 1203.4*, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.
- (d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).



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-1 California Evidence Courtroom Manual § 789

§ 789 Religious Belief

Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness.



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-1 California Evidence Courtroom Manual § 790

§ 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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-1 California Evidence Courtroom Manual § 791

§ 791 Prior Consistent Statement of Witness

Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

- (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
- (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.



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-1 California Evidence Courtroom Manual § 795

§ 795 Admissibility of Testimony of Hypnosis Subject

(a) The testimony of a witness is not inadmissible in a criminal proceeding by reason of the fact that the witness has previously undergone hypnosis for the purpose of recalling events which are the subject of the witness' testimony, if all of the following conditions are met:

(1) The testimony is limited to those matters which the witness recalled and related prior to the hypnosis.

(2) The substance of the prehypnotic memory was preserved in written, audiotape, or videotape form prior to the hypnosis.

(3) The hypnosis was conducted in accordance with all of the following procedures:

(A) A written record was made prior to hypnosis documenting the subject's description of the event, and information which was provided to the hypnotist concerning the subject matter of the hypnosis.

(B) The subject gave informed consent to the hypnosis.

(C) The hypnosis session, including the pre- and post-hypnosis interviews, was videotape recorded for subsequent review.

(D) The hypnosis was performed by a licensed medical doctor, psychologist, licensed clinical social worker, or a licensed marriage and family therapist experienced in the use of hypnosis and independent of and not in the presence of law enforcement, the prosecution, or the defense.

(4) Prior to admission of the testimony, the court holds a hearing pursuant to *Section 402 of the Evidence*

Code at which the proponent of the evidence proves by clear and convincing evidence that the hypnosis did not so affect the witness as to render the witness' prehypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness' prehypnosis recollection. At the hearing, each side shall have the right to present expert testimony and to cross-examine witnesses.

(b) Nothing in this section shall be construed to limit the ability of a party to attack the credibility of a witness who has undergone hypnosis, or to limit other legal grounds to admit or exclude the testimony of that witness.



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-1 California Evidence Courtroom Manual § 800

§ 800 Opinion Testimony by Lay Witness

If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

- (a) Rationally based on the perception of the witness; and
- (b) Helpful to a clear understanding of his testimony.



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-1 California Evidence Courtroom Manual § 801

§ 801 Opinion Testimony by Expert Witness

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

- (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
- (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.



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-1 California Evidence Courtroom Manual § 802

§ 802 Statement of Basis of Opinion

A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.



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-1 California Evidence Courtroom Manual § 803

§ 803 Opinion Based on Improper Matter

The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.



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-1 California Evidence Courtroom Manual § 804

§ 804 Opinion Based on Opinion or Statement of Another

(a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.

(c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.



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-1 California Evidence Courtroom Manual § 805

§ 805 Opinion on Ultimate Issue

Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.



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-1 California Evidence Courtroom Manual § 810

§ 810 Application

(a) Except where another rule is provided by statute, this article provides special rules of evidence applicable to any action in which the value of property is to be ascertained.

(b) This article does not govern ad valorem property tax assessment or equalization proceedings.



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-1 California Evidence Courtroom Manual § 811

§ 811 Value of Property

As used in this article, "value of property" means market value of any of the following:

- (a) Real property or any interest therein.
- (b) Real property or any interest therein and tangible personal property valued as a unit.



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-1 California Evidence Courtroom Manual § 812

§ 812 Concept of "Market Value" Not Affected

This article is not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting the meaning of "market value," whether denominated "fair market value" or otherwise.



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-1 California Evidence Courtroom Manual § 813

§ 813 Opinion Testimony

(a) The value of property may be shown only by the opinions of any of the following:

- (1) Witnesses qualified to express such opinions.
- (2) The owner or the spouse of the owner of the property or property interest being valued.
- (3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest.

(b) Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony given under subdivision (a); and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal.

(c) For the purposes of subdivision (a), "owner of the property or property interest being valued" includes, but is not limited to, the following persons:

- (1) A person entitled to possession of the property.

(2) Either party in an action or proceeding to determine the ownership of the property between the parties if the court determines that it would not be in the interest of efficient administration of justice to determine the issue of ownership prior to the admission of the opinion of the party.



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-1 California Evidence Courtroom Manual § 814

§ 814 Basis for Opinion

The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for an opinion.



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-1 California Evidence Courtroom Manual § 815

§ 815 Sales of Subject Property

When relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the sale or contract to sell and purchase includes only the property or property interest being taken or a part thereof, such sale or contract to sell and purchase may not be taken into account if it occurs after the filing of the lis pendens.



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-1 California Evidence Courtroom Manual § 816

§ 816 Comparable Sales

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may be fairly considered as shedding light on the value of the property being valued.



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-1 California Evidence Courtroom Manual § 817

§ 817 Leases of Subject Property

(a) Subject to subdivision (b), when relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the lease includes only the property or property interest being taken or a part thereof, such lease may not be taken into account in the determination of the value of property if it is entered into after the filing of the lis pendens.

(b) A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property only for the purpose of arriving at an opinion as to the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest.



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-1 California Evidence Courtroom Manual § 818

§ 818 Comparable Leases

For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation.



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-1 California Evidence Courtroom Manual § 819

§ 819 Capitalization of Income

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon).



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-1 California Evidence Courtroom Manual § 820

§ 820 Reproduction Cost

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.



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-1 California Evidence Courtroom Manual § 821

§ 821 Conditions in General Vicinity of Subject Property

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties.



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-1 California Evidence Courtroom Manual § 822

§ 822 Inadmissible Evidence

(a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property:

- (1) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain. The price or other terms and circumstances shall not be excluded pursuant to this paragraph if the proceeding relates to the valuation of all or part of a water system as defined in *Section 240 of the Public Utilities Code*.
- (2) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which the property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.
- (3) The value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.
- (4) An opinion as to the value of any property or property interest other than that being valued.
- (5) The influence upon the value of the property or property interest being valued of any

noncompensable items of value, damage, or injury.

(6) The capitalized value of the income or rental from any property or property interest other than that being valued.

(b) In an action other than an eminent domain or inverse condemnation proceeding, the matters listed in subdivision (a) are not admissible as evidence, and may not be taken into account as a basis for an opinion as to the value of property, except to the extent permitted under the rules of law otherwise applicable.



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-1 California Evidence Courtroom Manual § 823

§ 823 Property With No Relevant Market

Notwithstanding any other provision of this article, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable.



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-1 California Evidence Courtroom Manual § 824

§ 824 Method for Determining Value of Nonprofit or Special Use Property

(a) Notwithstanding any other provision of this article, a just and equitable method of determining the value of nonprofit, special use property, as defined by *Section 1235.155 of the Code of Civil Procedure*, for which there is no relevant, comparable market, is the cost of purchasing land and the reasonable cost of making it suitable for the conduct of the same nonprofit, special use, together with the cost of constructing similar improvements. The method for determining compensation for improvements shall be as set forth in subdivision (b).

(b) Notwithstanding any other provision of this article, a witness providing opinion testimony on the value of nonprofit, special use property, as defined by *Section 1235.155 of the Code of Civil Procedure*, for which there is no relevant, comparable market, shall base his or her opinion on the value of reproducing the improvements without taking into consideration any depreciation or obsolescence of the improvements.

(c) This section does not apply to actions or proceedings commenced by a public entity or public utility to acquire real property or any interest in real property for the use of water, sewer, electricity, telephone, natural gas, or flood control facilities or rights-of-way where those acquisitions neither require removal or destruction of existing improvements, nor render the property unfit for the owner's present or proposed use.



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-1 California Evidence Courtroom Manual § 870

§ 870 Opinion as to Sanity

A witness may state his opinion as to the sanity of a person when:

- (a) The witness is an intimate acquaintance of the person whose sanity is in question;
- (b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or
- (c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.



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-1 California Evidence Courtroom Manual § 900

§ 900 Application of Definitions

Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division. They do not govern the construction of any other division.



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-1 California Evidence Courtroom Manual § 901

§ 901 Proceeding

"Proceeding" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.



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§ 902 Civil Proceeding

"Civil proceeding" means any proceeding except a criminal proceeding.



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-1 California Evidence Courtroom Manual § 903

§ 903 Criminal Proceeding

"Criminal proceeding" means:

- (a) A criminal action; and
- (b) A proceeding pursuant to Article 3 (commencing with Section 3060) of Chapter 7 of Division 4 of Title 1 of the Government Code to determine whether a public officer should be removed from office for willful or corrupt misconduct in office.



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§ 905 Presiding Officer

"Presiding officer" means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made.



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CHAPTER 2. APPLICABILITY OF DIVISION

-1 California Evidence Courtroom Manual § 910

§ 910 Applicability of Division

Except as otherwise provided by statute, the provisions of this division apply in all proceedings. The provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings.



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-1 California Evidence Courtroom Manual § 911

§ 911 Recognition of Privileges

Except as otherwise provided by statute:

- (a) No person has a privilege to refuse to be a witness.
- (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.
- (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.



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-1 California Evidence Courtroom Manual § 912

§ 912 Waiver of Privilege

(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), when disclosure is

reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, is not a waiver of the privilege.



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-1 California Evidence Courtroom Manual § 913

§ 913 Comment on, and Inferences from, Exercise of Privilege

(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.



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-1 California Evidence Courtroom Manual § 914

§ 914 Sanctions for Failure to Obey Order Regarding Privileged Information

(a) The presiding officer shall determine a claim of privilege in any proceeding in the same manner as a court determines such a claim under Article 2 (commencing with §400) of Chapter 4 of Division 3.

(b) No person may be held in contempt for failure to disclose information claimed to be privileged unless he has failed to comply with an order of a court that he disclose such information. This subdivision does not apply to any governmental agency that has constitutional contempt power, nor does it apply to hearings and investigations of the Industrial Accident Commission, nor does it impliedly repeal Chapter 4 (commencing with Section 9400) of Part 1 of Division 2 of Title 2 of the Government Code. If no other statutory procedure is applicable, the procedure prescribed by *Section 1991 of the Code of Civil Procedure* shall be followed in seeking an order of a court that the person disclose the information claimed to be privileged.



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-1 California Evidence Courtroom Manual § 915

§ 915 Matters to be Considered in Ruling on Privilege Claim

(a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under *subdivision (a) of Section 2018.030 of the Code of Civil Procedure* in order to rule on the claim of privilege; provided, however, that in any hearing conducted pursuant to *subdivision (c) of Section 1524 of the Penal Code* in which a claim of privilege is made and the court determines that there is no other feasible means to rule on the validity of the claim other than to require disclosure, the court shall proceed in accordance with subdivision (b).

(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under *subdivision (b) of Section 2018.030 of the Code of Civil Procedure* (attorney work product) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.



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-1 California Evidence Courtroom Manual § 916

§ 916 Duty to Exclude Privileged Information

(a) The presiding officer, on his own motion or on the motion of any party, shall exclude information that is subject to a claim of privilege under this division if: (1) The person from whom the information is sought is not a person authorized to claim the privilege; and (2) There is no party to the proceeding who is a person authorized to claim the privilege.

(b) The presiding officer may not exclude information under this section if: (1) He is otherwise instructed by a person authorized to permit disclosure; or (2) The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence.



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§ 917 Presumption of Confidentiality

(a) If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, or domestic violence counselor--victim relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

(b) A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.

(c) For purposes of this section, "electronic" has the same meaning provided in *Section 1633.2 of the Civil Code*.

Legislative History

Amended by Stats 2006 ch 689 § 2 (SB 1743)



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-1 California Evidence Courtroom Manual § 918

§ 918 Error in Overruling Claim of Privilege

A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Section 970 or 971.



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§ 919 Where Disclosure Erroneously Compelled

(a) Evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if:

- (1) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or
- (2) The presiding officer did not exclude the privileged information as required by Section 916.

(b) If a person authorized to claim the privilege claimed it, whether in the same or a prior proceeding, but nevertheless disclosure erroneously was required by the presiding officer to be made, neither the failure to refuse to disclose nor the failure to seek review of the order of the presiding officer requiring disclosure indicates consent to the disclosure or constitutes a waiver and, under these circumstances, the disclosure is one made under coercion.



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-1 California Evidence Courtroom Manual § 920

§ 920 Implied Repeal of Other Statutes Related to Privileges

Nothing in this division shall be construed to repeal by implication any other statute relating to privileges.



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ARTICLE 1. PRIVILEGE OF DEFENDANT IN CRIMINAL CASE

-1 California Evidence Courtroom Manual § 930

§ 930 Privilege Not to be Called as a Witness and Not to Testify

To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.



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ARTICLE 2. PRIVILEGE AGAINST SELF-INCRIMINATION

-1 California Evidence Courtroom Manual § 940

§ 940 Privilege Against Self-Incrimination

To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.



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-1 California Evidence Courtroom Manual § 950

§ 950 Lawyer

As used in this article, "lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.



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-1 California Evidence Courtroom Manual § 951

§ 951 Client

As used in this article, "client" means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.



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-1 California Evidence Courtroom Manual § 952

§ 952 Confidential Communication Between Client and Lawyer

As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.



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-1 California Evidence Courtroom Manual § 953

§ 953 Holder of the Privilege

As used in this article, "holder of the privilege" means:

- (a) The client when he has no guardian or conservator.
- (b) A guardian or conservator of the client when the client has a guardian or conservator.
- (c) The personal representative of the client if the client is dead.
- (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.



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-1 California Evidence Courtroom Manual § 954

§ 954 Lawyer-Client Privilege

Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.



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-1 California Evidence Courtroom Manual § 955

§ 955 When Lawyer Required to Claim Privilege

The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.



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-1 California Evidence Courtroom Manual § 956

§ 956 Exception: Crime or Fraud

There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.



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-1 California Evidence Courtroom Manual § 956.5

§ 956.5 Exception: Reasonable Belief in Necessity of Disclosure to Prevent Death or Substantial Bodily Harm

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.



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-1 California Evidence Courtroom Manual § 957

§ 957 Exception: Parties Claiming Through Deceased Client

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.



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-1 California Evidence Courtroom Manual § 958

§ 958 Exception: Breach of Duty Arising Out of Lawyer-Client Relationship

There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.



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-1 California Evidence Courtroom Manual § 959

§ 959 Exception: Lawyer as Attesting Witness

There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document.



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-1 California Evidence Courtroom Manual § 960

§ 960 Exception: Intention of Deceased Client Concerning Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.



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-1 California Evidence Courtroom Manual § 961

§ 961 Exception: Validity of Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.



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-1 California Evidence Courtroom Manual § 962

§ 962 Exception: Joint Clients

Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).



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-1 California Evidence Courtroom Manual § 970

§ 970 Privilege Not to Testify Against Spouse

Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.



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-1 California Evidence Courtroom Manual § 971

§ 971 Privilege Not to be Called as a Witness Against Spouse

Except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.



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-1 California Evidence Courtroom Manual § 972

§ 972 Exceptions to Spousal Testimonial Privilege

A married person does not have a privilege under this article in:

- (a) A proceeding brought by or on behalf of one spouse against the other spouse.
- (b) A proceeding to commit or otherwise place his or her spouse or his or her spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition.
- (c) A proceeding brought by or on behalf of a spouse to establish his or her competence.
- (d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.
- (e) A criminal proceeding in which one spouse is charged with:
 - (1) A crime against the person or property of the other spouse or of a child, parent, relative, or cohabitant of either, whether committed before or during marriage.
 - (2) A crime against the person or property of a third person committed in the course of committing a

crime against the person or property of the other spouse, whether committed before or during marriage.

(3) Bigamy.

(4) A crime defined by *Section 270 or 270a of the Penal Code*.

(f) A proceeding resulting from a criminal act which occurred prior to legal marriage of the spouses to each other regarding knowledge acquired prior to that marriage if prior to the legal marriage the witness spouse was aware that his or her spouse had been arrested for or had been formally charged with the crime or crimes about which the spouse is called to testify.

(g) A proceeding brought against the spouse by a former spouse so long as the property and debts of the marriage have not been adjudicated, or in order to establish, modify, or enforce a child, family or spousal support obligation arising from the marriage to the former spouse; in a proceeding brought against a spouse by the other parent in order to establish, modify, or enforce a child support obligation for a child of a nonmarital relationship of the spouse; or in a proceeding brought against a spouse by the guardian of a child of that spouse in order to establish, modify, or enforce a child support obligation of the spouse. The married person does not have a privilege under this subdivision to refuse to provide information relating to the issues of income, expenses, assets, debts, and employment of either spouse, but may assert the privilege as otherwise provided in this article if other information is requested by the former spouse, guardian, or other parent of the child.

Any person demanding the otherwise privileged information made available by this subdivision, who also has an obligation to support the child for whom an order to establish, modify, or enforce child support is sought, waives his or her marital privilege to the same extent as the spouse as provided in this subdivision.



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-1 California Evidence Courtroom Manual § 973

§ 973 Waiver of Privilege

(a) Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.



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ARTICLE 5. PRIVILEGE FOR CONFIDENTIAL MARITAL COMMUNICATIONS

-1 California Evidence Courtroom Manual § 980

§ 980 Confidential Marital Communication Privilege

Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.



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-1 California Evidence Courtroom Manual § 981

§ 981 Exception: Crime or Fraud

There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud.



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-1 California Evidence Courtroom Manual § 982

§ 982 Exception: Commitment or Similar Proceedings

There is no privilege under this article in a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.



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-1 California Evidence Courtroom Manual § 983

§ 983 Exception: Competency Proceedings

There is no privilege under this article in a proceeding brought by or on behalf of either spouse to establish his competence.



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-1 California Evidence Courtroom Manual § 984

§ 984 Exception: Proceeding Between Spouses

There is no privilege under this article in:

- (a) A proceeding brought by or on behalf of one spouse against the other spouse.
- (b) A proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction.



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-1 California Evidence Courtroom Manual § 985

§ 985 Exception: Criminal Proceedings

There is no privilege under this article in a criminal proceeding in which one spouse is charged with:

- (a) A crime committed at any time against the person or property of the other spouse or of a child of either.
- (b) A crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse.
- (c) Bigamy.
- (d) A crime defined by *Section 270 or 270a of the Penal Code*.



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-1 California Evidence Courtroom Manual § 986

§ 986 Exception: Juvenile Court Proceedings

There is no privilege under this article in a proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.



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-1 California Evidence Courtroom Manual § 987

§ 987 Exception: Where Spouse is Criminal Defendant

There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.



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-1 California Evidence Courtroom Manual § 990

§ 990 Physician

As used in this article, "physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation.



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-1 California Evidence Courtroom Manual § 991

§ 991 Patient

As used in this article, "patient" means a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental or emotional condition.



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-1 California Evidence Courtroom Manual § 992

§ 992 Confidential Communication Between Patient and Physician

As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship.



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-1 California Evidence Courtroom Manual § 993

§ 993 Holder of the Privilege

As used in this article, "holder of the privilege" means:

- (a) The patient when he has no guardian or conservator.
- (b) A guardian or conservator of the patient when the patient has a guardian or conservator.
- (c) The personal representative of the patient if the patient is dead.



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-1 California Evidence Courtroom Manual § 994

§ 994 Physician-Patient Privilege

Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

The relationship of a physician and patient shall exist between a medical or podiatry corporation as defined in the Medical Practice Act and the patient to whom it renders professional services, as well as between such patients and licensed physicians and surgeons employed by such corporation to render services to such patients. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations, and other groups and entities.



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-1 California Evidence Courtroom Manual § 995

§ 995 When Physician Required to Claim Privilege

The physician who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 994.



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-1 California Evidence Courtroom Manual § 996

§ 996 Exception: Where Patient is Litigant

There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by:

- (a) The patient;
- (b) Any party claiming through or under the patient;
- (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
- (d) The plaintiff in an action brought under *Section 376 or 377 of the Code of Civil Procedure* for damages for the injury or death of the patient.



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-1 California Evidence Courtroom Manual § 997

§ 997 Exception: Crime or Tort

There is no privilege under this article if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.



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-1 California Evidence Courtroom Manual § 998

§ 998 Exception: Criminal Proceeding

There is no privilege under this article in a criminal proceeding.



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-1 California Evidence Courtroom Manual § 999

§ 999 Exception: Civil Proceeding to Recover Damages

There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure of the communication is shown.



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-1 California Evidence Courtroom Manual § 1000

§ 1000 Exception: Parties Claiming Through Deceased Patient

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.



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-1 California Evidence Courtroom Manual § 1001

§ 1001 Exception: Breach of Duty Arising Out of Physician-Patient Relationship

There is no privilege under this article as to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship.



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-1 California Evidence Courtroom Manual § 1002

§ 1002 Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.



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-1 California Evidence Courtroom Manual § 1003

§ 1003 Exception: Validity of Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.



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-1 California Evidence Courtroom Manual § 1004

§ 1004 Exception: Commitment or Similar Proceeding

There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.



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-1 California Evidence Courtroom Manual § 1005

§ 1005 Exception: Proceeding to Establish Competence

There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.



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-1 California Evidence Courtroom Manual § 1006

§ 1006 Exception: Required Report

There is no privilege under this article as to information that the physician or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection.



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-1 California Evidence Courtroom Manual § 1007

§ 1007 Exception: Proceeding to Terminate Right, License or Privilege

There is no privilege under this article in a proceeding brought by a public entity to determine whether a right, authority, license, or privilege (including the right or privilege to be employed by the public entity or to hold a public office) should be revoked, suspended, terminated, limited, or conditioned.



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-1 California Evidence Courtroom Manual § 1010

§ 1010 Psychotherapist

As used in this article, "psychotherapist" means a person who is, or is reasonably believed by the patient to be:

- (a) A person authorized to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry.
- (b) A person licensed as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.
- (c) A person licensed as a clinical social worker under Article 4 (commencing with Section 4996) of Chapter 14 of Division 2 of the Business and Professions Code, when he or she is engaged in applied psychotherapy of a nonmedical nature.
- (d) A person who is serving as a school psychologist and holds a credential authorizing that service issued by the state.
- (e) A person licensed as a marriage and family therapist under Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.
- (f) A person registered as a psychological assistant who is under the supervision of a licensed psychologist or board certified psychiatrist as required by *Section 2913 of the Business and Professions Code*, or a person registered as a marriage and family therapist intern who is under the supervision of a licensed marriage and family therapist, a licensed clinical social worker, a licensed psychologist, or a licensed physician certified in psychiatry, as specified in *Section 4980.44 of the Business and Professions Code*.
- (g) A person registered as an associate clinical social worker who is under the supervision of a licensed clinical social worker, a licensed psychologist, or a board certified psychiatrist as required by *Section*

4996.20 or 4996.21 of the Business and Professions Code.

(h) A person exempt from the Psychology Licensing Law pursuant to *subdivision (d) of Section 2909 of the Business and Professions Code* who is under the supervision of a licensed psychologist or board certified psychiatrist.

(i) A psychological intern as defined in *Section 2911 of the Business and Professions Code* who is under the supervision of a licensed psychologist or board certified psychiatrist.

(j) A trainee, as defined in *subdivision (c) of Section 4980.03 of the Business and Professions Code*, who is fulfilling his or her supervised practicum required by *subdivision (b) of Section 4980.40 of the Business and Professions Code* and is supervised by a licensed psychologist, board certified psychiatrist, a licensed clinical social worker, or a licensed marriage and family therapist.

(k) A person licensed as a registered nurse pursuant to Chapter 6 (commencing with Section 2700) of Division 2 of the Business and Professions Code, who possesses a master's degree in psychiatric-mental health nursing and is listed as a psychiatric-mental health nurse by the Board of Registered Nursing.

(l) An advanced practice registered nurse who is certified as a clinical nurse specialist pursuant to Article 9 (commencing with Section 2838) of Chapter 6 of Division 2 of the Business and Professions Code and who participates in expert clinical practice in the specialty of psychiatric-mental health nursing.

(m) A person rendering mental health treatment or counseling services as authorized pursuant to *Section 6924 of the Family Code*.



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-1 California Evidence Courtroom Manual § 1010.5

§ 1010.5 Privileged Communication Between Patient and Educational Psychologist

A communication between a patient and an educational psychologist, licensed under Article 5 (commencing with Section 4986) of Chapter 13 of Division 2 of the Business and Professions Code, shall be privileged to the same extent, and subject to the same limitations, as a communication between a patient and a psychotherapist described in subdivisions (c), (d), and (e) of Section 1010.



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-1 California Evidence Courtroom Manual § 1011

§ 1011 Patient

As used in this article, "patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.



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-1 California Evidence Courtroom Manual § 1012

§ 1012 Confidential Communication Between Patient and Psychotherapist

As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.



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-1 California Evidence Courtroom Manual § 1013

§ 1013 Holder of the Privilege

As used in this article, "holder of the privilege" means:

- (a) The patient when he has no guardian or conservator.
- (b) A guardian or conservator of the patient when the patient has a guardian or conservator.
- (c) The personal representative of the patient if the patient is dead.



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-1 California Evidence Courtroom Manual § 1014

§ 1014 Who May Claim the Privilege

Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

- (a) The holder of the privilege.
- (b) A person who is authorized to claim the privilege by the holder of the privilege.
- (c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

The relationship of a psychotherapist and patient shall exist between a psychological corporation as defined in Article 9 (commencing with Section 2995) of Chapter 6.6 of Division 2 of the Business and Professions Code, a marriage and family therapy corporation as defined in Article 6 (commencing with Section 4987.5) of Chapter 13 of Division 2 of the Business and Professions Code, or a licensed clinical social workers corporation as defined in Article 5 (commencing with Section 4998) of Chapter 14 of Division 2 of the Business and Professions Code, and the patient to whom it renders professional services, as well as between those patients and psychotherapists employed by those corporations to render services to those patients. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.



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-1 California Evidence Courtroom Manual § 1015

§ 1015 When Psychotherapist Required to Claim Privilege

The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.



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-1 California Evidence Courtroom Manual § 1016

§ 1016 Exception: Patient-Litigant

There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

- (a) The patient;
- (b) Any party claiming through or under the patient;
- (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
- (d) The plaintiff in an action brought under *Section 376 or 377 of the Code of Civil Procedure* for damages for the injury or death of the patient.



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-1 California Evidence Courtroom Manual § 1017

§ 1017 Exception: Psychotherapist Appointed by Court or Board of Prison Terms

(a) There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition.

(b) There is no privilege under this article if the psychotherapist is appointed by the Board of Prison Terms to examine a patient pursuant to the provisions of Article 4 (commencing with Section 2960) of Chapter 7 of Title 1 of Part 3 of the Penal Code.



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-1 California Evidence Courtroom Manual § 1018

§ 1018 Exception: Crime or Tort

There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.



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-1 California Evidence Courtroom Manual § 1019

§ 1019 Exception: Parties Claiming Through Deceased Patient

There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.



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-1 California Evidence Courtroom Manual § 1020

§ 1020 Exception: Breach of Duty Arising Out of Psychotherapist-Patient Relationship

There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.



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-1 California Evidence Courtroom Manual § 1021

§ 1021 Exception: Intention of Deceased Patient Concerning Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the intention of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.



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-1 California Evidence Courtroom Manual § 1022

§ 1022 Exception: Validity of Writing Affecting Property Interest

There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.



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-1 California Evidence Courtroom Manual § 1023

§ 1023 Exception: Proceeding to Determine Sanity of Criminal Defendant

There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.



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-1 California Evidence Courtroom Manual § 1024

§ 1024 Exception: Patient Dangerous to Himself or Others

There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.



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-1 California Evidence Courtroom Manual § 1025

§ 1025 Exception: Proceeding to Establish Competence

There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.



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-1 California Evidence Courtroom Manual § 1026

§ 1026 Exception: Required Report

There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection.



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-1 California Evidence Courtroom Manual § 1027

§ 1027 Exception: Child Under 16 Victim of Crime

There is no privilege under this article if all of the following circumstances exist:

- (a) The patient is a child under the age of 16.
- (b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.



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-1 California Evidence Courtroom Manual § 1030

§ 1030 Member of the Clergy

As used in this article, a "member of the clergy" means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization.



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-1 California Evidence Courtroom Manual § 1031

§ 1031 Penitent

As used in this article, "penitent" means a person who has made a penitential communication to a member of the clergy.



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-1 California Evidence Courtroom Manual § 1032

§ 1032 Penitential Communication

As used in this article, "penitential communication" means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of his or her church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep such communications secret.



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-1 California Evidence Courtroom Manual § 1033

§ 1033 Privilege of Penitent

Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege.



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-1 California Evidence Courtroom Manual § 1034

§ 1034 Privilege of Clergy

Subject to Section 912, a member of the clergy, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege.



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-1 California Evidence Courtroom Manual § 1035

§ 1035 Victim

As used in this article, "victim" means a person who consults a sexual assault counselor for the purpose of securing advice or assistance concerning a mental, physical, or emotional condition caused by a sexual assault.



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-1 California Evidence Courtroom Manual § 1035.2

§ 1035.2 Sexual Assault Counselor

As used in this article, "sexual assault counselor" means any of the following:

(a) A person who is engaged in any office, hospital, institution, or center commonly known as a rape crisis center, whose primary purpose is the rendering of advice or assistance to victims of sexual assault and who has received a certificate evidencing completion of a training program in the counseling of sexual assault victims issued by a counseling center that meets the criteria for the award of a grant established pursuant to *Section 13837 of the Penal Code* and who meets one of the following requirements:

(1) Is a psychotherapist as defined in Section 1010; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape crisis counseling.

(2) Has 40 hours of training as described below and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas:

(A) Law.

(B) Medicine.

(C) Societal attitudes.

(D) Crisis intervention and counseling techniques.

(E) Role playing.

(F) Referral services.

(G) Sexuality.

(b) A person who is employed by any organization providing the programs specified in *Section 13835.2 of the Penal Code*, whether financially compensated or not, for the purpose of counseling and assisting sexual assault victims, and who meets one of the following requirements:

(1) Is a psychotherapist as defined in Section 1010; has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in rape assault counseling.

(2) Has the minimum training for sexual assault counseling required by guidelines established by the employing agency pursuant to *subdivision (c) of Section 13835.10 of the Penal Code*, and is supervised by an individual who qualifies as a counselor under paragraph (1). The training, supervised by a person qualified under paragraph (1), shall include, but not be limited to, the following areas:

(A) Law.

(B) Victimology.

(C) Counseling.

(D) Client and system advocacy..

(E) Referral services.

Legislative History

Amended by Stats 2006 ch 689 § 5 (SB 1743)



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-1 California Evidence Courtroom Manual § 1035.4

§ 1035.4 Confidential Communication Between the Sexual Assault Counselor and the Victim

As used in this article, "confidential communication between the sexual assault counselor and the victim" means information transmitted between the victim and the sexual assault counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the sexual assault counselor is consulted. The term includes all information regarding the facts and circumstances involving the alleged sexual assault and also includes all information regarding the victim's prior or subsequent sexual conduct, and opinions regarding the victim's sexual conduct or reputation in sexual matters.

The court may compel disclosure of information received by the sexual assault counselor which constitutes relevant evidence of the facts and circumstances involving an alleged sexual assault about which the victim is complaining and which is the subject of a criminal proceeding if the court determines that the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled. The court may also compel disclosure in proceedings related to child abuse if the court determines the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled.

When a court is ruling on a claim of privilege under this article, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged and must not be disclosed, neither he or she nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

If the court determines certain information shall be disclosed, the court shall so order and inform the defendant. If the court finds there is a reasonable likelihood that particular information is subject to disclosure pursuant to the balancing test provided in this section, the following procedure shall be followed:

- (1) The court shall inform the defendant of the nature of the information which may be subject to

disclosure.

(2) The court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the sexual assault counselor regarding the information which the court has determined may be subject to disclosure.

(3) At the conclusion of the hearing, the court shall rule which items of information, if any, shall be disclosed. The court may make an order stating what evidence may be introduced by the defendant and the nature of questions to be permitted. The defendant may then offer evidence pursuant to the order of the court. Admission of evidence concerning the sexual conduct of the complaining witness is subject to Sections 352, 782, and 1103.



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-1 California Evidence Courtroom Manual § 1035.6

§ 1035.6 Holder of the Privilege

As used in this article, "holder of the privilege" means:

- (a) The victim when such person has no guardian or conservator.
- (b) A guardian or conservator of the victim when the victim has a guardian or conservator.
- (c) The personal representative of the victim if the victim is dead.



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-1 California Evidence Courtroom Manual § 1035.8

§ 1035.8 Sexual Assault Counselor-Victim Privilege

A victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a sexual assault victim counselor if the privilege is claimed by any of the following:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the sexual assault counselor at the time of the confidential communication, but that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.

Legislative History

Amended by Stats 2006 ch 689 § 6 (SB 1743)



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-1 California Evidence Courtroom Manual § 1036

§ 1036 Claim of Privilege by Sexual Assault Counselor

The sexual assault counselor who received or made a communication subject to the privilege under this article shall claim the privilege if he or she is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1035.8.

Legislative History

Amended by Stats 2006 ch 689 § 7 (SB 1743)



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-1 California Evidence Courtroom Manual § 1036.2

§ 1036.2 Sexual Assault Defined for Purpose of Privilege

As used in this article, "sexual assault" includes all of the following:

- (a) Rape, as defined in *Section 261 of the Penal Code*.
- (b) Unlawful sexual intercourse, as defined in *Section 261.5 of the Penal Code*.
- (c) Rape in concert with force and violence, as defined in *Section 264.1 of the Penal Code*.
- (d) Rape of a spouse, as defined in *Section 262 of the Penal Code*.
- (e) Sodomy, as defined in *Section 286 of the Penal Code*, except a violation of subdivision (e) of that section.
- (f) A violation of *Section 288 of the Penal Code*.
- (g) Oral copulation, as defined in *Section 288a of the Penal Code*, except a violation of subdivision (e) of that section.
- (h) Sexual penetration, as defined in *Section 289 of the Penal Code*.
- (i) Annoying or molesting a child under 18, as defined in *Section 647a of the Penal Code*.
- (j) Any attempt to commit any of the above acts.



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ARTICLE 8.7. DOMESTIC VIOLENCE COUNSELOR-VICTIM PRIVILEGE

-1 California Evidence Courtroom Manual § 1037

§ 1037 Victim

As used in this article, "victim" means any person who suffers domestic violence, as defined in Section 1037.7.



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-1 California Evidence Courtroom Manual § 1037.1

§ 1037.1. "Domestic Violence Counselor"

(a)

(1) As used in this article, "domestic violence counselor" means a person who is employed by a domestic violence victim service organization, as defined in this article, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of domestic violence and who has at least 40 hours of training as specified in paragraph (2).

(2) The 40 hours of training shall be supervised by an individual who qualifies as a counselor under paragraph (1), and who has at least one year of experience counseling domestic violence victims for the domestic violence victim service organization. The training shall include, but need not be limited to, the following areas: history of domestic violence, civil and criminal law as it relates to domestic violence, the domestic violence victim-counselor privilege and other laws that protect the confidentiality of victim records and information, societal attitudes towards domestic violence, peer counseling techniques, housing, public assistance and other financial resources available to meet the financial needs of domestic violence victims, and referral services available to domestic violence victims.

(3) A domestic violence counselor who has been employed by the domestic violence victim service organization for a period of less than six months shall be supervised by a domestic violence counselor who has at least one year of experience counseling domestic violence victims for the domestic violence victim service organization.

(b) As used in this article, "domestic violence victim service organization" means a nongovernmental organization or

entity that provides shelter, programs, or services to victims of domestic violence and their children, including, but not limited to, either of the following:

- (1) Domestic violence shelter-based programs, as described in *Section 18294 of the Welfare and Institutions Code*.
- (2) Other programs with the primary mission to provide services to victims of domestic violence whether or not that program exists in an agency that provides additional services.



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-1 California Evidence Courtroom Manual § 1037.2

§ 1037.2. "Confidential Communication"

(a) As used in this article, "confidential communication" means any information, including, but not limited to, written or oral communication, transmitted between the victim and the counselor in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the domestic violence counselor is consulted. The term includes all information regarding the facts and circumstances involving all incidences of domestic violence, as well as all information about the children of the victim or abuser and the relationship of the victim with the abuser.

(b) The court may compel disclosure of information received by a domestic violence counselor which constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim or another household member and which is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services. The court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator. The court may also compel disclosure in proceedings related to child abuse if the court determines that the probative value of the evidence outweighs the effect of the disclosure on the victim, the counseling relationship, and the counseling services.

(c) When a court rules on a claim of privilege under this article, it may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege consents to have present. If the judge determines that the information is

privileged and shall not be disclosed, neither he nor she nor any other person may disclose, without the consent of a person authorized to permit disclosure, any information disclosed in the course of the proceedings in chambers.

(d) If the court determines that information shall be disclosed, the court shall so order and inform the defendant in the criminal action. If the court finds there is a reasonable likelihood that any information is subject to disclosure pursuant to the balancing test provided in this section, the procedure specified in subdivisions (1), (2), and (3) of Section 1035.4 shall be followed.



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-1 California Evidence Courtroom Manual § 1037.3

§ 1037.3 Reporting of Child Abuse

Nothing in this article shall be construed to limit any obligation to report instances of child abuse as required by *Section 11166 of the Penal Code*.



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-1 California Evidence Courtroom Manual § 1037.4

§ 1037.4. "Holder of the Privilege"

As used in this article, "holder of the privilege" means:

- (a) The victim when he or she has no guardian or conservator.
- (b) A guardian or conservator of the victim when the victim has a guardian or conservator, unless the guardian or conservator is accused of perpetrating domestic violence against the victim.



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-1 California Evidence Courtroom Manual § 1037.5

§ 1037.5. Asserting Privilege to Disclose Communication

A victim of domestic violence, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a domestic violence counselor in any proceeding specified in Section 901 if the privilege is claimed by any of the following persons:

- (a) The holder of the privilege.
- (b) A person who is authorized to claim the privilege by the holder of the privilege.
- (c) The person who was the domestic violence counselor at the time of the confidential communication. However, that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.



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-1 California Evidence Courtroom Manual § 1037.6

§ 1037.6 Claim of Privilege by Counselor

The domestic violence counselor who received or made a communication subject to the privilege granted by this article shall claim the privilege whenever he or she is present when the communication is sought to be disclosed and he or she is authorized to claim the privilege under subdivision (c) of Section 1037.5.



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-1 California Evidence Courtroom Manual § 1037.7

§ 1037.7 Domestic Violence

As used in this article, "domestic violence" means "domestic violence" as defined in *Section 6211 of the Family Code*.



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-1 California Evidence Courtroom Manual § 1037.8

§ 1037.8 Informing Victim of Limits on Confidentiality

A domestic violence counselor shall inform a domestic violence victim of any applicable limitations on confidentiality of communications between the victim and the domestic violence counselor. This information may be given orally.



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ARTICLE 8.8. HUMAN TRAFFICKING CASEWORKER-VICTIM PRIVILEGE

-1 California Evidence Courtroom Manual § 1038

§ 1038 Claiming Human Trafficking Caseworker-Victim Privilege

(a) A trafficking victim, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the victim and a human trafficking caseworker if the privilege is claimed by any of the following persons:

(1) The holder of the privilege.

(2) A person who is authorized to claim the privilege by the holder of the privilege.

(3) The person who was the human trafficking caseworker at the time of the confidential communication. However, that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. The human trafficking caseworker who received or made a communication subject to the privilege granted by this article shall claim the privilege whenever he or she is present when the communication is sought to be disclosed and he or she is authorized to claim the privilege under this section.

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.



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-1 California Evidence Courtroom Manual § 1038.1

§ 1038.1 Order Compelling Disclosure of Privileged Information

(a) The court may compel disclosure of information received by a human trafficking caseworker that constitutes relevant evidence of the facts and circumstances involving a crime allegedly perpetrated against the victim and that is the subject of a criminal proceeding, if the court determines that the probative value of the information outweighs the effect of disclosure of the information on the victim, the counseling relationship, and the counseling services. The court may compel disclosure if the victim is either dead or not the complaining witness in a criminal action against the perpetrator.

(b) When a court rules on a claim of privilege under this article, it may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and those other persons that the person authorized to claim the privilege consents to have present.

(c) If the judge determines that the information is privileged and shall not be disclosed, neither he nor she nor any other person may disclose, without the consent of a person authorized to permit disclosure, any information disclosed in the course of the proceedings in chambers. If the court determines that information shall be disclosed, the court shall so order and inform the defendant in the criminal action. If the court finds there is a reasonable likelihood that any information is subject to disclosure pursuant to the balancing test provided in this section, the procedure specified in paragraphs (1), (2), and (3) of Section 1035.4 shall be followed.



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-1 California Evidence Courtroom Manual § 1038.2

§ 1038.2 Definitions

(a) As used in this article, "victim" means any person who is a "trafficking victim" as defined in Section 236.1.

(1) A person who is employed by any organization providing the programs specified in *Section 18294 of the Welfare and Institutions Code*, whether financially compensated or not, for the purpose of rendering advice or assistance to victims of human trafficking, who has received specialized training in the counseling of human trafficking victims, and who meets one of the following requirements:

(A) Has a master's degree in counseling or a related field; or has one year of counseling experience, at least six months of which is in the counseling of human trafficking victims.

(B) Has at least 40 hours of training as specified in this paragraph and is supervised by an individual who qualifies as a counselor under subparagraph (A), or is a psychotherapist, as defined in Section 1010. The training, supervised by a person qualified under subparagraph (A), shall include, but need not be limited to, the following areas: history of human trafficking, civil and criminal law as it relates to human trafficking, societal attitudes towards human trafficking, peer counseling techniques, housing, public assistance and other financial resources available to meet the financial needs of human trafficking victims, and referral services available to human trafficking victims. A portion of this training must include an explanation of privileged communication.

(2) A person who is employed by any organization providing the programs specified in *Section 13835.2 of the Penal Code*, whether financially compensated or not, for the purpose of counseling and assisting human trafficking victims, and who meets one of the following requirements:

(A) Is a psychotherapist as defined in Section 1010, has a master's degree in counseling

or a related field, or has one year of counseling experience, at least six months of which is in rape assault counseling.

(B) Has the minimum training for human trafficking counseling required by guidelines established by the employing agency pursuant to *subdivision (c) of Section 13835.10 of the Penal Code*, and is supervised by an individual who qualifies as a counselor under subparagraph (A). The training, supervised by a person qualified under subparagraph (A), shall include, but not be limited to, law, victimology, counseling techniques, client and system advocacy, and referral services. A portion of this training must include an explanation of privileged communication.

(b) As used in this article, "human trafficking caseworker" means any of the following:

(c) As used in this article, "confidential communication" means information transmitted between the victim and the caseworker in the course of their relationship and in confidence by a means which, so far as the victim is aware, discloses the information to no third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the human trafficking counselor is consulted. It includes all information regarding the facts and circumstances involving all incidences of human trafficking.

(d) As used in this article, "holder of the privilege" means the victim when he or she has no guardian or conservator, or a guardian or conservator of the victim when the victim has a guardian or conservator.



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-1 California Evidence Courtroom Manual § 1040

§ 1040 Privilege for Official Information

(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(c) Notwithstanding any other provision of law, the Employment Development Department shall disclose to law enforcement agencies, in accordance with the provisions of subdivision (k) of Section 1095 and *subdivision (b) of Section 2714 of the Unemployment Insurance Code*, information in its possession relating to any person if an arrest warrant has been issued for the person for commission of a felony.



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-1 California Evidence Courtroom Manual § 1041

§ 1041 Privilege for Identity of Informer

(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished in confidence by the informer to:

(1) A law enforcement officer;

(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

- (c) There is no privilege under this section to prevent the informer from disclosing his identity.



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-1 California Evidence Courtroom Manual § 1042

§ 1042 Adverse Order or Finding in Certain Cases

(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

(c) Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure.

(d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a

person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.



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-1 California Evidence Courtroom Manual § 1043

§ 1043 Disclosure of Peace Officer Personnel Records

(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to *Section 832.5 of the Penal Code* or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by *subdivision (b) of Section 1005 of the Code of Civil Procedure*. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

(b) The motion shall include all of the following:

(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

(2) A description of the type of records or information sought.

(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a

waiver of the hearing by the governmental agency identified as having the records.



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-1 California Evidence Courtroom Manual § 1044

§ 1044 Right of Access to Medical or Psychological History Records

Nothing in this article shall be construed to affect the right of access to records of medical or psychological history where such access would otherwise be available under Section 996 or 1016.



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-1 California Evidence Courtroom Manual § 1045

§ 1045 Records of Complaints or Discipline Imposed on Peace Officers

(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations, concerning an event or transaction in which the peace officer or custodial officer, as defined in *Section 831.5 of the Penal Code*, participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties, provided that information is relevant to the subject matter involved in the pending litigation.

(b) In determining relevance the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure:

(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.

(2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to *Section 832.5 of the Penal Code*.

(3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.

(c) In determining relevance where the issue in litigation concerns the policies or pattern of conduct of the employing agency, the court shall consider whether the information sought may be obtained from other records maintained by the employing agency in the regular course of agency business which would not necessitate the disclosure of individual personnel records.

(d) Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

(e) The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.



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-1 California Evidence Courtroom Manual § 1046

§ 1046 Disclosure Where Allegation of Excessive Force

In any case, otherwise authorized by law, in which the party seeking disclosure is alleging excessive force by a peace officer or custodial officer, as defined in *Section 831.5 of the Penal Code*, in connection with the arrest of that party, or for conduct alleged to have occurred within a jail facility, the motion shall include a copy of the police report setting forth the circumstances under which the party was stopped and arrested, or a copy of the crime report setting forth the circumstances under which the conduct is alleged to have occurred within a jail facility.



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-1 California Evidence Courtroom Manual § 1047

§ 1047 Records of Peace Officers Not Involved in Arrest

Records of peace officers or custodial officers, as defined in *Section 831.5 of the Penal Code*, including supervisory officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct is alleged to have occurred within a jail facility, shall not be subject to disclosure.



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-1 California Evidence Courtroom Manual § 1050

§ 1050 Privilege to Protect Secrecy of Vote

If he claims the privilege, a person has a privilege to refuse to disclose the tenor of his vote at a public election where the voting is by secret ballot unless he voted illegally or he previously made an unprivileged disclosure of the tenor of his vote.



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-1 California Evidence Courtroom Manual § 1060

§ 1060 Privilege to Protect Trade Secret

If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.



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-1 California Evidence Courtroom Manual § 1061

§ 1061 Procedure for Assertion of Trade Secret Privilege

(a) For purposes of this section, and Sections 1062 and 1063:

(1) "Trade secret" means "trade secret," as defined in *subdivision (d) of Section 3426.1 of the Civil Code*, or paragraph (9) of *subdivision (a) of Section 499c of the Penal Code*.

(2) "Article" means "article," as defined in paragraph (2) of *subdivision (a) of Section 499c of the Penal Code*.

(b) In addition to Section 1062, the following procedure shall apply whenever the owner of a trade secret wishes to assert his or her trade secret privilege, as provided in Section 1060, during a criminal proceeding:

(1) The owner of the trade secret shall file a motion for a protective order, or the people may file the motion on the owner's behalf and with the owner's permission. The motion shall include an affidavit based upon personal knowledge listing the affiant's qualifications to give an opinion concerning the trade secret at issue, identifying, without revealing, the alleged trade secret and articles which disclose the secret, and presenting evidence that the secret qualifies as a trade secret under either *subdivision (d) of Section 3426.1 of the Civil Code* or paragraph (9) of *subdivision (a) of Section 499c of the Penal Code*. The motion and affidavit shall be served on all parties in the proceeding.

(2) Any party in the proceeding may oppose the request for the protective order by submitting affidavits based upon the affiant's personal knowledge. The affidavits shall be filed under seal, but shall be provided to the owner of the trade secret and to all parties in the proceeding. Neither the owner of the trade secret nor any party in the proceeding may disclose the affidavit to persons other than to counsel of

record without prior court approval.

(3) The movant shall, by a preponderance of the evidence, show that the issuance of a protective order is proper. The court may rule on the request without holding an evidentiary hearing. However, in its discretion, the court may choose to hold an in camera evidentiary hearing concerning disputed articles with only the owner of the trade secret, the people's representative, the defendant, and defendant's counsel present. If the court holds such a hearing, the parties' right to examine witnesses shall not be used to obtain discovery, but shall be directed solely toward the question of whether the alleged trade secret qualifies for protection.

(4) If the court finds that a trade secret may be disclosed during any criminal proceeding unless a protective order is issued and that the issuance of a protective order would not conceal a fraud or work an injustice, the court shall issue a protective order limiting the use and dissemination of the trade secret, including, but not limited to, articles disclosing that secret. The protective order may, in the court's discretion, include the following provisions:

(A) That the trade secret may be disseminated only to counsel for the parties, including their associate attorneys, paralegals, and investigators, and to law enforcement officials or clerical officials.

(B) That the defendant may view the secret only in the presence of his or her counsel, or if not in the presence of his or her counsel, at counsel's offices.

(C) That any party seeking to show the trade secret, or articles containing the trade secret, to any person not designated by the protective order shall first obtain court approval to do so:

(i) The court may require that the person receiving the trade secret do so only in the presence of counsel for the party requesting approval.

(ii) The court may require the person receiving the trade secret to sign a copy of the protective order and to agree to be bound by its terms. The order may include a provision recognizing the owner of the trade secret to be a third-party beneficiary of that agreement.

(iii) The court may require a party seeking disclosure to an expert to provide that expert's name, employment history, and any other relevant information to the court for examination. The court shall accept that information under seal, and the information shall not be disclosed by any court except upon termination of the action and upon a showing of good cause to believe the secret has been disseminated by a court-approved expert. The court shall evaluate the expert and determine whether the expert poses a discernible risk of disclosure. The court shall withhold approval if the expert's economic interests place the expert in a competitive position with the victim, unless no other experts are available. The court may interview the expert in camera in aid of its ruling. If the court rejects the expert, it shall state its reasons for doing so on the record and a transcript of those reasons shall be prepared and sealed.

(D) That no articles disclosing the trade secret shall be filed or otherwise made a part of the court record available to the public without approval of the court and prior notice to the owner of the secret. The owner of the secret may give either party permission to accept the notice on the owner's behalf.

(E) Other orders as the court deems necessary to protect the integrity of the trade secret.

(c) A ruling granting or denying a motion for a protective order filed pursuant to subdivision (b) shall not be construed as a determination that the alleged trade secret is or is not a trade secret as defined by *subdivision (d) of Section 3426.1 of the Civil Code* or paragraph (9) of *subdivision (a) of Section 499c of the Penal Code*. Such a ruling shall not have any effect on any civil litigation.

(d) This section shall have prospective effect only and shall not operate to invalidate previously entered protective orders.



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-1 California Evidence Courtroom Manual § 1062

§ 1062 Motion to Exclude Public from Criminal Proceeding Involving Trade Secret

(a) Notwithstanding any other provision of law, in a criminal case, the court, upon motion of the owner of a trade secret, or upon motion by the People with the consent of the owner, may exclude the public from any portion of a criminal proceeding where the proponent of closure has demonstrated a substantial probability that the trade secret would otherwise be disclosed to the public during that proceeding and a substantial probability that the disclosure would cause serious harm to the owner of the secret, and where the court finds that there is no overriding public interest in an open proceeding. No evidence, however, shall be excluded during a criminal proceeding pursuant to this section if it would conceal a fraud, work an injustice, or deprive the People or the defendant of a fair trial.

(b) The motion made pursuant to subdivision (a) shall identify, without revealing, the trade secrets which would otherwise be disclosed to the public. A showing made pursuant to subdivision (a) shall be made during an in camera hearing with only the owner of the trade secret, the People's representative, the defendant, and defendant's counsel present. A court reporter shall be present during the hearing. Any transcription of the proceedings at the in camera hearing, as well as any articles presented at that hearing, shall be ordered sealed by the court and only a court may allow access to its contents upon a showing of good cause. The court, in ruling upon the motion made pursuant to subdivision (a), may consider testimony presented or affidavits filed in any proceeding held in that action.

(c) If, after the in camera hearing described in subdivision (b), the court determines that exclusion of trade secret information from the public is appropriate, the court shall close only that portion of the criminal proceeding necessary to prevent disclosure of the trade secret. Before granting the motion, however, the court shall find and state for the record that the moving party has met its burden pursuant to subdivision (b), and that the closure of that portion of the proceeding will not deprive the People or the defendant of a fair trial.

(d) The owner of the trade secret, the People, or the defendant may seek relief from a ruling denying or granting closure by petitioning a higher court for extraordinary relief.

(e) Whenever the court closes a portion of a criminal proceeding pursuant to this section, a transcript of that closed proceeding shall be made available to the public as soon as practicable. The court shall redact any information qualifying as a trade secret before making that transcript available.

(f) The court, subject to *Section 867 of the Penal Code*, may allow witnesses who are bound by a protective order entered in the criminal proceeding protecting trade secrets, pursuant to Section 1061, to remain within the courtroom during the closed portion of the proceeding.



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-1 California Evidence Courtroom Manual § 1063

§ 1063 Sealing of Articles Protected by Protective Order

The following provisions shall govern requests to seal articles which are protected by a protective order entered pursuant to *Evidence Code Section 1060* or *1061*:

(a) The People shall request sealing of articles reasonably expected to be filed or admitted into evidence as follows:

(1) No less than 10 court days before trial, and no less than five court days before any other criminal proceeding, the People shall file with the court a list of all articles which the People reasonably expect to file with the court, or admit into evidence, under seal at that proceeding. That list shall be available to the public. The People may be relieved from providing timely notice upon showing that exigent circumstances prevent that notice.

(2) The court shall not allow the listed articles to be filed, admitted into evidence, or in any way made a part of the court record otherwise open to the public before holding a hearing to consider any objections to the People's request to seal the articles. The court at that hearing shall allow those objecting to the sealing to state their objections.

(3) After hearing any objections to sealing, the court shall conduct an in camera hearing with only the owner of the trade secret contained within those articles, the People's representative, defendant, and defendant's counsel present. The court shall review the articles sought to be sealed, evaluate objections to sealing, and determine whether the People have satisfied the constitutional standards governing public access to articles which are part of the judicial record. The court may consider testimony presented or affidavits filed in any proceeding held in that action. The People, defendant, and the owner of the trade secret may file affidavits based on the affiant's personal knowledge to be considered at that hearing. Those affidavits are to be sealed and not released to the

public, but shall be made available to the parties. The court may rule on the request to seal without taking testimony. If the court takes testimony, examination of witnesses shall not be used to obtain discovery, but shall be directed solely toward whether sealing is appropriate.

(4) If the court finds that the movant has satisfied appropriate constitutional standards with respect to sealing particular articles, the court shall seal those articles if and when they are filed, admitted into evidence, or in any way made a part of the court record otherwise open to the public. The articles shall not be unsealed absent an order of a court upon a showing of good cause. Failure to examine the court file for notice of a request to seal shall not constitute good cause to consider objections to sealing.

(b) The following procedure shall apply to other articles made a part of the court record:

(1) Where any articles protected by a protective order entered pursuant to Section 1060 or 1061 are filed, admitted into evidence, or in any way made a part of the court record in such a way as to be otherwise open to the public, the People, a defendant, or the owner of a trade secret contained within those articles may request the court to seal those articles.

(2) The request to seal shall be made by noticed motion filed with the court. It may also be made orally in court at the time the articles are made a part of the court record. Where the request is made orally, the movant must file within 24 hours a written description of that request, including a list of the articles which are the subject of that request. These motions and lists shall be available to the public.

(3) The court shall promptly conduct hearings as provided in paragraphs (2), (3), and (4) of subdivision (a). The court shall, pending the hearings, seal those articles which are the subject of the request. Where a request to seal is made orally, the court may conduct hearings at the time the articles are made a part of the court record, but shall reconsider its ruling in light of additional objections made by objectors within two court days after the written record of the request to seal is made available to the public.

(4) Any articles sealed pursuant to these hearings shall not be unsealed absent an order of a court upon a showing of good cause. Failure to examine the court file for notice of a request to seal shall not constitute good cause to consider objections to sealing.



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CHAPTER 5. IMMUNITY OF NEWSMAN FROM CITATION FOR CONTEMPT

-1 California Evidence Courtroom Manual § 1070

§ 1070 Refusal to Disclose News Source

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.



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-1 California Evidence Courtroom Manual § 1100

§ 1100 Manner of Proof of Character

Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.



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-1 California Evidence Courtroom Manual § 1101

§ 1101 Evidence of Character to Prove Conduct

(a) Except as provided in this Section and in Sections 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.

(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.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.



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-1 California Evidence Courtroom Manual § 1102

§ 1102 Opinion and Reputation Evidence of Character of Criminal Defendant to Prove Conduct

In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

- (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.
- (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).



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-1 California Evidence Courtroom Manual § 1103

§ 1103 Character Evidence of Crime Victim to Prove Conduct; Evidence of Defendant's Character or Trait for Violence; Evidence of Witness's Sexual Conduct

(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

- (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.
- (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

(b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).

(c)(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under *Section 261, 262 or 264.1 of the Penal Code*, or under *section 286, 288a, or 289 of the Penal Code*, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those actions, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

(2) Notwithstanding paragraph (3), evidence of the manner in which the victim was dressed at the time of the commission of the offense shall not be admissible when offered by either party on the issue of consent in any prosecution for an offense specified in paragraph (1), unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence shall make an offer of proof outside the hearing of the jury. The court shall then make its determination and at that time, state the reasons for its ruling on the record. For the purposes of this paragraph, "manner of dress" does not include the condition of the victim's clothing before, during, or after the commission of the offense.

(3) Paragraph (1) shall not be applicable to evidence of the complaining witness's sexual conduct with the defendant.

(4) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.

(5) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.

(6) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this subdivision.



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-1 California Evidence Courtroom Manual § 1104

§ 1104 Character Trait for Care or Skill

Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.



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-1 California Evidence Courtroom Manual § 1105

§ 1105 Habit or Custom to Prove Specific Behavior

Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.



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-1 California Evidence Courtroom Manual § 1106

§ 1106 Evidence in 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 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.

(c) If the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff.

(d) Nothing in this section shall be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783.



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-1 California Evidence Courtroom Manual § 1107

§ 1107 Expert Testimony on Battered Women's Syndrome in Criminal Actions

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

(b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven.

(c) For purposes of this section, "abuse" is defined in *Section 6203 of the Family Code* and "domestic violence" is defined in *Section 6211 of the Family Code* or acts defined in Section 242, subdivision (e) of Section 243, or *Section 262, 273.5, 273.6, 422, or 653(m) of the Penal Code*.

(d) This section is intended as a rule of evidence only and no substantive change affecting the Penal Code is intended.

(e) This section shall be known, and may be cited as, the Expert Witness Testimony on Battered Women's Experiences Section of the Evidence Code.



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-1 California Evidence Courtroom Manual § 1108

§ 1108 Evidence of Another Sexual Offense by Defendant; Disclosure; Construction of Section

(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.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of *Section 1054.7 of the Penal Code*.

(c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.

(d) As used in this section, the following definitions shall apply:

(1) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:

(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code.

(B) Any conduct proscribed by *Section 220 of the Penal Code*, except assault with intent

to commit mayhem.

(C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

(D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

(E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

(F) An attempt or conspiracy to engage in conduct described in this paragraph.

(2) "Consent" shall have the same meaning as provided in *Section 261.6 of the Penal Code*, except that it does not include consent which is legally ineffective because of the age, mental disorder, or developmental or physical disability of the victim.



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-1 California Evidence Courtroom Manual § 1109

§ 1109 Evidence of Other Acts of Domestic Violence or Abuse of Elder or Dependent Adults

(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(2) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(3) Except as provided in subdivision (e) or (f) and subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. Nothing in this paragraph prohibits or limits the admission of evidence pursuant to subdivision (b) of Section 1101.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of *Section 1054.7 of the Penal Code*.

(c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other

statute or case law.

(d) As used in this section:

(1) "Abuse of an elder or dependent person" means physical or sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment that results in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering.

(2) "Child abuse" means an act proscribed by *Section 273d of the Penal Code*.

(3) "Domestic violence" has the meaning set forth in *Section 13700 of the Penal Code*. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, "domestic violence" has the further meaning as set forth in *Section 6211 of the Family Code*, if the act occurred no more than five years before the charged offense.

(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.

(f) Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under *Section 1250 of the Health and Safety Code* is inadmissible under this section.



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-1 California Evidence Courtroom Manual § 1115

§ 1115 Definitions

For purposes of this chapter:

- (a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.
- (b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.
- (c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.



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-1 California Evidence Courtroom Manual § 1116

§ 1116 Effect of Chapter

(a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.



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-1 California Evidence Courtroom Manual § 1117

§ 1117 Application of Chapter

(a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

- (1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.
- (2) A settlement conference pursuant to *Rule 3.1380 of the California Rules of Court*.



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-1 California Evidence Courtroom Manual § 1118

§ 1118 Oral Agreements

An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:

- (a) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.
- (b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.
- (c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.
- (d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.



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-1 California Evidence Courtroom Manual § 1119

§ 1119 Admissibility of Communications During Mediation

Except as otherwise provided in this chapter:

- (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.



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-1 California Evidence Courtroom Manual § 1120

§ 1120 Evidence Otherwise Admissible

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

- (1) The admissibility of an agreement to mediate a dispute.
- (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
- (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.



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-1 California Evidence Courtroom Manual § 1121

§ 1121 Mediator's Reports and Findings

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.



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-1 California Evidence Courtroom Manual § 1122

§ 1122 Conditions of Admissibility of Communications

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

- (1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.
- (2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.



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§ 1123 Admissibility of Written Settlement Agreements

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

- (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- (b) The agreement provides that it is enforceable or binding or words to that effect.
- (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
- (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.



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-1 California Evidence Courtroom Manual § 1124

§ 1124 Admissibility of Oral Agreements

An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

- (a) The agreement is in accordance with Section 1118.
- (b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.
- (c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.



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-1 California Evidence Courtroom Manual § 1125

§ 1125 End of Mediation

(a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

- (1) The parties execute a written settlement agreement that fully resolves the dispute.
- (2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.
- (3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.
- (4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.
- (5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

- (1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.



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-1 California Evidence Courtroom Manual § 1126

§ 1126 Continuity of Confidentiality

Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.



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-1 California Evidence Courtroom Manual § 1127

§ 1127 Attorney's Fees and Costs

If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.



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-1 California Evidence Courtroom Manual § 1128

§ 1128 Subsequent References to Mediation

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of *Section 657 of the Code of Civil Procedure*. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.



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-1 California Evidence Courtroom Manual § 1150

§ 1150 Evidence to Test a Verdict

(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

(b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.



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-1 California Evidence Courtroom Manual § 1151

§ 1151 Subsequent Remedial Conduct

When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.



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-1 California Evidence Courtroom Manual § 1152

§ 1152 Offers to Compromise

(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of *subdivision (h) of Section 790.03 of the Insurance Code*, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of *subdivision (h) of Section 790.03 of the Insurance Code*, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.

(c) This section does not affect the admissibility of evidence of any of the following:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.

(2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.



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-1 California Evidence Courtroom Manual § 1153

§ 1153 Offer to Plead Guilty or Withdrawn Plea of Guilty by Criminal Defendant

Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.



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-1 California Evidence Courtroom Manual § 1153.5

§ 1153.5 Offer for Civil Resolution of Crimes Against Property

Evidence of an offer for civil resolution of a criminal matter pursuant to the provisions of *Section 33 of the Code of Civil Procedure*, or admissions made in the course of or negotiations for the offer shall not be admissible in any action.



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-1 California Evidence Courtroom Manual § 1154

§ 1154 Offer to Discount a Claim

Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.



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-1 California Evidence Courtroom Manual § 1155

§ 1155 Liability Insurance

Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing.



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-1 California Evidence Courtroom Manual § 1156

§ 1156 Records of Medical or Dental Study of In-hospital Staff Committee

(a) In-hospital medical or medical-dental staff committees of a licensed hospital may engage in research and medical or dental study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such in-hospital medical or medical-dental staff committees relating to such medical or dental studies are subject to Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical or medical-dental staff committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) This section does not affect the admissibility in evidence of the original medical or dental records of any patient.

(d) This section does not exclude evidence which is relevant evidence in a criminal action.



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-1 California Evidence Courtroom Manual § 1156.1

§ 1156.1 Records of Medical or Psychiatric Studies of Quality Assurance Committees

(a) A committee established in compliance with *Sections 4070 and 5624 of the Welfare and Institutions Code* may engage in research and medical or psychiatric study for the purpose of reducing morbidity or mortality, and may make findings and recommendations to the county and state relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such committees relating to such medical or psychiatric studies are subject to Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him or her to such committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014. However, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) This section does not affect the admissibility in evidence of the original medical or psychiatric records of any patient.

(d) This section does not exclude evidence which is relevant evidence in a criminal action.



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-1 California Evidence Courtroom Manual § 1157

§ 1157 Proceedings and Records of Quality of Care Committees

(a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, marriage and family therapist, licensed clinical social worker or veterinary staffs in hospitals, or of a peer review body, as defined in *Section 805 of the Business and Professions Code*, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or for that peer review body, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietitian review or veterinary review or acupuncturist review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, acupuncture, or chiropractic societies, marriage and family therapist, licensed clinical social worker or psychological review committees of state or local marriage and family therapist, state or local licensed clinical social worker, or state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.

(c) The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(d) The prohibitions in this section do not apply to medical, dental, dental hygienist, podiatric, dietetic, psychological, marriage and family therapist, licensed clinical social worker, veterinary, acupuncture, or chiropractic society

committees that exceed 10 percent of the membership of the society, nor to any of those committees if any person serves upon the committee when his or her own conduct or practice is being reviewed.

(e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, or at the 1990 portion of the 1989-90 Regular Session of the Legislature, or at the 2000 portion of the 1999-2000 Regular Session of the Legislature do not exclude the discovery or use of relevant evidence in a criminal action.



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-1 California Evidence Courtroom Manual § 1157.5

§ 1157.5 Committee of Nonprofit Medical Care Foundation or Professional Standards Review Organization

Except in actions involving a claim of a provider of health care services for payment for such services, the prohibition relating to discovery or testimony provided by Section 1157 shall be applicable to the proceedings or records of an organized committee of any nonprofit medical care foundation or professional standards review organization which is organized in a manner which makes available professional competence to review health care services with respect to medical necessity, quality of care, or economic justification of charges or level of care.



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-1 California Evidence Courtroom Manual § 1157.6

§ 1157.6 Proceedings and Records of Quality Assurance Committees for County Health Facilities

Neither the proceedings nor the records of a committee established in compliance with *Sections 4070 and 5624 of the Welfare and Institutions Code* having the responsibility of evaluation and improvement of the quality of mental health care rendered in county operated and contracted mental health facilities shall be subject to discovery. Except as provided in this section, no person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery or testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting, or to any person requesting facility staff privileges.



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-1 California Evidence Courtroom Manual § 1157.7

§ 1157.7 Application of Section 1157 Discovery or Testimony Prohibitions

The prohibition relating to discovery or testimony provided in Section 1157 shall be applicable to proceedings and records of any committee established by a local governmental agency to monitor, evaluate, and report on the necessity, quality, and level of specialty health services, including, but not limited to, trauma care services, provided by a general acute care hospital which has been designated or recognized by that governmental agency as qualified to render specialty health care services. The provisions of Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code and Chapter 9 (commencing with Section 54950) of Division 2 of Title 5 of the Government Code shall not be applicable to the committee records and proceedings.



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*-1 California Evidence Courtroom Manual § 1158***§ 1158 Inspection and Copying of Patient's Records**

Whenever, prior to the filing of any action or the appearance of a defendant in an action, an attorney at law or his or her representative presents a written authorization therefor signed by an adult patient, by the guardian or conservator of his or her person or estate, or, in the case of a minor, by a parent or guardian of the minor, or by the personal representative or an heir of a deceased patient, or a copy thereof, a physician and surgeon, dentist, registered nurse, dispensing optician, registered physical therapist, podiatrist, licensed psychologist, osteopathic physician and surgeon, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or pharmacist or pharmacy, duly licensed as such under the laws of the state, or a licensed hospital, shall make all of the patient's records under his, hers or its custody or control available for inspection and copying by the attorney at law or his, or her, representative, promptly upon the presentation of the written authorization.

No copying may be performed by any medical provider or employer enumerated above, or by an agent thereof, when the requesting attorney has employed a professional photocopier or anyone identified in *Section 22451 of the Business and Professions Code* as his or her representative to obtain or review the records on his or her behalf. The presentation of the authorization by the agent on behalf of the attorney shall be sufficient proof that the agent is the attorney's representative.

Failure to make the records available, during business hours, within five days after the presentation of the written authorization, may subject the person or entity having custody or control of the records to liability for all reasonable expenses, including attorney's fees, incurred in any proceeding to enforce this section.

All reasonable costs incurred by any person or entity enumerated above in making patient records available pursuant to this section may be charged against the person whose written authorization required the availability of the records.

"Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents (\$0.10) per page for standard reproduction of documents of a size 8 1/2 by 14 inches or less; twenty cents (\$0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to an authorization; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of sixteen dollars

(\$16) per hour per person, computed on the basis of four dollars (\$4) per quarter hour or fraction thereof; actual postage charges; and actual costs, if any, charged to the witness by a third person for the retrieval and return of records held by that third person.

Where the records are delivered to the attorney or the attorney's representative for inspection or photocopying at the record custodian's place of business, the only fee for complying with the authorization shall not exceed fifteen dollars (\$15), plus actual costs, if any, charged to the record custodian by a third person for retrieval and return of records held offsite by the third person.



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-1 California Evidence Courtroom Manual § 1159

§ 1159 Animal Experimentation in Product Liability Actions

(a) No evidence pertaining to live animal experimentation, including, but not limited to, injury, impact, or crash experimentation, shall be admissible in any product liability action involving a motor vehicle or vehicles.

(b) This section shall apply to cases for which a trial has not actually commenced, as described in paragraph (6) of *subdivision (a) of Section 581 of the Code of Civil Procedure*, on January 1, 1993.



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-1 California Evidence Courtroom Manual § 1160

§ 1160 Expressions of Sympathy or Benevolence

(a) The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

(b) For purposes of this section:

(1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) "Family" means the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of parent, or spouse's parents of an injured party.



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-1 California Evidence Courtroom Manual § 1200

§ 1200 The Hearsay Rule

(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.



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-1 California Evidence Courtroom Manual § 1201

§ 1201 Multiple Hearsay

A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.



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-1 California Evidence Courtroom Manual § 1202

§ 1202 Credibility of Hearsay Declarant

Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.



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-1 California Evidence Courtroom Manual § 1203

§ 1203 Cross-Examination of Hearsay Declarant

(a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

(b) This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the statement.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for examination pursuant to this section.



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-1 California Evidence Courtroom Manual § 1203.1

§ 1203.1 Statement Offered at Preliminary Examination

Section 1203 is not applicable if the hearsay statement is offered at a preliminary examination, as provided in *Section 872 of the Penal Code*.



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-1 California Evidence Courtroom Manual § 1204

§ 1204 Constitutional Prohibitions

A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.



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-1 California Evidence Courtroom Manual § 1205

§ 1205 No Repeal by Implication

Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence.



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-1 California Evidence Courtroom Manual § 1220

§ 1220 Statements Offered Against a Party-Declarant

Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.



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-1 California Evidence Courtroom Manual § 1221

§ 1221 Adoptive Admission

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.



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-1 California Evidence Courtroom Manual § 1222

§ 1222 Authorized Admission

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and
- (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.



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-1 California Evidence Courtroom Manual § 1223

§ 1223 Co-Conspirator Statements

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
- (b) The statement was made prior to or during the time that the party was participating in that conspiracy;
and
- (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.



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-1 California Evidence Courtroom Manual § 1224

§ 1224 Statement of Declarant Whose Liability, Obligation or Duty is in Issue

When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.



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-1 California Evidence Courtroom Manual § 1225

§ 1225 Statement of Declarant Whose Right, Title or Interest in Property is in Issue

When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.



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-1 California Evidence Courtroom Manual § 1226

§ 1226 Statement of a Child in Parent's Action for Child's Injury

Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under *Section 376 of the Code of Civil Procedure* for injury to such minor child.



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-1 California Evidence Courtroom Manual § 1227

§ 1227 Statement of Deceased Declarant in a Wrongful Death Action

Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action for wrongful death brought under *Section 377 of the Code of Civil Procedure*.



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-1 California Evidence Courtroom Manual § 1228

§ 1228 Use of Child's Statements to Establish Foundation for Admissibility of Defendant's Statements in Sex Crimes Prosecution

Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of violating *Section 261, 264.1, 285, 286, 288, 288a, 289, or 647a of the Penal Code*, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following:

- (a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department.
- (b) The statement describes the minor child as a victim of sexual abuse.
- (c) The statement was made prior to the defendant's confession. The court shall view with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice.
- (d) There are no circumstances, such as significant inconsistencies between the confession and the statement concerning material facts establishing any element of the crime or the identification of the defendant, that would render the statement unreliable.
- (e) The minor child is found to be unavailable pursuant to paragraph (2) or (3) of subdivision (a) of Section 240 or refuses to testify.
- (f) The confession was memorialized in a trustworthy fashion by a law enforcement official.

If the prosecution intends to offer a statement of the complaining witness pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement. If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the statement is found to be admissible pursuant to this section, it shall be admitted out of the

presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.



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-1 California Evidence Courtroom Manual 1228.1

1228.1 Child Welfare Services Case Plans

(a) Except as provided in subdivision (b), neither the signature of any parent or legal guardian on a child welfare services case plan nor the acceptance of any services prescribed in the child welfare services case plan by any parent or legal guardian shall constitute an admission of guilt or be used as evidence against the parent or legal guardian in a court of law.

(b) A parent's or guardian's failure to cooperate, except for good cause, in the provision of services specified in the child welfare services case plan may be used as evidence, if relevant, in any hearing held pursuant to *Section 366.21, 366.22, or 388 of the Welfare and Institutions Code* and at any jurisdictional or dispositional hearing held on a petition filed pursuant to *Section 300, 342, or 387 of the Welfare and Institutions Code*.



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ARTICLE 2. DECLARATIONS AGAINST INTEREST

-1 California Evidence Courtroom Manual § 1230

§ 1230 Declarations Against Interest in General

Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.



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ARTICLE 2.5. SWORN STATEMENTS REGARDING GANG-RELATED CRIMES

-1 California Evidence Courtroom Manual § 1231

§ 1231 Prior Statements of Deceased Declarant

Evidence of a prior statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is deceased and the proponent of introducing the statement establishes each of the following:

- (a) The statement relates to acts or events relevant to a criminal prosecution under provisions of the California Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 of the Penal Code).
- (b) A verbatim transcript, copy, or record of the statement exists. A record may include a statement preserved by means of an audio or video recording or equivalent technology.
- (c) The statement relates to acts or events within the personal knowledge of the declarant.
- (d) The statement was made under oath or affirmation in an affidavit; or was made at a deposition, preliminary hearing, grand jury hearing, or other proceeding in compliance with law, and was made under penalty of perjury.
- (e) The declarant died from other than natural causes.
- (f) The statement was made under circumstances that would indicate its trustworthiness and render the declarant's statement particularly worthy of belief. For purposes of this subdivision, circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:
 - (1) Whether the statement was made in contemplation of a pending or anticipated criminal or civil matter, in which the declarant had an interest, other than as a witness.
 - (2) Whether the declarant had a bias or motive for fabricating the statement, and the extent of any bias or motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

(4) Whether the statement was a statement against the declarant's interest.



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-1 California Evidence Courtroom Manual § 1231.1

§ 1231.1 Notice Requirement

A statement is admissible pursuant to Section 1231 only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.



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-1 California Evidence Courtroom Manual § 1231.2

§ 1231.2 Administration of Oaths

A peace officer may administer and certify oaths for purposes of this article.



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-1 California Evidence Courtroom Manual § 1231.3

§ 1231.3 Hearsay Testimony of Law Enforcement Official

Any law enforcement officer testifying as to any hearsay statement pursuant to this article shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and testifying at preliminary hearings and trials.



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-1 California Evidence Courtroom Manual § 1231.4

§ 1231.4 Jury Instruction Regarding Cause of Death

If evidence of a prior statement is introduced pursuant to this article, the jury may not be told that the declarant died from other than natural causes, but shall merely be told that the declarant is unavailable.



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ARTICLE 3. PRIOR STATEMENTS OF WITNESSES

-1 California Evidence Courtroom Manual § 1235

§ 1235 Prior Inconsistent Statements

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.



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-1 California Evidence Courtroom Manual § 1236

§ 1236 Prior Consistent Statements

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.



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-1 California Evidence Courtroom Manual § 1237

§ 1237 Past Recollection Recorded

(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

- (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
- (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
- (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
- (4) Is offered after the writing is authenticated as an accurate record of the statement.

(b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.



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-1 California Evidence Courtroom Manual § 1238

§ 1238 Prior Identification

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

- (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;
- (b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and
- (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.



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-1 California Evidence Courtroom Manual § 1240

§ 1240 Spontaneous Statement

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

- (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
- (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.



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-1 California Evidence Courtroom Manual § 1241

§ 1241 Contemporaneous Statement

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

- (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and
- (b) Was made while the declarant was engaged in such conduct.



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-1 California Evidence Courtroom Manual § 1242

§ 1242 Dying Declaration

Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.



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-1 California Evidence Courtroom Manual § 1250

§ 1250 Statement of Declarant's Then Existing State of Mind

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

- (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
- (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.



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-1 California Evidence Courtroom Manual § 1251

§ 1251 Statement of Declarant's Previously Existing State of Mind

Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:

- (a) The declarant is unavailable as a witness; and
- (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.



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-1 California Evidence Courtroom Manual § 1252

§ 1252 Restriction on Admissibility of Statement of Mental or Physical State

Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness.



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-1 California Evidence Courtroom Manual § 1253

§ 1253 Statements for Medical Diagnosis or Treatment of Child Abuse

Subject to Section 1252, evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. This section applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect. "Child abuse" and "child neglect," for purposes of this section, have the meanings provided in subdivision (c) of Section 1360. In addition, "child abuse" means any act proscribed by Chapter 5 (commencing with Section 281) of Title 9 of Part 1 of the Penal Code committed against a minor.



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-1 California Evidence Courtroom Manual § 1260

§ 1260 Statement Regarding Declarant's Will

(a) Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.



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-1 California Evidence Courtroom Manual § 1261

§ 1261 Statement of Decedent in Action Against Declarant's Estate

(a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.



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-1 California Evidence Courtroom Manual § 1270

§ 1270 Definition of a Business

As used in this article, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.



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-1 California Evidence Courtroom Manual § 1271

§ 1271 Admissible Writings

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of a business;
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.



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-1 California Evidence Courtroom Manual § 1272

§ 1272 Absence of Entry in Business Records

Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if:

- (a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and
- (b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.



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-1 California Evidence Courtroom Manual § 1280

§ 1280 Record Made by Public Employee

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

- (a) The writing was made by and within the scope of duty of a public employee;
- (b) The writing was made at or near the time of the act, condition, or event; and
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.



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-1 California Evidence Courtroom Manual § 1281

§ 1281 Vital Statistics

Evidence of a writing made as a record of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law.



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-1 California Evidence Courtroom Manual § 1282

§ 1282 Finding of Presumed Death

A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (56 Stats. 143, 1092, and P.L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. 1001-1016), as enacted or as heretofore or hereafter amended, shall be received in any court, office, or other place in this state as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance.



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-1 California Evidence Courtroom Manual § 1283

§ 1283 Finding of Missing Person

An official written report or record that a person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive, made by an employee of the United States authorized by any law of the United States to make such report or record shall be received in any court, office, or other place in this state as evidence that such person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive.



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-1 California Evidence Courtroom Manual § 1284

§ 1284 Statement of Absence of Public Record

Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office.



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-1 California Evidence Courtroom Manual § 1290

§ 1290 Former Testimony In General

As used in this article, "former testimony" means testimony given under oath in:

- (a) Another action or in a former hearing or trial of the same action;
- (b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States;
- (c) A deposition taken in compliance with law in another action; or
- (d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.



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-1 California Evidence Courtroom Manual § 1291

§ 1291 Former Testimony Offered Against Party to Former Proceeding

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

- (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
- (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:

- (1) Objections to the form of the question which were not made at the time the former testimony was given.
- (2) Objections based on competency or privilege which did not exist at the time the former testimony was given.



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-1 California Evidence Courtroom Manual § 1292

§ 1292 Former Testimony Offered Against Person Not a Party to Former Proceeding

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

- (1) The declarant is unavailable as a witness;
- (2) The former testimony is offered in a civil action; and
- (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections based on competency or privilege which did not exist at the time the former testimony was given.



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-1 California Evidence Courtroom Manual § 1293

§ 1293 Former Testimony by Child Witness at Preliminary Examination

(a) Evidence of former testimony made at a preliminary examination by a minor child who was the complaining witness is not made inadmissible by the hearsay rule if:

(1) The former testimony is offered in a proceeding to declare the minor a dependent child of the court pursuant to *Section 300 of the Welfare and Institutions Code*.

(2) The issues are such that a defendant in the preliminary examination in which the former testimony was given had the right and opportunity to cross-examine the minor child with an interest and motive similar to that which the parent or guardian against whom the testimony is offered has at the proceeding to declare the minor a dependent child of the court.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the minor child were testifying at the proceeding to declare him or her a dependent child of the court.

(c) The attorney for the parent or guardian against whom the former testimony is offered or, if none, the parent or guardian may make a motion to challenge the admissibility of the former testimony upon a showing that new substantially different issues are present in the proceeding to declare the minor a dependent child than were present in the preliminary examination.

(d) As used in this section, "complaining witness" means the alleged victim of the crime for which a preliminary

examination was held.

(e) This section shall apply only to testimony made at a preliminary examination on and after January 1, 1990.



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-1 California Evidence Courtroom Manual § 1294

§ 1294 Former Testimony by Unavailable Witness

(a) The following evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter pursuant to Section 1235 is not made inadmissible by the hearsay rule if the witness is unavailable and former testimony of the witness is admitted pursuant to Section 1291:

- (1) A videotaped statement introduced at a preliminary hearing or prior proceeding concerning the same criminal matter.
- (2) A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter.

(b) The party against whom the prior inconsistent statements are offered, as his or her option, may examine or cross-examine any person who testified at the preliminary hearing or prior proceeding as to the prior statements of the witness.



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-1 California Evidence Courtroom Manual § 1300

§ 1300 Use of Felony Judgment in Civil Action

Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere.



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-1 California Evidence Courtroom Manual § 1301

§ 1301 Judgment Against Person Entitled to Indemnity

Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:

- (a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;
- (b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or
- (c) Recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached.



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-1 California Evidence Courtroom Manual § 1302

§ 1302 Judgment Determining Liability of Third Person

When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.



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-1 California Evidence Courtroom Manual § 1310

§ 1310 Statement Concerning Declarant's Family History

(a) Subject to subdivision (b), evidence of a statement by a declarant who is unavailable as a witness concerning his own birth, marriage, divorce, a parent and child relationship, relationship by blood or marriage, race, ancestry, or other similar fact of his family history is not made inadmissible by the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.



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-1 California Evidence Courtroom Manual § 1311

§ 1311 Statement Concerning Family History of Another

(a) Subject to subdivision (b), evidence of a statement concerning the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The declarant was related to the other by blood or marriage; or

(2) The declarant was otherwise so intimately associated with the other's family as to be likely to have had accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.



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-1 California Evidence Courtroom Manual § 1312

§ 1312 Entries in Family Records and the Like

Evidence of entries in family Bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.



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-1 California Evidence Courtroom Manual § 1313

§ 1313 Reputation in Family Concerning Family History

Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.



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-1 California Evidence Courtroom Manual § 1314

§ 1314 Reputation in Community Concerning Family History

Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule.



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-1 California Evidence Courtroom Manual § 1315

§ 1315 Church Records Concerning Family History

Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history which is contained in a writing made as a record of a church, religious denomination, or religious society is not made inadmissible by the hearsay rule if:

- (a) The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under Section 1271; and
- (b) The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing.



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-1 California Evidence Courtroom Manual § 1316

§ 1316 Marriage, Baptismal and Similar Certificates

Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

- (a) The maker was a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and
- (b) The certificate was issued by the maker at the time and place of the ceremony or sacrament or within a reasonable time thereafter.



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-1 California Evidence Courtroom Manual § 1320

§ 1320 Reputation Concerning Community History

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community.



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-1 California Evidence Courtroom Manual § 1321

§ 1321 Reputation Concerning Public Interest in Property

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns the interest of the public in property in the community and the reputation arose before controversy.



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-1 California Evidence Courtroom Manual § 1322

§ 1322 Reputation Concerning Boundary or Custom Affecting Land

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy.



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-1 California Evidence Courtroom Manual § 1323

§ 1323 Statement Concerning Boundary

Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.



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-1 California Evidence Courtroom Manual § 1324

§ 1324 Reputation Concerning Character

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.



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-1 California Evidence Courtroom Manual § 1330

§ 1330 Recitals in Writings Affecting Property

Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

- (a) The matter stated was relevant to the purpose of the writing;
- (b) The matter stated would be relevant to an issue as to an interest in the property; and
- (c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.



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-1 California Evidence Courtroom Manual § 1331

§ 1331 Recitals in Ancient Writings

Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.



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-1 California Evidence Courtroom Manual § 1340

§ 1340 Publications Relied Upon in the Course of Business

Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270.



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-1 California Evidence Courtroom Manual § 1341

§ 1341 Publications Concerning Facts of General Notoriety and Interests

Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.



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-1 California Evidence Courtroom Manual § 1350

§ 1350 Forfeiture of Hearsay Objection Due to Defendant's Misconduct

(a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:

- (1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.
- (2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.
- (3) The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.
- (4) The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.
- (5) The statement is relevant to the issues to be tried.
- (6) The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

(b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial.

(c) If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

(d) As used in this section, "serious felony" means any of the felonies listed in *subdivision (c) of Section 1192.7 of the Penal Code* or any violation of *Section 11351, 11352, 11378, or 11379 of the Health and Safety Code*.

(e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.



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ARTICLE 16. STATEMENTS BY CHILDREN UNDER THE AGE OF 12 IN CHILD NEGLECT AND ABUSE
PROCEEDINGS

-1 California Evidence Courtroom Manual § 1360

§ 1360 In General

(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

- (1) The statement is not otherwise admissible by statute or court rule.
- (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.
- (3) The child either:
 - (A) Testifies at the proceedings.
 - (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

(c) For purposes of this section, "child abuse" means an act proscribed by *Section 273a, 273d, or 288.5 of the Penal Code*, or any of the acts described in *Section 11165.1 of the Penal Code*, and "child neglect" means any of the acts described in *Section 11165.2 of the Penal Code*.



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ARTICLE 17. PHYSICAL ABUSE

-1 California Evidence Courtroom Manual § 1370

§ 1370 In General

(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:

- (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
- (2) The declarant is unavailable as a witness pursuant to Section 240.
- (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
- (4) The statement was made under circumstances that would indicate its trustworthiness.
- (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

- (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.



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-1 California Evidence Courtroom Manual § 1380

§ 1380 Statements Made by Elderly and Dependent Adults

(a) In a criminal proceeding charging a violation, or attempted violation, of *Section 368 of the Penal Code*, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, as defined in subdivisions (a) and (b) of Section 240, and all of the following are true:

- (1) The party offering the statement has made a showing of particularized guarantees of trustworthiness regarding the statement, the statement was made under circumstances which indicate its trustworthiness, and the statement was not the result of promise, inducement, threat, or coercion. In making its determination, the court may consider only the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.
- (2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.
- (3) The entire statement has been memorialized in a videotape recording made by a law enforcement official, prior to the death or disabling of the declarant.
- (4) The statement was made by the victim of the alleged violation.
- (5) The statement is supported by corroborative evidence.
- (6) The victim of the alleged violation is an individual who meets both of the following requirements:
 - (A) Was 65 years of age or older or was a dependent adult when the alleged violation or attempted violation occurred.

(B) At the time of any criminal proceeding, including, but not limited to, a preliminary hearing or trial, regarding the alleged violation or attempted violation, is either deceased or suffers from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.



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-1 California Evidence Courtroom Manual § 1400

§ 1400 Authentication

Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.



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-1 California Evidence Courtroom Manual § 1401

§ 1401 Authentication Required

- (a) Authentication of a writing is required before it may be received in evidence.
- (b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.



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-1 California Evidence Courtroom Manual § 1402

§ 1402 Authentication of Altered Writings

The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.



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-1 California Evidence Courtroom Manual § 1410

§ 1410 Article Not Exclusive

Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved.



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-1 California Evidence Courtroom Manual 1410.5

1410.5 Graffiti Constitutes a Writing

(a) For purposes of this chapter, a writing shall include any graffiti consisting of written words, insignia, symbols, or any other markings which convey a particular meaning.

(b) Any writing described in subdivision (a), or any photograph thereof, may be admitted into evidence in an action for vandalism, for the purpose of proving that the writing was made by the defendant.

(c) The admissibility of any fact offered to prove that the writing was made by the defendant shall, upon motion of the defendant, be ruled upon outside the presence of the jury, and is subject to the requirements of Sections 1416, 1417, and 1418.



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-1 California Evidence Courtroom Manual § 1411

§ 1411 Subscribing Witness's Testimony Unnecessary

Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.



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-1 California Evidence Courtroom Manual § 1412

§ 1412 Use of Other Evidence When Subscribing Witness's Testimony Required

If the testimony of a subscribing witness is required by statute to authenticate a writing and the subscribing witness denies or does not recollect the execution of the writing, the writing may be authenticated by other evidence.



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-1 California Evidence Courtroom Manual § 1413

§ 1413 Witness to the Execution of a Writing

A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness.



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-1 California Evidence Courtroom Manual § 1414

§ 1414 Admission of Authenticity

A writing may be authenticated by evidence that:

- (a) The party against whom it is offered has at any time admitted its authenticity; or
- (b) The writing has been acted upon as authentic by the party against whom it is offered.



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-1 California Evidence Courtroom Manual § 1415

§ 1415 Authentication by Handwriting Evidence

A writing may be authenticated by evidence of the genuineness of the handwriting of the maker.



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-1 California Evidence Courtroom Manual § 1416

§ 1416 Proof of Handwriting by Person Familiar Therewith

A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:

- (a) Having seen the supposed writer write;
- (b) Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;
- (c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or
- (d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer.



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-1 California Evidence Courtroom Manual § 1417

§ 1417 Comparison of Handwriting by Trier of Fact

The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.



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-1 California Evidence Courtroom Manual § 1418

§ 1418 Comparison of Writing by Expert Witness

The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court.



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-1 California Evidence Courtroom Manual § 1419

§ 1419 Exemplars When Writing is More than 30 Years Old

Where a writing whose genuineness is sought to be proved is more than 30 years old, the comparison under Section 1417 or 1418 may be made with writing purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing whether it is genuine.



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-1 California Evidence Courtroom Manual § 1420

§ 1420 Authentication by Evidence of Reply

A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing.



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-1 California Evidence Courtroom Manual § 1421

§ 1421 Authentication by Content

A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing.



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-1 California Evidence Courtroom Manual § 1450

§ 1450 Classification of Presumptions in Article

The presumptions established by this article are presumptions affecting the burden of producing evidence.



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-1 California Evidence Courtroom Manual § 1451

§ 1451 Acknowledged Writings

A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with Section 1180) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code.



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-1 California Evidence Courtroom Manual § 1452

§ 1452 Official Seals

A seal is presumed to be genuine and its use authorized if it purports to be the seal of:

- (a) The United States or a department, agency, or public employee of the United States.
- (b) a public entity in the United States or a department, agency, or public employee of such public entity.
- (c) a nation recognized by the executive power of the United States or a department, agency, or officer of such nation.
- (d) a public entity in a nation recognized by the executive power of the United States or a department, agency, or officer of such public entity.
- (e) a court of admiralty or maritime jurisdiction.
- (f) a notary public within any state of the United States.



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-1 California Evidence Courtroom Manual § 1453

§ 1453 Domestic Official Signatures

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of:

- (a) a public employee of the United States.
- (b) a public employee of any public entity in the United States.
- (c) a notary public within any state of the United States.



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-1 California Evidence Courtroom Manual § 1454

§ 1454 Foreign Official Signatures

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of an officer, or deputy of an officer, of a nation or public entity in a nation recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a final statement certifying the genuineness of the signature and the official position of (a) the person who executed the writing or (b) any foreign official who has certified either the genuineness of the signature and official position of the person executing the writing or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person executing the writing. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation, authenticated by the seal of his office.



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-1 California Evidence Courtroom Manual § 1520

§ 1520 Best Evidence Rule

The content of a writing may be proved by an otherwise admissible original.



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-1 California Evidence Courtroom Manual § 1521

§ 1521 Secondary Evidence Rule

(a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:

- (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.
- (2) Admission of the secondary evidence would be unfair.

(b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).

(c) Nothing in this section excuses compliance with Section 1401 (authentication).

(d) This section shall be known as the "Secondary Evidence Rule."



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-1 California Evidence Courtroom Manual § 1522

§ 1522 Reasons to Exclude Secondary Evidence

(a) In addition to the grounds for exclusion authorized by Section 1521, in a criminal action the court shall exclude secondary evidence of the content of a writing if the court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial. This section does not apply to any of the following:

- (1) A duplicate as defined in Section 260.
- (2) A writing that is not closely related to the controlling issues in the action.
- (3) A copy of a writing in the custody of a public entity.
- (4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

(b) In a criminal action, a request to exclude secondary evidence of the content of a writing, under this section or any other law, shall not be made in the presence of the jury.



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-1 California Evidence Courtroom Manual § 1523

§ 1523 Oral Testimony as Secondary Evidence

(a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.



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-1 California Evidence Courtroom Manual § 1530

§ 1530 Copy of Writing in Official Custody

(a) A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if:

(1) The copy purports to be published by the authority of the nation or state, or public entity therein in which the writing is kept;

(2) The office in which the writing is kept is within the United States or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

(3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. Except as provided in the next sentence, the final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. Prior to January 1, 1971, the final statement may also be made by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office. If reasonable

opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without the final statement or (ii) permit the writing or entry in foreign custody to be evidenced by an attested summary with or without a final statement.

(b) The presumptions established by this section are presumptions affecting the burden of producing evidence.



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-1 California Evidence Courtroom Manual § 1531

§ 1531 Certification of Copy for Evidence

For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.



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-1 California Evidence Courtroom Manual § 1532

§ 1532 Official Record of Recorded Writing

(a) The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if:

- (1) The record is in fact a record of an office of a public entity; and
- (2) A statute authorized such a writing to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of producing evidence.



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-1 California Evidence Courtroom Manual § 1550

§ 1550 Photographic Copies Made as Business Records

A nonerasable optical image reproduction provided that additions, deletions, or changes to the original document are not permitted by the technology, a photostatic, microfilm, microcard, miniature photographic, or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if the copy or reproduction was made and preserved as a part of the records of a business (as defined by Section 1270) in the regular course of that business. The introduction of the copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence. A court may require the introduction of a hard copy printout of the document.



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-1 California Evidence Courtroom Manual § 1550.1

§ 1550.1 Secondary Evidence

Reproductions of files, records, writings, photographs, fingerprints or other instruments in the official custody of a criminal justice agency that were microphotographed or otherwise reproduced in a manner that conforms with the provisions of *Section 11106.1, 11106.2, or 11106.3 of the Penal Code* shall be admissible to the same extent and under the same circumstances as the original file, record, writing or other instrument would be admissible.



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-1 California Evidence Courtroom Manual § 1551

§ 1551 Photographic Copies Where Original Destroyed or Lost

A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken or a reproduction from an electronic recording of video images on magnetic surfaces is admissible as the original writing itself if, at the time of the taking of such film or electronic recording, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film or electronic recording, a certification complying with the provisions of Section 1531 and stating the date on which, and the fact that, it was so taken under his direction and control.



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-1 California Evidence Courtroom Manual § 1552

§ 1552 Printed Representation of Computer Information

(a) A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

(b) Subdivision (a) shall not apply to computer-generated official records certified in accordance with Section 452.5 or 1530.



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-1 California Evidence Courtroom Manual § 1553

§ 1553 Printed Representation of Video or Digital Images

A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.



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-1 California Evidence Courtroom Manual § 1560

§ 1560 Compliance with Subpoena Duces Tecum for Business Records

(a) As used in this article:

- (1) "Business" includes every kind of business described in Section 1270.
- (2) "Record" includes every kind of record maintained by such a business.

(b) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or other qualified delivers by mail or otherwise a true, legible, and durable copy of all of the records described in the subpoena to the clerk of the court or to another person described in *subdivision (d) of Section 2026.010 of the Code of Civil Procedure*, together with the affidavit described in Section 1561, within one of the following time periods:

- (1) In any criminal action, five days after the receipt of the subpoena.
- (2) In any civil action, within 15 days after the receipt of the subpoena.
- (3) Within the time agreed upon by the party who served the subpoena and the custodian or other qualified witness.

(c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and

number of the action, name of witness, and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and directed as follows:

- (1) If the subpoena directs attendance in court, to the clerk of the court.
- (2) If the subpoena directs attendance at a deposition, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business.
- (3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records that are original documents and that are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received. Records that are copies may be destroyed.

(e) As an alternative to the procedures described in subdivisions (b), (c), and (d), the subpoenaing party in a civil action may direct the witness to make the records available for inspection or copying by the party's attorney, the attorney's representative, or deposition officer as described in *Section 2020.420 of the Code of Civil Procedure*, at the witness' business address under reasonable conditions during normal business hours. Normal business hours, as used in this subdivision, means those hours that the business of the witness is normally open for business to the public. When provided with at least five business days' advance notice by the party's attorney, attorney's representative, or deposition officer, the witness shall designate a time period of not less than six continuous hours on a date certain for copying of records subject to the subpoena by the party's attorney, attorney's representative, or deposition officer. It shall be the responsibility of the attorney's representative to deliver any copy of the records as directed in the subpoena. Disobedience to the deposition subpoena issued pursuant to this subdivision is punishable as provided in *Section 2020.240 of the Code of Civil Procedure*.

Legislative History

Stats. 2006, ch. 538 (S.B. 1852), § 155)



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-1 California Evidence Courtroom Manual § 1561

§ 1561 Affidavit Accompanying Records

(a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

- (1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.
- (2) The copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to subdivision (e) of Section 1560 the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be.
- (3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.
- (4) The identity of the records.
- (5) A description of the mode of preparation of the records.

(b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560.

(c) Where the records described in the subpoena were delivered to the attorney or his or her representative or

deposition officer for copying at the custodian's or witness' place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her representative or deposition officer stating that the copy is a true copy of all the records delivered to the attorney or his or her representative or deposition officer for copying.



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-1 California Evidence Courtroom Manual § 1562

§ 1562 Copy of Records

If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of producing evidence.



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-1 California Evidence Courtroom Manual § 1563

§ 1563 One Witness and Mileage Fee

(a) This article shall not be interpreted to require tender or payment of more than one witness fee and one mileage fee or other charge, to a witness or witness' business, unless there is an agreement to the contrary between the witness and the requesting party.

(b) All reasonable costs incurred in a civil proceeding by any witness which is not a party with respect to the production of all or any part of business records the production of which is requested pursuant to a subpoena duces tecum may be charged against the party serving the subpoena duces tecum.

(1) "Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents (\$0.10) per page for standard reproduction of documents of a size 8 1/2 by 14 inches or less; twenty cents (\$0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to a subpoena; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of twenty-four dollars (\$24) per hour per person, computed on the basis of six dollars (\$6) per quarter hour or fraction thereof; actual postage charges; and the actual cost, if any, charged to the witness by a third person for the retrieval and return of records held offsite by that third person.

(2) The requesting party, or the requesting party's deposition officer, shall not be required to pay those costs or any estimate thereof prior to the time the records are available for delivery pursuant to the subpoena, but the witness may demand payment of costs pursuant to this section simultaneous with actual delivery of the subpoenaed records, and until payment is made, is under no obligation to deliver the records.

- (3) The witness shall submit an itemized statement for the costs to the requesting party, or the requesting party's deposition officer, setting forth the reproduction and clerical costs incurred by the witness. Should the costs exceed those authorized in paragraph (1), or the witness refuses to produce an itemized statement of costs as required by paragraph (3), upon demand by the requesting party, or the requesting party's deposition officer, the witness shall furnish a statement setting forth the actions taken by the witness in justification of the costs.
- (4) The requesting party may petition the court in which the action is pending to recover from the witness all or a part of the costs paid to the witness, or to reduce all or a part of the costs charged by the witness, pursuant to this subdivision, on the grounds that those costs were excessive. Upon the filing of the petition the court shall issue an order to show cause and from the time the order is served on the witness the court has jurisdiction over the witness. The court may hear testimony on the order to show cause and if it finds that the costs demanded and collected, or charged but not collected, exceed the amount authorized by this subdivision, it shall order the witness to remit to the requesting party, or reduce its charge to the requesting party by an amount equal to, the amount of the excess. In the event that the court finds the costs excessive and charged in bad faith by the witness, the court shall order the witness to remit the full amount of the costs demanded and collected, or excuse the requesting party from any payment of costs charged but not collected, and the court shall also order the witness to pay the requesting party the amount of the reasonable expenses incurred in obtaining the order including attorney's fees. If the court finds the costs were not excessive, the court shall order the requesting party to pay the witness the amount of the reasonable expenses incurred in defending the petition, including attorney's fees.
- (5) If a subpoena is served to compel the production of business records and is subsequently withdrawn, or is quashed, modified or limited on a motion made other than by the witness, the witness shall be entitled to reimbursement pursuant to paragraph (1) for all costs incurred in compliance with the subpoena to the time that the requesting party has notified the witness that the subpoena has been withdrawn or quashed, modified or limited. In the event the subpoena is withdrawn or quashed, if those costs are not paid within 30 days after demand therefor, the witness may file a motion in the court in which the action is pending for an order requiring payment, and the court shall award the payment of expenses and attorney's fees in the manner set forth in paragraph (4).
- (6) Where the records are delivered to the attorney, the attorney's representative, or the deposition officer for inspection or photocopying at the witness' place of business, the only fee for complying with the subpoena shall not exceed fifteen dollars (\$15), plus the actual cost, if any, charged to the witness by a third person for retrieval and return of records held offsite by that third person. If the records are retrieved from microfilm, the reasonable cost, as defined in paragraph (1), shall also apply.
- (c) When the personal attendance of the custodian of a record or other qualified witness is required pursuant to Section 1564, in a civil proceeding, he or she shall be entitled to the same witness fees and mileage permitted in a case where the subpoena requires the witness to attend and testify before a court in which the action or proceeding is pending and to any additional costs incurred as provided by subdivision (b).



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-1 California Evidence Courtroom Manual § 1564

§ 1564 Personal Attendance of Custodian and Production of Original Records

The personal attendance of the custodian or other qualified witness and the production of the original records is not required unless, at the discretion of the requesting party, the subpoena duces tecum contains a clause which reads:

"The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena."



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-1 California Evidence Courtroom Manual § 1565

§ 1565 Service of More than One Subpoena Duces Tecum

If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.



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-1 California Evidence Courtroom Manual § 1566

§ 1566 Applicability of Article

This article applies in any proceeding in which testimony can be compelled.



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-1 California Evidence Courtroom Manual § 1567

§ 1567 Employee Income and Benefit Information

A completed form described in *Section 3664 of the Family Code* for income and benefit information provided by the employer may be admissible in a proceeding for modification or termination of an order for child, family, or spousal support if both of the following requirements are met:

- (a) The completed form complies with Sections 1561 and 1562.
- (b) A copy of the completed form and notice was served on the employee named therein pursuant to *Section 3664 of the Family Code*.



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-1 California Evidence Courtroom Manual § 1600

§ 1600 Record of Document Affecting Property Interest

(a) The record of an instrument or other document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

- (1) The record is in fact a record of an office of a public entity; and
- (2) A statute authorized such a document to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of proof.



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-1 California Evidence Courtroom Manual § 1601

§ 1601 Proof of Content of Lost Official Record Affecting Property

(a) Subject to subdivisions (b) and (c), when in any action it is desired to prove the contents of the official record of any writing lost or destroyed by conflagration or other public calamity, after proof of such loss or destruction, the following may, without further proof, be admitted in evidence to prove the contents of such record:

(1) Any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person engaged in the business of preparing and making abstracts of title prior to such loss or destruction; or

(2) Any abstract of title, or of any instrument affecting title, made, issued, and certified as correct by any person engaged in the business of insuring titles or issuing abstracts of title to real estate, whether the same was made, issued, or certified before or after such loss or destruction and whether the same was made from the original records or from abstract and notes, or either, taken from such records in the preparation and upkeeping of its plant in the ordinary course of its business.

(b) No proof of the loss of the original writing is required other than the fact that the original is not known to the party desiring to prove its contents to be in existence.

(c) Any party desiring to use evidence admissible under this section shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use such evidence at the trial of the action, and shall give all such other parties a reasonable opportunity to inspect the evidence, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof.



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-1 California Evidence Courtroom Manual § 1603

§ 1603 Deed by Officer in Pursuance of Court Process

A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed. The presumption established by this section is a presumption affecting the burden of proof.



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-1 California Evidence Courtroom Manual § 1604

§ 1604 Certificate of Purchase or of Location of Lands

A certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.



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-1 California Evidence Courtroom Manual § 1605

§ 1605 Authenticated Spanish Title Records

Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this state, derived from the Spanish or Mexican governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-66, are admissible as evidence with like force and effect as the originals and without proving the execution of such originals.



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Rule 703. Bases of Opinion Testimony by Experts

Rule 704. Opinion on Ultimate Issue

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

Rule 706. Court Appointed Experts

Rule 801. Definitions

Rule 802. Hearsay Rule

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

Rule 804. Hearsay Exceptions: Declarant Unavailable

Rule 805. Hearsay Within Hearsay

Rule 806. Attacking and Supporting Credibility of Declarant

Rule 807. Residual Exception

Rule 901. Requirement of Authentication or Identification

Rule 902. Self-authentication

Rule 903. Subscribing Witness' Testimony Unnecessary

Rule 1001. Definitions

Rule 1002. Requirement of Original

Rule 1003. Admissibility of Duplicates

Rule 1004. Admissibility of Other Evidence of Contents

Rule 1005. Public Records

Rule 1006. Summaries

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Rule 1008. Functions of Court and Jury

Rule 1101. Applicability of Rules

Rule 1102. Amendments

Rule 1103. Title



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California Evidence Courtroom Manual

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1 FEDERAL RULES OF EVIDENCE

*1-1 California Evidence Courtroom Manual Scope***Scope**COMPARISON OF FEDERAL RULES OF EVIDENCE
WITH CALIFORNIA EVIDENCE CODE

FRE	Similar	Similar in Part	Significant Substantive Difference	No Counter-part	Controlled by Federal Case Law
101				X	
102		CEC 2			
103(a)			CEC 353, 354		
103(b)			CEC 353, 354		
103(c)				X	
103(d)				X	
104(a)		CEC 310	CEC 405		
104(b)			CEC 403		
104(c)		CEC 402(b)			
104(d)				X	
104(e)				X	
105	CEC 355				
106			CEC 356		
201(a)				X	
201(b)		CEC 452(g)-(h)			
201(c)		CEC 451, 452			
201(d)		CEC 453			
201(e)		CEC 455			
201(f)				X	
201(g)		CEC 457			
301		CEC 603, 604			

1-1 California Evidence Courtroom Manual Scope

302				X
401	CEC 210, 603, 604, 630	CEC 660, 721	CEC 607	
402	CEC 350, 351			
403	CEC 352			
404(a)		CEC 1104	CEC 1101	
404(a)(1)	CEC 1103(b)	CEC 1102		
404(a)(2)	CEC 1103(b)			
404(a)(3)		CEC 1101(c)		
404(b)			CEC 1101(b)	
405(a)			CEC 1102, 1103(a)-(b)	
405(b)				X
406		CEC 1105		
407			CEC 1151	
408			CEC 1152(a), 1153.5, 1154	
409				X
410		CEC 1153		
411	CEC 1155			
412		CEC 782	CEC 783, 1103(c), 1106	
413		CEC 1108		
414		CEC 1108		
415		CEC 1108		
501				See Note
502				See Note
601		CEC 700, 701		
602		CEC 170, 702		
603		CEC 165, 710		
604		CEC 750-753		
605		CEC 703, 703.5		
606(a)		CEC 704		
606(b)		CEC 1150		
607	CEC 785			
608(a)		CEC 786, 790, 791		

1-1 California Evidence Courtroom Manual Scope

608(b)		CEC 787		
609		CEC 788		
610	CEC 789			
611(a)		CEC 765(a), 320		
611(b)		CEC 761, 773		
611(c)		CEC 764, 767, 776		
612		CEC 771		
613(a)		CEC 768, 769		
613(b)	CEC 770			
614(a)		CEC 775		
614(b)		CEC 775		
614(c)		CEC 775		
615	CEC 777			
701	CEC 800	CEC 870		
702			CEC 720	CEC 801(a), 870
703			CEC 801(b)	CEC 803
704		CEC 870		
704(a)	CEC 805			
704(b)		Pen. Code § 29		
705	CEC 802			
706(a)		CEC 730, 732, 460		
706(b)		CEC 731		
706(c)		CEC 722		
706(d)		CEC 733		
801(a)		CEC 150, 225, 125		
801(b)	CEC 135	CEC 150		
801(c)		CEC 150, 1200		
801(d)(1)(A)			CEC 1235	
801(d)(1)(B)		CEC 1236		
801(d)(1)(C)			CEC 1238	
801(d)(2)(A)		CEC 1220	CEC 1235	
801(d)(2)(B)		CEC 1221, 1236		
801(d)(2)(C)	CEC 1222		CEC 1238	

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801(d)(2)(D)		CEC 1222	
801(d)(2)(E)		CEC 1223	
802		CEC 1200	
803(1)			CEC 1241
803(2)		CEC 1240	
803(3)		CEC 1260	CEC 1250
803(4)		CEC 1228, 1253	
803(5)	CEC 1237		
803(6)		CEC 1270	CEC 1271
803(7)	CEC 1272		
803(8)			CEC 1280-1283
803(9)	CEC 1281		
803(10)	CEC 1284		
803(11)	CEC 1315		
803(12)	CEC 1316		
803(13)	CEC 1312		
803(14)		CEC 1323, 1330	
803(15)		CEC 1323, 1330	
803(16)		CEC 1225, 1331	
803(17)	CEC 1340		
803(18)		CEC 721, 1341	
803(19)	CEC 1313, 1314		
803(20)	CEC 1321, 1322	CEC 1225, 1320	
803(21)	CEC 1324		
803(22)			CEC 1300
803(23)			X
804(a)(1)	CEC 240(a)(1)		
804(a)(2)			X
804(a)(3)		CEC 240(a)(3)	
804(a)(4)	CEC 240(a)(3)		
804(a)(5)		CEC 240(a)(4), (a)(5)	

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804(b)(1)		CEC 1292	CEC 1290, 1291	
804(b)(2)			CEC 1242	
804(b)(3)		CEC 1231, 1231.4	CEC 1230	
804(b)(4)		CEC 1310, 1311	CEC 1310(b)	
804(b)(6)			CEC 1350, 240(b)	
805	CEC 1201			
806		CEC 1202, 1203		
807				X
901(a)	CEC 1400- 1402			
901(b)	CEC 1410			
901(b)(1)	CEC 1413, 1415, 1416	CEC 1414		
901(b)(2)	CEC 1415, 1416			
901(b)(3)	CEC 1415, 1417		CEC 1418	
901(b)(4)	CEC 1421	CEC 1414, 1420		
901(b)(5)				X
901(b)(6)				X
901(b)(7)				X
901(b)(8)			CEC 643, 1419	
901(b)(9)				X
902(1)	CEC 1453, 1530(a)(2)			
902(2)	CEC 1453, 1530(a)(2)			
902(3)	CEC 1453, 1530(a)(3)	CEC 1452, 1454		
902(4)	CEC 1453, 1530(a)(2)			
902(5)	CEC 644, 1530(a)(1)	CEC 645		
902(6)		CEC 645.1		
902(7)				X
902(8)	CEC 1451			

1-1 California Evidence Courtroom Manual Scope

902(9)			X
902(10)			X
902(11)			X
902(12)			X
903	CEC 1411		
1001(1)	CEC 250		
1001(2)	CEC 250		
1001(3)	CEC 255	CEC 1551	
1001(4)	CEC 260	CEC 1552, 1553	
1002		CEC 1520	
1003		CEC 1605, 1521	
1004		CEC 1522, 1523	
1004(1)			X
1004(2)			X
1004(3)		CEC 1522	
1004(4)		CEC 1522, 1523	
1005		CEC 1522	
1006		CEC 1523	
1007			X
1008			X
1101(a)			X
1101(b)		CEC 300	
1101(c)		CEC 910	
1101(d)		CEC 1203.1	
1101(e)			X
1102			X
1103			X

Note:

Privileges are codified in *California Evidence Code §§ 900-1070*:

900-920 (general provisions);

930-940 (privileges of criminal defendants);

950-962 (lawyer/client privilege);

970-973 (spousal testimonial privilege);

980-987 (confidential marital communication privilege);

990-1007 (physician/patient privilege);

1010-1027 (psychotherapist/patient privileges);

1030-1034 (clergy/penitent privilege);

1035-1036.2 (sexual assault victim/counselor privilege);

1037-1037.7 (domestic violence victim/counselor privilege);

1040-1047 (official information and identity of informant privilege);

1060-1063 (trade secrets);

1070 (newsperson's privilege).



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1 FEDERAL RULES OF EVIDENCE
RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES
ARTICLE I GENERAL PROVISIONS

-1 California Evidence Courtroom Manual Rule 101

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

(Amended, eff 10-1-87; 11-1-88; 12-1-93)



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE I GENERAL PROVISIONS

-1 California Evidence Courtroom Manual Rule 102

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.



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ARTICLE I GENERAL PROVISIONS

-1 California Evidence Courtroom Manual Rule 103

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling.-- Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.*-- In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.*-- In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling.-- The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury.-- In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error.-- Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(Amended, eff 12-1-00)



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE I GENERAL PROVISIONS

-1 California Evidence Courtroom Manual Rule 104

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Amended, eff 10-1-87)



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE I GENERAL PROVISIONS

-1 California Evidence Courtroom Manual Rule 105

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.



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ARTICLE I GENERAL PROVISIONS

-1 California Evidence Courtroom Manual Rule 106

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

(Amended, eff 10-1-87)



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE II JUDICIAL NOTICE

-1 California Evidence Courtroom Manual Rule 201

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE III PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

-1 California Evidence Courtroom Manual Rule 301

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.



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ARTICLE III PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

-1 California Evidence Courtroom Manual Rule 302

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 401

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.



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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 402

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.



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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 403

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.



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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 404

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.-- Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.*-- In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) *Character of alleged victim.*-- In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) *Character of witness.*-- Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.-- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice

in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Amended, eff 10-1-87; 12-1-91; 12-1-06)



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 405

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

(Amended, eff 10-1-87)



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 406

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.



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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 407

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

(Amended, eff 12-1-97)



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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 408

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(Amended, eff 12-1-06)

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.



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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 409

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 410

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any proceedings under *Rule 11 of the Federal Rules of Criminal Procedure* or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

(Amended, 12-12-75; 4-30-79, eff 12-1-80)



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1 FEDERAL RULES OF EVIDENCE
RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES
ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 411

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(Amended, eff 10-1-87)



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 412

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

- (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
- (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
- (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is

admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(Effective 10-28-78; amended, eff 11-18-88; 12-1-94)



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE IV RELEVANCY AND ITS LIMITS

-1 California Evidence Courtroom Manual Rule 413

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another

person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

(Effective 7-9-95)



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-1 California Evidence Courtroom Manual Rule 414

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

- (2) any conduct proscribed by chapter 110 of title 18, United States Code;
- (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
- (4) contact between the genitals or anus of the defendant and any part of the body of a child;
- (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
- (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

(Effective 7-9-95)



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-1 California Evidence Courtroom Manual Rule 415

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(Effective 7-9-95)



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ARTICLE V PRIVILEGES

-1 California Evidence Courtroom Manual Rule 501

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.



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ARTICLE V PRIVILEGES

-1 California Evidence Courtroom Manual Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of *Civil Procedure* 26(b)(5)(B).

(c) Disclosure made in a State proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule. Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.



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-1 California Evidence Courtroom Manual Rule 601

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.



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-1 California Evidence Courtroom Manual Rule 602

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

(Amended, eff 10-1-87; 11-1-88)



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-1 California Evidence Courtroom Manual Rule 603

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

(Amended, eff 10-1-87)



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-1 California Evidence Courtroom Manual Rule 604

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

(Amended, eff 10-1-87)



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-1 California Evidence Courtroom Manual Rule 605

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.



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-1 California Evidence Courtroom Manual Rule 606

Rule 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

(Amended, eff 12-12-75; 10-1-87, 12-1-06)



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-1 California Evidence Courtroom Manual Rule 607

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

(Amended, eff 10-1-87)



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-1 California Evidence Courtroom Manual Rule 608

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

(Amended, eff 10-1-87; 11-1-88; 12-1-03)



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-1 California Evidence Courtroom Manual Rule 609

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(Amended, eff 10-1-87; 12-1-90, 12-1-06)



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-1 California Evidence Courtroom Manual Rule 610

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

(Amended, eff 10-1-87)



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-1 California Evidence Courtroom Manual Rule 611

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(Amended, eff 10-1-87)



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-1 California Evidence Courtroom Manual Rule 612

Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by *section 3500 of title 18, United States Code*, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

(Amended, eff 10-1-87)



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-1 California Evidence Courtroom Manual Rule 613

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

(Amended, eff 10-1-87; 11-1-88)



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-1 California Evidence Courtroom Manual Rule 614

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.



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-1 California Evidence Courtroom Manual Rule 615

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

(Amended, eff 10-1-87; 11-1-88; 11-18-88; 12-1-98)



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ARTICLE VII OPINIONS AND EXPERT TESTIMONY

-1 California Evidence Courtroom Manual Rule 701

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

(Amended, eff 10-1-87; 12-1-00)



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-1 California Evidence Courtroom Manual Rule 702

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

(Amended, eff 12-1-00)



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-1 California Evidence Courtroom Manual Rule 703

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(Amended, eff 10-1-87; 12-1-00)



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-1 California Evidence Courtroom Manual Rule 704

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

(Amended, eff 10-12-84)



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-1 California Evidence Courtroom Manual Rule 705

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Amended, eff 10-1-87; 12-1-93)



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-1 California Evidence Courtroom Manual Rule 706

Rule 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the *fifth amendment*. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(Amended, eff 10-1-87)



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1 FEDERAL RULES OF EVIDENCE
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ARTICLE VIII HEARSAY

-1 California Evidence Courtroom Manual Rule 801

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if--

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

(Amended, eff 10-31-75; 10-1-87; 12-1-97)



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-1 California Evidence Courtroom Manual Rule 802

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.



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-1 California Evidence Courtroom Manual Rule 803

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition.* Statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or

adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.*-- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of vital statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of religious organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents.* Statements in a document in existence twenty years or more the authenticity of which is established.

(17) *Market reports, commercial publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation concerning personal or family history.* Reputation among members of a person's family by blood, adoption, or marriage or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) *Reputation concerning boundaries or general history.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) *Reputation as to character.* Reputation of a person's character among associates or in the community.

(22) *Judgment of previous conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to personal, family, or general history, or boundaries.* Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) [Transferred to Rule 807]

(Amended, eff 12-12-75; 10-1-87; 12-1-97; 12-1-00)



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-1 California Evidence Courtroom Manual Rule 804

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Transferred to Rule 807]

(6) *Forfeiture by wrongdoing.* A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(Amended, eff 12-12-75; 10-1-87; 11-18-88; 12-1-97)



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-1 California Evidence Courtroom Manual Rule 805

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.



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-1 California Evidence Courtroom Manual Rule 806

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Amended, eff 10-1-87; 12-1-97)



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-1 California Evidence Courtroom Manual Rule 807

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Effective 12-1-97)



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ARTICLE IX AUTHENTICATION AND IDENTIFICATION

-1 California Evidence Courtroom Manual Rule 901

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations*. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports*. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation*. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system*. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule*. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.



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-1 California Evidence Courtroom Manual Rule 902

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final

certification.

(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions under Acts of Congress.* Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) *Certified domestic records of regularly conducted activity.* Certified domestic records of regularly conducted activity.

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) *Certified foreign records of regularly conducted activity.*-- Certified foreign records of regularly conducted activity.--

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(Amended, eff 10-1-87; 11-1-88; 12-1-00)



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-1 California Evidence Courtroom Manual Rule 903

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.



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ARTICLE X CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

-1 California Evidence Courtroom Manual Rule 1001

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation.

(2) *Photographs.* "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original.* An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate.* A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.



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-1 California Evidence Courtroom Manual Rule 1002

Rule 1002. Requirement of Original

To prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.



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-1 California Evidence Courtroom Manual Rule 1003

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.



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-1 California Evidence Courtroom Manual Rule 1004

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) *Original not obtainable.* No original can be obtained by any available judicial process or procedure; or

(3) *Original in possession of opponent.* At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) *Collateral matters.* The writing, recording, or photograph is not closely related to a controlling issue.

(Amended, eff 10-1-87)



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-1 California Evidence Courtroom Manual Rule 1005

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.



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-1 California Evidence Courtroom Manual Rule 1006

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.



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-1 California Evidence Courtroom Manual Rule 1007

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

(Amended, eff 10-1-87)



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-1 California Evidence Courtroom Manual Rule 1008

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.



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1 FEDERAL RULES OF EVIDENCE
RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES
ARTICLE XI MISCELLANEOUS RULES

-1 California Evidence Courtroom Manual Rule 1101

Rule 1101. Applicability of Rules

(a) Courts and judges. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) *Preliminary question of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) *Grand jury*. Proceedings before grand juries.

(3) *Miscellaneous proceedings*. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under *section 706(2)(F) of title 5, United States Code*; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under section 310-318 of the *Immigration and Nationality Act* (8 U.S.C. 1421-1429); prize proceedings in admiralty under *sections 7651-7681 of title 10, United States Code*; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under *sections 2241-2254 of title 28, United States Code*; motions to vacate, set aside or correct sentence under *section 2255 of title 28, United States Code*; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes," approved March 3, 1925 (46 U.S.C. 781-790), as implemented by *section 7730 of title 10, United States Code*.

(Amended, eff 12-12-75; 10-1-79; 10-1-82; 10-1-87; 11-1-88; 11-18-88; 12-1-93)



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-1 California Evidence Courtroom Manual Rule 1102

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in *section 2072 of title 28 of the United States Code*.

(Amended, eff 12-1-91)



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-1 California Evidence Courtroom Manual Rule 1103

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.